

National Security Case Studies

Special Case-Management Challenges

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Introduction

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

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

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

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 Citations to unpublished orders and opinions often include hyperlinks to copies of the documents available at FJC Online.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

First World Trade Center Bombing

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

On Friday, February 26, 1993, a bomb exploded in the parking garage of the World Trade Center in Manhattan, killing six people and injuring more than one thousand.¹

The Bombing of the World Trade Center

On April 24, 1992, Ahmad Mohammad Ajaj moved from Houston, Texas, to Pakistan, where he attended a terrorist training camp called “Camp Khaldan” on the border between Afghanistan and Pakistan.² He learned how to make bombs, and he met Ramzi Ahmed Yousef.³ On September 1, 1992, Ajaj and Yousef entered the United States using false identities.⁴ Ajaj’s passport was discovered to be a forgery.⁵ He was indicted in the Eastern District of New York, where John F. Kennedy International Airport is located, and imprisoned for six months on a guilty plea.⁶ Yousef was stopped for traveling on an Iraqi passport without a visa but released on his own recognizance because the detention center was full.⁷

In the United States, Yousef assembled a conspiracy of terrorists.⁸ With the assistance of Mahmoud Abouhalima, Yousef and Mohammad A. Salameh rented

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

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

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

4. The 9/11 Commission Report 72 (2004); *Yousef*, 327 F.3d at 78, 135; *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 291; *see* Blumenthal, *supra* note 1; Mary B.W. Tabor, *Man Held in Bombing but Is Not Charged, Lawyer Says*, N.Y. Times, May 6, 1993, at B3; Wren, *supra* note 1.

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

6. *Salameh*, 152 F.3d at 107, 109, 118–20 (noting that the guilty plea was entered on Oct. 6, 1992); *Salameh*, 54 F. Supp. 2d at 246, 294; Docket Sheet, *United States v. Ajaj*, No. 1:92-cr-993 (E.D.N.Y. Sept. 14, 1992) (noting a judgment on Jan. 13, 1993); *see* Blumenthal, *supra* note 1; Tabor, *supra* note 4.

7. *Yousef*, 327 F.3d at 78 n.2; *Salameh*, 152 F.3d at 107; *see* Richard Bernstein, *Inspector Testifies She Urged No Asylum for Blast Suspect*, N.Y. Times, Nov. 16, 1993, at B3; Blumenthal, *supra* note 1.

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

in Jersey City, New Jersey, a storage unit and an apartment, where they made and stored explosive materials.⁹ Nidal Ayyad, a chemical engineer, acquired the explosives.¹⁰

On February 23, 1993, Salameh rented a Ryder van, which the conspirators loaded with explosive materials.¹¹ Three days later, Yousef and Eyad Ismoil drove the van-bomb to the World Trade Center, where they exploded the bomb by timer at 12:18 p.m.¹²

Ayyad anonymously contacted the New York Daily News by telephone and the New York Times by mail to take responsibility for the bomb as retaliation for the United States' support of Israel.¹³ His DNA was found on the New York Times envelope, and a draft of the letter to the Times was found on his computer.¹⁴

Investigators discovered the van's vehicle identification number in the bomb's debris.¹⁵ Salameh was arrested when he returned to the Ryder rental office on March 4 to recover a \$400 rental deposit on the destroyed van, which he had reported stolen.¹⁶

9. *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107–08; *Salameh*, 54 F. Supp. 2d at 246–47; see Richard Bernstein, *4 Are Convicted in Bombing at the World Trade Center That Killed 6, Stunned U.S.*, N.Y. Times, Mar. 5, 1994, at 11; Blumenthal, *supra* note 1; Robert D. McFadden, *Agents Step Up Search for Bombing Suspect's Links*, N.Y. Times, Mar. 6, 1993, at 11; Alison Mitchell, *Chemical Engineer Is Held in the Trade Center Blast*, N.Y. Times, Mar. 11, 1993, at A1 [hereinafter *Engineer Held*]; Alison Mitchell, *U.S. Widens Charges in Trade Center Bombing*, N.Y. Times, May 27, 1993, at B4 [hereinafter *U.S. Widens Charges*].

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

11. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 246–47; United States v. El-Gabrownny, 876 F. Supp. 495, 497 (S.D.N.Y. 1994); United States v. El-Gabrownny, 825 F. Supp. 38, 40 (S.D.N.Y. 1993); see Blumenthal, *supra* note 1; Ralph Blumenthal, *Insistence on Refund for a Truck Results in an Arrest in Explosion*, N.Y. Times, Mar. 5, 1993, at A1 [hereinafter *Insistence on Refund*]; Robert D. McFadden, *Jersey City Man Is Charged in Bombing of Trade Center After Rented Van Is Traced*, N.Y. Times, Mar. 5, 1993, at A1.

12. *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; see Bernstein, *supra* note 9; Blumenthal, *supra* note 1; Wren, *supra* note 1; see also Benjamin Weiser, *Man Accused of Delivering a Bomb Said He Believed It Was Soap*, N.Y. Times, Oct. 16, 1997, at B3 (reporting testimony that Ismoil thought the van carried soap).

13. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; see Bernstein, *supra* note 9; Richard Bernstein, *Telephone Threat After Blast Is Played at World Trade Center Bombing Trial*, N.Y. Times, Dec. 10, 1993, at B3; Blumenthal, *supra* note 1; Alison Mitchell, *Letter Explained Motive in Bombing, Officials Now Say*, N.Y. Times, Mar. 28, 1993, at 11.

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

15. *Yousef*, 327 F.3d at 79, 135; *El-Gabrownny*, 876 F. Supp. at 497; *El-Gabrownny*, 825 F. Supp. at 40; see Blumenthal, *supra* note 1; Blumenthal, *Insistence on Refund*, *supra* note 11; McFadden, *supra* note 11.

16. The 9/11 Commission Report 72 (2004); *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; see Bernstein, *supra* note 9; Blumenthal, *supra* note 1; Blumenthal, *Insistence on Refund*, *supra* note 11; McFadden, *supra* note 9; McFadden, *supra* note 11.

It was reported that Salameh had also returned to the rental office the day after the rental to replace a missing rearview mirror, creating a “mystery of why someone who intended to use a

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

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

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

Salameh and Ayyad were indicted in the Southern District of New York on March 17, 1993.²⁵ The court assigned the case to Judge Kevin Thomas Duffy.²⁶

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

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

18. See Mitchell, *supra* note 17.

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

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

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

22. *Salameh*, 152 F.3d at 108 n.2; *Salameh*, 54 F. Supp. 2d at 254; see Alison Mitchell, *U.S. Informer Is New Suspect in Bomb Plot*, N.Y. Times, Aug. 5, 1993, at B1; Robert F. Worth, *Second Attack on Iraq Prison in 48 Hours Wounds 5 Iraqis*, N.Y. Times, Apr. 5, 2005, at A9.

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

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

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

25. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Ralph Blumenthal, *Suspect in Blast Believed to Be in Pakistan*, N.Y. Times, Mar. 18, 1993, at B4; see also Mitchell, *Engineer Held*, *supra* note 9 (reporting Ayyad’s arrest on Mar. 10, 1993).

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

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

On March 31, a superseding indictment added Abouhalima and Yousef as defendants.²⁷ The next day, the court ordered the parties and their attorneys not to discuss publicly anything related to the case.²⁸ The court of appeals vacated this gag order as overbroad on April 30.²⁹

Bilal Alkaiasi turned himself in on March 24, 1993,³⁰ and a second superseding indictment added him as a defendant on April 7.³¹ Because evidence against him was weaker than evidence against the others, his prosecution was severed.³² On May 9, 1994, he pleaded guilty to an immigration violation and agreed to be deported.³³ Judge Duffy sentenced him on July 13 to one year and eight months in prison, which was four months more than the time already served.³⁴

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

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

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

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

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

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

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

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

32. *See* Bernstein, *supra* note 9; Mitchell, *supra* note 22; Tabor, *supra* note 14; Mary B.W. Tabor, *Trade Center Defendant Agrees to a Plea Bargain*, N.Y. Times, May 10, 1994, at B3. A sixth superseding information against Alkaiasi was filed on May 9, 1994. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21.

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

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

Alkaiasi was released from prison on November 7, 1994. <http://www.bop.gov>.

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

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

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

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

Judge Duffy does not use jury questionnaires. *United States v. Salameh*, No. 1:93-cr-180, 1993 WL 364486, at *2 (S.D.N.Y. Sept. 15, 1993) ("There has been . . . absolutely no showing that jury questionnaires are of any particular help in the selection of a jury in highly publicized cases where a searching voir dire is conducted."); *see* Gross, *supra* note 26, at 23–24.

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

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

On May 24, 1994, the court sentenced each of the four defendants to 240 years in prison.⁴⁶ Judge Duffy arrived at 240 years by computing the remaining life expectancies of the six killed victims, which summed to 180 years, and adding 60 years, which is the mandatory sentence for two counts of assault on a federal officer.⁴⁷

On August 4, 1998, the court of appeals affirmed the convictions, but remanded for resentencing, holding that the defendants did not effectively waive their rights to counsel at sentencing.⁴⁸ Judge Duffy resentenced the defendants in October 1999 to prison terms ranging from 108 years and four months to 117 years and one month.⁴⁹ The terms varied according to the defendants' ages, because for some of the counts, Judge Duffy used a sentencing method recently approved by the court of appeals of imposing a sentence of one month less than a defendant's life expectancy if the sentencing guidelines suggested a life term, but at the time of the crime the guidelines specified that life terms would be decided

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

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

41. *Salameh*, 152 F.3d at 108, 135; *United States v. Salameh*, 856 F. Supp. 781, 782 (S.D.N.Y. 1994); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Bernstein, *supra* note 9; Richard Bernstein, *Jurors Begin Deliberations in Blast Case*, N.Y. Times, Feb. 24, 1994, at B1; Wren, *supra* note 1.

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

43. *Salameh*, 856 F. Supp. at 782 (noting a desire to hire William Kunstler and Ronald Kuby, who were counsel for Siddig Ibrahim Siddig Ali and Ibrahim el-Gabrowni in a related prosecution before Judge Mukasey); see *United States v. Rahman*, 861 F. Supp. 266, 272 (S.D.N.Y. 1994); see also Bernstein, *supra* note 42; Gross, *supra* note 26, at 10.

44. *Salameh*, 856 F. Supp. 781; see Gross, *supra* note 26, at 10. The court of appeals denied the defendants' petition for a writ of mandamus. Docket Sheet, *In re Abouhalima*, No. 94-3038 (2d Cir. Apr. 21, 1994) (noting denial of the writ on May 3, 1994); see *Rahman*, 861 F. Supp. at 272.

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

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

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

48. *Salameh*, 152 F.3d at 161; see *Convictions Are Upheld in Trade Center Case*, N.Y. Times, Aug. 5, 1998, at B6; Gross, *supra* note 26, at 11.

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

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

Plots to Bomb New York Landmarks

When Salameh rented the van used to bomb the World Trade Center, he used as identification a New York driver's license with an address belonging to Ibrahim el-Gabrowny.⁵² On March 4, 1993, federal agents searched el-Gabrowny's home, where they found stun guns and taped messages from el-Gabrowny's cousin, El Sayyid Nosair, urging aggressive reactions to Jewish immigration to Israel.⁵³ Agents found el-Gabrowny near his home, and he was belligerent when frisked.⁵⁴ He was discovered to have fraudulent Nicaraguan passports for Nosair and Nosair's family.⁵⁵

El-Gabrowny was indicted for assault in the Southern District of New York on March 17.⁵⁶ The court assigned the case to Judge Michael B. Mukasey,⁵⁷ who tried to conduct this case as much like other criminal trials as possible.⁵⁸

50. *Id.* (noting sentences of 1,403 months for Salameh, 1,300 months for Abouhalima, 1,405 months for Ayyad, and 1,378 months for Ajaj); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21 (same); *see* United States v. Tocco, 135 F.3d 116, 131–32 (2d Cir. 1998) (approving a sentencing scheme by Judge Jack B. Weinstein of the Eastern District of New York).

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

52. United States v. Rahman, 189 F.3d 88, 108 (2d Cir. 1999); United States v. El-Gabrowny, 876 F. Supp. 495, 497 (S.D.N.Y. 1994); United States v. El-Gabrowny, 825 F. Supp. 38, 40 (S.D.N.Y. 1993); *see* Blumenthal, *supra* note 1.

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

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

54. *Rahman*, 189 F.3d at 108; *El-Gabrowny*, 35 F.3d at 64; *El-Gabrowny*, 876 F. Supp. at 496–98; *Rahman*, 861 F. Supp. at 270; *El-Gabrowny*, 825 F. Supp. at 39–41; *see* McFadden, *supra* note 11; Alison Mitchell, *Suspect in Bombing Is Linked to Sect with a Violent Voice*, N.Y. Times, Mar. 5, 1993, at A1.

55. *Rahman*, 189 F.3d at 108; *El-Gabrowny*, 35 F.3d at 64; *El-Gabrowny*, 876 F. Supp. at 496–97; *Rahman*, 861 F. Supp. at 270; United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); *El-Gabrowny*, 825 F. Supp. at 39, 41; *see* Blumenthal, *supra* note 1; McFadden, *supra* note 9.

56. *El-Gabrowny*, 35 F.3d at 64; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; *El-Gabrowny*, 825 F. Supp. at 39; Docket Sheet, United States v. Abdel Rahman, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Abdel Rahman* Docket Sheet] (also noting the filing of a superseding indictment against El-Gabrowny on May 19, 1993); *see* Blumenthal, *supra* note 25.

57. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56.

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

Nosair was in prison on a sentence of 7½ to 22 years for a state conviction on assault and weapons charges stemming from the killing of a “militant Zionist” and former member of the Israeli parliament, Rabbi Meir Kahane, at a November 5, 1990, speech Kahane made in New York City.⁵⁹ There was evidence that projectiles found in the room where Kahane and others were shot came from Nosair’s gun, but he was acquitted of the murder.⁶⁰

In 1991, during Nosair’s state trial, an FBI informant, Emad Eldin Aly Abdou Salem, began to befriend followers of Sheik Omar Abdel Rahman, a blind Islamic cleric.⁶¹ Salem met el-Gabrownny at the trial of Nosair, who was el-Gabrownny’s cousin.⁶²

Abdel Rahman was tried, but acquitted, in Egypt as an accomplice in the October 6, 1981, murder of President Anwar el-Sadat.⁶³ He illegally entered the

Hulse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. Times, Nov. 9, 2007, at A1; Sheryl Gay Stolberg & Philip Shenon, *Bush to Appoint Ex-Judge as Head of Justice Dept.*, N.Y. Times, Sept. 17, 2007, at A1.

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

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

59. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; see *United States v. Nosair*, 854 F. Supp. 251, 251 (S.D.N.Y. 1994); see also Blumenthal, *supra* note 1; McFadden, *supra* note 9; John T. McQuiston, *Kahane Is Killed After Giving Talk in New York Hotel*, N.Y. Times, Nov. 6, 1990, at A1; Mitchell, *supra* note 54; Ronald Sullivan, *Judge Gives Maximum Term in Kahane Case*, N.Y. Times, Jan. 30, 1992, at A1.

60. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; see Blumenthal, *supra* note 1; M.A. Farber, *Gun That Was Found on Defendant Is Linked to Kahane Shooting*, N.Y. Times, Dec. 5, 1991, at B3; McFadden, *supra* note 9; McFadden, *supra* note 11; Mitchell, *supra* note 54; Selwyn Raab, *Jury Acquits Defendant in Kahane Trial*, N.Y. Times, Dec. 22, 1991, at 136; Tabor, *supra* note 14.

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

61. *Rahman*, 189 F.3d at 104, 106; see Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. Times, Jan. 31, 1995, at 1 (reporting that Salem was paid more than \$1 million by the United States government for his assistance); Alison Mitchell, *Bomb Informer Active in 1991, Authorities Say*, N.Y. Times, July 15, 1993, at A1 [hereinafter *Bomb Informer*]; Alison Mitchell, *Egyptian Was Informer, Officials Say*, N.Y. Times, June 26, 1993, at 123 [hereinafter *Egyptian Informer*]; Alison Mitchell, *Official Recalls Delay in Using Informer*, N.Y. Times, July 16, 1993, at B2 (reporting that Salem had entered the federal witness protection program); Mitchell, *supra* note 54 (describing Abdel Rahman as “blind, with one eye without a pupil, the other an empty socket”); see also Mary B.W. Tabor, *Informer’s Ex-Wife Said He Warned of Terrorism*, N.Y. Times, Sept. 28, 1993, at B2 (reporting that Salem “said that the day after the explosion [he] was upset and told [his ex-wife] the bombing could have been averted if the F.B.I. had heeded his warnings”).

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

63. See William E. Farrell, *5 in Sadat Trial Sentenced to Die*, N.Y. Times, Mar. 7, 1982, at 11; William E. Farrell, *Egypt Reports Plot to Kill Aides at Sadat’s Funeral*, N.Y. Times, Oct. 31,

United States in 1990 and faced a deportation order at the time of the World Trade Center bombing.⁶⁴ His followers plotted to assassinate Egypt's president, Hosni Mubarak, during a March 1993 visit to the United Nations in New York City.⁶⁵ Siddig Ibrahim Siddig Ali obtained Mubarak's itinerary from a source in the Sudanese government.⁶⁶ But the plot was foiled when a confidant of Abdel Rahman's, Abdo Mohammed Haggag, informed the Egyptian government of the assassination plan and Mubarak's New York trip was canceled.⁶⁷

Siddig Ali and Clement Rodney Hampton-El led paramilitary training on weekends between October 1992 and February 1993.⁶⁸ Participants included Amir and Fadil Abdelgani and Tarig Elhassan, as well as the Egyptian spy Haggag.⁶⁹ The training was for jihad, perhaps in Bosnia.⁷⁰ Hampton-El was observed by the FBI in July 1989 shooting weapons at a public rifle range on Long Island with World Trade Center bombers Abouhalima, Salameh, and Ayyad.⁷¹

In May 2003, the informant Salem persuaded Siddig Ali to establish a bomb-making safehouse where the FBI had installed surveillance equipment.⁷²

The conspirators considered bombing various New York City locations, including the United Nations, the federal building, the FBI headquarters, the diamond district, the Lincoln Tunnel, and the Holland Tunnel.⁷³

On June 13, 1993, Fares Khallafalla and the informant Salem purchased timers for bombs.⁷⁴ On June 19 and 21, Amir Abdelgani, Victor Alvarez, and Salem

1981, at 13; McFadden, *supra* note 9; McFadden, *supra* note 11; Mitchell, *supra* note 54; Tabor, *supra* note 14; *see also* The 9/11 Commission Report 56 (2004) (Abdel Rahman's "preaching had inspired the assassination of Sadat").

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

64. *See* James C. McKinley, Jr., *Islamic Leader on U.S. Terrorist List Is in Brooklyn*, N.Y. Times, Dec. 16, 1990, at 144; McFadden, *supra* note 11; Mitchell, *supra* note 54.

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

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

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

67. *Id.*

68. *Id.* at 107.

69. *Id.*

70. *Id.*

71. *Id.* at 105.

72. *Id.* at 109; *see* Mitchell, *Egyptian Informer*, *supra* note 61.

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

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

unsuccessfully tried to steal cars to use as both bomb-delivery and getaway vehicles.⁷⁵ On June 22 and 23, Mohammed Saleh, who owned two gas stations in Yonkers, provided nearly \$300 worth of diesel fuel to Siddig Ali and the Abdelganis to use for making bombs.⁷⁶

A couple hours after midnight on June 24, 1993, the FBI raided the safehouse and arrested Siddig Ali, Amir and Fadil Abdelgani, Elhassan, and Alvarez while they were mixing explosive chemicals.⁷⁷ Hampton-El, Saleh, and Khallafalla were arrested at their homes in Flatbush, Yonkers, and Jersey City, respectively.⁷⁸

It was reported that the government allowed Abdel Rahman to remain free pending his deportation appeal because he was not considered a flight risk and the conspiracy evidence against him was weak.⁷⁹ But after his van evaded federal agents following him on June 30, the government decided to arrest him on an immigration detainer.⁸⁰ A negotiated surrender was agreed on for July 3.⁸¹

On July 14, the indictment against el-Gabrownny was expanded to include bomb conspiracy charges and defendants Siddig Ali, Hampton-El, Amir Abdelgani, Khallafalla, Elhassan, Fadil Abdelgani, Saleh, Alvarez, and two others: Earl Gant and a defendant identified only as "Wahid."⁸² Abdel Rahman, Nosair, Haggag, and Mohammed Abouhalima, the brother of World Trade Center bomber Mahmoud Abouhalima, were added as defendants by superseding indictment on August 25.⁸³

Gant, who was considered a minor player in the case, was arrested on July 1, 1993, and released on bail on October 19; he pleaded guilty on April 1, 1994.⁸⁴

75. *Id.*; see McFadden, *supra* note 73.

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

77. *Id.* at 111; see McFadden, *supra* note 73.

78. *Rahman*, 189 F.3d at 111; see McFadden, *supra* note 73.

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

80. See Mitchell, *supra* note 79.

81. See *id.*

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

82. United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Ralph Blumenthal, *Court Says Tapes in Bomb Plot Fail to Support Some Charges*, N.Y. Times, July 8, 1993, at B3 (reporting that Wahid was still missing); Mitchell, *Bomb Informer*, *supra* note 61.

83. *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Mary B.W. Tabor, *U.S. Indicts Egyptian Cleric as Head of Group Plotting "War of Urban Terrorism"*, N.Y. Times, Aug. 26, 1993, at A1.

84. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Ralph Blumenthal, *Defendant in a Bombing Plot Released on Bail*, N.Y. Times, Oct. 19, 1993, at B2 (reporting that there was evidence that Gant agreed to obtain explosives but had no real awareness of what they would be used for); Mary B.W. Tabor, *9th Held in Bomb Plot as Tie Is Made to a 1991 Murder*, N.Y. Times, July 1, 1993, at B3.

He was sentenced on July 20, 1994, to time served, with three years of supervised release.⁸⁵

“Wahid” turned out to be Matarawy Mohammed Said Saleh, who was arrested on July 22, 1993, and who is not related to co-defendant Mohammed Saleh.⁸⁶ Because prosecutors determined that Wahid joined the conspiracy only hours before the government began arresting co-defendants, he pleaded guilty and was sentenced on December 19, 1995, to time served, with three years of supervised release.⁸⁷

Haggag agreed to testify for the government; terrorism charges against him were dropped, and he pleaded guilty to an unrelated insurance fraud scheme in which he tried to collect on a fire he set in a cafe he co-owned.⁸⁸

The other defendants were tried for seditious conspiracy “to conduct a campaign of urban terrorism,” including participation in the bombing of the World Trade Center, the murder of Rabbi Kahane, the plot to assassinate President Mubarak, and plans to bomb New York landmarks.⁸⁹

Famed defender of the unpopular William M. Kunstler and his partner, Ronald L. Kuby, represented el-Gabrownny.⁹⁰ When the indictment was superseded to include Siddig Ali and others as defendants, Kunstler and Kuby appeared for both el-Gabrownny and Siddig Ali.⁹¹ Judge Mukasey sought to ensure that a conflict-of-interest waiver by the defendants was knowing.⁹²

I said I would conduct a hearing at a later date to determine that both defendants understood their right to conflict-free representation, and that in aid of such a determination I

85. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Ronald Sullivan, *Minor Figure in Bomb Plot Sentenced to Time Served*, N.Y. Times, July 21, 1994, at B4 (reporting that Gant said he thought the explosives he was providing would be used to combat the rape and massacre of Muslims in Bosnia).

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

87. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Fried, *supra* note 86.

88. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56 (noting sentencing in Feb. 1996); see Joseph P. Fried, *In Plea Deal, Jerseyman to Testify in Terror Trial*, N.Y. Times, May 2, 1995, at 5.

89. *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999); *United States v. Rahman*, 861 F. Supp. 266, 270 (S.D.N.Y. 1994); *United States v. Rahman*, 854 F. Supp. 254, 258 (S.D.N.Y. 1994); *United States v. El-Gabrownny*, 844 F. Supp. 955, 957 (S.D.N.Y. 1994); see Tabor, *supra* note 83.

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

90. *United States v. Rahman*, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see David Margolick, *Still Radical After All These Years*, N.Y. Times, July 6, 1993, at B1.

91. *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56.

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

would appoint whichever attorneys from the panel of Criminal Justice Act (“CJA”) attorneys were scheduled to receive cases that week, for the purpose of advising each defendant of that right independent of any advice received from the Kunstler firm. Kunstler objected, stating immediately in open court, without consulting either defendant, that “[t]hey are perfectly willing to be represented here by me and they are here and they are willing to waive any alleged conflict of interest.” (7/15/93 Tr. 17) He added that he did not want any CJA attorney “talking to either one of them.” When I noted that neither defendant would be obligated to talk to independent counsel, but only to listen to an explanation of the risks of dual representation, Kunstler responded, “There are no risks here, Judge, except those created by the government.” (*Id.* at 18)

Notwithstanding defense counsel’s position, I appointed the two lawyers on duty to accept CJA appointment that day and a succeeding day to act as independent counsel to El-Gabrownny and Siddig Ali, to explain to them the hazards of joint representation

...

. . . [B]oth defendants said they had understood the explanations of possible conflicts, and both expressed the desire to be represented by the Kunstler firm.⁹³

When the indictment was superseded to include as defendants Nosair, Abdel Rahman, and two others, attorney Michael Warren appeared for Nosair, and another attorney appeared for Abdel Rahman.⁹⁴

Warren and Kunstler represented Nosair at his state murder trial,⁹⁵ and Warren appeared for el-Gabrownny at el-Gabrownny’s first appearance following the filing of a criminal complaint and preceding the filing of the indictment.⁹⁶ Judge Mukasey denied Nosair’s application to name Warren as his appointed attorney in this federal trial as an exception to regular Criminal Justice Act procedures.⁹⁷ Judge Mukasey assigned Nosair a CJA panel attorney.⁹⁸

Abdel Rahman’s attorney announced that he and Abdel Rahman could not agree on a fee; Kunstler and Kuby informed the court that they had accepted Abdel Rahman’s request that they represent him instead.⁹⁹ The government moved to

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

94. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56.

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

96. *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56 (noting the filing of a criminal complaint against El-Gabrownny on Mar. 5, 1993, and the filing of an indictment against El-Gabrownny on Mar. 17, 1993).

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

In denying Nosair’s request on reconsideration, Judge Mukasey also denied an application by Lynne Stewart to represent Mouhammed Abouhalima. *Rahman, id.*, 1993 WL 410449 (Oct 13, 1993); *see* Gross, *supra* note 26, at 8.

98. *Rahman*, 861 F. Supp. at 270; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56.

99. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; *Rahman*, No. 1:93-cr-181, 1993 WL 385762 (S.D.N.Y. Sept. 27, 1993); *see Kunstler to Defend Sheik in Bombing Case*, N.Y. Times, Sept. 22, 1993, at B4; *see also* Gross, *supra* note 26, at 7–10 (describing as a “celebrity

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

On February 8, 1994, Mohammed Abouhalima, the brother of World Trade Center bombing defendant Mahmud Abouhalima, was released in a sealed proceeding.¹⁰⁵ But he was indicted on September 18, 1996, for aiding his brother's escape.¹⁰⁶ He was convicted on May 28, 1997, and sentenced on November 24, 1998, to eight years in prison.¹⁰⁷

In June 1994, Siddig Ali obtained substitute counsel to help him try to cooperate with the government, but the government decided in August not to strike a deal.¹⁰⁸ The substitute counsel asked to be relieved as Siddig Ali's attorney, because his knowledge of Siddig Ali's proffers to the government would constrain

lawyer" issue the attorneys' wanting to represent not only lesser known defendants but also the most high-profile defendant).

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

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

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

Abdel Rahman had been successful defending himself pro se in Egypt on conspiracy charges in connection with the 1981 assassination of Egyptian President Anwar Sadat and thus thought he could duplicate those results; Abdel Rahman also wanted to use the trial as a platform from which to convey his views.

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

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

103. See Bernstein, *supra* note 61; Gross, *supra* note 26, at 4 ("Ultimately, Abdel Rahman's close circle of people around him convinced him that he would have little chance of prevailing if he continued through trial pro se and convinced him to accept counsel.").

104. See Tabor, *supra* note 4.

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

106. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Joseph P. Fried, *U.S. Says Man Helped Brother Flee in Trade Center Bombing*, N.Y. Times, Sept. 19, 1996, at 8.

107. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see *Two Are Sentenced in Trade Center Bombing*, N.Y. Times, Nov. 25, 1998.

The court of appeals affirmed. *United States v. Abouhalima*, No. 98-1677, 1999 WL 1295846 (2d Cir. Dec. 23, 1999). Mohammed Abouhalima was released from prison on August 25, 2005. <http://www.bop.gov>.

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

what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.¹⁰⁹ The government objected.¹¹⁰ Judge Mukasey ruled that Kunstler and Kuby could no longer represent Siddig Ali.¹¹¹ Judge Mukasey also ruled that the Kunstler firm's prior representations of Siddig Ali and Nosair had now created conflicts of interest with its representation of el-Gabrownny so serious as to disqualify it from representing el-Gabrownny as well.¹¹² Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.¹¹³

Voir dire began on January 9, 1995.¹¹⁴ To facilitate jury selection, Judge Mukasey used a jury questionnaire, which he had seldom done before, and he found it very helpful.¹¹⁵ Judge Mukasey used an anonymous jury and conducted post-questionnaire voir dire in a conference room with the press represented by two reporters—one from print and one from electronic media.¹¹⁶

Opening statements commenced on January 30.¹¹⁷ Judge Mukasey found it helpful—necessary even—to charge the jury with applicable law at the beginning of the case, between opening statements and presentation of evidence.¹¹⁸ For example, it was important for the jury to understand up front that seditious conspira-

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

110. *Id.* at 267–68.

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

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

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

114. *United States v. Abouhalima*, 961 F. Supp. 78, 80 (S.D.N.Y. 1997); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Richard Bernstein, *Trial for 12 Opens in Plot for Bombing New York Buildings*, N.Y. Times, Jan. 10, 1995, at 1.

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

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

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

Gross, *supra* note 26, at 22–23.

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

117. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Bernstein, *supra* note 61.

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

cy did not necessarily include an intent to overthrow the government.¹¹⁹ As was his general practice, Judge Mukasey permitted jurors to take notes.¹²⁰

On February 6, Siddig Ali pleaded guilty, agreed to be a witness for the government, and asked God to forgive him for his acts, which he admitted were wrong.¹²¹ He was sentenced to 11 years in prison on October 15, 1999, on a finding that he provided the government with extensive assistance in the case.¹²²

Judge Mukasey conducted the nine-month trial four days per week.¹²³ A brief experience with five days per week fatigued all participants without moving things along noticeably faster.¹²⁴ Both Arabic and Spanish interpreters were required.¹²⁵

While the trial was in progress, on April 19, 1995, the federal building in Oklahoma City, including the courthouse, was partially destroyed by a bomb.¹²⁶ Judge Mukasey permitted the jurors to consult news of the event, but admonished them not to let it influence them in the trial.¹²⁷

On October 1, 1995, the jury convicted el-Gabrownny, Hampton-El, both Abdelganis, Khallafalla, Elhassan, Saleh, Alvarez, Abdel Rahman, and Nosair of seditious conspiracy and other charges, including a guilty verdict for Nosair in Rabbi Kahane's murder.¹²⁸ On January 17, 1996, Judge Mukasey sentenced Abdel Rahman and Nosair to life in prison and sentenced the other eight defendants as follows: el-Gabrownny to 57 years; Alvarez, Elhassan, Hampton-El, and Saleh to 35 years; Amir Abdelgani and Khallafalla to 30 years; and Fadil Abdelghani to 25 years.¹²⁹

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a reconsideration of el-Gabrownny's sen-

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

120. *Id.*

121. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Richard Bernstein, *Bomb Plot Defendant Shifts Plea to Guilty and Implicates Others*, N.Y. Times, Feb. 7, 1995, at 1.

122. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Benjamin Weiser, *Remorseful Terror Conspirator Gets an 11-Year Sentence*, N.Y. Times, Oct. 16, 1999, at B6.

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

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

125. *Id.*

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

127. *Id.*; see Joseph P. Fried, *Judge Refuses to Sequester Jury in Terrorism Case in New York*, N.Y. Times, Apr. 20, 1995, at 8.

128. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Joseph P. Fried, *Sheik and 9 Followers Guilty of a Conspiracy of Terrorism*, N.Y. Times, Oct. 2, 1995, at 1.

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

129. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56; see Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. Times, Jan. 18, 1996, at 1; Wren, *supra* note 1.

tence.¹³⁰ On remand, Judge Mukasey sentenced el-Gabrownly to 33 years,¹³¹ which the court of appeals affirmed.¹³²

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.¹³³ There, he launched a conspiracy to bomb U.S. airliners serving routes in southeast Asia.¹³⁴ To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.¹³⁵ On December 11, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.¹³⁶ Yousef exited the plane during a stopover in Cebu, Philippines, and the bomb exploded during the second leg, killing one passenger and injuring several others.¹³⁷

Yousef and his high school friend Abdul Hakim Murad were burning chemicals in their Manila apartment on January 6, 1995, and they accidentally started a fire that resulted in a visit from Philippine police officers and discovery of the plot to bomb planes.¹³⁸

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.¹³⁹ While en route, he confessed that the goal of the bombing plot was to punish the United States and its people for their support of Israel.¹⁴⁰

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

131. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 56.

132. Opinion, *United States v. El-Gabrownly*, No. 00-1401 (2d Cir. May 24, 2001), available at 10 Fed. Appx. 23.

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

134. The 9/11 Commission Report 147 (2004) (noting that the plan became known as the “Bojinka” plot); *Yousef*, 327 F.3d at 79–80; Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror* 24 (2007) (reporting that the plan was to use liquid explosives that would pass through airport metal detectors).

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

136. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; *United States v. Yousef*, 927 F. Supp. 673, 675 (S.D.N.Y. 1996); see McKinley, *supra* note 20; Wren, *supra* note 1.

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

138. *Yousef*, 327 F.3d at 79, 81; see McKinley, *supra* note 20; Philip Shenon, *Broad Terror Campaign Is Foiled by Fire in Kitchen, Officials Say*, N.Y. Times, Feb. 12, 1995, at 1; Temple-Raston, *supra* note 134, at 24; Wren, *supra* note 1.

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

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

Philippine authorities arrested Shah on January 11, but he escaped.¹⁴¹ He was recaptured by Malaysian authorities in December 1995 and flown to New York on December 12.¹⁴²

Yousef fled the Philippines but was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.¹⁴³ He was transported to the Southern District of New York on February 8.¹⁴⁴ En route, he confessed to an intention to topple one of the World Trade Center towers into the other.¹⁴⁵

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.¹⁴⁶ Yousef asked to address the jury during opening arguments, and Judge Duffy said that if he did he would have to act as his own lawyer throughout the trial.¹⁴⁷ Yousef and Judge Duffy agreed that he would do this.¹⁴⁸ All three defendants were convicted on September 5, the fourth day of deliberation.¹⁴⁹

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.¹⁵⁰ This time, Yousef let a lawyer represent him.¹⁵¹ Both were convicted on November 12.¹⁵²

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

142. *Yousef*, 327 F.3d at 79, 82; see McKinley, *supra* note 141.

143. The 9/11 Commission Report 148 (2004); *Yousef*, 327 F.3d at 79, 81–82; *United States v. Yousef*, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); see Johnston, *supra* note 20; McKinley, *supra* note 20; Temple-Raston, *supra* note 134, at 24; Wren, *supra* note 1.

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

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

146. *Yousef*, 327 F.3d at 85 (giving the start date as May 29, which was the day of opening arguments); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21 (also noting the filing on Apr. 13, 1995, of an eighth superseding indictment against Yousef, Yasin, and Murad; the filing on June 14, 1995, of a ninth superseding indictment against Yousef, Yasin, and Murad; the filing on Sept. 11, 1995, of a tenth superseding indictment against Yousef, Yasin, Murad, and Ismoil; the filing on Dec. 13, 1995, of eleventh superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah; and the filing on Feb. 21, 1996, of twelfth superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah); see *Judge Dismisses 75 on Bomb Jury Panel*, N.Y. Times, May 14, 1996, at 2 [hereinafter *Judge Dismisses*].

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

148. See Gross, *supra* note 26, at 5; Christopher S. Wren, *Terror Suspect Defends Himself and Offers Jury an Alibi*, N.Y. Times, May 31, 1996, at 1; Wren, *supra* note 1; Christopher S. Wren, *With Judge’s Gentle Help, Terror Suspect Starts Case*, N.Y. Times, Aug. 22, 1996, at 1.

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

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

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

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

Judge Duffy sentenced Yousef on January 8, 1998, to 240 years in prison for his participation in the World Trade Center bombing and a consecutive life sentence for his participation in the plot to bomb airliners.¹⁵³ At his sentencing, Yousef proclaimed, “I am a terrorist and I am proud of it.”¹⁵⁴ Judge Duffy sentenced Ismoil on April 3, 1998, to 240 years in prison; and the judge sentenced Murad on May 15, 1998, to life plus 60 years.¹⁵⁵ The court of appeals affirmed the convictions and sentences on April 4, 2003.¹⁵⁶ On October 8, 2004, Judge Duffy sentenced Shah to 30 years.¹⁵⁷

Challenge: Court Security

Security was tight in these trials. One downside of tight security in a criminal prosecution is the message it sends to the jury that the defendants might be dangerous. In the trial for conspiracy to bomb airplanes, Judge Duffy had to dismiss the first 75 prospective jurors because they indicated they would be influenced by heavy court security.¹⁵⁸

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors’ protection.¹⁵⁹ To protect the jurors’ safety and anonymity, they did not report directly to the courthouse but to secret locations from which deputy marshals transported

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

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

154. See Weiser, *supra* note 153.

155. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see *Pilot Is Given Life Term for Bombing Plot*, N.Y. Times, May 16, 1998, at B5; Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. Times, Apr. 5, 1998, at B2.

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

The appeal was heard by Judges Ralph K. Winter, Jr., John Walker, Jr., and José A. Cabranes. Because, by chance, all three judges sat in New Haven, Connecticut, oral argument was held there. Interview with Hon. José A. Cabranes, Nov. 4, 2009. Second Circuit oral arguments are almost always held in New York. Interview with 2d Cir. Clerk’s Office Staff, Nov. 6, 2009.

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

158. See *Judge Dismisses*, *supra* note 146.

159. Michael B. Mukasey, *United States v. Abdel Rahman: Preliminary Voir Dire* (Jan. 9, 1995) [hereinafter *Mukasey Preliminary Voir Dire*]; see Bernstein, *supra* note 9; Blumenthal, *supra* note 38; Gross, *supra* note 26, at 21 (“In every major terrorism trial that has taken place in the Southern District [of New York], an anonymous jury has been used due to the heightened risk of harm to potential jurors because of the nature of the crime at issue.”); Tabor, *supra* note 39; Wren, *supra* note 1 (“After the [first Yousef] trial ended, the jurors were whisked away in three vans before reporters could approach them.”).

them to court.¹⁶⁰ When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.¹⁶¹

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.¹⁶² Judge Mukasey did not sequester the jurors during his trial until it was time to deliberate, at which time he moved to a seven-days-per-week schedule.¹⁶³

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.¹⁶⁴

Challenge: Classified Evidence

In the seditious conspiracy trial, the government presented six classified exhibits ex parte to Judge Mukasey, pursuant to the Classified Information Procedures Act (CIPA).¹⁶⁵ Judge Mukasey kept the exhibits in a safe while he considered whether they had to be produced.¹⁶⁶ He ruled which exhibit had to be disclosed to the defendants, ordered that it not be disclosed to anyone else by the defendants, and ordered that all of the exhibits be kept under seal with the court information security officer.¹⁶⁷

160. Mukasey Preliminary Voir Dire, *supra* note 159; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007.

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

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

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

164. Mukasey Preliminary Voir Dire, *supra* note 159; see Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

165. *United States v. Rahman*, 870 F. Supp. 47, 49 (S.D.N.Y. 1994); Interview with Michael B. Mukasey, June 25, 2007; see Gross, *supra* note 26, at 37; see also 18 U.S.C. app. 3; Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers* (2007).

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

167. *Rahman*, 870 F. Supp. 47; see Gross, *supra* note 26, at 37 (reporting that only one of the six documents had to be disclosed); Liptak, *supra* note 123 (“Judge Mukasey was concerned throughout about balancing the defendants’ rights against national security. He ordered an array of potential evidence to be disclosed to the defense, for instance, but drew the line at information he said would needlessly compromise intelligence operations.”).

American Embassies in Kenya and Tanzania

*United States v. El-Hage (Leonard
B. Sand, Kevin Thomas Duffy, and
Lewis A. Kaplan, S.D.N.Y.)*¹⁶⁸

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania on August 7, 1998, killing 224 people, including 12 Americans.¹⁶⁹

The Bombing in Kenya

Pakistani authorities arrested Mohammed Saddiq Odeh on the day of the bombings for traveling with a fraudulent passport,¹⁷⁰ and he quickly became a suspect in the Nairobi bombing.¹⁷¹ Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12, 1998, as another suspect in the bombing.¹⁷² Al-'Owhali

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

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

169. The 9/11 Commission Report 70 (2004); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 104 (2d Cir. 2008); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001); *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 604, 606 (S.D.N.Y. 2000); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see Rick Lyman, *Texans Cell Terror Suspect Apolitical*, N.Y. Times, Sept. 20, 1998, at 126; James C. McKinley, Jr., *Bombs Rip Apart 2 U.S. Embassies in Africa*, N.Y. Times, Aug. 8, 1998, at A1.

Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya. See Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6.

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

170. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 185 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 104; *United States v. Bin Laden*, 132 F. Supp. 2d 198 (S.D.N.Y. 2001); see Raymond Bonner, *Pakistan Arrests Two New Suspects in Embassy Blasts*, N.Y. Times, Aug. 19, 1998, at A1; Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6 [hereinafter *Tanzania Charges*].

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

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

admitted driving the bomb to the embassy in Kenya.¹⁷³ Later that month, the suspects were moved to New York,¹⁷⁴ and they were indicted on October 7.¹⁷⁵ The United States decided to seek the death penalty against al-'Owhali but not Odeh.¹⁷⁶

The government identified Haroun Fazil as another suspect in the Nairobi bombing.¹⁷⁷ It is believed that he drove a pickup truck to lead the vehicle carrying the bomb to the embassy.¹⁷⁸ The government offered a \$2 million reward for information leading to his arrest, but he has not been apprehended.¹⁷⁹

On September 16, 1998, Wadih el-Hage, a naturalized U.S. citizen and resident of Arlington, Texas, who once shared a house with Fazil in Nairobi and who once was Osama bin Laden's personal secretary, was arrested immediately after testifying before a grand jury.¹⁸⁰ El-Hage, who also testified before a grand jury

173. See Johnston, *supra* note 172; see *In re Terrorist Bombings*, 552 F.3d at 182 (noting that al-'Owhali's cooperation was contingent on his being tried in the United States, which he regarded as his enemy, instead of Kenya, which he did not).

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

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

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

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

177. See Benjamin Weiser, *2 New Suspects Linked by U.S. to Terror Case*, N.Y. Times, Sept. 18, 1998, at A1 [hereinafter *2 New Suspects*]; Benjamin Weiser, *A Bin Laden Agent Left Angry Record of Gripes and Fears*, N.Y. Times, Dec. 2, 1998, at A1 [hereinafter *Angry Record*].

178. See Weiser, *2 New Suspects*, *supra* note 177; Weiser, *Angry Record*, *supra* note 177.

179. See Weiser, *2 New Suspects*, *supra* note 177; Weiser, *Angry Record*, *supra* note 177; Benjamin Weiser, *U.S. Charges Ex-Soldier, Calling Him Plotter with Bin Laden*, N.Y. Times, May 20, 1999, at A12 [hereinafter *U.S. Charges Ex-Soldier*].

180. *In re Terrorist Bombings*, 552 F.3d at 104; *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *Bin Laden*, 91 F. Supp. 2d at 606; *Bin Laden*, 92 F. Supp. 2d at 231; Docket Sheet, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998) [hereinafter S.D.N.Y. *El Hage* Docket Sheet]; see Lyman, *supra* note 169; Weiser, *2 New Suspects*, *supra* note 177; see also The 9/11 Commission Report 56 (2004) (“Hage was a U.S. citizen who had worked with Bin

about Bin Laden's activities a year earlier, was charged with making false statements to investigators and the grand jury.¹⁸¹ On October 7, charges against him were broadened to include conspiracy to kill American citizens.¹⁸²

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.¹⁸³

On October 24, 2000, el-Hage tried to plead guilty, but the court did not accept his plea, because Judge Sand determined that el-Hage was pleading guilty to avoid the strip searches required every time he came to court rather than because he believed he was guilty.¹⁸⁴

The Bombing in Tanzania

On September 21, 1998, the government of Tanzania charged Mustafa Mahmoud Said Ahmed and Rashid Saleh Hemed with the bombing of the American embassy in Dar es Salaam.¹⁸⁵ Tanzania dropped charges against Ahmed in March

Ladin in Afghanistan in the 1980s, and in 1992 he went to Sudan to become one of al Qaeda's major financial operatives.”).

Osama bin Laden already had a sealed indictment against him, which was issued in June 1998. *See* The 9/11 Commission Report 110 (2004). On November 4, 1998, a 238-count superseding indictment was issued against Bin Laden that included charges for the embassy bombings. *See* The 9/11 Commission Report 128 (2004); Benjamin Weiser, *Saudi Is Indicted in Bomb Attacks on U.S. Embassies*, N.Y. Times, Nov. 5, 1998, at A1.

181. *El-Hage*, 213 F.3d at 77; *Bin Laden*, 91 F. Supp. 2d at 605–07 (noting that el-Hage appeared before the grand jury on Sept. 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180 (noting criminal complaint filed on Sept. 17, 1998); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 12 (2008) [hereinafter *Trying Cases*]; *see* Lyman, *supra* note 169; Weiser, *2 New Suspects*, *supra* note 177.

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

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

183. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *United States v. Salim*, 549 F.3d 67, 70 (2d Cir. 2008); *see* Benjamin Weiser, *U.S. May Ask Death Penalty in Embassy Bombings*, N.Y. Times, Oct. 9, 1998, at A10.

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

The case originally was assigned to Judge John E. Sprizzo, S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180, but Judge Sprizzo recused himself because he previously provided representation to Libya, *see* Benjamin Weiser, *U.S. Asks British to Deliver Suspected Bin Laden Aide*, N.Y. Times, Sept. 29, 1998, at A10 [hereinafter *Deliver Aide*].

184. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180 ; *see* Benjamin Weiser, *Judge Rejects Guilty Plea in Bomb Plot*, N.Y. Times, Oct. 25, 2000, at B1.

185. *See* Bonner, *Tanzania Charges*, *supra* note 170; *see also* James Risen & Benjamin Weiser, *Before Bombings, Omens and Fears*, N.Y. Times, Jan. 9, 1999, at A1 (reporting that in 1997 Ahmed warned the American embassy in Kenya of a bomb plot).

2000.¹⁸⁶ After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.¹⁸⁷

Khalfan Khamis Mohamed was arrested in Cape Town, South Africa, on October 5, 1999, flown to New York, and arraigned on October 8 for participation in the Dar es Salaam bombing.¹⁸⁸ His attorney admitted at trial that K.K. Mohamed helped assemble the bomb.¹⁸⁹ The United States decided to seek the death penalty against him.¹⁹⁰ South Africa's Constitutional Court, its highest court, subsequently ruled that it was improper to turn Mohamed over to the United States for a capital trial.¹⁹¹ Judge Sand ruled that the decision by the South African court did not invalidate Mohamed's capital prosecution, but Mohamed could offer the decision as mitigating evidence.¹⁹²

A Larger Plot

Mamdouh Mahmud Salim, Osama bin Laden's finance manager, was suspected of organizing the embassy bombings and was arrested in Munich, Germany, on September 16, 1998.¹⁹³ German authorities handed him over to the U.S. government

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

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

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

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

189. See Hirsch, *supra* note 169, at 69, 81 (reporting also that Mohamed was known as "K.K."); Benjamin Weiser, *Suspect Admits Helping Make Embassy Bomb*, N.Y. Times Feb. 6, 2001, at A1 (reporting that Mohamed's attorney made the concession during opening arguments); see also *Bin Laden*, 156 F. Supp. 2d at 362–63 ("During interrogation by American officials on October 5 and 6, 1999, Khalfan Mohamed admitted to playing a role in the August 7, 1998, bombing of the American Embassy in Dar es Salaam.").

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

190. *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting June 27, 2000, filing of death penalty notice); *United States v. Bin Laden*, 126 F. Supp. 2d 256 (S.D.N.Y. 2000) (denying a claim that death penalty certification was race-based); see Weiser, *Faking Illness*, *supra* note 176; Weiser, *2d Death Penalty*, *supra* note 176.

191. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; see Hirsch, *supra* note 169, at 228; Benjamin Weiser, *South Africa Regrets Its Role in a Defendant's Extradition*, N.Y. Times, May 31, 2001, at B4 (reporting that the May 28, 2001, ruling "came too late to do Mr. Mohamed any good").

192. *Bin Laden*, 156 F. Supp. 2d 359; see Hirsch, *supra* note 169, at 228–29.

193. *United States v. Bin Laden*, 160 F. Supp. 2d 670, 674 (S.D.N.Y. 2001); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180 (noting Sept. 14, 1998, complaint and arrest warrant against Salim); see Benjamin Weiser, *Judge Orders Embassy Bomb Suspect Held Without Bail*, N.Y. Times, Dec. 22, 1998, at B6 [hereinafter *Held Without Bail*]; Benjamin Weiser, *U.S. Says Bin Laden Aide Tried to Get Nuclear Material*, N.Y. Times, Sept. 26, 1998, at A3 [hereinafter *Nuclear Material*].

on December 20 on condition that he not face the death penalty.¹⁹⁴ He first appeared before the district court on December 21.¹⁹⁵ The government charged him with four broad conspiracy counts.¹⁹⁶

Khalid al-Fawwaz, who was reportedly a close friend of Osama bin Laden's and who ran al-Qaeda's media operations, was arrested by British authorities in September 1998.¹⁹⁷ On June 19, 1999, the U.S. government indicted him for having a hand in the 1998 bombings.¹⁹⁸ At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdul Bary on July 11, 1999.¹⁹⁹ Britain's House of Lords ruled on December 17, 2001, that these three suspects could be extradited to the United States,²⁰⁰ but the extradition has not yet happened.²⁰¹ Eidarous died of leukemia on July 16, 2008, while under house arrest in London.²⁰²

Ali A. Mohamed, a former sergeant in the U.S. Army, who previously was a major in Egypt's army, was secretly charged with al-Qaeda conspiracies in September 1998.²⁰³ He was formally indicted on May 19, 1999, after he refused to cooperate in the tracking down of Osama bin Laden, and he first appeared in court on May 27.²⁰⁴ On October 20, 2000, he agreed to plead guilty.²⁰⁵

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

194. *Bin Laden*, 156 F. Supp. 2d at 370; see Weiser, *Held Without Bail*, *supra* note 193.

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

196. See Weiser, *Held Without Bail*, *supra* note 193; Weiser, *Nuclear Material*, *supra* note 193 (reporting the unsealing of charges on Sept. 25, 1998).

197. See Andrew Jacobs, *U.S. Indicts 2 More Men in Bombing of Embassies*, N.Y. Times, June 17, 1999, at A17; Weiser, *Angry Record*, *supra* note 177; Weiser, *Deliver Aide*, *supra* note 183; Craig Whitlock, *Extradition of Terror Suspects Founders*, Wash. Post, Dec. 21, 2008, at A1.

198. See Jacobs, *supra* note 197.

199. See David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6; Whitlock, *supra* note 197.

200. See Warren Hoge, *Court Approves Extraditions in Bombings of U.S. Embassies*, N.Y. Times, Dec. 18, 2001; Whitlock, *supra* note 197.

201. See Craig Whitlock, *Britain Pays to Keep Suspects from U.S. Hands*, Wash. Post, May 2, 2009, at A9; Whitlock, *supra* note 197.

202. Nolle Prosequi, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Dec. 3, 2008); see Whitlock, *supra* note 197.

203. See Benjamin Weiser, *U.S. Ex-Sergeant Linked to Bin Laden Conspiracy*, N.Y. Times, Oct. 30, 1998, at A1; see also The 9/11 Commission Report 68 (2004) (describing Ali Mohamed as "a former Egyptian army officer who had moved to the United States in the mid-1980s, enlisted in the U.S. Army, and became an instructor at Fort Bragg"); Benjamin Weiser & James Risen, *A Soldier's Shadowy Trail in U.S. and in the Mideast*, N.Y. Times, Dec. 1, 1998, at A1 (reporting that Mohamed applied to be a CIA agent in 1984).

204. United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see Benjamin Weiser, *Indicted Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. Times, June 5, 1999, at A3 (reporting that Mohamed was also known as Abu Omar); Weiser, *U.S. Charges Ex-Soldier*, *supra* note 179.

205. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; see Benjamin Weiser, *Bin Laden Linked to Embassy Blast by an Ex-Soldier*, N.Y. Times, Oct. 21, 2000, at A1.

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.²⁰⁶ He was held in secret for more than four months before charges against him were made public.²⁰⁷ In early 2003, he pleaded guilty²⁰⁸ and was sentenced to 10 years and one month in prison.²⁰⁹

Among the 25 defendants indicted in the U.S. prosecution, many of whom remain fugitives, is Ahmed Khalfan Ghailani.²¹⁰ He was not captured until a raid on his home in Pakistan in July 2004.²¹¹ He was held in secret CIA prisons until 2006, when he was transferred to Guantánamo Bay.²¹² The U.S. government announced on March 31, 2008, that it would seek the death penalty in a trial by military commission,²¹³ but the following year the government decided to try him in the Southern District of New York instead.²¹⁴ On October 5, 2009, the attorney general announced that the government would not seek the death penalty.²¹⁵

A Prison Guard Is Stabbed

On November 1, 2000, Salim stabbed a prison guard with a sharpened comb when the guard escorted Salim back to retrieve some documents from the cell that Salim shared with K.K. Mohamed.²¹⁶

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

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

207. *See* Weiser, *Qaeda Member*, *supra* note 206; Weiser, *Held Secretly*, *supra* note 206.

208. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180 (noting Jan. 31, 2003, guilty plea); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 138 (2d Cir. 2008) (noting February 2003 conviction); *see* Weiser, *Qaeda Member*, *supra* note 206.

209. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *see* Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of 10 years).

210. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *see* William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. Times, Apr. 1, 2008, at A14.

211. *United States v. Ghailani*, ___ F. Supp. 2d ___, ___, 2009 WL 3853799 (S.D.N.Y. 2009) (pp.2–3 of filed op.); *see* Glaberson, *supra* note 210; Josh White & Joby Warrick, *Detainee Is Charged with Capital Murder in Embassy Bombing*, Wash. Post, Apr. 1, 2008, at A2.

212. *Ghailani*, ___ F. Supp. 2d ___, ___, 2009 WL 3853799 (S.D.N.Y. 2009) (pp.2–4 of filed op.); *see* Glaberson, *supra* note 210; White & Warrick, *supra* note 211.

213. *See* Glaberson, *supra* note 210; White & Warrick, *supra* note 211.

214. *Ghailani*, ___ F. Supp. 2d ___, ___, 2009 WL 3853799 (S.D.N.Y. 2009) (p.5 of filed op.); *see* William Glaberson, *Detainee to Be Transferred to U.S. for Trial*, N.Y. Times, May 22, 2009, at A16; Benjamin Weiser, *A Row over Who Will Represent Guantánamo Detainee*, N.Y. Times, June 2, 2009, at A17.

215. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *see* Benjamin Weiser, *U.S. Will Not Seek the Death Penalty for Suspect in Embassy Blasts*, N.Y. Times, Oct. 6, 2009, at A25.

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

When the defendants met with their attorneys, they were escorted from their cells to the place where they met with the attorneys and were escorted back. Defendant Salim was escorted back by a corrections officer who was well known to be kind. Protocol would have called for the inmate, the defendant, to be put into the cell, the cell to be locked, with the corrections officer outside the cell, the defendant still handcuffed. Then the defendant was to put his hands through an opening left for that purpose and the cuffs to be removed.

Well, Officer Louis Pepe didn't follow that protocol and took the handcuffs off Salim while he was still in the cell. Salim had taken a plastic comb and honed it into a knife and stabbed the corrections officer and inflicted a permanent brain injury to him.²¹⁷

Because Salim's attorneys were both witnesses to the stabbing and potential targets, the court discontinued their representation of Salim and severed his prosecution from the other defendants' trial, which was scheduled to begin only two months later.²¹⁸ Both Salim and K.K. Mohamed were transferred to other jails,²¹⁹ but only Salim was charged with the stabbing.²²⁰ The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.²²¹

Salim pleaded guilty on April 3, 2002, to attempted murder.²²² Judge Batts sentenced him to 32 years in prison.²²³ The court of appeals remanded the case for

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

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

217. *Trying Cases*, *supra* note 181, at 13–14.

218. *Bin Laden*, 160 F. Supp. 2d at 673; *Trying Cases*, *supra* note 181, at 12; see Hirsch, *supra* note 169, at 213; Weiser, *Quandary*, *supra* note 216.

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

220. *Bin Laden*, 160 F. Supp. 2d at 673; see Weiser, *Escape Plan*, *supra* note 216.

Although the government did not charge Mohamed with participation in the stabbing, in an effort to persuade his sentencing jury to have him executed, the government argued that he participated in the stabbing. See Weiser, *Doctor Details Injuries*, *supra* note 216.

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

222. *Salim*, 549 F.3d at 70; *Salim*, 287 F. Supp. 2d at 259; S.D.N.Y. *Salim* Docket Sheet, *supra* note 221; see Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

223. *Salim*, 549 F.3d at 70; S.D.N.Y. *Salim* Docket Sheet, *supra* note 221 (also noting ordered restitution of \$4,722,820); see Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004, at B3 (reporting that Judge Batts had to eject the victim

resentencing, concluding that Judge Batts's conclusion that a terrorism enhancement required transnational conduct was error.²²⁴ Briefing on resentencing is to be completed by May 15, 2010.²²⁵

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.²²⁶ With the help of a jury questionnaire, Judge Sand screened a jury pool of 1,302 people.²²⁷ Opening arguments began a month later, on February 5.²²⁸ Both Arabic and Kiswahili interpreters were required.²²⁹

Many survivors of the bombings attended the trial, wearing lapel pins provided by a victims' advocate showing a map of Africa with Kenya and Tanzania highlighted.²³⁰ The pins helped the deputy marshals identify victims for appropriate seating, but Judge Sand ordered that the pins not be worn after defense counsel argued that they would improperly influence the jurors.²³¹

Closing arguments began on May 1,²³² and the jury began its deliberations on May 10.²³³ All four defendants were convicted of all charges on May 29.²³⁴

from the court for disruptive behavior); *see Salim*, 287 F. Supp. 2d 250 (finding facts for sentence calculation).

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

225. S.D.N.Y. *Salim* Docket Sheet, *supra* note 221.

226. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 102, 106 (2d Cir. 2008); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 363 (S.D.N.Y. 2001); *United States v. Bin Laden*, 132 F. Supp. 2d 168, 172 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *Trying Cases*, *supra* note 181, at 12; *see Benjamin Weiser, First Day of Jury Selection in U.S. Embassy Bombings*, N.Y. Times, Jan. 3, 2001, at B3; *see also Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 1* (2007) (describing the case as "the United States of America's first comprehensive attempt to prosecute the growing menace of Islamic extremism in a court of law").

227. Leonard B. Sand, *United States v. El Hage: Jury Questionnaire* (Jan. 3, 2001); *Trying Cases*, *supra* note 181, at 12; Interview with Hon. Leonard B. Sand, June 25, 2007; *see Alan Feuer, Jury Questionnaire Fills in a Few Blanks*, N.Y. Times, Feb. 8, 2001, at B8.

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

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

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

230. *See Hirsch*, *supra* note 169, at 72.

231. *See id.* at 72–73.

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

233. *See Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; Hirsch, *supra* note 169, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

234. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 101–02, 107 (2d Cir. 2008); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); *United States v. Bin Laden*, 160 F. Supp. 2d 670, 673 n.5 (S.D.N.Y. 2001); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 361, 363 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *Trying*

Judge Sand granted al-'Owhali and K.K. Mohamed separate death penalty hearings.²³⁵ First came Al-'Owhali's hearing—the first death penalty hearing in the Southern District of New York since the 1950s—and the jury began to deliberate on his sentence on June 5, 2001.²³⁶ On June 12, the jury announced that it was deadlocked, which meant that al-'Owhali would be imprisoned for life without the possibility of release.²³⁷ The jury began to deliberate on K.K. Mohamed's sentence on July 5²³⁸ and announced a deadlock on July 10.²³⁹

On October 18, 2001, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.²⁴⁰ Because of the intervening and

Cases, supra note 181, at 12; *see Weiser, 4 Guilty, supra* note 176 (reporting also that none of the defendants testified); Hirsch, *supra* note 169, at 179–80.

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

235. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *Trying Cases, supra* note 181, at 12; *see Benjamin Weiser, McVeigh Execution Casts Shadow on Embassy Terror Trial*, N.Y. Times, Apr. 24, 2001, at B2 (reporting on Judge Sand's Apr. 23, 2001, ruling).

236. *See Hirsch, supra* note 169, at 186; Benjamin Weiser, *Jury Weighs Death Penalty for Bomber*, N.Y. Times, June 6, 2001, at B4.

The last execution in New York was the 1954 execution of Gerhard Puff, who was executed a year after Julius and Ethel Rosenberg. *See Benjamin Weiser, Reno Allows First U.S. Death Penalty Trial in Manhattan in Decades*, N.Y. Times, Nov. 20, 1997, at B1 [hereinafter *Reno Allows*]. Attorney General Janet Reno authorized capital prosecutions of John Cuff, Deric Frank, and Clarence Heatley in 1997, but they pleaded guilty and avoided capital sentencing trials. *See 25-Year Sentence for Ex-Girlfriend's Death*, N.Y. Times, Jan. 30, 2000, at 133; Benjamin Weiser, *Former Officer Gets a Life Term for 10 Murders in a Drug Gang*, N.Y. Times, Mar. 23, 1999, at B1; Benjamin Weiser, *Gang Leader, in Plea Deal, Admits to Role in 13 Killings*, N.Y. Times, Feb. 6, 1999, at B2; Weiser, *Reno Allows, supra*; Benjamin Weiser, *Reno Authorizes a Second Death Penalty Case for Prosecutors in Manhattan*, N.Y. Times, Nov. 21, 1997, at B4. The first federal defendant sentenced to death in New York since Puff was Ronell Wilson, whom a jury voted to execute on January 30, 2007, in the Eastern District of New York. *See Michael Brick, Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. Times, Jan. 31, 2007, at A1.

237. *In re Terrorist Bombings*, 552 F.3d at 101, 107; *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *see Benjamin Weiser, Life for Terrorist in Embassy Attack*, N.Y. Times, June 13, 2001, at A1 (reporting that 10 jurors concluded that execution would make the defendant a martyr and that five jurors decided that life in prison would be the greater punishment); Hirsch, *supra* note 169, at 201–03 (same, reporting also that before announcing their verdict, the jurors requested a copy of the oath they had taken).

It was reported that the vote was nine to three in favor of execution. Benjamin Weiser, *4 Are Sentenced to Life in Prison in 1998 U.S. Embassy Bombings*, N.Y. Times, Oct. 19, 2001, at A1 [hereinafter *4 Are Sentenced*]; Weiser, *Jury Torn, supra* note 234.

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

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

240. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *In re Terrorist Bombings*, 552 F.3d at 102, 102; *United States v. Bin Laden*, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *see Weiser, supra* note 237.

The defendants ultimately were sent to serve their sentences at the Administrative Maximum Facility, or "Super Max," in Florence, Colorado. Benjamin Weiser, *Prison Switch for Terrorists in Bombings*, N.Y. Times, Dec. 25, 2001, at B6.

nearby attacks on September 11, 2001, court security on the day of sentencing was substantially enhanced.²⁴¹

New Trial Denied

On January 23, 2002, Judge Kevin Thomas Duffy took over for Judge Sand with respect to further proceedings in prosecutions for the embassy bombings.²⁴² That same month, prosecutors learned that the United States Marshals Service had many hours of videotape recordings of interviews with the government's first witness, an informant named Jamal Ahmed al-Fadl, that should have been turned over to El-Hage's attorneys for preparation of cross-examination.²⁴³ In response to El-Hage's motion for a new trial, Judge Duffy wrote, "Through a mixture of inaction, incompetence and stonewalling to cover up their mistakes, the United States Marshals Service and the Department of Justice's Office of Enforcement Operations have seriously jeopardized the convictions of al-Qaeda terrorist Wadiah El-Hage."²⁴⁴

Al-Fadl was in the Witness Security Program, living in a secret location.²⁴⁵ Prosecutors arranged for videoconference connection to al-Fadl, and the Marshals Service videotaped videoconferences with al-Fadl without the prosecutors' knowledge.²⁴⁶ Prosecutors received copies of the tapes from the Marshals Service and provided defense counsel with transcripts, redacting "various portions to protect the identities of certain individuals and to protect operation information that they believed was not subject to discovery."²⁴⁷ On October 24, 2003, El-Hage moved for a new trial.²⁴⁸

Judge Duffy concluded that "although this material would have fueled a significant attack on al-Fadl's credibility, it would not have directly contradicted the government's case, and appears to fall within the general rule that undisclosed

241. See Hirsch, *supra* note 169, at 244; Weiser, *4 Are Sentenced*, *supra* note 237 ("The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.").

242. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180; *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 165 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 101 n.2, 141 n.41; *Trying Cases*, *supra* note 181, at 12; see *Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 169, at 258.

243. *In re Terrorist Bombings*, 552 F.3d at 140-43; *Bin Laden*, 397 F. Supp. 2d at 474-81, 518; *Trying Cases*, *supra* note 181, at 12; see Benjamin Weiser, *U.S. Videos of Qaeda Informer Offer Glimpse into a Secret Life*, N.Y. Times, May 1, 2004, at A1 [hereinafter *Qaeda Informer*].

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

245. *In re Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 474; see Weiser, *Qaeda Informer*, *supra* note 243.

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

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

248. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 108, 141 (2d Cir. 2008); *Id.* at 474, 478.

impeachment material generally does not warrant a new trial.”²⁴⁹ The court of appeals affirmed.²⁵⁰

All four defendants appealed their convictions,²⁵¹ but K.K. Mohamed withdrew his appeal.²⁵²

After the trial, the New York Times published an article based on interviews with nine of the 12 jurors.²⁵³ The story reported that two jurors sought outside religious guidance on their sentence verdicts, one juror did legal research on the Internet, and some jurors were aware that the defendants were shackled under the defense table.²⁵⁴ Judge Duffy determined that the article entitled El-Hage to neither a new trial nor an evidentiary hearing.²⁵⁵

On November 24, 2008, the court of appeals affirmed the convictions of Odeh, al-'Owhali, and el-Hage.²⁵⁶

Another Defendant

Nearly 11 years after the embassy bombings, Ahmed Khalfan Ghailani, the ninth defendant in the third superseding indictment filed December 16, 1998, was trans-

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

250. *In re Terrorist Bombings*, 552 F.3d at 140–46, 156, *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2010 WL 58776 (2010).

251. Docket Sheet, *United States v. Mohamed*, No. 01-1571 (2d Cir. Nov. 1, 2001) [hereinafter 2d Cir. *Mohamed* Docket Sheet] (appeal by Mohamed); Docket Sheet, *United States v. Odeh*, No. 01-1553 (2d Cir. Oct. 24, 2001) (appeal by Odeh); Docket Sheet, *United States v. El Hage*, No. 01-1550 (2d Cir. Oct. 25, 2001) (appeal by el Hage); Docket Sheet, *United States v. Al-'Owhali*, No. 01-1535 (2d Cir. Oct. 19, 2001) (lead case, appeal by al-'Owhali); *see Weiser, Jury Torn, supra* note 234.

252. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; 2d Cir. *Mohamed* Docket Sheet, *supra* note 251 (noting a Jan. 21, 2004, order that the appeal was withdrawn with prejudice); *see Benjamin Weiser, 3 Seek Retrial in Bombing of Embassies*, N.Y. Times, Jan. 23, 2004, at B4.

253. Weiser, *Jury Torn, supra* note 234 (reporting that one juror could not be found and two jurors declined interviews).

254. *Id.*; *see United States v. Bin Laden*, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); Weiser, *supra* note 252; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1 [hereinafter *Jury Behavior*].

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

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

Al-'Owhali obtained a remand to the district court for proceedings on the effect of new evidence on the validity of his confession. 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 251 (noting Apr. 30, 2009, remand). On February 16, 2010, Judge Duffy denied Al-'Owhali relief. Opinion, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Feb. 16, 2010).

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

ferred from the detention camp at Guantánamo Bay, Cuba, to the Southern District of New York.²⁵⁷

On June 15, 2009, the case was transferred to Judge Lewis A. Kaplan, who set trial for September 27, 2010.²⁵⁸

Challenge: Attorney–Client Contacts

In detention, the original defendants were cut off from virtually all communications.²⁵⁹ They were permitted to meet with their attorneys, but the attorneys were prohibited from sharing anything said in the meetings with investigators or experts, which seriously hampered the preparation of a defense.²⁶⁰ In response to complaints by defense attorneys, Judge Sand visited the jail and approved the detention conditions, except that he ordered that the defendants be permitted to call their families three times a month instead of once.²⁶¹

Attorney–client communications were also impaired by the fact that defense counsel could not discuss classified evidence with their clients because the defendants did not have security clearances.²⁶² The court of appeals affirmed Judge Sand’s ruling that failure to share classified information with the defendants, as opposed to their cleared counsel, did not violate the Constitution.²⁶³

Relations between defendants and assigned counsel are often difficult; they were particularly so in this case: “Lawyers don’t often represent somebody who hates them, who, all things being considered, would just as soon kill them. How you maintain an attorney–client relationship under those circumstances is very difficult.”²⁶⁴

257. See Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, Wash. Post, June 10, 2009, at A1; Benjamin Weiser, *In U.S. Court, Guantánamo Detainee Pleads Not Guilty to Embassy Bombing Charges*, N.Y. Times, June 10, 2009, at A24.

258. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180.

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

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

260. See Weiser, *Suspects Isolated*, *supra* note 259; Weiser, *Judge to Hear Complaints*, *supra* note 259; Weiser, *Rules Violate Rights*, *supra* note 259.

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

262. *In re Terrorist Bombings*, 552 F.3d at 116–23; *United States v. Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001); Leonard B. Sand, *United States v. El Hage: Protective Order ¶ 15* (July 29, 1999); see Gross, *supra* note 26, at 12.

263. *In re Terrorist Bombings*, 552 F.3d at 115–30, 156; *Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393; see Weiser, *supra* note 256.

264. *Trying Cases*, *supra* note 181, at 13.

Although circumstances suggested that Salim meant to do his attorneys harm, Ghailani's confidence in his military commission attorneys was so great that he asked Judge Kaplan to order the Secretary of Defense to continue their representation of him in New York.²⁶⁵ Although the Secretary was not a party to the case, Judge Kaplan agreed to consider the motion.²⁶⁶ Judge Kaplan ruled that although an indigent defendant has a constitutional right to effective assistance of counsel, the indigent defendant does not have a constitutional right to select counsel.²⁶⁷

Challenge: Mental Health During Detention

After several months of restrictive confinement, el-Hage angrily criticized Judge Sand during a hearing for not reading a letter el-Hage had prepared that proclaimed his innocence and contended that the United States could have prevented the embassy bombings.²⁶⁸ Deputy marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge the judge.²⁶⁹ Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.²⁷⁰ The government agreed to give el-Hage a cell mate, but the court ruled that his conditions of confinement were largely proper, and el-Hage complained that the cell mate made his cell too crowded.²⁷¹

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage's possessions and privileges.²⁷² According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.²⁷³ However, two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness.²⁷⁴ Judge Sand decided that the

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

266. *United States v. Ghailani*, ___ F. Supp. 2d ___, ___, 2009 WL 3853799 (S.D.N.Y. 2009) (pp.6–27 of filed op.); *id.* at ___ (p.27 of filed op.) (“Ghailani asks this Court to decide only the constitutional effect of the Secretary’s intended action, not the propriety or wisdom of his decision to act in that manner.”).

267. *Id.* at 29–32; see Benjamin Weiser, *Terrorism Suspect Can’t Keep His Military Lawyers, Judge Rules*, N.Y. Times, Nov. 19, 2009, at A25.

268. *In re Terrorist Bombings*, 552 F.3d at 149; see Benjamin Weiser, *Suspect in Embassy Bombings Avows Innocence in Letters to Relatives*, N.Y. Times, June 25, 1999, at B5 [hereinafter *Suspect Avows Innocence*]; Benjamin Weiser, *Terrorism Suspect Charges Toward Judge, but Is Tackled*, N.Y. Times, June 23, 1999, at B6 [hereinafter *Suspect Charges*].

269. *In re Terrorist Bombings*, 552 F.3d at 149–50; *Trying Cases*, *supra* note 181, at 13; see Weiser, *Suspect Avows Innocence*, *supra* note 268; Weiser, *Suspect Charges*, *supra* note 268.

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

271. See Benjamin Weiser, *Judge Upholds Strict Jail Conditions for Suspect in Bin Laden Case*, N.Y. Times, Jan. 11, 2000, at B7; Weiser, *supra* note 270.

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

273. See *id.*

274. See Weiser, *Faking Illness*, *supra* note 176.

expert opinions were well founded and that el-Hage was competent to stand trial.²⁷⁵

Challenge: Jury Security

Judge Sand decided to close jury selection and use an anonymous jury, but not sequester the jury.²⁷⁶

On Monday, Feb. 5, 2001, the first day of the trial, the 12 jurors and six alternates met at a secret location in Midtown Manhattan and were driven to court by armed federal marshals. Safety concerns were paramount for the jurors, who were not sequestered. The jury room was guarded by marshals and was checked each morning by bomb-sniffing dogs. But there was always the unexpected. One day, jurors said, they were startled when someone climbed through the window. It turned out to be a workman looking to use the bathroom.²⁷⁷

Challenge: Court Security

Persons entering the courtroom had to pass through a metal detector and sign a log book stating their purpose in attending the trial.²⁷⁸

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

I held a conference before the jury was selected in my regular courtroom, which is a fairly standard size courtroom. The four defendants were seated in the jury box with a marshal on each side. The issue was that one of the defendants, El-Hage, had written a letter that he wanted to send to the media. The government objected, because they thought, “How do we know whether there are codes in that or other things that would not be apparent to us?” And so we were discussing the sending of a paraphrase—not the exact language, but the substance.

While this discussion is going on, El-Hage, seated between two marshals in the jury box, jumps out of the jury box and races toward the bench. Now, I don’t know why he was racing to the bench. I have a suspicion that he was not coming to shake my hand and thank me for the careful attention I was giving to his case. The courtroom was scattered with security officers. You know, you sort of look around and you see them, and they sometimes don’t look so alert to you. Instantly, there was a security officer standing in front of me, shielding me with his body, which I appreciated. There had been a sketch artist who was just in the line of fire between El-Hage and myself. She immediately threw her easel over and ducked. Of course, one of the security officers tackled El-Hage just as he was coming up to the bench.²⁷⁹

Because of El-Hage’s actions, the defendants were shackled to the floor under the table.²⁸⁰ To prevent the jurors from realizing this, the jury was not present

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

276. See Feuer, *supra* note 227; Gross, *supra* note 26, at 21–22; Weiser, *supra* note 226; Weiser, *Jury Torn*, *supra* note 234; Benjamin Weiser, *Life-and-Death Questions in Embassy Bombings Case*, N.Y. Times, June 3, 2001, at 137 (reporting that “even Judge Leonard B. Sand does not know their names”).

277. Weiser, *Jury Torn*, *supra* note 234.

278. See Hirsch, *supra* note 169, at 71.

279. *Trying Cases*, *supra* note 181, at 13.

280. *Trying Cases*, *supra* note 181, at 14; Interview with Hon. Leonard B. Sand, June 25, 2007; see Gross, *supra* note 26, at 15 & n.54; Hirsch, *supra* note 169, at 78.

when defendants were brought in and out.²⁸¹ And, for this trial, there was no “all rise” when the judge entered.²⁸² Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.²⁸³

Challenge: Witness Security

The informant Al-Fadl was formerly Osama bin Laden’s payroll manager, whom the government had identified prior to his testimony, even to defense counsel, only as CS-1, which stood for “confidential source one.”²⁸⁴ He had been under U.S. protection in an undisclosed location since 1998 after pleading guilty to a conspiracy charge in a sealed proceeding in the Southern District of New York.²⁸⁵ “In 1996, Mr. Fadl fled [al-Qaeda] after he embezzled about \$110,000 from one of Mr. bin Laden’s companies, eventually walking into an American embassy in Africa and offering his services in the fight against al-Qaeda.”²⁸⁶

Al-Fadl’s identity was not revealed to defense counsel until four days before his scheduled testimony, and a protective order forbade counsel from revealing his identity to their clients until the day before al-Fadl appeared in court.²⁸⁷ Judge Sand forbade courtroom artists from sketching al-Fadl’s face.²⁸⁸

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client’s religious beliefs.²⁸⁹ As Judge Sand reported,

An attorney who was very diligently representing his client was talking to his client. His client explained that if he died as a martyr he would go immediately to paradise and have thirteen virgin brides. The lawyer said, “Can you imagine having thirteen fathers-in-law?” The next morning there is on my desk a motion to replace the attorney. The defen-

281. *Trying Cases*, *supra* note 181, at 14; Interview with Hon. Leonard B. Sand, June 25, 2007; *see* Hirsch, *supra* note 169, at 78.

282. *United States v. Bin Laden*, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); *Trying Cases*, *supra* note 181, at 14; *see* Hirsch, *supra* note 169, at 78.

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

284. *See* Hirsch, *supra* note 169, at 103; Benjamin Weiser, *Ex-Aide to Bin Laden Describes Terror Campaign Aimed at U.S.*, N.Y. Times, Feb. 7, 2001, at A1 [hereinafter *Ex-Aide*]; Benjamin Weiser, *Secret Witness Set to Testify in Terror Trial*, N.Y. Times, Feb. 5, 2001, at B1; Weiser, *Qaeda Informer*, *supra* note 243.

Al-Fadl is related by marriage to al-Nalfi. *See* Weiser, *Qaeda Member*, *supra* note 206; Weiser, *Held Secretly*, *supra* note 206; Weiser, *Qaeda Informer*, *supra* note 243.

285. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 142 (2d Cir. 2008); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *see* Weiser, *Ex-Aide*, *supra* note 284; Weiser, *Qaeda Informer*, *supra* note 243.

286. Weiser, *Qaeda Informer*, *supra* note 243; *see* The 9/11 Commission Report 109 (2004) (“Jamal Ahmed al Fadl walked into a U.S. embassy in Africa, established his bona fides as a former senior employee of Bin Ladin, and provided a major breakthrough of intelligence on the creation, character, direction, and intentions of al Qaeda.”); *Bin Laden*, 397 F. Supp. 2d at 474.

287. *See* Hirsch, *supra* note 169, at 109.

288. *See id.*

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

dant said, “How can I be represented by a lawyer who mocks my religion?” I granted the application.²⁹⁰

Judge Sand carefully timed breaks in the trial to permit prayer at the appropriate times by the Muslim defendants, whose entry to and exit from the courtroom was made cumbersome by their hidden shackles.²⁹¹

Challenge: Classified Evidence

In order to have access to classified evidence, defense counsel had to have security clearances.²⁹² Initially the attorneys in the original trial objected to their adversaries’ invading their privacy with background checks, but the government assured the attorneys and the court that background information would not be shared with prosecutors in the case.²⁹³ The court ruled that a security clearance requirement did not violate the defendants’ Sixth Amendment right to counsel, and the court of appeals affirmed.²⁹⁴

Judge Sand resolved issues concerning discovery of classified information by conducting *ex parte* discussions with defense counsel concerning defense strategy and *ex parte* discussions with prosecutors concerning potentially relevant classified information.²⁹⁵ Sometimes Judge Sand was able to mediate a substitution for classified information:

The District Court held five *in camera* CIPA hearings in February 2001. Portions of the February 6, 2001 hearing were conducted *ex parte*; the others were attended by counsel for both sides. El-Hage’s defense attorneys, in the presence of the government, described in detail the classified material that they anticipated disclosing. The District Court then excused El-Hage’s counsel in order to inquire into the government’s reasons for refusing to declassify these items. After the government completed its presentation and was excused, the District Court recalled El-Hage’s attorneys, inquiring, in the absence of government counsel, into the use that El-Hage’s counsel planned to make of the classified information at issue. Having established that El-Hage’s attorneys wished to use the classified material for cross-examination of a government witness, the District Court suggested that the parties could work together to produce a paraphrased version of the relevant portions. The District Court then recalled the government in order to discuss the merits of this proposal with counsel on both sides.²⁹⁶

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

After giving El-Hage’s counsel the opportunity to set forth their theory on the relevance of this information, the District Court explained that—based upon its review of an *ex*

290. *Trying Cases*, *supra* note 181, at 13.

291. *See Hirsch*, *supra* note 169, at 78.

292. Leonard B. Sand, United States v. El Hage: Protective Order ¶ 5 (July 29, 1999); Interview with Hon. Lewis Kaplan, Nov. 5, 2009; *see Gross*, *supra* note 26, at 13; Benjamin Weiser, *Bomb Suspects’ Lawyers to Need Security Checks*, N.Y. Times, July 1, 1999, at B5.

293. *See id.*

294. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 119–28 (2d Cir. 2008); *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); *see Gross*, *supra* note 26, at 13.

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

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

parte submission made by the government—it could represent with confidence that the classified information did not have the significance claimed by counsel.²⁹⁷

Judge Sand held, and the court of appeals agreed, that the Fourth Amendment’s warrant requirement does not apply to extraterritorial searches by the U.S. government, but the Fourth Amendment’s reasonableness requirement does apply to extraterritorial searches of U.S. citizens.²⁹⁸ In 1996 and 1997, as part of an investigation of al-Qaeda, telephone lines used by El-Hage in Kenya were bugged, and his Nairobi home was searched.²⁹⁹ To resolve El-Hage’s suppression motion, Judge Sand determined the reasonableness of the searches by *ex parte* examination of classified evidence instead of hearing evidence in an adversary proceeding.³⁰⁰ The court of appeals determined that Judge Sand’s method was appropriate.³⁰¹

Judge Kaplan reviewed classified information on Ghailani to determine what had to be produced in discovery to cleared defense counsel.³⁰² Defense counsel challenged the adequacy of a chart summarizing the nature of 897 classified “CIA reports that the government claims are not themselves discoverable but that contain statements made by the defendant in response to custodial interrogation.”³⁰³ After reviewing 895 of the documents, Judge Kaplan determined that cleared defense counsel were entitled to an augmented chart “indicating, whenever the underlying documents so indicate, the duration of the interview in which a statement was made and whether that interview took place in the defendant’s cell or elsewhere.”³⁰⁴ Judge Kaplan determined that the defense was entitled to additional information about two of the documents—“a summary of each statement referencing the Embassy Bombings sufficient to indicate the substance of the statement, the time when it was made, and to whom”—and Judge Kaplan reserved judgment on two documents the government had not yet shown him.³⁰⁵

Judge Sand’s and Judge Kaplan’s law clerks had security clearances.³⁰⁶ It is Judge Cabranes’s practice to ask his law clerks to seek security clearances,³⁰⁷ but

297. *Id.* at 119.

298. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 159, 161–64, 167–72, 176–77 (2d Cir. 2008); *United States v. Bin Laden*, 264 F. Supp. 2d 264, 270–77 (S.D.N.Y. 2000); *see Weiser*, *supra* note 256.

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

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

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

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

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

303. *Id.* at 1.

304. *Id.* at 2.

305. *Id.*

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

Judge Newman has never had a cleared clerk, unless the clerk came with a security clearance as a result of previous employment.³⁰⁸ It is especially difficult for appellate judges to wait until they have a relevant case to ask their clerks to seek security clearances, because appellate judges are typically assigned to cases only a few weeks in advance of oral argument.³⁰⁹

Challenge: Classified Arguments

By the time of Ghailani's prosecution, electronic filing had become widespread in federal courts. Judge Kaplan issued a two-page order explaining how filings containing classified information would be electronically docketed: an unredacted copy of the filing would be filed with the court information security officer and only a caption page would be filed electronically until a redacted copy could be filed electronically after a security review.³¹⁰

Challenge: Classified Order

A discovery order by Judge Kaplan early in the case against Ghailani contained details about two classified documents, about which Judge Kaplan determined cleared counsel were entitled to more information.³¹¹ The order was filed with the court information security officer on November 24, 2009.³¹² The security officer arranged for redaction by intelligence agencies: two bulleted paragraphs were redacted from the order, and then the redacted order was filed publicly on December 7.³¹³

A second discovery order was filed with the court information security officer on December 8, and a redacted version was filed publicly on February 4, 2010.³¹⁴

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of Al-'Owhali's trial.³¹⁵ It was reported that, "The lawyers . . . said they want[ed] to question Dr. Albright about 'her knowledge of the number of Iraqi children dying as a direct consequence of the United States enforcement of United Nations sanctions following the gulf

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

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

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

310. Order, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 27, 2009).

311. *Ghailani* Discovery Order, *supra* note 302.

312. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180.

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

314. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 180.

315. See Hirsch, *supra* note 169, at 195–96 (reporting that al-'Owhali wanted to prove that "U.S. government actions and al Qaeda actions could be viewed as similarly criminal"); *Subpoena for Albright in Bombings Trial*, N.Y. Times, Apr. 18, 2001, at B7 [hereinafter *Subpoena for Albright*].

war.”³¹⁶ Judge Sand agreed to sign the subpoena,³¹⁷ but on the government’s motion he quashed it.³¹⁸ Al-’Owhali presented at trial as a substitute for her live testimony a *60 Minutes* interview with Secretary Albright.³¹⁹ Al-’Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.³²⁰

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

317. *See Subpoena for Albright*, *supra* note 315.

318. *See* Weiser, *supra* note 316.

319. *See* Hirsch, *supra* note 169, at 196.

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

Millennium Bomber

United States v. Ressam

(*John C. Coughenour, W.D. Wash.*)

On December 14, 1999, Ahmed Ressam was detained by customs officials suspicious of his nervousness as he tried to enter the United States by ferry from Canada into Washington with over 100 pounds of explosives in his car.³²¹

Ressam was born in Algeria in 1967, and in February 1994 he moved to Canada, where he unsuccessfully applied for political asylum.³²² In Canada, he lived on welfare and petty theft.³²³

Traveling under the name Benni Noris with fraudulent documentation, Ressam rented a car in Vancouver and traveled with his car by ferry from Victoria to Port Angeles, Washington.³²⁴ Ressam's car was the last off the ferry.³²⁵ Noting that Ressam's hands were shaking and, despite the cold weather, he was sweating, the customs inspector asked him to step out of the car, and Ressam initially re-

321. *United States v. Ressam*, ___ F.3d ___, ___ & n.1, 2010 WL 347962 (9th Cir. 2010) (pp.1886–87 & n.1 of filed op.); *United States v. Ressam*, 474 F.3d 597, 600 (9th Cir. 2007); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003), *cert. denied*, 538 U.S. 1068 (2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 673 (S.D.N.Y. 2006); The 9/11 Commission Report 82 (2004); *see Compl., United States v. Ressam*, No. 2:99-mj-547 (W.D. Wash. Dec. 17, 1999) [hereinafter *Ressam Compl.*]; Paula Bock, *An Otherwise Ordinary Day in Quiet Port Angeles, Local Folks Tackle a Terrorist—And Nothing Has Been Quite the Same Since*, *Seattle Times*, Nov. 25, 2001, at 16; *Frontline: Trail of a Terrorist* (PBS television broadcast Oct. 25, 2001); Susan Gilmore & Mike Carter, *Man Stopped at Border with Suspected Bomb Materials*, *Seattle Times*, Dec. 16, 1999, at A1; Josh Meyer, *Border Arrest Stirs Fear of Terrorist Cells in U.S.*, *L.A. Times*, Mar. 11, 2001, at 1; Steve Miletich, Susan Gilmore, Mike Carter, Joshua Robin, Ian Ith & Anne Koch, *FBI Probes Possible Terrorist Plot Here*, *Seattle Times*, Dec. 17, 1999, at A1; Scott Sunde & Elaine Porterfield, *Wider Bomb Plot Possible*, *Seattle Post-Intelligencer*, Dec. 18, 1999, at A1; Sam Howe Verhovek & Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, *N.Y. Times*, Dec. 18, 1999, at A1.

322. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (pp.1883–84 of filed op.); *Ressam*, 474 F.3d at 599; *see Ressam Compl., supra* note 321; Bock, *supra* note 321; William Booth, *Focus Is Narrow as Ressam Trial Begins*, *Wash. Post*, Mar. 14, 2001, at A8; John F. Burns, *Arrest at U.S. Border Reverberates in France*, *N.Y. Times*, Dec. 22, 1999, at A1; Maggie Farley, *Canada's Lapses Kept Algerian Suspect Free*, *L.A. Times*, Dec. 23, 1999, at 1; *Trail of a Terrorist, supra* note 321; Meyer, *supra* note 321; Steven Pearlstein, *Canadians Examine Lapses in Security*, *Wash. Post*, Dec. 22, 1999, at A8.

323. *See Trail of a Terrorist, supra* note 321.

324. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1886 of filed op.); *Ressam*, 474 F.3d at 599–600; *Ressam*, 221 F. Supp. 2d at 1254; *see Ressam Compl., supra* note 321; Bock, *supra* note 321; *Trail of a Terrorist, supra* note 321; Sunde & Porterfield, *supra* note 321; Verhovek & Weiner, *supra* note 321.

325. *See Ressam*, 474 F.3d at 600; *Ressam Compl., supra* note 321; Bock, *supra* note 321; *Trail of a Terrorist, supra* note 321; Meyer, *supra* note 321; Sunde & Porterfield, *supra* note 321.

fused.³²⁶ Then he got out of the car and, as agents began searching the trunk, he fled.³²⁷ He was caught a few blocks away.³²⁸

It was later determined that Ressam's sweating may have been caused by malaria, which he did not know at the time he had.³²⁹

A search of the car showed that its spare tire had been replaced by 10 garbage bags containing 118 pounds of urea and 14 pounds of aluminum sulfate, two olive jars packed in sawdust containing a honey-like explosive, pill bottles containing other explosives, nine-volt batteries, and four circuit boards connected to Casio watches.³³⁰

A Tylenol bottle contained a powerful military-grade explosive, cyclotrimethylene-trinitramine, or RDX. Another small bottle held hexamethylenetriperoxodiamin, or HMTD, an unstable explosive so dangerous it's not manufactured commercially. Two tall olive jars were filled with 50 ounces of ethylene glycol dinitrate, or EGDN, a chemical cousin to nitroglycerin. Used in dynamite, EGDN is sensitive to shock, heat and friction. Screwing the jar lids could have been enough to set it off.³³¹

Also in the car were maps of Washington, Oregon, and California.³³² Further investigation led to suspicion that he was an agent of Osama bin Laden.³³³

Ressam was indicted on December 22, 1999, in the Western District of Washington, for false statements and improper transportation of explosives.³³⁴ The court assigned the case to Judge John C. Coughenour.³³⁵

326. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1886 of filed op.); *see Ressam Compl.*, *supra* note 321; Gilmore & Carter, *supra* note 321; Meyer, *supra* note 321; Sunde & Porterfield, *supra* note 321; Verhovek & Weiner, *supra* note 321.

327. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1887 of filed op.); *Haouari v. United States*, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); *see Ressam Compl.*, *supra* note 321; Bock, *supra* note 321; Gilmore & Carter, *supra* note 321; Trail of a Terrorist, *supra* note 321; Meyer, *supra* note 321; Sunde & Porterfield, *supra* note 321; Verhovek & Weiner, *supra* note 321.

328. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1887 of filed op.); *see Ressam Compl.*, *supra* note 321; Gilmore & Carter, *supra* note 321; Meyer, *supra* note 321; Miletich *et al.*, *supra* note 321; Verhovek & Weiner, *supra* note 321.

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

330. *Ressam*, ___ F.3d at ___ n.1, 2010 WL 347962 (p.1887 n.1 of filed op.); *Ressam*, 474 F.3d at 600; *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *see Ressam Compl.*, *supra* note 321; John J. Goldman, *Algerian Admits Bomb Plot, Pledges Cooperation*, L.A. Times, Mar. 9, 2001, at 12; John Kifner & William K. Rashbaum, *Brooklyn Man Is Charged with Aiding in Bomb Plot*, N.Y. Times, Dec. 31, 1999, at A1; Steve Miletich, Mike Carter, James V. Grimaldi & Anne Koch, *Terrorist Link Explored*, Seattle Times, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 321; Verhovek & Weiner, *supra* note 321.

331. Bock, *supra* note 321.

332. *See Meyer, supra* note 321; Miletich *et al.*, *supra* note 321; Sunde & Porterfield, *supra* note 321; Verhovek & Weiner, *supra* note 321.

333. *See Michael Janofsky, Terrorism Trial May Keep to Narrower Focus*, N.Y. Times, Mar. 14, 2001, at A12; Meyer, *supra* note 321; Steven Mufson, *Arrest Stirs Terrorism Concerns*, Wash. Post, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 321.

334. Indictment, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); *see William Booth, Algerian Indicted on Explosives Counts*, Wash. Post, Dec. 23, 1999, at A1; Steve Miletich, *Algerian Indicted by Grand Jury*, Seattle Times, Dec. 22, 1999, at A1; Kim Murphy,

Ressam shared a motel room with another man for three weeks just before his ferry trip.³³⁶ Canadian authorities determined that the other man was Abdelmajed Dahoumane.³³⁷ On January 20, 2000, Ressam's indictment was superseded to add a terrorism charge and to add Dahoumane as a defendant.³³⁸ On April 6, 2000, the U.S. embassy in Montreal offered a reward of \$5 million for information leading to Dahoumane's arrest and conviction.³³⁹ Dahoumane was arrested in Algeria late in 2000.³⁴⁰ On April 1, 2001, the Algerian government announced that it would try Dahoumane there.³⁴¹ Dahoumane pleaded guilty in Algeria.³⁴²

Investigation showed that Ressam had a reservation for one night's stay at a Seattle motel near the Space Needle and a flight to London the following day.³⁴³ Seattle canceled its millennium New Year's Eve party scheduled for the base of

Algerian Suspect Pleads Not Guilty to 5 Bomb Charges, L.A. Times, Dec. 23, 1999, at 17; Elaine Porterfield, *Bomb Suspect Is Indicted*, Seattle Post-Intelligencer, Dec. 23, 1999, at A1; Sam Howe Verhovek, *Grand Jury Charges Man Found with Bomb Materials*, N.Y. Times, Dec. 23, 1999, at A20.

335. Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 23, 1999) ("For reasons of security, the Honorable John C. Coughenour, Chief Judge for the Western District of Washington, directs the above-captioned case be filed in Seattle and assigned to the undersigned."); see Porterfield, *supra* note 334.

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

336. See Trail of a Terrorist, *supra* note 321; Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. Times, Dec. 19, 1999, at 142.

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

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

339. See Meyer, *supra* note 321 (reporting that this was the same bounty offered for Osama bin Laden); Steve Miletich & Mike Carter, *Prints Found on Bomb Parts*, Seattle Times, Apr. 12, 2000, at B1; *Reward Offered on Suspected Terrorist*, L.A. Times, Apr. 7, 2000, at 6; Sam Skolnik, *U.S. Puts \$5 Million Bounty for Algerian*, Seattle Post-Intelligencer, Apr. 7, 2000, at A1; Wise & Eggen, *supra* note 338.

340. See Lorraine Adams, *The Other Man*, Wash. Post Mag., May 20, 2001, at 10; Judith Miller, *Suspect in New Year's Terror Plot Is Arrested in Algeria*, N.Y. Times, Dec. 7, 2000, at A3; Wise & Eggen, *supra* note 338.

341. See Adams, *supra* note 340; *Algiers to Try Terror Suspect Sought by U.S.*, N.Y. Times, Apr. 2, 2001, at A5.

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

343. See *Ressam Compl.*, *supra* note 321; Miletich *et al.*, *supra* note 330; Verhovek & Weiner, *supra* note 321.

the Space Needle.³⁴⁴ Because of the extensive news coverage in Seattle about “the possibility of a planned bombing of the Space Needle, the signature building of the Seattle skyline,” on March 3, 2000, Judge Coughenour granted Ressam’s motion to move the trial to Los Angeles.³⁴⁵

It was reported that a substantial factor in Judge Coughenour’s ruling was the superior security of Los Angeles’s newer courthouse compared to Seattle’s old courthouse, designed in the 1920s, where judges rode the same elevators as defendants, jurors, and witnesses.³⁴⁶

A minor international incident erupted in March 2000 as Ressam’s attorneys prepared for trial.³⁴⁷ The Western District of Washington’s Federal Public Defender’s office agreed to accept service on Ressam’s behalf of three seizure notices from the Royal Canadian Mounted Police.³⁴⁸ Two attorneys and an investigator traveled to Montreal to investigate the seizures, and they obtained from the court there copies of documents in the related files.³⁴⁹ Apparently, the documents were disclosed to Ressam’s attorneys in error, and they were taken back from the attorneys at the airport.³⁵⁰ The U.S. government moved for return of all copies of the documents and for an order prohibiting Ressam’s attorneys from discussing them with their client.³⁵¹ Both parties submitted affidavits, and Ressam’s attorneys

344. See Timothy Egan, *Citing Security, Seattle Cancels a New Year’s Eve Party*, N.Y. Times, Dec. 29, 1999, at A16; Trail of a Terrorist, *supra* note 321; Steve Miletich, J. Martin McOmber & Anne Koch, *How City Party Was Canceled*, Seattle Times, Dec. 28, 1999, at A1; Kery Murakami, *Seattle Center New Year’s Gala Canceled*, Seattle Post-Intelligencer, Dec. 28, 1999, at A1; Jube Shiver, Jr., *Millennium Disconnects*, L.A. Times, Dec. 29, 1999, at 9.

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

345. Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 3, 2000); *Ressam*, 474 F.3d at 601; see Meyer, *supra* note 321; Steve Miletich, *Ressam Will Get L.A. Trial*, Seattle Times, Mar. 3, 2000, at A1; Kim Murphy, *Trial of Suspected Algerian Terrorist Will Be Shifted from Seattle to L.A.*, L.A. Times, Mar. 4, 2000, at 14; Elaine Porterfield, *Bombing Suspect Will Be Tried in L.A.*, Seattle Post-Intelligencer, Mar. 4, 2000, at A1.

346. Mike Carter, *Jury Selection to Begin Today in Ressam Trial*, Seattle Times, Mar. 12, 2001, at B1; Steve Miletich, *Security Cited as Judge Moves Ressam Trial to L.A.*, Seattle Times, Mar. 4, 2000, at A1; Murphy, *supra* note 345; Porterfield, *supra* note 345.

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

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

348. See Oliver Aff., *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000).

349. See Def.’s Resp., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); Steve Miletich, *Man in Alleged Bomb Plot to Enter Lesser Plea*, Seattle Times, Mar. 16, 2000, at B2; Sunde, *supra* note 347.

350. See Gov’t Mot., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000); Miletich, *supra* note 347; Sunde, *supra* note 347.

351. Gov’t Mot., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000); see Miletich, *supra* note 347.

submitted a sealed ex parte affidavit “concerning purpose of review of Montreal court files.”³⁵²

The Federal Public Defender pointed out that an order barring discussion with his client would present his attorneys with a conflict of interest potentially requiring withdrawal from the case: either they could serve their client and risk sanctions or they could obey the order and disserve their client.³⁵³ After a hearing, Judge Coughenour ruled that the matter was moot because Ressam’s attorneys no longer had copies of the documents.³⁵⁴ The judge told the attorneys they could use the information from the Canadian files, but only as a last resort and without disclosing to Ressam its origin.³⁵⁵

A couple of weeks before trial, on February 28, 2001, a 6.8-magnitude earthquake hit the Seattle area,³⁵⁶ so a status conference held the next day was held at the SeaTac detention facility where Ressam was housed.³⁵⁷

Jury selection began in Los Angeles on March 12, 2001.³⁵⁸ After a little more than seven hours of voir dire, a jury was selected from 44 prospective jurors.³⁵⁹ Opening arguments and the first witnesses were presented the next day.³⁶⁰

On the first day of trial, a government witness presented a map seized from Ressam’s Montreal apartment with Los Angeles International Airport and two other local airports circled.³⁶¹ Discovery of this map had been reported by news media nearly two months previously.³⁶²

On April 6, 2001, the jury convicted Ressam on all counts.³⁶³ On the same day, he and 23 others were sentenced by a French judge, before whom Ressam

352. Def.’s Resp., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); Gov’t Mot., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000).

353. Def.’s Resp., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); see Mike Carter, *Ressam Lawyers May Use Secret Files*, Seattle Times, Mar. 24, 2000, at B3.

354. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); see Carter, *supra* note 353.

355. See Carter, *supra* note 353; Sunde, *supra* note 347.

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

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

358. *Ressam* Compl., *supra* note 321; see Carter, *supra* note 346; *Jury Selection Begins in Terrorism Trial*, N.Y. Times, Mar. 13, 2001, at A17.

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

360. *Ressam* Compl., *supra* note 321; see Booth, *supra* note 322; Janofsky, *supra* note 333.

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

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

363. United States v. Ressam, ___ F.3d ___, ___, 2010 WL 347962 (9th Cir. 2010) (p.1888 of filed op.); United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); Haouari v. United States, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); Docket Sheet, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); see Adams, *supra* note 340; William Booth, *Algerian Convicted on Terror Charges*, Wash. Post, Apr. 7, 2001, at A1; Mike Carter, *Ressam Guilty on All Counts*, Seattle Times, Apr. 7, 2001, at A1; Thomas J. Lueck, *Algerian Is Found Guilty in Plot to Bomb Sites in*

was tried in absentia, to five years in prison for conspiracy to support Islamic militants.³⁶⁴

Abdelghani Meskini's Brooklyn telephone number was found when Ressam was arrested.³⁶⁵ Apparently Meskini flew to Seattle on December 11, 1999, to meet Ressam.³⁶⁶ Because Ressam was a no-show, Meskini flew back to New York on December 16.³⁶⁷ On the basis of his number's being in Ressam's car, the Foreign Intelligence Surveillance Court authorized surveillance of Meskini's telephone.³⁶⁸ Meskini was arrested early in the morning on December 30 at his home as a suspected accomplice of Ressam.³⁶⁹

On January 6, 2000, a sealed indictment was filed in the Southern District of New York against Mokhtar Haouari, a former schoolmate of Meskini's in Algeria.³⁷⁰ He was arrested four days later in Montreal; another three days later, the indictment was superseded to add Meskini as a defendant.³⁷¹ The court assigned the case to Judge John F. Keenan.³⁷²

Based in part on surveillance of Meskini's telephone conversations, Haouari was charged with coordinating Ressam's bomb plot.³⁷³ Haouari waived extradition proceedings and agreed to be tried in the United States, where he was ar-

the U.S., N.Y. Times, Apr. 7, 2001, at A9; Josh Meyer, *Man Convicted of Taking Part in Bomb Plot*, *L.A. Times*, Apr. 7, 2001, at 1; Sam Skolnik & Scott Sunde, *Ressam Guilty of Terrorism*, *Seattle Post-Intelligencer*, Apr. 7, 2001, at A1; *see also* Tr., *Ressam*, No. 2:99-cr-666 (W.D. Wash. Apr. 4, 2001, filed Oct. 11, 2005) (jury instructions).

364. *See* Booth, *supra* note 363; Carter, *supra* note 363; Meyer, *supra* note 363; Skolnik & Sunde, *supra* note 363.

365. *See* Booth, *supra* note 363; Mike Carter, *Feds Link Ressam to Terror Camps*, *Seattle Times*, Mar. 9, 2001, at A1; Trail of a Terrorist, *supra* note 321; Meyer, *supra* note 321; Steve Miletich & Mike Carter, *Ressam Linked to Terrorist Group*, *Seattle Times*, Dec. 31, 1999, at A1.

366. *Haouari*, 429 F. Supp. 2d at 676; *see* Adams, *supra* note 340; Meyer, *supra* note 321; Miletich & Carter, *supra* note 365; David A. Vise, *Algerian Arrested Dec. 24*, *Wash. Post*, Jan. 4, 2000, at A2.

367. *Haouari*, 429 F. Supp. 2d at 676; *see* Adams, *supra* note 340; Meyer, *supra* note 321; Miletich & Carter, *supra* note 365; Vise, *supra* note 366.

368. *See* Walter Pincus, *Judge Discusses Details of Work on Secret Court*, *Wash. Post*, June 26, 2007, at A4; *see also* *Ressam* Mar. 1, 2001, Tr., *supra* note 357.

369. *Haouari*, 429 F. Supp. 2d at 677; *United States v. Haouari*, No. 1:00-cr-15, 2000 WL 1593345 at *1 (S.D.N.Y. Oct. 25, 2000); *see* Adams, *supra* note 340; Trail of a Terrorist, *supra* note 321; Kifner & Rashbaum, *supra* note 330; Meyer, *supra* note 321; Miletich & Carter, *supra* note 365; Vise, *supra* note 366.

370. Docket Sheet, *United States v. Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 10, 2000) [hereinafter *Haouari* Docket Sheet]; *see* Adams, *supra* note 340; Craig Pyes, *Canada Adds Details on Algerians' Suspected Bomb Plot*, *N.Y. Times*, Jan. 21, 2000, at A3.

371. Superseding Indictment, *Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 13, 2000); *see* Adams, *supra* note 340; Benjamin Weiser & Craig Pyes, *U.S., in Pursuit of Bomb Plot, Indicts Man Held in Canada*, *N.Y. Times*, Jan. 19, 2000, at A1.

372. *Haouari* Docket Sheet, *supra* note 370.

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

373. *See* Meyer, *supra* note 321; Pyes, *supra* note 370.

rained on August 14, 2000.³⁷⁴ On March 7, 2001, Meskini pleaded guilty and agreed to cooperate with the prosecution.³⁷⁵

As Ressam's sentencing date approached, he agreed to cooperate with the prosecution of Haouari, and Ressam's sentencing was postponed.³⁷⁶ At Haouari's trial, on July 3, 2001, Ressam testified that he and accomplices had planned to bomb Los Angeles International Airport on New Year's Eve.³⁷⁷ He said he planned to explode a suitcase filled with fertilizer and nitric acid.³⁷⁸

In order to keep the witness Ressam separate from the witness Haouari, each was brought to Judge Keenan's courtroom by a different elevator.³⁷⁹ There is one other courtroom on the same floor as Judge Keenan's, and separate prisoner elevators serve the two courtrooms.³⁸⁰ Ressam was brought up in the other courtroom's elevator.³⁸¹

Haouari found Ressam's testimony so upsetting that he repeatedly banged his head against the counsel table.³⁸² In time, he knocked himself out.³⁸³ Judge Keenan had to excuse the jury and seek medical attention for the defendant.³⁸⁴

One juror, who worked as a waitress, had to be replaced when she recognized at work a journalist covering the trial and struck up a conversation with him about it.³⁸⁵

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

375. United States v. Ressam, ___ F.3d ___, ___, 2010 WL 347962 (9th Cir. 2010) (p.1890 of filed op.); United States v. Meskini, 319 F.3d 88, 91 (2d Cir. 2003); Haouari v. United States, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); United States v. Haouari, No. 1:00-cr-15, 2001 WL 1154714 at *1 (S.D.N.Y. Sept. 28, 2001); see Adams, *supra* note 340; Carter, *supra* note 365; Alan Feuer, *Man Pleads Guilty to Role in Millennial Terrorism Plot*, N.Y. Times, Mar. 10, 2001, at B2; Dan Eggen, *Algerian Guilty in Plot to Bomb Landmarks in U.S.*, Wash. Post, Mar. 9, 2001, at A3; Goldman, *supra* note 330; Meyer, *supra* note 321; Sam Skolnik, *A Guilty Plea to Aiding Ressam*, Seattle Post-Intelligencer, Mar. 9, 2001, at B1.

376. See Trail of a Terrorist, *supra* note 321; Laura Mansnerus & Judith Miller, *Bomb Plot Insiders Details Training*, N.Y. Times, July 4, 2001, at A1; Sam Skolnik & Paul Shukovsky, *Ressam: Seattle No Target*, Seattle Post-Intelligencer, May, 21, 2001, at A1; see also Tr., United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. July 27, 2005, filed Aug. 4, 2005) [hereinafter *Ressam* July 27, 2005, Tr.] (discussing Ressam's cooperation); Tr., *Id.* (Apr. 27, 2005, filed Sept. 9, 2005) [hereinafter *Ressam* Apr. 27, 2005, Tr.] (same).

377. United States v. Ressam, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see Trail of a Terrorist, *supra* note 321; Josh Meyer, *Terrorist Says Plans Didn't End with LAX*, L.A. Times, July 4, 2001, at 1; Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target*, Wash. Post, July 4, 2001, at A2; see also Mike Carter & Steve Miletich, *Ressam: L.A. Airport Was Target*, Seattle Times, May 30, 2001, at A1 (reporting that Ressam had told Haouari's prosecutors that the Los Angeles airport was his target); Josh Meyer, *Millennium Terrorist New Detailing Plot, Sources Say*, L.A. Times, May 30, 2001, at 1 (same).

378. See Trail of a Terrorist, *supra* note 321; Powell & Haughney, *supra* note 377.

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

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

On July 13, a jury acquitted Haouari of aiding and abetting what became known as the millennium bombing plot, but convicted him of conspiracy and fraud.³⁸⁶ On January 16, 2002, Judge Keenan sentenced Haouari to 24 years in prison.³⁸⁷ A year later, the court of appeals affirmed the conviction and sentence.³⁸⁸

On July 27, 2005, at the conclusion of Ressam's cooperation with investigations and prosecutions,³⁸⁹ Judge Coughenour sentenced Ressam to 22 years in prison.³⁹⁰

A year and a half later, the court of appeals reversed Ressam's conviction on one count, for carrying explosives while committing a felony, reasoning that carrying explosives did not relate to the felony of signing a false name to a customs declaration.³⁹¹ The court remanded the case for resentencing.³⁹²

386. Haouari v. United States, 510 F.3d 350, 351 (2d Cir. 2007); *Meskini*, 319 F.3d at 91; *Haouari*, 429 F. Supp. 2d at 676; *Haouari*, WL 1154714 at *1; see Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. Times, Jan. 17, 2002; Christine Haughney, *Third Algerian Convicted in Bombing Plot*, Wash. Post, July 14, 2001, at A22; Laura Mansnerus, *Man Is Guilty in Bomb Plot at Millennium*, N.Y. Times, July 14, 2001, at B1; Josh Meyer, *LAX Bombing Plot Figure Is Convicted*, L.A. Times, July 14, 2001, at 8.

387. *Haouari*, 429 F. Supp. 2d at 673; *United States v. Ressam*, ___ F.3d ___, ___, 2010 WL 347962 (9th Cir. 2010) (p.1890 of filed op.); see Fritsch, *supra* note 386; John J. Goldman, *Algerian Gets Prison in LAX Bomb Plot*, L.A. Times, Jan. 17, 2002, at 13.

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

389. Judge Coughenour observed that the gentler approach of Seattle-based investigators was more effective in obtaining Ressam's cooperation than the more aggressive approach of New York-based investigators, who took over during the prosecution of Haouari. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

390. *Ressam*, ___ F.3d at ___, 2010 WL 347962 (pp.1882, 1897–98 of filed op.); *United States v. Ressam*, 474 F.3d 597, 601(9th Cir. 2007); *Ressam* July 27, 2005, Tr., *supra* note 376; see Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, Seattle Times, July 28, 2005, at A1; Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced to 22 Years*, N.Y. Times, July 28, 2005, at A20; Paul Shukovsky, *22 Years*, Seattle Post-Intelligencer, July 28, 2005, at A1; Tomas Alex Tizon & Lynn Marshall, *Would-Be Millennium Bomber Ressam Gets 22-Year Sentence*, L.A. Times, July 28, 2005, at 10; see also Docket Sheet, *United States v. Ressam*, No. 05-30441 (9th Cir. Sept. 9, 2005) (defendant's appeal of the conviction); Docket Sheet, *United States v. Ressam*, No. 05-30422 (9th Cir. Aug. 29, 2005) (government's appeal of the sentence).

391. *Ressam*, 474 F.3d 597, 598–604; see *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1898 of filed op.); Hal Bernton & Mike Carter, *Appeals Court Throws Out 1 Ressam Felony Conviction*, Seattle Times, Jan. 17, 2007, at B3; Paul Shukovsky, *Court Reverses 1 Count Against Ressam*, Seattle Post-Intelligencer, Jan. 17, 2007, at B1; Jennifer Steinhauer, *Appeals Court Vacates Term of Algerian in Bomb Plot*, N.Y. Times, Jan. 17, 2007, at A13; Henry Weinstein, *Court Voids Sentence in LAX Plot*, L.A. Times, Jan. 17, 2007, at 8.

392. *Ressam*, 474 F.3d 597, 604; see *Ressam*, ___ F.3d at ___, 2010 WL 347962 (p.1898 of filed op.); Shukovsky, *supra* note 391.

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

On December 7, 2007, the Supreme Court agreed to review the court of appeals' decision.³⁹³ On March 25, 2008, Attorney General Michael B. Mukasey, who, as a judge, had presided over the prosecution of blind Sheik Omar Abdel Rahman, argued the government's case to reinstate the conviction.³⁹⁴ The Supreme Court agreed with the argument and reinstated the conviction on May 19.³⁹⁵ On December 3, Judge Coughenour resentenced Ressay to 22 years.³⁹⁶ On February 2, 2010, the court of appeals determined that the sentence was too lenient and remanded the case for resentencing by a different judge.³⁹⁷

Challenge: Classified Evidence

Invoking the Classified Information Procedures Act (CIPA), the government asked Judge Coughenour to review classified documents to determine whether or not they were discoverable.³⁹⁸ Judge Coughenour reviewed the documents without the assistance of a law clerk, because there was not time to obtain top secret clearance.³⁹⁹ The documents were delivered to the judge by a court information security officer and reviewed by the judge under the security officer's watch.⁴⁰⁰

393. *United States v. Ressay*, 553 U.S. 272 (2007); See Robert Barnes, *Cases of 2 U.S. Citizens in Iraq to Be Heard*, Wash. Post, Dec. 8, 2007, at A2; Linda Greenhouse, *Americans Held in Iraq Draw Justices' Attention*, N.Y. Times, Dec. 8, 2007, at A15.

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

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

395. *United States v. Ressay*, 553 U.S. 272, 128 S. Ct. 1858 (2008); see *Ressay*, ___ F.3d at ___, 2010 WL 347962 (p.1898 of filed op.); William Branigin, *High Court Affirms Terrorism Conviction*, Wash. Post, May 20, 2008, at A6; Linda Greenhouse, *Court Upholds Child Pornography Law, Despite Free Speech Concerns*, N.Y. Times, May 20, 2008, at A17; *Justices Rule Against Ressay in Terror Case*, Seattle Post-Intelligencer, May 20, 2008, at B2; David G. Savage, *Full Prison Term Restored for "Millennium Bomber,"* L.A. Times, May 20, 2008, at 11.

396. Am. Judgment, *United States v. Ressay*, No. 2:99-cr-666 (W.D. Wash. Dec. 3, 2008); *Ressay*, ___ F.3d at ___, 2010 WL 347962 (pp.1882-83 of filed op.); see Mike Carter, *Ressay Recants Everything Said as an Informant*, Seattle Times, Dec. 4, 2008, at A1; Paul Shukovsky, *Ressay Sentence Reinstated*, Seattle Post-Intelligencer, Dec. 4, 2008, at B1.

397. *Ressay*, ___ F.3d ___, 2010 WL 347962; see John Schwartz, *Appeals Court Throws Out Sentence in Bombing Plot, Calling It Too Light*, NY. Times, Feb. 3, 2010, at A15; see also Docket Sheet, *United States v. Ressay*, No. 09-30000 (9th Cir. Jan. 5, 2009) (noting that a petition for rehearing is due Mar. 18, 2010).

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

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

400. *Id.*

They were stored in a safe to which the officer, and not the judge, had access.⁴⁰¹ Judge Coughenour decided that the documents were not discoverable.⁴⁰²

Challenge: Examination of Foreign Witnesses

The government sought testimony of witnesses in Canada, beyond the court's subpoena power, who were unwilling to travel to the United States to offer testimony.⁴⁰³ So, by stipulation of the parties, Judge Coughenour traveled to Canada to preside over video depositions in both Montreal and Vancouver to obtain the testimony.⁴⁰⁴ A Canadian court official attended to rule on potential issues of Canadian law.⁴⁰⁵ Ressay participated by video conference from his jail cell with the assistance of an Arabic interpreter.⁴⁰⁶

On one occasion, after Judge Coughenour had traveled to Canada for the deposition, a Canadian judge ruled, at a proceeding from which Judge Coughenour was excluded, that the witness did not have to testify.⁴⁰⁷

Some of the witnesses subsequently indicated that they might be willing to testify live at Ressay's trial, but the parties agreed that either side could substitute deposition video tapes.⁴⁰⁸

Challenge: Court Security

At Ressay's first appearance in court in Seattle, on December 17, 1999, "Security was so tight at the courthouse that anyone entering—even employees—had to produce a photo identification. A phalanx of U.S. marshals also blocked the door to [U.S. Magistrate Judge David] Wilson's courtroom and armed officers patrolled the streets as Ressay was brought to the courthouse."⁴⁰⁹

For Ressay's trial, security at the Roybal courthouse in Los Angeles also was enhanced, including added patrols, bomb-sniffing dogs, and inspections of cars entering the underground garage.⁴¹⁰

401. *Id.*

Judge Coughenour preferred not to have to deal with the lock and combination himself. Interview with Dep't of Justice Litig. Sec. Section Staff, Jan. 7, 2010.

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

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

404. *Id.*; see Ressay Mar. 1, 2001, Tr., *supra* note 357; Skolnik, *supra* note 403.

405. See Ressay Mar. 1, 2001, Tr., *supra* note 357.

406. Interview with Hon. John C. Coughenour, Oct. 3, 2008; see *Seattle Judge to Hear from Terrorism-Case Witnesses*, Seattle Times, Oct. 27, 2000, at B2.

407. Ressay Apr. 27, 2005, Tr., *supra* note 376; Interview with Hon. John C. Coughenour, Oct. 3, 2008.

408. Interview with Hon. John C. Coughenour, Oct. 3, 2008; see Ressay Mar. 1, 2001, Tr., *supra* note 357.

409. Sunde & Porterfield, *supra* note 321.

410. See Carter, *supra* note 359.

Challenge: Jury Security

Judge Coughenour was not asked to use an anonymous jury; he has never used one. But jurors did not report directly to the courthouse; instead they met at a secret location from which they were transported to the courthouse by deputy marshals.

Challenge: Witness Security

On March 29, 2001, Meskini testified at Ressam's trial.⁴¹¹ It was reported that his testifying would require his entering the witness protection program.⁴¹² He was brought to the courtroom through a side door.⁴¹³

Judge Coughenour overruled the government's attempts to protect the identity of another witness, such as taking testimony remotely or behind a screen and withholding background information, and the government decided not to use the witness.⁴¹⁴

411. See Adams, *supra* note 340; Booth, *supra* note 365; Steve Miletich, *Key Witness Testifies Against Ressam*, Seattle Times, Mar. 30, 2001, at B1; Sam Skolnik, *U.S. Puts Reputed Fraud on the Stand*, Seattle Post-Intelligencer, Mar. 30, 2001, at B1.

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

413. See Miletich, *supra* note 411.

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

A Would-Be Spy

United States v. Regan
(*Gerald Bruce Lee, E.D. Va.*)

On August 23, 2001, federal agents arrested Brian Patrick Regan, a resident of Bowie, Maryland, and a retired master sergeant of the U.S. Air Force, at Dulles International Airport, aborting his trip to Zurich.⁴¹⁵ The government filed a criminal complaint against him the next day in the U.S. District Court for the Eastern District of Virginia, accusing him of attempted espionage.⁴¹⁶ The complaint accused him of attempting to sell to Iraq, Libya, and China top-secret information to which he had access as a contract employee of the National Reconnaissance Office (NRO).⁴¹⁷ Regan was indicted on October 23, 2001,⁴¹⁸ and superseding indictments were filed on February 14⁴¹⁹ and July 24, 2002.⁴²⁰ The government filed a notice of intent to seek the death penalty on April 19, 2002.⁴²¹ The court assigned the case to Judge Gerald Bruce Lee.⁴²²

415. *United States v. Regan*, 221 F. Supp. 2d 672, 675 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 666, 669 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 661, 662–63 (E.D. Va. 2002); see Rona Kobel, *An Unlikely Setting for Global Intrigue Espionage*, Balt. Sun, Feb. 11, 2003, at 1B; *Retired Air Force Sergeant Accused of Spying Is Going to Trial*, N.Y. Times, Jan. 13, 2003, at A19 [hereinafter *Going to Trial*]; Susannah Rosenblatt, *Arduous Dig to Find Spy's Buried Stash*, L.A. Times, July 31, 2003, at 24.

416. *United States v. Regan*, 228 F. Supp. 2d 742, 745 (E.D. Va. 2002); *Regan*, 221 F. Supp. 2d at 674; *Regan*, 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; Docket Sheet, *United States v. Regan*, No. 1:01-cr-405 (E.D. Va. Oct. 23, 2001).

417. *United States v. Regan*, 281 F. Supp. 2d 795, 801 (E.D. Va. 2002); *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan*, 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; see *Going to Trial*, *supra* note 415.

Regan served in the U.S. Air Force from 1980 to 2001, retiring as a master sergeant. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan*, 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; see *Going to Trial*, *supra* note 415. Until his retirement, he worked at the Signals Intelligence Applications Integration Office of the NRO. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan*, 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662.

418. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan*, 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; Docket Sheet, *supra* note 416.

419. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 675; *Regan*, 221 F. Supp. 2d at 669; *Regan*, 221 F. Supp. 2d at 663; Docket Sheet, *supra* note 416.

420. *Regan*, 228 F. Supp. 2d at 746 (noting the filing of a superseding indictment in light of the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)); *Regan*, 221 F. Supp. 2d at 675 (same); *Regan*, 221 F. Supp. 2d at 669 (same); *Regan*, 221 F. Supp. 2d at 663 (same); Docket Sheet, *supra* note 416.

421. *Regan*, 228 F. Supp. 2d at 746; *Regan*, 221 F. Supp. 2d at 675; *Regan*, 221 F. Supp. 2d at 669; *Regan*, 221 F. Supp. 2d at 663; Docket Sheet, *supra* note 416; see *Going to Trial*, *supra* note 415.

422. Docket Sheet, *supra* note 416; see *U.S. Prosecutors Reconsider, Back Delay in Espionage Suspect's Trial*, L.A. Times, Apr. 25, 2002, at 25 [hereinafter *Prosecutors Reconsider*]; *Would-Be Spy Given Life in Prison*, L.A. Times, Mar. 21, 2003, at 29 [hereinafter *Life in Prison*].

Tim Reagan and Joy Richardson interviewed Judge Lee for this report in the judge's chambers on October 2, 2006.

On February 20, 2003, a jury convicted Regan of trying to sell secrets to Iraq and China, but acquitted him of trying to sell secrets to Libya.⁴²³ The jury rejected the death penalty on February 24,⁴²⁴ and Regan was sentenced on March 20 to life in prison without the possibility of parole.⁴²⁵ Regan agreed to accept the life sentence in exchange for the government's not prosecuting his wife and allowing her to keep part of his military pension.⁴²⁶

Regan also agreed to disclose what he had done with classified information.⁴²⁷ Regan directed agents to a green plastic toothbrush holder and a purple plastic salt shaker, each hidden near exit ramps off Interstate 95 between Washington, D.C., and Richmond, Virginia.⁴²⁸ These containers held coded descriptions of the locations of 19 buried bundles of classified documents—20,000 pages, five compact discs, and five videotapes—hidden in Pocahontas State Park in Virginia and Patapsco Valley State Park in Maryland.⁴²⁹

Challenge: Classified Evidence

As is common for a spy case, Regan's prosecution involved classified information to which the defendant and defense counsel had to be given access.⁴³⁰ The defendant and his attorneys were given access to the classified information and a computer in a sensitive compartmented information facility (SCIF) located in the courthouse.⁴³¹

The SCIF is a secure facility located in the courthouse where the Defendant and his attorneys may lawfully view classified information. Defense counsel may not remove certain classified information from the SCIF, and the Defendant may not remove classified information from the SCIF. . . . The SCIF has been provided to the espionage defendant and his counsel so that they may have access to classified information to prepare for trial. The Defendant and his counsel must have access to classified information in a "prosecution free zone." Defense counsel and their client reasonably expect to be free to work in the SCIF to compose work papers, trial memoranda, and trial strategy, free from the roving eye of the prosecutor or the Court. Because the classified information involved

423. Docket Sheet, *supra* note 416; see Josh Meyer, *Would-Be Spy Won't Face Death Penalty*, L.A. Times, Feb. 25, 2003, at 15; *The Week That Was*, Balt. Sun, Feb. 23, 2003, at 2C; *Life in Prison*, *supra* note 422.

424. Docket Sheet, *supra* note 416; see Meyer, *supra* note 423; Rosenblatt, *supra* note 415; *The Week That Was*, Balt. Sun, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 422.

425. Docket Sheet, *supra* note 416; see Rosenblatt, *supra* note 415; *Life in Prison*, *supra* note 422.

426. See *Life in Prison*, *supra* note 422.

427. See Rosenblatt, *supra* note 415.

428. See *id.*

429. See *id.*

430. United States v. Regan, 281 F. Supp. 2d 795, 801 (E.D. Va. 2002).

Because classified information is an issue in many cases brought in the district that is home to the Pentagon and the Central Intelligence Agency, Judge Lee requires all of his law clerks to have security clearances. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

431. *Regan*, 281 F. Supp. 2d at 800–01; see Reagan, *supra* note 165, at 19 (describing SCIFs).

Defense experts also had to obtain security clearances to examine classified documents. See *Prosecutors Reconsider*, *supra* note 422.

in this case relates to national security, the information must be kept secure. The SCIF affords the Government a place to continue to protect classified information.⁴³²

Discovered in Regan's jail cell were apparently typewritten letters to his wife and children and a page of code.⁴³³ These documents appeared to concern the locations of hidden classified information.⁴³⁴ The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.⁴³⁵ Judge Lee allowed a search, but established special procedures to preserve the attorney-client privilege and work-product protection.⁴³⁶

In order to avoid any claims that the Government has had access to defense counsel's pre-trial preparation, the Court is not going to allow the United States Attorney or the Federal Bureau of Investigation to conduct the search. Rather the Court is going to refer this matter to a United States Magistrate Judge to supervise the process of securing the defense's SCIF computer hard drives and disks for imaging and their return to counsel. The United States Magistrate Judge will work with a court selected neutral computer expert with proper security clearances to image the Defendant's computer hard drives and to search for the enumerated four items: (1) two letters to Anette Regan; (2) letters or memoranda to his children; and (3) a page of code composed of letters and numbers. All of the items listed above will be attached to the court's Order, UNDER SEAL. If these items are found on the hard drive, then the computer expert will provide this information in electronic and hard copy to the United States Magistrate Judge for review. The United States Magistrate Judge is directed to report the computer expert's findings to all counsel and the District Judge. [The CIPA court security officer] is directed to maintain the imaged hard drive in a secure location until the verdict is reached in this case and further order of the court. The accompanying order will provide specific details regarding the logistics of the computer imaging and search process.

VIII. Post-Verdict Search Procedures

After the jury has reached its verdict in this case, the Government may seek leave of Court to conduct a further search on the hard drives and floppy disks. The Government shall notify defense counsel of its intentions by a written motion. The Government must notice its motion for a hearing with the Clerk's Office, and then the motion shall be heard by the Court. Once the Government has reviewed the material that was seized pursuant to the search, the Government may make use of the items as it deems proper.

Additionally, the appointed computer expert shall not reveal the contents of the search to anyone except the Magistrate Judge appointed to work on this case.

This Memorandum Opinion and its accompanying Order SHALL be placed UNDER SEAL, to avoid revealing any information that might adversely affect a potential juror in the trial of Defendant Brian Patrick Regan.⁴³⁷

432. *Regan*, 281 F. Supp. 2d at 801; see Anita Huslin, *If These Walls Could Talk . . .*, Wash. Post, May 28, 2006, at D1 ("the SCIF is a sanctuary, the ultimate members-only club for the keepers of secrets").

433. *Id.* at 800, 807.

434. *Id.* at 800, 804-05.

435. *Id.* at 799-800.

436. *Id.* at 800.

437. *Id.* at 806-07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 416.

The unit of the Justice Department that provides the courts with information security officers—the Litigation Security Section within the Management Division⁴³⁸—conducted the search.⁴³⁹

438. *See* Reagan, *supra* note 165, at 17–18.

439. Interview with Dep't of Justice Litig. Sec. Section Staff, Feb. 3, 2010.

Detroit

United States v. Koubriti (Gerald E. Rosen, E.D. Mich.)

Six days after the September 11, 2001, attacks on the United States, federal agents visited a suspected Detroit apartment residence of Nabil al-Marabh, a suspect in the attacks.⁴⁴⁰ Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.⁴⁴¹ Agents found fraudulent identification documents in the name of Youssef Hmimssa, a former roommate, who had asked them to hold the documents for him.⁴⁴² Koubriti and Hannan admitted that they knew that the documents were fraudulent.⁴⁴³ They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.⁴⁴⁴ Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.⁴⁴⁵ Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.⁴⁴⁶ Abdel Ilah Elmardoudi, the alleged ringleader in Chicago,

440. *Koubriti v. Convertino*, ___ F.3d ___, ___, 2010 WL 364188 (6th Cir. 2010) (p.2 of filed op.) (finding prosecutorial immunity in one defendant’s civil action); *United States v. Koubriti*, 305 F. Supp. 2d 723, 724–25, 727 (E.D. Mich. 2003) (sanctioning Attorney General John Ashcroft for false and public statements about the case in violation of the court’s gag order); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003) (agreeing to partially close the juror voir dire); *United States v. Koubriti*, 199 F. Supp. 2d 656, 658–59 (E.D. Mich. 2002) (denying motions to suppress evidence acquired during the search of the apartment); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001) (denying bond release pending trial); *Trying Cases*, *supra* note 181, at 21; *see* David Johnston, *3 Held in Detroit After Aircraft Diagrams Are Found*, N.Y. Times, Sept. 20, 2001, at B2; Philip Shenon & Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. Times, Nov. 1, 2001, at A1; Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001, at B1.

441. *Koubriti*, 305 F. Supp. 2d at 727; *Koubriti*, 199 F. Supp. 2d at 660–61; *Koubriti*, 2001 WL 1525270, at *1; *see* This American Life: The Prosecutor (PRI radio broadcast May 31, 2008) [hereinafter Prosecutor].

Two days later, al-Marabh was arrested in Burbank, Illinois. *See* Shenon & Van Natta, *supra* note 440; Jodi Wilgoren, *Trail of Man Sought in 2 Plots Leads to Chicago and Arrest*, N.Y. Times, Sept. 21, 2001, at B8. The government ultimately decided to merely deport him. *See* Danny Hakim, *Trial Set to Begin for Four Men Accused of Being in Terror Cell*, N.Y. Times, Mar. 17, 2003, at A15.

442. *Koubriti*, 305 F. Supp. 2d at 727; *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658; *Koubriti*, 2001 WL 1525270, at *2; *see* Johnston, *supra* note 440; Shenon & Van Natta, *supra* note 440; Prosecutor, *supra* note 441; Van Natta, *supra* note 440.

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

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

445. *Koubriti*, 199 F. Supp. 2d at 658; *Koubriti*, 2001 WL 1525270, at *1 n.2; *see* Danny Hakim, *Informer Is Cited as the Key to Unlocking a Terrorist Cell*, N.Y. Times, Aug. 30, 2002, at A10; Shenon & Van Natta, *supra* note 440; Van Natta, *supra* note 440.

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

also was indicted on March 27.⁴⁴⁷ On August 28, 2002, the government added charges against the defendants for material support of terrorism.⁴⁴⁸ The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Gerald E. Rosen.⁴⁴⁹

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.⁴⁵⁰ On September 9, 2005, he was sentenced to more than six years in prison for document fraud.⁴⁵¹

This was a high-profile case that had received some national press coverage and a lot of local press coverage.⁴⁵² The court selected 280 prospective jurors for the case, and the judge greeted them on March 18, 2003, with a speech disclosing the case on which they might serve and welcoming them to their opportunity to provide civic service.⁴⁵³

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.⁴⁵⁴ Based on answers to this questionnaire, the court and the attorneys were able to sort the potential jurors into three groups: (1) apparently suitable, (2) possibly suitable, and (3) not suitable.⁴⁵⁵ Jurors were questioned indivi-

447. *Koubriti*, 199 F. Supp. 2d at 658 n.1; see *United States v. Elmardoudi*, 501 F.3d 935, 937–38 (8th Cir. 2007); see also Hakim, *supra* note 441; Prosecutor, *supra* note 441.

Elmardoudi was arrested in North Carolina near Greensboro on November 4, 2002. *Elmardoudi*, 501 F.3d at 937; see Danny Hakim, *Man Accused of Being Leader of Detroit Terror Cell Is Arrested*, N.Y. Times, Nov. 15, 2002, at A20; Dan Eggen & Allan Lengel, *Alleged Leader of "Sleeper Cell" Arrested in N.C.*, Wash. Post, Nov. 15, 2002, at A28.

448. *United States v. Koubriti*, 305 F. Supp. 2d 723, 731 (E.D. Mich. 2003); see Douglas Farah & Tom Jackman, *6 Accused of Conspiracy to Aid in Terror Attacks*, Wash. Post, Aug. 29, 2002, at A1.

449. Docket Sheet, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001) [hereinafter E.D. Mich. *Koubriti* Docket Sheet]; Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 Cardozo Pub. L. Pol'y & Ethics J. 101, 102 ("I presided over the nation's first post-September 11 terrorism trial"); see Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. Times, Sept. 3, 2004, at A12.

Tim Reagan interviewed Judge Rosen for this report in the judge's chambers on December 7, 2006, and by telephone on January 3 and April 18, 2007.

450. *Koubriti*, 305 F. Supp. 2d at 734; see *Koubriti v. Convertino*, ___ F.3d ___, ___ n.3, 2010 WL 364188 (6th Cir. 2010) (p.3 n.3 of filed op.); *Koubriti*, 199 F. Supp. 2d at 658 n.1.

"In the deal, Mr. Hmimssa received 46 months in prison for 10 unrelated felonies committed in three states; he could have faced up to 81 years." Danny Hakim, *2 Arabs Convicted and 2 Cleared of Terrorist Plot Against the U.S.*, N.Y. Times, June 4, 2003, at A1.

451. Criminal J., *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 9, 2005) (sentencing Hmimssa to 78 months in prison).

Hmimssa was released from prison on May 25, 2007. <http://www.bop.gov>.

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

453. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 449 (noting voir dire from Mar. 18, 2003, to Mar. 26, 2003); Gerald E. Rosen, *United States v. Koubriti: Preliminary Voir Dire* (Mar. 18, 2003) (text of speech); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

454. Gerald E. Rosen, *United States v. Koubriti: Jury Questionnaire* (Mar. 18, 2003); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

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

dually, beginning with those “apparently suitable,” in random order, and a jury was selected from the approximately 65–80 potential jurors in that group.⁴⁵⁶

On June 3, the jury convicted Koubriti and Elwardoudi of both terrorism and document-fraud charges, convicted Hannan of document-fraud charges only, and acquitted Ali-Haimoud.⁴⁵⁷

In December 2003, it came to the court’s attention that the lead prosecutor in the case had withheld from defense counsel a potentially exculpatory or impeaching document.⁴⁵⁸ The defendant moved for a mistrial, but the government maintained that the document was not material.⁴⁵⁹ Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.⁴⁶⁰

As thoroughly detailed in the Government’s filing, at critical junctures and on critical issues essential to a fair determination by the jury of the issues tried in this case, the prosecution failed in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further, as the Government’s filing also makes abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution’s case.⁴⁶¹

Judge Rosen concluded that “the prosecution early on in the case developed and became invested in a view of the case and the Defendants’ culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view.”⁴⁶²

456. *Id.*

457. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *United States v. Koubriti*, 305 F. Supp. 2d 723, 736 (E.D. Mich. 2003); *see Koubriti v. Convertino*, ___ F.3d ___, ___ & n.7, 2010 WL 364188 (6th Cir. 2010) (p.4 & n.7 of filed op.); *United States v. Elwardoudi*, 501 F.3d 935, 938 (8th Cir. 2007); *see also Hakim, supra* note 450; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10; Prosecutor, *supra* note 441.

Ali-Haimoud sued the publisher of *The Terrorist Recognition Handbook* for falsely identifying him, with a photograph, as a known al-Qaeda member. Notice of Removal, *Ali-Haimoud v. Nance*, No. 2:04-cv-74737 (E.D. Mich. Dec. 3, 2004). The case was remanded to state court on stipulation that the plaintiff would neither seek nor accept more than \$75,000 in damages. Stipulation, *id.* (Apr. 22, 2005).

458. *United States v. Koubriti*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004); *United Koubriti*, 297 F. Supp. 2d 955, 958–61 (E.D. Mich. 2004); *Trying Cases, supra* note 181, at 22; *see Koubriti*, ___ F.3d at ___, 2010 WL 364188 (p.4 of filed op.); Prosecutor, *supra* note 441.

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

460. *Trying Cases, supra* note 181, at 23; *see Koubriti*, ___ F.3d at ___, 2010 WL 364188 (p.4 of filed op.); Prosecutor, *supra* note 441.

461. *Koubriti*, 336 F. Supp. 2d at 680–81; *see also id.* at 681–82 n.5 (“Having itself reviewed [additional] classified materials, the Court observes that they provide additional and substantial support for the conclusions reached in the Government’s filing.”).

462. *Id.* at 681; *see Hakim, supra* note 449 (quoting text).

The prosecutor and a government witness were acquitted of wrongdoing in a criminal trial. Docket Sheet, *United States v. Convertino*, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006) (noting Oct. 31, 2007, jury verdict of not guilty); *Koubriti*, ___ F.3d at ___, 2010 WL 364188 (p.5 of filed op.); *Trying Cases, supra* note 181, at 23; *see Spencer S. Hsu, Ex-Prosecutor, Security Officer Cleared in Terrorism Case*, Wash. Post, Nov. 1, 2007, at A3; Philip Shenon, *Ex-Prosecutor Ac-*

As a result, at the request of both the government and the defense, on September 2, 2004, the court dismissed the terrorism charges against Koubriti and Elmardoudi and ordered a new trial on the fraudulent-document charges against Koubriti, Elmardoudi, and Hannan.⁴⁶³ The government elected not to pursue further the charges tried.⁴⁶⁴

The government nevertheless filed a fourth superseding indictment against Koubriti and Hannan on December 15, charging them with faking an automobile accident in July 2001 to defraud an insurance company.⁴⁶⁵ Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of time served and deportation to Morocco.⁴⁶⁶ The court released Koubriti on bond on October 12, 2004.⁴⁶⁷ Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.⁴⁶⁸ On February 9, 2010, Judge Rosen granted the government's motion to dismiss Koubriti's indictment for successful completion of pretrial diversion.⁴⁶⁹

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.⁴⁷⁰ The

quitted of Misconduct in 9/11 Case, N.Y. Times, Nov. 1, 2007, at A17; Prosecutor, *supra* note 441.

463. *Koubriti*, 509 F.3d at 748; *Koubriti*, 336 F. Supp. 2d at 682; *Trying Cases*, *supra* note 181, at 23; *see Koubriti*, ___ F.3d at ___, 2010 WL 364188 (pp.4–5 of filed op.); *Elmardoudi*, 501 F.3d at 938 & n.4; *see also* Hakim, *supra* note 449; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15; Prosecutor, *supra* note 441.

464. *Koubriti*, 435 F. Supp. 2d at 670 & n.5; Order to Dismiss Third Superseding Indictment, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Jan. 18, 2005); Prosecutor, *supra* note 441.

465. *Koubriti*, 509 F.3d at 748; Fourth Superseding Indictment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Dec. 15, 2004); *see Koubriti*, ___ F.3d at ___, 2010 WL 364188 (p.5 of filed op.); *Koubriti*, 435 F. Supp. 2d at 668, 670; *see also Terror Case Is Switched to Fraud Charges*, Wash. Post, Dec. 16, 2004, at A10.

When federal agents first searched Koubriti and Hannan's apartment, they noticed airport-employee badges, which the agents regarded as alarming evidence. *United States v. Koubriti*, 199 F. Supp. 2d 656, 660 (E.D. Mich. 2002); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001); *see Johnston*, *supra* note 440; Prosecutor, *supra* note 441. The residents told them at the time that they used to work for Sky Chefs as dishwashers but stopped after an automobile accident prevented them from working there. *Koubriti*, 199 F. Supp. 2d at 661; *Koubriti*, 2001 WL 1525270, at *3; *see Shenon & Van Natta*, *supra* note 440.

466. Criminal J., *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Mar. 22, 2005); Plea Agreement, *id.* (Mar. 22, 2005); *see also Koubriti*, 435 F. Supp. 2d at 668 n.1 (noting that Hannan has been deported).

467. *Koubriti*, ___ F.3d at ___, 2010 WL 364188 (p.5 of filed op.).

468. *Koubriti*, 509 F.3d 746 (resolving *United States v. Koubriti*, No. 06-1937 (6th Cir. June 30, 2006) by holding that a retrial after a mistrial is not double jeopardy), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1915 (2008); *Koubriti*, 435 F. Supp. 2d 666.

469. Order, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Feb. 9, 2010); *see Paul Egan, Ex-Terror Suspect in Talks to Clear Record*, Detroit News, Apr. 15, 2009, at 4A.

470. Compl., *Koubriti v. Rojo*, No. 2:05-cv-74343 (E.D. Mich. Nov. 14, 2005).

In their first motion for summary judgment, the defendants noted that “[w]hile incarcerated in the Wayne County Jail Plaintiff was deemed a level 4 security risk by the U.S. Marshals, and as

court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,⁴⁷¹ and the case settled.⁴⁷² Koubriti then sued his prosecutors for malicious prosecution,⁴⁷³ but the Sixth Circuit's court of appeals determined that the prosecutors had prosecutorial immunity.⁴⁷⁴

Elmardoudi was sentenced by the U.S. District Court for the District of Minnesota to four years and three months in prison in a separate prosecution for trafficking in fraudulent telephone calling cards,⁴⁷⁵ and he was sentenced by the U.S. District Court for the Northern District of Iowa to five years in prison for fraudulent use of Social Security numbers.⁴⁷⁶

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."⁴⁷⁷ Jurors did not come directly to the courthouse in the morning.⁴⁷⁸ Instead, they assembled at a secret location and were driven to the courthouse in a van.⁴⁷⁹ Someone found out about the secret location and called the jury room with a death threat.⁴⁸⁰ On the following day, someone called the Detroit News with a death

such, was placed in a 'super max' security cell block." Defs.' Summ. J. Mot. at 1, *id.* (July 25, 2006).

Between September 17, 2001 until August of 2003, Plaintiff Koubriti was incarcerated in the Wayne County Jail, and per level 4 "super max" security protocol, Plaintiff Koubriti was ensconced in his cell for 23 hours per day, and allowed 1 hour per day of exercise. . . . In August of 2003, Plaintiff was released, but was recharged again in November 2003. From November 2003 until July of 2004, Plaintiff Koubriti was once again incarcerated in the Wayne County Jail and given a level 4 max security risk classification.

Id. at 2.

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

472. Stipulated Dismissals, *id.* (Aug. 9 & 24, 2007).

473. Compl., Koubriti v. Convertino, No. 2:07-cv-13678 (E.D. Mich. Aug. 30, 2007); Docket Sheet, *id.*; see Zachary Gorchow, *Overtured Conviction Sparks Lawsuit Against Federal Officials*, Det. Free Press, Aug. 31, 2007; Prosecutor, *supra* note 441.

474. Koubriti v. Convertino, ___ F.3d ___, 2010 WL 364188 (6th Cir. 2010).

475. United States v. Elmardoudi, 501 F.3d 935, 937, 940 (8th Cir. 2007) (describing the crime as "'shoulder surfing,' that is, surreptitiously memorizing other people's calling card and credit card numbers at the Minneapolis-St. Paul airport and then passing the numbers on to other people who used them to pay for telephone calls."), *cert. denied*, ___ U.S. ___, 128 S. Ct. 926 (2008); Am. Sentencing J., United States v. Elmardoudi, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006).

476. Judgment, United States v. Elmardoudi, No. 1:06-cr-112 (N.D. Iowa Mar. 14, 2008); Indictment, *id.* (Aug. 16, 2006); see *Elmardoudi*, 501 F.3d at 937. The court of appeals affirmed. Opinion, United States v. Elmardoudi, No. 08-1685 (8th Cir. Mar. 9, 2009) (per curiam), available at 313 Fed. Appx. 923, *cert. denied*, ___ U.S. ___, 130 S. Ct. 421 (2009).

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

478. *Id.*

479. *Id.*

480. *Trying Cases*, *supra* note 181, at 21; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

threat concerning the judge.⁴⁸¹ The Marshal changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.⁴⁸²

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.⁴⁸³ Jury selection was conducted behind closed doors.⁴⁸⁴ Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.⁴⁸⁵ Judge Rosen notes that it was very important to make sure that the jury clerk knew that the names and addresses of the jurors were confidential.⁴⁸⁶

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued "a public and formal judicial admonishment of the Attorney General."⁴⁸⁷ As Judge Rosen recalled,

the Attorney General of the United States violated a gag order that was stipulated by the parties—indeed, drafted by the government—not once, but twice, which occasioned contempt motions by the defense throughout the trial, which I put off until after the trial. I think I was the first federal judge to be required to issue a public admonishment of the Attorney General of the United States.⁴⁸⁸

On October 23, 2001, Judge Rosen issued a stipulated gag order forbidding public comments about the case that would have a reasonable likelihood of interfering with a fair trial.⁴⁸⁹ Eight days later, Attorney General John Ashcroft incorrectly stated at a press conference that the defendants in the case were "suspected of having knowledge of the September 11th attacks."⁴⁹⁰ In addition, during the

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

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

483. *United States v. Koubriti*, 305 F. Supp. 2d 723, 728 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 418 (E.D. Mich. 2002) (denying a motion opposing the empanelling of an anonymous jury); *Trying Cases*, *supra* note 181, at 21; see David Eggen & Allan Lengel, *In Detroit, First Post-9/11 Terrorism Trial*, Wash. Post, Mar. 19, 2003, at A3; David Runk, *Judge Says Elmardoudi Terror Trial to Proceed*, St. Paul Pioneer Press, Mar. 25, 2003, at B9.

484. *Trying Cases*, *supra* note 181, at 21; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Eggen & Lengel, *supra* note 483.

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

486. *Id.*

487. *Koubriti*, 305 F. Supp. 2d at 726; see *id.* at 763–65; see also Robert E. Pierre, *Judge Rebukes Ashcroft for Gag Violation*, Wash. Post, Dec. 17, 2003, at A27; Richard B. Schmitt, *Ashcroft Is Rebuked by U.S. Judge*, L.A. Times, Dec. 17, 2003, at 20.

488. *Trying Cases*, *supra* note 181, at 21.

489. *Koubriti*, 305 F. Supp. 2d at 728–29; see *id.* at 733 ("I didn't initiate the gag order, but I intend to keep it in place until further order of the Court, and I intend to enforce it."); see also Prosecutor, *supra* note 441.

490. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; see Shenon & Van Natta, *supra* note 440 (reporting on the Attorney General's news conference); Prosecutor, *supra* note 441.

Two days after the news conference, the Justice Department acknowledged that "it did not know whether three Arab men now in custody in Michigan had advance knowledge of the terror attacks of Sept. 11." Don Van Natta, Jr., *Justice Dept. Alters Stand on 3 Detained*, N.Y. Times, Nov. 3, 2001, at B5; see Prosecutor, *supra* note 441. But, more than five years after that, govern-

trial, the Attorney General commented favorably at a press conference on the credibility of the cooperating codefendant's testimony.⁴⁹¹

On the day before the grand jury handed down the second superseding indictment adding terrorism charges for the first time, Fox News announced the forthcoming indictment in sufficient detail as to suggest the indictment had been improperly leaked.⁴⁹² On the following day, MSNBC News presented improperly leaked evidence against the defendants.⁴⁹³ The Attorney General's responsibility for these leaks remained unclear.⁴⁹⁴

The defendants moved for sanctions against the Attorney General on August 28, 2003.⁴⁹⁵ On the following day, Judge Rosen ordered the Attorney General "to show cause in writing why he should not be compelled to appear for a hearing to address Defendants' motion."⁴⁹⁶ In response, the Attorney General stated that he regretted making the statements and acknowledged that they were mistakes, but said that they were entirely inadvertent.⁴⁹⁷

Because the sanction motion occurred after the trial was over, a civil contempt sanction could not remedy the wrongdoing; the only type of pertinent contempt would be criminal contempt as a punitive sanction.⁴⁹⁸ Criminal contempt proceedings against a sitting Cabinet officer would require extraordinary procedures and implicate serious constitutional issues.⁴⁹⁹ Because the record did not suggest willful violation of the court's order, Judge Rosen decided that confronting these difficulties would not be necessary.⁵⁰⁰ But because the Attorney General did violate the court's order on two occasions, Judge Rosen decided to formally admonish him.⁵⁰¹

Challenge: Classified Evidence

In order to investigate claims of prosecutorial misconduct, the court had to review the prosecution's entire case file, which included classified documents, as well as highly sensitive records maintained at CIA headquarters.⁵⁰² Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and

ment counsel told an appellate panel at oral argument that Elwardoudi was accused of supporting terrorists connected with the September 11, 2001, attacks. *United States v. Elwardoudi*, 504 F.3d 935, 938 n.3 (8th Cir. 2007).

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

492. *Id.* at 731; *Trying Cases*, *supra* note 181, at 22; *see* Prosecutor, *supra* note 441 (noting that Judge Rosen learned from the broadcast that he would preside over the case).

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

494. *Id.* at 725 n.1.

495. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 449.

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

497. *Id.* at 737–38; *see* Schmitt, *supra* note 487.

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

499. *Id.* at 726, 742, 752–57.

500. *Id.* at 726, 748–57.

501. *Id.* at 725–26, 757–65; *see* Schmitt, *supra* note 487; Prosecutor, *supra* note 441.

502. *Trying Cases*, *supra* note 181, at 22; Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

use of the CIA's evidence.⁵⁰³ Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.⁵⁰⁴

Review of classified evidence in Detroit required the court to (1) establish a sensitive compartmented information facility (SCIF)⁵⁰⁵ and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.⁵⁰⁶

A SCIF is a secure room in which documents are stored in independently locked file drawers.⁵⁰⁷ The room was created by information security officers for the Justice Department, and then the court programmed the codes for access.⁵⁰⁸ Only chambers staff with security clearances may enter this SCIF.⁵⁰⁹

If there is any chance that a case will involve classified information, Judge Rosen advised the following:

The first thing that the judge should do is to have a conference with the lawyers and attempt to determine whether classified information is going to be a part of the case. That's not as easy as it sounds, because sometimes it is unclear whether classified information will be a part of the case. The government may have classified information, but they may not be certain if they are going to use it. So, at the very least, if it looks remotely as if classified information may be implicated in the case, the court should discuss this with counsel and have a very open discussion.⁵¹⁰

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

504. *Trying Cases*, *supra* note 181, at 5–6; Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

505. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; *see* Reagan, *supra* note 165, at 19 (describing SCIFs).

506. *United States v. Koubriti*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004).

Because Judge Rosen employs career law clerks, there has been no staff turnover since all of his staff were cleared, so all of his staff remain cleared. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

507. Rosen, *supra* note 449, at 105; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; *see also* *Trying Cases*, *supra* note 181, at 4–5.

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

509. *Id.*

510. *Trying Cases*, *supra* note 181, at 3.

Twentieth Hijacker

United States v. Moussaoui
(*Leonie M. Brinkema, E.D. Va.*)⁵¹¹

On September 11, 2001, four hijacked commercial jumbo jets were crashed in New York, Virginia, and Pennsylvania, killing nearly 3,000 people, including 19 suspected hijackers.⁵¹² Two planes crashed into the two towers of the World Trade Center in New York City, and one plane crashed into the Pentagon; each of these planes apparently had five hijackers aboard.⁵¹³ The fourth plane crashed near Shanksville, Pennsylvania, apparently after passengers thwarted the hijackers' plan to strike a strategic target—perhaps the Capitol.⁵¹⁴ This plane apparently had only four hijackers aboard.⁵¹⁵ Just a few days later, it was reported that Zacarias Moussaoui may have been intended to be the twentieth hijacker.⁵¹⁶

Moussaoui could not hijack a plane on September 11, because he was in custody following an arrest in Minnesota on August 16 for an immigration violation.⁵¹⁷ Three days earlier, he had begun instruction at the Pan Am International Flight Academy.⁵¹⁸ It was initially reported that he aroused suspicion when he

511. Pre-conviction appeals were heard by Fourth Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory; a post-conviction appeal was first heard by Judges Williams and Gregory and Fourth Circuit Judge William B. Traxler, Jr., and then reheard by Judges Traxler and Gregory and Fourth Circuit Judge Dennis W. Shedd.

512. The 9/11 Commission Report 1–14, 311 (2004); *United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010); *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); *United States v. Moussaoui*, 333 F.3d 509, 512 (4th Cir. 2003); see Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon*, Wash. Post, Sept. 12, 2001, at A1; Serge Schmemmann, *U.S. Attacked*, N.Y. Times, Sept. 12, 2001, at A1; see also <http://legacy.com/Sept11/Home.aspx> (providing victim profiles).

513. See Grunwald, *supra* note 512; David Johnston & Philip Shenon, *Man Held Since August Is Charged with a Role in Sept. 11 Terror Plot*, N.Y. Times, Dec. 12, 2001, at A1; *New Theory on a 20th Hijacker Is Offered*, N.Y. Times, Nov. 16, 2001, at B10 [hereinafter *New Theory*]; Schmemmann, *supra* note 512.

514. The 9/11 Commission Report 244 (2004); *Moussaoui*, 591 F.3d at 266; see Grunwald, *supra* note 512; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; *New Theory*, *supra* note 513; Schmemmann, *supra* note 512.

515. See David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, N.Y. Times, Oct. 6, 2001, at A1; Johnston & Shenon, *supra* note 513; Longman, *supra* note 514; *New Theory*, *supra* note 513.

516. Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. Times, Sept. 21, 2001, at B1; David Peterson, *Mother Says Extremists Brainwashed Her Son*, Minneapolis-St. Paul Star Trib., Sept. 20, 2001, at 9A (reporting that the French newsmagazine *L'Express* speculated online on Sept. 19, 2001, that Moussaoui might be the twentieth hijacker).

517. The 9/11 Commission Report 247 (2004) (reporting that the planners of the attacks might have canceled them if they had known about Moussaoui's arrest); *Moussaoui*, 591 F.3d at 266; *Moussaoui*, 382 F.3d at 457; *Moussaoui*, 333 F.3d at 512; *United States v. Moussaoui*, 282 F. Supp. 2d 480, 483 (E.D. Va. 2003); see Katherine C. Donahue, *Slave of Allah* 3, 15–16 (2007); Johnston & Shenon, *supra* note 513; Peterson, *supra* note 516; Pohlman, *supra* note 175, at 192.

518. The 9/11 Commission Report 246–47, 273 (2004); *Moussaoui*, 591 F.3d at 266, 274; see Johnston & Shenon, *supra* note 515.

expressed an interest in steering a jumbo jet but not in taking off or landing.⁵¹⁹ But the *Washington Post* reported in November that the director of the FBI told federal prosecutors at a closed-door meeting that initial reports of Moussaoui's not wanting to learn how to take off or land were inaccurate, and Moussaoui no longer was thought to be intended as the twentieth hijacker; he was thought to have been intended for a later attack.⁵²⁰

Moussaoui was born on May 30, 1968, in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.⁵²¹ He moved to London in 1990, and then moved back to France in 1997.⁵²² By the time he entered the United States on a student visa, French authorities already suspected him of terrorist ties.⁵²³ In February 2001, he moved to Norman, Oklahoma, for training at the Airman Flight School, where his performance was judged poor.⁵²⁴

During this time, he apparently had contact with Ramzi Muhammad Abdullah bin al-Shibh, a roommate of Mohamed Atta in Hamburg, Germany.⁵²⁵ Atta is be-

One of the three instructors who alerted authorities to suspicion concerning Moussaoui received a \$5 million reward in 2008. *See Reward in Moussaoui Case*, N.Y. Times, Jan. 25, 2008; *Two Others Seek Reward in Moussaoui Case*, N.Y. Times, Jan. 26, 2008.

519. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, Wash. Post, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 515; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, Wash. Post, Sept. 22, 2001, at A20.

520. Dan Eggen, *Yemeni Fugitive Linked to Hijackers*, Wash. Post, Nov. 15, 2001, at A20; *see* Bin al-Shibh Dep. Op. at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 10, 2003), available at 2003 WL 21263699 ("he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda"); Philip Shenon, *F.B.I. Chief Says Failed Sept. 11 Hijackers May Remain at Large*, N.Y. Times, Nov. 17, 2001, at B5.

In 2004, the 9/11 Commission reported that 9/11 conspirator "Khallad believes [Khalid Sheikh Mohammed] wanted between four and six operators per plane. KSM states that al Qaeda had originally planned to use 25 or 26 hijackers but ended up with only the 19." The 9/11 Commission Report 235 (2004).

521. *See* Daley, *supra* note 516; Donahue, *supra* note 517, at 42, 104; Schmidt & Romano, *supra* note 519.

522. *See* Daley, *supra* note 516.

523. *See* Donahue, *supra* note 517, at 16–17, 116–17; Grimaldi, *supra* note 519 (reporting that French officials warned the FBI of their suspicions at least ten days before the September 11 attacks); Diana Jean Schemo & Robert Pear, *Suspects in Hijackings Exploited Loopholes in Immigration Policy*, N.Y. Times, Sept. 27, 2001, at A1.

In April 1998, Moussaoui was at the same terrorist training camp in Afghanistan as Ahmed Ressam, who is sometimes referred to as the Millennium Bomber. Donahue, *supra* note 517, at 121, 165; *see also supra*, "Millennium Bomber" (concerning the prosecution of Ressam).

524. The 9/11 Commission Report 224–25 (2004) (reporting that Mohamed Atta, the hijacking pilot of American Airlines flight 11, visited the flight school several months earlier); *United States v. Moussaoui*, 591 F.3d 263, 274 (4th Cir. 2010); *see* Daley, *supra* note 516; Donahue, *supra* note 517, at 13–15, 125; Timothy Dwyer & Jerry Markon, *Flight Instructor Recalls Unease with Moussaoui*, Wash. Post, Mar. 10, 2006, at A2; Johnston & Shenon, *supra* note 515; Schmidt & Romano, *supra* note 519.

525. The 9/11 Commission Report 162 (2004) (Atta and Bin al-Shibh moved in with hijacker Marwan al-Shehhi in April 1998); *Moussaoui*, 591 F.3d at 274; *see* James Risen, *U.S. Says Suspect Tied to 9/11 and Qaeda Is Captured in Raid*, N.Y. Times, Sept. 14, 2002, at A1; John Taglia-

lieved to have been the leader of the September 11 attacks and the pilot of the first plane to hit the World Trade Center.⁵²⁶ Bin al-Shibh also apparently wired Moussaoui \$14,000.⁵²⁷ Ramzi bin al-Shibh was also known as Ramzi Omar, and he too came to be suspected as the intended twentieth hijacker,⁵²⁸ but he was repeatedly denied a visa to enter the United States.⁵²⁹ He was captured in Karachi, Pakistan, on the eve of the first anniversary of September 11.⁵³⁰

Unlike the hijackers, who trained on aircraft simulators for a year or more, Moussaoui enrolled in flight school only months before the September 11 attacks.⁵³¹

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.⁵³² Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court immediately appointed three attorneys to represent him.⁵³³ The court assigned the case to Judge Leonie M. Brinkema.⁵³⁴

bue & Raymond Bonner, *German Data Led U.S. to Search for More Suicide Hijacker Teams*, N.Y. Times, Sept. 29, 2001, at A1; *see also* The 9/11 Commission Report 161 (2004) (profiling Bin al-Shibh).

526. The 9/11 Commission Report 5 (2004) (Atta was “the only terrorist on board trained to fly a jet”); *see* Johnston & Shenon, *supra* note 515; Risen, *supra* note 526; Tagliabue, *supra* note 526.

527. The 9/11 Commission Report 246, 273 (2004); *see* Donahue, *supra* note 517, at 1, 28–29, 76; Johnston & Shenon, *supra* note 513.

528. *See New Theory*, *supra* note 513; Risen, *supra* note 526; Shenon, *supra* note 520; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

Another person designated the twentieth hijacker—Mohammed al-Qahtani—awaits prosecution at Guantánamo Bay. *See* William Glaberson, *Detainee Will Face New War-Crimes Charges*, N.Y. Times, Nov. 19, 2008, at A25.

529. The 9/11 Commission Report 161, 168, 225 (2004) (reporting that Bin al-Shibh could not persuade immigration officials that he would return home); *see* Michael Moss, *A Traveler with Strong Views on the Right Kind of Islam and No Fear of Sharing Them*, N.Y. Times, Dec. 12, 2001, at B6.

530. *See* Donahue, *supra* note 517, at 29; Kamran Khan & Peter Finn, *Pakistanis Detail Capture of Key 9/11 Suspect*, Wash. Post, Sept. 15, 2002, at A1; Walter Pincus, *Binalshibh Said to Provide “Useful Information,”* Wash. Post., Oct. 4, 2002, at A17; Risen, *supra* note 526.

531. *See* Johnston & Shenon, *supra* note 515.

532. Indictment, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001); United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); United States v. Moussaoui, 483 F.3d 220, 223 n.1 (4th Cir. 2007); *see* Donahue, *supra* note 517, at 1–2, 19; Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, Wash. Post, Dec. 12, 2001, at A1; Johnston & Shenon, *supra* note 513; Pohlman, *supra* note 175, at 192.

Moussaoui was originally flown to New York, on September 14, 2001, for possible prosecution there. *See* Donahue, *supra* note 517, at 18–19 (“But the Department of Justice was going to ask for the death penalty, and the New York court had deadlocked on the death penalty for two of the East African embassy bombing suspects. A court near the Pentagon would more likely decide for the death penalty.”). Moussaoui was transported to Alexandria, Virginia, on December 13, 2001. *See id.* at 19.

533. Complex Case Order at 1, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) (recognizing four capital counts), available at 2001 WL 1887910; *see* Donahue, *supra*

At his January 2, 2002, arraignment, Moussaoui refused to enter a plea: “In the name of Allah, I do not have anything to plead. I enter no plea. Thank you very much.”⁵³⁵ Judge Brinkema, with the consent of Moussaoui’s lawyer, entered a plea of not guilty.⁵³⁶ Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.⁵³⁷

Moussaoui refused to honor the judge by standing when she entered or left the courtroom, so Judge Brinkema arranged proceedings so that she and he would enter and leave the courtroom at the same time.⁵³⁸

At a hearing on April 22 concerning Moussaoui’s conditions of confinement, the defendant raised his hand and, when recognized by Judge Brinkema, began a 50-minute diatribe on Islam and the U.S. government’s conspiracy to kill him.⁵³⁹ He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.⁵⁴⁰ Judge Brinkema said that he could represent himself if he were adjudged competent to do so, but that she recommended against it and would continue the appointment of his attorneys as backups.⁵⁴¹

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.⁵⁴² On June

note 517, at 1, 19; Johnston & Shenon, *supra* note 513; David Johnston & Benjamin Weiser, *Government’s Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

534. Docket Sheet, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) [hereinafter E.D. Va. Docket Sheet]; see Philip Shenon & Neil A. Lewis, *Unpredictable Judge for Terrorism Suspect*, N.Y. Times, Dec. 26, 2001, at B6.

Tim Reagan interviewed Judge Brinkema for this report in the judge’s chambers on January 5, 2007, and by telephone on March 26, 2008.

535. See David Johnston, *Not-Guilty Plea Is Set for Man in Terror Case*, N.Y. Times, Jan. 3, 2002, at A1; see also Libby Copeland, *A Glimpse at a Symbol of a Changed World*, Wash. Post, Jan. 3, 2002, at C1; Donahue, *supra* note 517, at 8, 20.

536. E.D. Va. Docket Sheet, *supra* note 534; *Moussaoui*, 591 F.3d at 267; see Copeland, *supra* note 535; Donahue, *supra* note 517, at 20; Johnston, *supra* note 535.

537. Complex Case Order, *supra* note 533, at 3 (setting a deadline of Mar. 29, 2002); Death Penalty Notice, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Mar. 28, 2002); *Moussaoui*, 483 F.3d at 223–24 n.1; see Donahue, *supra* note 517, at 23; Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. Times, Mar. 29, 2002, at A20.

538. See Pohlman, *supra* note 175, at 193–94 (presenting excerpts from speech); see also; Donahue, *supra* note 517, at 9, 64.

539. See Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

540. *Moussaoui*, 591 F.3d at 269–70; United States v. Moussaoui, 333 F.3d 509, 512–13 (4th Cir. 2003); see Mot. Proceed Pro Se, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Apr. 25, 2002) (handwritten motion dated Apr. 22, 2002); Pohlman, *supra* note 175, at 192; Donahue, *supra* note 517, at 23–24, 36, 39–40, 166; Shenon, *supra* note 539.

541. Mental Health Evaluation Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2002), available at 2002 WL 1311722; see *Moussaoui*, 591 F.3d at 270; Donahue, *supra* note 517, at 24, 36, 54; Shenon, *supra* note 539.

542. See Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11; see also Donahue, *supra* note 517, at 54.

13, Judge Brinkema granted Moussaoui's motion to represent himself, keeping appointed counsel as standbys.⁵⁴³

The government filed a superseding indictment on June 19,⁵⁴⁴ and at the arraignment six days later Moussaoui tried to plead no contest.⁵⁴⁵ Judge Brinkema admonished him that such a plea did not mean what he seemed to think it meant and again entered a plea of not guilty on his behalf.⁵⁴⁶

On June 24, in *Ring v. Arizona*, the Supreme Court determined that aggravating factors meriting a death sentence must be proved to a jury beyond a reasonable doubt.⁵⁴⁷ So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.⁵⁴⁸ At the July 18 arraignment on the new indictment, Moussaoui announced, "I, Moussaoui Zacarias, in the interests to preserve my life, enter with full conscience a plea of guilty, because I have knowledge and participated in Al Qaeda."⁵⁴⁹ Judge Brinkema decided to give him a week to reconsider his guilty plea.⁵⁵⁰ On July 25, Moussaoui insisted that his support for al-Qaeda did not include involvement in the September 11 hijackings, and, on instructions from Judge Brinkema that this was inconsistent with a guilty plea, he changed his plea to not guilty.⁵⁵¹

On January 31, 2003, Judge Brinkema secretly ordered the government to allow Moussaoui's standby attorneys to interview Bin al-Shibh, who was undergoing intensive interrogations overseas.⁵⁵² Judge Brinkema postponed the trial

543. Pro Se Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 14, 2002), available at 2002 WL 1311738; *Moussaoui*, 591 F.3d at 274–75, 292–93; *Moussaoui*, 333 F.3d at 513; see Donahue, *supra* note 517, at 24, 36, 54; Pohlman, *supra* note 175, at 192; Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

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

545. Order Denying No-Contest Plea, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 9, 2002), available at 2002 WL 1587025; see Neil A. Lewis, *Defendant in Sept. 11 Plot Accuses Judge of Trickery*, N.Y. Times, June 26, 2002, at A18.

546. Order Denying No-Contest Plea, *supra* note 545; E.D. Va. Docket Sheet, *supra* note 534; see Lewis, *supra* note 545.

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

548. Second Superseding Indictment, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 16, 2002); *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); see Donahue, *supra* note 517, at 26; Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

549. *United States v. Moussaoui*, 591 F.3d 263, 270 (4th Cir. 2010); see Philip Shenon, *9/11 Defendant in Guilty Plea*, N.Y. Times, July 19, 2002, at A1; see also Donahue, *supra* note 517, at 26; Pohlman, *supra* note 175, at 194.

550. *Moussaoui*, 591 F.3d at 270; see Donahue, *supra* note 517, at 26; Shenon, *supra* note 549.

551. E.D. Va. Docket Sheet, *supra* note 534; *Moussaoui*, 591 F.3d at 270–71; see Donahue, *supra* note 517, at 27; Pohlman, *supra* note 175, at 194; Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

552. Bin al-Shibh Dep. Op., *supra* note 520, at 16–17 ("The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant's behalf—both as to guilt and potential punishment."); Bin al-Shibh Deposition Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 31, 2003); *Moussaoui*, 382 F.3d at 458; *United States v. Moussaoui*, 333 F.3d 509, 513 (4th Cir. 2003); E.D. Va. Docket Sheet, *supra* note 534;

indefinitely to permit the government to appeal.⁵⁵³ The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.⁵⁵⁴ Judge Brinkema ruled that a government summary of what Bin al-Shibh would say if interviewed would be insufficient “because of its unreliability, incompleteness and inaccuracy.”⁵⁵⁵ After oral argument on June 3 before U.S. Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,⁵⁵⁶ the court of appeals determined on June 26 that it did not have appellate jurisdiction over Judge Brinkema’s order, and the merits of the government’s objection were not so clear as to warrant mandamus.⁵⁵⁷

On August 29, Judge Brinkema ordered the government to provide Moussaoui deposition access to Khalid Sheikh Mohammed—regarded as the mastermind of the September 11 attacks—and Mustafa Ahmed al-Hawsawi—regarded as the paymaster for the September 11 attacks—as well.⁵⁵⁸ Mohammed and al-Hawsawi

see Donahue, *supra* note 517, at 28–29; Pohlman, *supra* note 175, at 194, 196; Susan Schmidt & Dana Priest, *Judge Orders Access to Detainee for Moussaoui’s Lawyers*, Wash. Post, Feb. 1, 2003, at A9; Philip Shenon, *Moussaoui Case May Have to Shift from U.S. Court to Tribunal, Administration Says*, N.Y. Times, Feb. 7, 2003 (reporting that the government feared “that if Mr. bin al-Shibh is questioned by Mr. Moussaoui’s lawyers, he might divulge information about Al Qaeda that the government wants to keep secret.”).

553. Order Vacating Trial Date, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 12, 2003), available at 2003 WL 402249; *see* Donahue, *supra* note 517, at 29; Jerry Markon, *Moussaoui Trial Postponed for Third Time*, Wash. Post, Feb. 13, 2002, at A8; Philip Shenon, *Judge Grants the Government a Delay of Moussaoui’s Trial*, N.Y. Times, Feb. 13, 2003, at A21.

554. *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018 (4th Cir. Apr. 14, 2003); *Moussaoui*, 382 F.3d at 458; *see* Donahue, *supra* note 517, at 29; Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Pohlman, *supra* note 175, at 194; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

555. Bin al-Shibh Substitution Op. at 6, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 15, 2003), available at 2003 WL 21277161; *Moussaoui*, 382 F.3d at 458–59; *see* Donahue, *supra* note 517, at 29; Jerry Markon, *Judge Rejects Bid to Block Access to Sept. 11 Planner*, Wash. Post, May 16, 2003, at A3; Philip Shenon, *Ruling Leaves Legal Standoff in 9/11 Case*, N.Y. Times, May 16, 2003, at A17.

556. *Moussaoui*, 382 F.3d at 513; *Moussaoui*, 382 F.3d at 459; *see* Philip Shenon, *Justice Dept. Warns of Risk to Prosecution and Security*, N.Y. Times, June 4, 2003, at A21.

557. *Moussaoui*, 382 F.3d at 512, 514, 517 (resolving *In re United States*, No. 03-4261 (4th Cir. Mar. 17, 2003) (mandamus); *United States v. Moussaoui*, No. 03-4162 (4th Cir. Feb. 12, 2003) (appeal)); *Moussaoui*, 382 F.3d at 459; *see* Donahue, *supra* note 517, at 29; Neil A. Lewis, *Bush Officials Lose Round in Prosecuting Terror Suspect*, N.Y. Times, June 27, 2003, at A13; Jerry Markon, *Appeals Court Rebuffs U.S. in Moussaoui Case*, Wash. Post, June 27, 2003, at A1; Pohlman, *supra* note 175, at 198.

Over the dissent of five judges, the court decided not to rehear the appeal en banc. *United States v. Moussaoui*, 382 F.3d 279 (4th Cir. 2003); *see* Jerry Markon, *Moussaoui Prosecutors Defy Judge*, Wash. Post, July 15, 2003, at A1; Philip Shenon, *U.S. Will Defy Court’s Order in Terror Case*, N.Y. Times, July 15, 2003, at A1.

558. Mohammed and al-Hawsawi Dep. Op., *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2003), available at 2003 WL 22258213; *Moussaoui*, 382 F.3d at 459; *see* Donahue, *supra* note 517, at 29; Eric Lichtblau, *New Ruling Favors Suspect in Terror Case*, N.Y. Times, Aug. 31, 2003, at 123; Jerry Markon, *Moussaoui Granted Access to Witnesses*, Wash. Post,

had been captured in Pakistan on February 27.⁵⁵⁹ The government refused to comply with the deposition orders, so Judge Brinkema ruled that the government could not argue that Moussaoui had anything to do with the September 11 attacks, and Judge Brinkema ruled that the government could not seek a sentence of death.⁵⁶⁰

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.⁵⁶¹ Although the court of appeals agreed that the government's proposed substitutions for detainee depositions were inadequate, in an opinion by Judge Wilkins, the court ordered Judge Brinkema to attempt to craft adequate substitutions.⁵⁶² Judge Gregory dissented in part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.⁵⁶³

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.⁵⁶⁴ The government prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.⁵⁶⁵ The court of appeals did not share Judge Brinkema's skepticism about the reliability of the detainee reports: the interrogators "have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to

Aug. 30, 2003, at A12; Susan Schmidt, *2nd Key Al Qaeda Suspect Identified*, Wash. Post, Mar. 5, 2003, at A1.

Ramzi Yousef, a principal in the first World Trade Center bombing, is Mohammed's nephew. The 9/11 Commission Report 73, 145 (2004). "According to KSM, he started to think about attacking the United States after Yousef returned to Pakistan following the 1993 World Trade Center bombing." *Id.* at 153.

559. See Donahue, *supra* note 517, at 29; Schmidt, *supra* note 558.

Khalid Sheikh Mohammed, Mustafa Ahmed al-Hawsawi, Ramzi bin al-Shibh, and two others were arraigned in military tribunals at Guantánamo Bay on June 5, 2008. See William Glaberson, *Arraigned, 9/11 Defendants Talk of Martyrdom*, N.Y. Times, June 6, 2008, at A1; Josh White, *9/11 Architect Tells Court He Hopes for Martyrdom*, Wash. Post, June 6, 2008, at A1.

560. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 481–82, 487 (E.D. Va. 2003); *Moussaoui*, 382 F.3d at 459–60; see Donahue, *supra* note 517, at 29–30; Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Pohlman, *supra* note 175, at 191, 198; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

561. *Moussaoui*, 382 F.3d at 462–63.

562. *Id.* at 456–57, 479–82; see Donahue, *supra* note 517, at 122; Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5; Pohlman, *supra* note 175, at 191, 224–32.

On March 21, 2005, the Supreme Court denied Moussaoui's petition for a writ of certiorari. *Moussaoui v. United States*, 544 U.S. 931 (2005); see Donahue, *supra* note 517, at 31; Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005; Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3; Pohlman, *supra* note 175, at 191.

563. *Moussaoui*, 382 F.3d at 483–89 (Gregory, concurring in part and dissenting in part); see Markon, *supra* note 562; Pohlman, *supra* note 175, at 226–27.

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

565. *Id.*

prevent acts of terrorism and to capture other al Qaeda operatives.”⁵⁶⁶ Noting that Judge Brinkema judged the summaries accurate reflections of the reports, the court of appeals ruled that the summaries “provide an adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses’ deposition testimony.”⁵⁶⁷

Meanwhile, on November 14, 2003, Judge Brinkema decided that because of his frequent inappropriate filings Moussaoui could no longer proceed pro se.⁵⁶⁸ Seventeen months later, on April 22, 2005, one month after the Supreme Court denied his petition for a writ of certiorari, Moussaoui pleaded guilty to a conspiracy to kill Americans, but denied involvement in the September 11 attacks.⁵⁶⁹

Judge Brinkema bifurcated Moussaoui’s penalty trial into a first phase on whether he was eligible for the death penalty and a possible second phase on whether he merited the death penalty.⁵⁷⁰ Jury selection began on February 6, 2006.⁵⁷¹ The court sent summonses to more than 1,000 residents within the district’s Alexandria division.⁵⁷² Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than 500 potential jurors filled out.⁵⁷³

566. *Id.* at 478.

567. *Id.* at 479.

568. Order Vacating Pro Se Status at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 14, 2003); *United States v. Moussaoui*, 591 F.3d 263, 271 (4th Cir. 2010); *Moussaoui*, 382 F.3d at 460 n.6; see Donahue, *supra* note 517, at 30–31, 36, 40; Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Pohlman, *supra* note 175, at 194; Philip Sheanon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

569. Plea Statement, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2005); *Moussaoui*, 591 F.3d at 272; *United States v. Moussaoui*, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see Donahue, *supra* note 517, at 31; Neil A. Lewis, *Moussaoui Tells Court He’s Guilty of a Terror Plot*, N.Y. Times, Apr. 23, 2005, at A1; Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, Wash. Post, Apr. 23, 2005, at A1; Pohlman, *supra* note 175, at 192, 246.

“Mr. Moussaoui’s lawyers urged him not to plead guilty, but they could not tell him why.” Adam Liptak, *The Right to Counsel, in the Right Situations*, N.Y. Times, Feb. 26, 2008, at A11.

570. *Moussaoui*, 591 F.3d at 275; Leonie M. Brinkema, *United States v. Moussaoui: Preliminary Venire Instructions* (Feb. 6, 2006); Leonie M. Brinkema, *United States v. Moussaoui: Jury Instructions for Penalty Phase Part Two* (Feb. 6, 2006); see Donahue, *supra* note 517, at 33–34, 65.

571. E.D. Va. Docket Sheet, *supra* note 534; see Donahue, *supra* note 517, at 34, 59; Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

572. Interview with Hon. Leonie M. Brinkema, Mar. 26, 2007.

573. Trial Conduct Order 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006); Leonie M. Brinkema, *United States v. Moussaoui: Jury Questionnaire* (Feb. 6, 2006); Interview with Hon. Leonie M. Brinkema, Mar. 26, 2007; see Donahue, *supra* note 517, at 59 (“Beginning on Wednesday, February 15, the potential jurors were to arrive in smaller groups for individual questioning, or *voir dire*, in order to create a pool of 85 potential jurors.”; *id.* at 61–62; Jerry Markon, *Terrorism Jury Faces Slew of Questions*, Wash. Post, Nov. 29, 2006, at B1.

Opening statements began on March 6.⁵⁷⁴ The government's core argument for Moussaoui's execution was that the tragedies of September 11, 2001, would not have occurred had Moussaoui not lied to authorities following his arrest in August 2001.⁵⁷⁵ Proceedings were not publicly televised, but they were broadcast to viewing sites in Manhattan, Central Islip, Boston, Philadelphia, Newark, and Alexandria for family members of September 11 victims.⁵⁷⁶

As the sentencing trial entered its second week, Judge Brinkema learned that a lawyer for the Transportation Security Administration was improperly coaching witnesses who were aviation officials.⁵⁷⁷ Judge Brinkema ruled that the coached witnesses could not testify.⁵⁷⁸

The trial continued and jurors began to deliberate on Wednesday, March 29.⁵⁷⁹ After a weekend break,⁵⁸⁰ on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.⁵⁸¹ On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,⁵⁸² returning a verdict of life in prison on Wednesday, May 3.⁵⁸³ After inter-

574. E.D. Va. Docket Sheet, *supra* note 534; *see* Donahue, *supra* note 517, at 59, 65; Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14.

575. *See* Lewis, *supra* note 574; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

576. *See* Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006); Donahue, *supra* note 517, at 65–66; Timothy Dwyer, *9/11 Families to Watch Moussaoui Face Fate*, Wash. Post, Feb. 6, 2006, at A1; Neil A. Lewis, *At Satellite Courthouses, 9/11 Relatives Will Watch Moussaoui's Sentencing*, N.Y. Times, Mar. 5, 2006, at 118; *see also* Trial Conduct Order 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 3, 2006).

"During the trial, Judge Brinkema remarked that fewer people were watching from the off-site courtrooms than anticipated." Donahue, *supra* note 517, at 174.

577. *See* Donahue, *supra* note 517, at 69–70; Stephen Labaton & Matthew L. Wald, *Lawyer Thrust into Spotlight After Misstep in Terror Case*, N.Y. Times, Mar. 15, 2006, at A1; Neil A. Lewis, *Judge Calls Halt to Penalty Phase of Terror Trial*, N.Y. Times, Mar. 14, 2006, at A1; Jerry Markon & Timothy Dwyer, *Judge Halts Terror Trial*, Wash. Post, Mar. 14, 2006, at A1.

578. Second Aviation Witness Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006); First Aviation Witness Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 14, 2006); *see* Donahue, *supra* note 517, at 70; Neil A. Lewis, *Judge Gives Prosecutors New Chance in Terror Case*, N.Y. Times, Mar. 18, 2006, at A10; Neil A. Lewis, *Judge Penalizes Moussaoui Prosecutors by Barring Major Witnesses*, N.Y. Times, Mar. 15, 2006, at A24; Jerry Markon, *Moussaoui Prosecutors Get a Break*, Wash. Post, Mar. 18, 2006, at A1; Jerry Markon & Timothy Dwyer, *Federal Witnesses Banned in 9/11 Trial*, Wash. Post, Mar. 15, 2006, at A1.

579. E.D. Va. Docket Sheet, *supra* note 534; *see* Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

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

581. *United States v. Moussaoui*, 591 F.3d 263, 277 (4th Cir. 2010); Phase 1 Jury Verdict, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 3, 2006); *see* Donahue, *supra* note 517, at 85; Neil A. Lewis, *Jurors Permit Death Penalty for Moussaoui*, N.Y. Times, Apr. 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Moussaoui Found Eligible for Death*, Wash. Post, Apr. 4, 2006, at A1.

582. E.D. Va. Docket Sheet, *supra* note 534; *see* Donahue, *supra* note 517, at 99; Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

views with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.⁵⁸⁴

Surprised that the jury spared his life, and more confident as a result in the possibility for a fair trial in an American court, Moussaoui moved on May 8 to withdraw his guilty plea.⁵⁸⁵ Judge Brinkema denied his motion.⁵⁸⁶ The court of appeals affirmed: "the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands."⁵⁸⁷

583. Phase 2 Jury Verdict, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 3, 2006); *Moussaoui*, 591 F.3d at 277, 302; *United States v. Moussaoui*, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see Donahue, *supra* note 517, at 2, 100; Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. Times, May 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, Wash. Post, May 4, 2006, at A1.

On May 12, 2006, [Moussaoui] was flown by the US Marshals Service on a small jet operated by the Justice Prisoner and Alien Transportation System, more commonly known as "Con Air," to the Administrative Maximum security facility, or "Supermax" prison in Florence, Colorado. He now spends 23 hours a day alone in a cell, with another hour alone in exercise space.

Donahue, *supra* note 517, at 3.

584. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1; see Donahue, *supra* note 517, at 2–3, 102–03.

585. Mot. to Withdraw Plea, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 517, at 102, 167; Neil A. Lewis, *Moussaoui's Move to Recant Guilty Plea Is Denied*, N.Y. Times, May 9, 2006, at A18; Jerry Markon, *Moussaoui Fails in Bid to Withdraw 9/11 Guilty Plea*, Wash. Post, May 9, 2006, at A16.

According to Moussaoui's affidavit,

16. I was extremely surprised when the jury did not return a verdict of death because I knew that it was the intention of the American justice system to put me to death.

17. I had thought that I would be sentenced to death based on the emotions and anger toward me for the deaths on September 11 but after reviewing the jury verdict and reading how the jurors set aside their emotions and disgust for me and focused on the law and the evidence that was presented during the trial, I came to understand that the jury process was more complex than I assumed.

18. Because I now see that it is possible that I can receive a fair trial even with Americans as jurors and that I can have the opportunity to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001, I wish to withdraw my guilty plea and ask the Court for a new trial to prove my innocence of the September 11 plot.

Moussaoui Aff. at 3, Mot. to Withdraw Plea, *supra*; see Donahue, *supra* note 517, at 167.

586. Order Denying Plea Withdrawal, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 517, at 102, 167; Lewis, *supra* note 585; Markon, *supra* note 585; Pohlman, *supra* note 175, at 247.

587. *Moussaoui*, 591 F.3d at 307; see Docket Sheet, *United States v. Moussaoui*, No. 06-4494 (4th Cir. May 15, 2006) [hereinafter 4th Cir. *Moussaoui* May 15, 2006, Docket Sheet] (noting Feb. 17, 2010, petition for rehearing).

The appeal was first heard on January 26, 2009. 4th Cir. *Moussaoui* May 15, 2006, Docket Sheet, *supra*; see Jerry Markon, *Moussaoui's Attorneys Call Guilty Plea Invalid*, Wash. Post, Jan. 27, 2009, at A8. Judge Williams was on the panel that heard the appeal, but she retired for health reasons before the panel issued an opinion, so the appeal was reheard on September 25, 2009. 4th Cir. *Moussaoui* May 15, 2006, Docket Sheet, *supra*; see *New Arguments in 9/11 Case*, N.Y.

Challenge: Attorney Appointment

Judge Brinkema initially appointed the Federal Public Defender and a private attorney to represent him.⁵⁸⁸ “The relationship between Moussaoui and his appointed attorneys was strained at best, and Moussaoui almost immediately began demanding to proceed *pro se*, but with the assistance of Muslim counsel.”⁵⁸⁹ Moussaoui identified a Muslim attorney in Texas whom he wanted to consult with, but this attorney never made an appearance, never sought admission to the court’s bar, and never consented to the screening required for the security clearance that would be needed to represent Moussaoui in court.⁵⁹⁰

Moussaoui’s relations with private appointed counsel were more problematic than his relations with the Federal Defender’s office, so Judge Brinkema appointed another private attorney.⁵⁹¹ “Although Moussaoui initially refused to communicate with any of his appointed counsel, he later testified that he began communicating with [the second private attorney] because [he] was polite to [Moussaoui].”⁵⁹²

Challenge: Court Security

Security was enhanced at Moussaoui’s arraignment.⁵⁹³ Moussaoui arrived before 6:00 a.m., while it was still dark.⁵⁹⁴ Deputy marshals surrounded the courthouse, and extra metal detectors were stationed at the courtroom.⁵⁹⁵ Although the outside air was frigid, members of the news media and the public—there were several dozen of the former and almost none of the latter—were not allowed into the building until shortly before the hearing.⁵⁹⁶

At subsequent appearances also, extra deputy marshals guarded the courthouse.⁵⁹⁷ It was reported that the courthouse had never seen such a level of security.⁵⁹⁸

Times, July 15, 2009, at A11; Josh White & Jerry Markon, *Diagnosis of Early Alzheimer’s Forces Chief Judge to Retire*, Wash. Post, July 10, 2009, at B3.

Tim Reagan attended the September 25, 2009, rehearing and interviewed Judge Roger L. Gregory for this report in the judge’s chambers that same day.

588. *Moussaoui*, 591 F.3d at 267.

589. *Id.*

590. *Id.* at 269.

591. *Id.*

592. *Id.* at 271 n.6.

593. See Copeland, *supra* note 535; Johnston, *supra* note 535.

594. See Copeland, *supra* note 535; see also Brooke A. Masters, *Alexandria’s Logistical Juggling Act*, Wash. Post, Mar. 14, 2002 (“High-risk prisoners are being transported between the jail and the courthouse at night or in the early morning, and the streets are shut down to minimize the risks.”).

595. See Johnston, *supra* note 535.

596. See Copeland, *supra* note 535.

597. See Masters, *supra* note 594.

598. See Libby Copeland & Richard Leiby, *The Moussaoui Circus Extends Its Run*, Wash. Post, July 26, 2002 (“This is the most security we’ve ever had to use here at the courthouse since it opened in 1996,” said John Clark, acting U.S. marshal for the Eastern District of Virginia.”).

On Friday, April 22, 2005, [at the hearing concerning Moussaoui's conditions of confinement where Moussaoui asked to proceed pro se,] security at the Alexandria Federal District Court was extremely tight. Two dogs and their handlers patrolled the street outside the courthouse, sniffing people's briefcases and purses for explosive devices. People entering the courthouse passed through a nuclear materials detector positioned just outside the doors. Up on the seventh floor, Courtroom 700 was closed off until 1:30 p.m. . . . At precisely 1:30 p.m. the guards let people take the elevators up from the second floor. The lawyers, press, family members of 9/11 victims, and the curious began to file in, again passing through another security checkpoint. IDs were checked, briefcases were x-rayed, people walked through metal detectors, men pulled their pant legs up to show that they had nothing hidden in their socks. At exactly 3:30 p.m. Judge Brinkema and Zacarias Moussaoui both entered the courtroom. Proceedings began.⁵⁹⁹

Challenge: Jury Security

Judge Brinkema used an anonymous jury.⁶⁰⁰ Jurors assembled in a secret location and were driven to the courthouse.⁶⁰¹ The court set up a special room for the jurors to eat lunch away from the public.⁶⁰² They were never permitted to be in the building unsupervised.⁶⁰³

Judge Brinkema observed that it is important to work cooperatively with the Marshal while maintaining ultimate responsibility.⁶⁰⁴

Challenge: Classified Evidence

Classified materials require extraordinary procedures, but Judge Brinkema tries to keep procedures as normal as possible.⁶⁰⁵ She requires all of her law clerks and other staff members to qualify for top-secret security clearances.⁶⁰⁶

Because Moussaoui's standby attorneys would need access to classified evidence to prepare his defense, Judge Brinkema issued a protective order, which provided that defense access to classified information would require appropriate security clearances and the signing of a memorandum of understanding requiring that classified secrets be kept secret forever.⁶⁰⁷

Moussaoui himself was not supposed to have access to classified information.⁶⁰⁸ But, in June and July of 2002, the government inadvertently included clas-

599. Donahue, *supra* note 517, at 32.

600. Trial Conduct Order 1, *supra* note 573; *see* Markon, *supra* note 573.

601. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.*

606. *Id.*

607. *United States v. Moussaoui*, 591 F.3d 263, 267 (4th Cir. 2010); Protective Order & Mem. of Understanding, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002); *see* Donahue, *supra* note 517, at 23; Pohlman, *supra* note 175, at 194.

608. Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 23, 2002), available at 2002 WL 1987964.

As the Government strenuously argues, the defendant's repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and

sified materials among documents produced to Moussaoui.⁶⁰⁹ On August 22, the government wrote to Judge Brinkema stating that two documents produced to Moussaoui had mistakenly not been classified and asking that a “walled-off FBI team” search Moussaoui’s cell to retrieve the documents.⁶¹⁰ (To accommodate the pro se defendant’s access to documents in this case, Moussaoui was eventually given three cells.⁶¹¹)

Judge Brinkema denied the FBI search.

[G]iven the massive amounts of material produced in this case, there is a significant danger than any agents sent to Mr. Moussaoui’s cell would have to rummage through all of his materials. That would risk serious intrusions into his *pro se* work product, which a “walled off” FBI team would not solve.⁶¹²

But Judge Brinkema did permit the Marshal Service, in consultation with the court information security officer, to search Moussaoui’s cells for the two documents plus an additional five that the government identified in the interim as improperly produced.⁶¹³ Of the seven searched for, five were found.⁶¹⁴ By the following week, the government presented to Judge Brinkema a list of 43 improperly produced documents.⁶¹⁵ Many of the documents were prepared by FBI agents who were brought into September 11 investigations without sufficient training in

pledged allegiance to Osama Bin Laden are strong evidence that the national security could be threatened if the defendant had access to classified information.

Id. at 2; see Liptak, *supra* note 569; Philip Shenon, *U.S. Gave Secrets to Terror Suspect*, N.Y. Times, Sept. 27, 2002, at A1.

Standby counsel, but not Moussaoui, also were granted access to “sensitive security information,” which is secret—but not classified—information related to transportation security. See 49 C.F.R. § 1520.5(a); Tom Jackman, *Moussaoui’s Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

609. Letter (Aug. 22, 2002) [hereinafter Aug. 22, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 26, 2002), available at 2002 WL 32001771; Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; see Shenon, *supra* note 608.

These documents [redacted] were inadvertently produced as unclassified documents, in electronic form, to defense counsel and Mr. Moussaoui on June 12, 2002 [redacted] and June 7, 2002 [redacted]. On July 29, 2002, in accordance with the Court’s order on hard-copy discovery, a paper copy of these documents was delivered to Mr. Moussaoui.

Aug. 22, 2002, Letter, *supra*, at 1.

610. Aug. 22, 2002, Letter, *supra* note 609; see Shenon, *supra* note 608.

611. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

612. Aug. 22, 2002, Letter, *supra* note 609.

613. Interview with Dep’t of Justice Litig. Sec. Section Staff, Feb. 3, 2010; see Letter (Aug. 29, 2002) [hereinafter Aug. 29, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *supra* note 609.

614. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; see Aug. 29, 2002, Letter, *supra* note 613; Shenon, *supra* note 608.

615. See Letter (Sept. 5, 2002) [hereinafter Sept. 5, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *supra* note 609; Shenon, *supra* note 608.

handling and labeling classified information.⁶¹⁶ Eventually, the documents were retrieved and properly classified.⁶¹⁷

In part to accommodate the disruption to Moussaoui's trial preparation caused by the searches for improperly produced documents, Judge Brinkema pushed back the trial date six months.⁶¹⁸

Challenge: Classified Arguments

District Court for the Eastern District of Virginia

Moussaoui's appointed standby attorneys had security clearances; to ensure that they did not inadvertently put classified information into the public record, Judge Brinkema established a procedure in which they submitted filings to the court information security officer, who was given 48 hours to identify any classified information that had to be redacted from the public record.⁶¹⁹ These filings could not be shared with Moussaoui, who did not have a security clearance, until they had been reviewed by the security officer.⁶²⁰ Unredacted filings containing classified information were filed with the security officer rather than the clerk.⁶²¹ The government was responsible for classification reviews if its filings.⁶²²

Court of Appeals for the Fourth Circuit

The court of appeals' clerk's office anticipated that it was likely to eventually receive an appeal in Moussaoui's case, and classified information would be part of the court record.⁶²³ So the clerk's office worked with the court information security officers to (1) create a sensitive compartmented information facility (SCIF)—an especially secure storage facility suitable for storing sensitive compartmented information and other classified information—and (2) begin the process of obtaining security clearances for several staff members.⁶²⁴

The court's judges meet in regular session in Richmond six times a year. There are safes in the court's SCIF for the Moussaoui case, with separate drawers

616. See Dan Eggen, *FBI Failed to Classify Reports Before Moussaoui Had Them*, Wash. Post, Sept. 28, 2002, at A8.

617. Classified Document Retrieval Unsealing Order, *supra* note 609, at 1.

618. Order Rescheduling Trial, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 30, 2002), available at 2002 WL 32001785; see Philip Shenon, *Judge Agrees to New Delay in Trial in Conspiracy Case*, N.Y. Times, Oct. 1, 2002, at A20.

619. Classified Filing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Oct. 3, 2002); see *Moussaoui Motions to Be Cleared*, Wash. Post, Oct. 4, 2002, at A15 [hereinafter *Moussaoui Motions*].

620. Classified Filing Order, *supra* note 619, at 2; see *Moussaoui Motions*, *supra* note 619.

621. Classified Filing Order, *supra* note 619, at 2–3.

622. *Id.* at 2; see *Moussaoui Motions*, *supra* note 619.

One 71-page government brief had 50 blank (redacted) pages, 15 partially redacted pages, three full pages of text, and three head and end pages. Gov't Response Brief, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 13, 2003); see Pohlman, *supra* note 175, at 194.

623. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

624. *Id.*; Interview with Dep't of Justice Litig. Sec. Section Staff, Feb. 3, 2010; see Reagan, *supra* note 165, at 19 (describing SCIFs).

allocated to each judge.⁶²⁵ Cleared court staff members can bring classified documents from the SCIF to judges' Richmond chambers for review while the judges are in Richmond.⁶²⁶ Judge Gregory's home chambers are in Richmond, so cleared court staff members can bring him classified documents from the Richmond SCIF even when the court is not in session. Judge Gregory frequently visits the SCIF himself to retrieve documents.⁶²⁷ He observed that although it is convenient to have the documents stored near his chambers, he still must keep them within view at all times while they are out of the SCIF.⁶²⁸

Judge Wilkins had chambers in Greenville, South Carolina, and the courthouse there has a SCIF.⁶²⁹ Judge Williams had chambers in Orangeburg, South Carolina, which is approximately 50 miles south of Columbia. Either court information security officers brought classified documents to her chambers in Orangeburg for her review while they were there, or she traveled to Columbia, where the FBI has a SCIF.⁶³⁰ Judge Shedd's chambers are in Columbia, so he can review files at the FBI SCIF there or at the court in Richmond during a session.⁶³¹

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, the briefs were filed with the court information security officer under seal.⁶³² Some information about their contents, however, were reported in the *Washington Post*.⁶³³ In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs were filed with the court information security officer under seal and redacted briefs were filed in the public record.⁶³⁴

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.⁶³⁵ Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.⁶³⁶ Moussaoui would give a document for the court of appeals to the jail where he was detained, and the jail would pass

625. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Feb. 3, 2010.

626. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

627. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

628. *Id.*

629. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008. Judge Wilkins retired on October 5, 2008. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>.

630. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

631. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

632. Docket Sheet, *United States v. Moussaoui*, No. 03-4162 (4th Cir. Feb. 12, 2003) [hereinafter 4th Cir. *Moussaoui* Feb. 12, 2003, Docket Sheet]; see Jerry Markon, *U.S. Filed Terror Briefs in Secrecy*, Wash. Post, Mar. 15, 2003, at A6 ("legal specialists said they could recall virtually no other examples of the government's filing an entire set of legal briefs under seal").

633. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, Wash. Post, Apr. 2, 2003, at A7.

634. Docket Sheet, *United States v. Moussaoui*, No. 03-4792 (4th Cir. Oct. 7, 2003) [hereinafter 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet].

635. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

636. *Id.*

it on to a court information security officer who notified the court.⁶³⁷ The court docketed it as filed with the court information security officer, who had it reviewed for classified information and then sent a redacted copy to the court for public filing.⁶³⁸ Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.⁶³⁹

For a petition to rehear en banc the ruling on Judge Brinkema's discovery sanction, full briefs were filed in the court's Richmond SCIF, and redacted copies were sent to each judge.⁶⁴⁰ Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.⁶⁴¹ The court denied the petition.⁶⁴²

The appeal of Moussaoui's guilty plea also included classified briefing.⁶⁴³ Judge Gregory observed that the most difficult issue presented to an appellate judge by the presence of classified information in a case is the difficulty of obtaining law clerk assistance.⁶⁴⁴ Judge Gregory does not have a career law clerk, and security clearances take such a large fraction of a temporary law clerk's tenure to acquire that he relies on a court of appeals staff attorney, who has a security clearance, to help him with matters involving classified information.⁶⁴⁵

In August 2009, the court worked with the court information security officer to establish a larger SCIF in Richmond, suitable for working and meeting in addition to storage.⁶⁴⁶

Challenge: Closed Proceedings

Closed proceedings in district courts are not common, but they do occur, especially in cases involving classified information. Closed proceedings in appellate courts are more rare.

All four oral arguments before the court of appeals included a public session and a closed session at which classified information could be discussed.⁶⁴⁷ At the

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet, *supra* note 634 (noting denial of rehearing on Oct. 13, 2004).

643. 4th Cir. *Moussaoui* May 15, 2006, Docket Sheet, *supra* note 587; Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

644. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

645. *Id.*

646. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008, and Sept. 1, 2009; Interview with Dep't of Justice Litig. Sec. Section Staff, Feb. 3, 2010.

647. 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet, *supra* note 634; Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 28, 2009; *see* Pohlman, *supra* note 175, at 196, 217; *id.* at 197–98 (presenting redacted transcript from closed June 3, 2002, closed session).

public session, a court information security officer and a CIA officer attended to monitor the proceeding in case it needed to be interrupted to prevent disclosure of classified information.⁶⁴⁸ At these public sessions, no interruption was necessary.⁶⁴⁹

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, a motion panel of the court of appeals initially granted the government's motion to seal the oral argument.⁶⁵⁰ But on a motion by news media to hold the oral argument in open court, the panel that would ultimately hear the appeal decided to bifurcate the argument: A public oral argument was held followed by a closed oral argument concerning classified information.⁶⁵¹ The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.⁶⁵² The court ordered that a redacted transcript of the closed argument be made available to the public within five business days of the court reporter's submission of the transcript to the government, which was required within 24 hours of the argument.⁶⁵³ A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.⁶⁵⁴

Challenge: Classified Opinion

Many opinions issued by the district court and the court of appeals in this case were redacted. Judge Gregory observed that in the appeal of Judge Brinkema's discovery sanction the majority's opinion and Judge Gregory's separate opinion came back from the redaction process looking like Swiss cheese.⁶⁵⁵ In the opinion issued by the court, redactions appear as white space equal in size to the amount of text redacted; in West's published version, the expression "[Redacted]" replaces redacted text, regardless of quantity.

Challenge: Terrorist Communications

Once Moussaoui declared in court that he wished to proceed pro se, he began to file with the court handwritten documents that the court regarded as motions.⁶⁵⁶

648. Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 28, 2009.

649. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

650. 4th Cir. *Moussaoui* Feb. 12, 2003, Docket Sheet, *supra* note 632 (noting Mar. 24, 2003, grant of motion to seal argument); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Jerry Markon, *Moussaoui Hearing Closed to Public*, Wash. Post, Mar. 25, 2003, at A2.

651. Argument Closure Op., *Moussaoui*, No. 03-4162 (4th Cir. May 13, 2002) (order by Circuit Judges William W. Wilkins, H. Emory Widener, Jr., and Paul V. Niemeyer), available at 65 Fed. Appx. 881; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Philip Shenon, *In Shift, Appeals Court Opens Hearing on a 9/11 Suspect*, N.Y. Times, May 14, 2003, at A15.

652. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

653. Argument Closure Op., *supra* note 651, at 17.

654. *See* Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, Wash. Post, June 13, 2003, at A9.

655. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; *see* *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

656. E.D. Va. Docket Sheet, *supra* note 534.

The court initially filed these documents under seal.⁶⁵⁷ On a Friday, the day after the court granted Moussaoui's request to proceed *pro se*, Judge Brinkema ordered Moussaoui's filings served on the government, which was required to advise the court by Monday morning whether it objected to the unsealing of the filings.⁶⁵⁸ The government announced that it did not object to the unsealing, so Judge Brinkema ordered the filings unsealed and ordered future *pro se* filings sealed only until 4:00 p.m. on the workday following the filing to provide the government with an opportunity to object.⁶⁵⁹

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.⁶⁶⁰ Judge Brinkema determined that Moussaoui's filings included improper material.

The defendant's pleadings have been replete with irrelevant, inflammatory and insulting rhetoric, which would not be tolerated from an attorney practicing in this court. Because he has been warned numerous times that such writing would have to stop, the defendant may no longer hide behind his *pro se* status to avoid being held to appropriate pleading practice. Further, we find that the record supports the United States' concern that the defendant, who is charged with conspiracy to commit acts of terrorism transcending national boundaries among other offenses, is attempting to use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement.⁶⁶¹

Judge Brinkema ordered that "any future pleadings filed by the defendant, *pro se*, containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language will be filed and maintained under seal."⁶⁶² She sealed several, but not all, recent filings.⁶⁶³ She declined Moussaoui's suggestion that the court engage in the burdensome task of redacting inappropriate language from the filings instead of sealing them: "If he desires his pleadings to be publicly filed, the defendant must limit his writings to appropriate requests for relevant judicial relief."⁶⁶⁴

On motion from news media, and after observing that "the defendant has filed fewer pleadings and has significantly toned down his inappropriate rhetoric," Judge Brinkema modified her order so that all *pro se* filings would be sealed for 10 days to give the government an opportunity "to advise the Court in writing

657. Pro Se Order, *supra* note 543, at 1.

658. *Id.* at 2.

659. Pro Se Filings Unsealing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 17, 2002), available at 2002 WL 1311764.

660. Letter, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 22, 2002) (portions redacted); see Philip Kennicott, *A Window on the Mind of Moussaoui*, *Wash. Post*, July 25, 2002, at C1 (reporting on the contents of Moussaoui's filings).

661. Pro Se Filings Sealing Order at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), available at 2002 WL 1990900.

662. *Id.* at 4.

663. *Id.* at 3-4.

664. *Id.* at 4 n.3.

whether the pleading should remain under seal or be unsealed with or without redactions.”⁶⁶⁵

The Court will also conduct its own review of the defendant’s *pro se* pleadings, and will redact any insulting, threatening or inflammatory language which would not be tolerated from an attorney practicing in this court. Should the defendant’s pleadings again become replete with inappropriate rhetoric, we will return to categorical sealing.⁶⁶⁶

Moussaoui was granted access to a videotape of an al-Jazeera interview with the captured Bin al-Shibh, but the tape produced apparently was blank.⁶⁶⁷ Judge Brinkema ordered the “inexcusable error” corrected immediately, but also ordered Moussaoui’s motion to correct the error to remain under total seal, because it was “replete with irrelevant and inflammatory rhetoric, including messages to third parties and a prayer for the destruction of the United States.”⁶⁶⁸

665. Pro Se Filings Sealing Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Sept. 27, 2002) [hereinafter Sept. 27, 2002, Pro Se Filings Sealing Order], available at 2002 WL 32001783; see *News Media Win Ruling in Terror Trial*, N.Y. Times, Sept. 28, 2002, at A11.

666. Sept. 27, 2002, *Pro Se Filings Sealing Order*, *supra* note 665, at 4 n.1.

667. Videotape Production Order at 1, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Nov. 5, 2002), available at 2002 WL 32001775; see Philip Shenon, *Court Papers Show Moussaoui Seeks Access to Captured Al Qaeda Members*, N.Y. Times, Nov. 1, 2002, at A20.

668. Videotape Production Order, *supra* note 667.

American Taliban

United States v. Lindh
(*T.S. Ellis III, E.D. Va.*)

On November 25, 2001, at the Qala-i-Janghi prison near Mazar-e Sharif, Afghanistan, CIA officer Johnny “Mike” Spann interviewed a captured Taliban fighter who was an American citizen: John Phillip Walker Lindh.⁶⁶⁹ Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.⁶⁷⁰ Lindh⁶⁷¹ was shot in the upper thigh during the uprising, and he denied involvement in Spann’s death.⁶⁷² Lindh and several dozen other surviving Taliban troops were recaptured on December 1, 2001, when the Northern Alliance flooded them out of a basement.⁶⁷³

Lindh was charged in a criminal complaint filed on January 15, 2002, with conspiracy to kill American citizens and with providing support to terrorists, including al-Qaeda.⁶⁷⁴ He arrived in the Eastern District of Virginia for trial eight days later.⁶⁷⁵ An indictment filed on February 5 added related charges as well as a

669. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002); see Dan Eggen & Brooke A. Masters, *U.S. Won’t Seek Death for Walker*, Wash. Post, Jan. 16, 2002, at A1; David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y. Times, Jan. 16, 2002, at A1; Fredrick Kunkle, *Lindh Never Betrayed Homeland, Parents Say*, Wash. Post, July 16, 2002, at A10; Brooke A. Masters & Patricia Davis, *Walker’s Long Trip Ends at Alexandria Jail*, Wash. Post, Jan. 24, 2002, at A13.

670. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; see Eggen & Masters, *supra* note 669; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 669; Kunkle, *supra* note 669; Vernon Loeb, *U.S. Soldiers Re-count Smart Bomb’s Blunder*, Wash. Post, Feb. 2, 2002, at A15; Romero & Temple-Raston, *supra* note 226, at 91–92; Rene Sanchez, *John Walker’s Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

671. Early references to Lindh stated that he preferred to be identified by his mother’s last name, Walker, but Lindh’s attorney stated in January 2002 that Lindh prefers to be identified by his father’s last name. See *Walker No More*, N.Y. Times, Jan. 25, 2002, at A11.

672. *Lindh*, 227 F. Supp. 2d at 569; see Eggen & Masters, *supra* note 669; Johnston, *supra* note 669; see also Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Romero & Temple-Raston, *supra* note 226, at 92–93.

673. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; see Johnston, *supra* note 669; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 670; Romero & Temple-Raston, *supra* note 226, at 94.

Also captured was Yasser Esam Hamdi. See John Mintz & Brooke A. Masters, *U.S.-Born Detainee May End Up in Va.*, Wash. Post, Apr. 5, 2002, at A3; Romero & Temple-Raston, *supra* note 226, at 95, 142, 191; see also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that U.S. citizens cannot be held indefinitely as enemy combatants without a meaningful opportunity to contest their detention); Romero & Temple-Raston, *supra* note 226, at 144, 191 (reporting on *Hamdi*).

674. Docket Sheet, *United States v. Lindh*, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002); see Eggen & Masters, *supra* note 669; Johnston, *supra* note 669; Masters & Davis, *supra* note 669; Romero & Temple-Raston, *supra* note 226, at 140 & fig. 7.

675. See Masters & Davis, *supra* note 669.

firearms charge.⁶⁷⁶ The court assigned the case to Judge T.S. Ellis III.⁶⁷⁷ Lindh pleaded not guilty on February 13.⁶⁷⁸ Judge Ellis denied Lindh's motion to transfer the case to a district that did not include so many persons directly affected by the September 11, 2001, terrorist attacks.⁶⁷⁹

Lindh was born in February 1981 in the District of Columbia as the second of three children born to Marilyn Walker and Frank Lindh, who subsequently moved the family to California and ultimately separated.⁶⁸⁰ John Walker Lindh was raised a Catholic, but he decided to convert to Islam at 16, taking the name Suleyman.⁶⁸¹ At 18, he moved to Yemen to study Arabic and then moved to Bannu, Pakistan, to attend a madrassah.⁶⁸²

Adopting the name Abdul Hamid, he reportedly volunteered to fight with the Taliban; because he did not know Pashto or Urdu (the local languages), he was assigned to fight with troops financed by Osama bin Laden.⁶⁸³ He arrived on the Taliban's front line on September 6, 2001.⁶⁸⁴

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.⁶⁸⁵ Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.⁶⁸⁶ Other photos apparently were destroyed.⁶⁸⁷

676. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); Docket Sheet, *supra* note 674; see Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 226, at 139.

677. Docket Sheet, *supra* note 674; see Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 226, at 142.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

678. Docket Sheet, *supra* note 674; see Masters, *supra* note 677.

679. United States v. Lindh, 212 F. Supp. 2d 541, 547–52 (E.D. Va. 2002); see Tom Jackman, *Judge Turns Down Lindh's Challenges*, Wash. Post, June 18, 2002, at B5; Katharine Q. Seelye, *Judge in Lindh Case Refuses Defense Request to Move Trial*, N.Y. Times, June 18, 2002, at A18.

680. See Kunkle, *supra* note 669; Loeb, *supra* note 673; Evelyn Nieves, *A U.S. Convert's Path from Suburbia to a Gory Jail for Taliban*, N.Y. Times, Dec. 4, 2001, at B1; Romero & Temple-Raston, *supra* note 226, at 13, 15; Sanchez, *supra* note 670.

681. See Eggen & Masters, *supra* note 669 (reporting that Lindh took the name Suleyman al-Faris); Kunkle, *supra* note 669; Loeb, *supra* note 673; Nieves, *supra* note 680 (reporting that Lindh took the name Suleyman al-Lindh); Romero & Temple-Raston, *supra* note 226, at 16 (reporting that "Suleyman" is equivalent to "Solomon"); Sanchez, *supra* note 670.

682. See Eggen & Masters, *supra* note 669; Loeb, *supra* note 673; Romero & Temple-Raston, *supra* note 226, at 17–19 (reporting that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 670.

683. See Eggen & Masters, *supra* note 669; Loeb, *supra* note 673; Nieves, *supra* note 680; Romero & Temple-Raston, *supra* note 226, at 22–23, 138 (reporting that Lindh undertook military training to fight the Northern Alliance, not al-Qaeda training, which was to fight civilians); Sanchez, *supra* note 670.

684. See Romero & Temple-Raston, *supra* note 226, at 24.

685. See Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9; Romero & Temple-Raston, *supra* note 226, at 111 & fig. 5.

686. See Masters, *supra* note 685; Romero & Temple-Raston, *supra* note 226, at 114 (reporting that the obscenity was "shithead").

687. See Masters, *supra* note 685; Romero & Temple-Raston, *supra* note 226, at 114.

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.⁶⁸⁸ To protect Brosnahan's law firm's employees from harm, Brosnahan kept the firm's name off of the case.⁶⁸⁹

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.⁶⁹⁰ But the government acknowledged at a hearing two months later that there was no evidence that Lindh killed or shot at any American citizen, including Spann.⁶⁹¹

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.⁶⁹² All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.⁶⁹³ On October 4, Judge Ellis imposed the statutory maximum of consecutive ten-year terms on each charge, a sentence to which the parties had agreed.⁶⁹⁴ Lindh tearfully admitted making a mistake by joining the Taliban.⁶⁹⁵ Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.⁶⁹⁶

Challenge: Protected National Security Information

Early in the prosecution, the government determined that it had to disclose to the defendant "reports of interviews of detainees captured in Afghanistan and elsewhere who may have knowledge of al Qaeda or who may have been members of that organization and who are housed primarily at Guantanamo Bay, Cuba."⁶⁹⁷ The reports were regarded as "unclassified information vital to national security."⁶⁹⁸ The government submitted to the court *ex parte* and *in camera* both an unredacted set of reports and a set with proposed redactions, omitting agent and case identifiers and information concerning other detainees not relevant to the defense.⁶⁹⁹

688. See Eggen & Masters, *supra* note 669; Romero & Temple-Raston, *supra* note 226, at 94, 111–14, 136–37.

689. See *Nation in Brief*, Wash. Post, Feb. 2, 2002, at A26.

690. See Masters, *supra* note 677; Romero & Temple-Raston, *supra* note 226, at 140–41 (reporting that the government brought Spann's family to the courthouse).

691. See Brooke A. Masters, *Prosecutors Concede Limits of Their Case Against Lindh*, Wash. Post, Apr. 2, 2002, at A11.

692. *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); Docket Sheet, *supra* note 674; see Jackman, *supra* note 670; Kunkle, *supra* note 669; Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. Times, July 16, 2002; Romero & Temple-Raston, *supra* note 226, at 188.

693. *Lindh*, 227 F. Supp. 2d at 566; see Jackman, *supra* note 670; Lewis, *supra* note 692; Romero & Temple-Raston, *supra* note 226, at 188–89.

694. *Lindh*, 227 F. Supp. 2d at 571–72; Docket Sheet, *supra* note 674; see *Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 670; Romero & Temple-Raston, *supra* note 226, at 12, 189–90.

695. See *Apologetic Lindh*, *supra* note 694; Romero & Temple-Raston, *supra* note 226, at 189.

696. *Lindh*, 227 F. Supp. 2d at 572.

697. *United States v. Lindh*, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002).

698. *Id.* at 742.

699. *Id.* at n.2.

Judge Ellis granted the government's motion for a protective order.⁷⁰⁰

[G]iven the nature of al Qaeda and its activities, and the ongoing federal law enforcement investigation into al Qaeda, the identities of the detainees, as well as the questions asked and the techniques employed by law enforcement agents in the interviews are highly sensitive and confidential. Additionally, the intelligence information gathered in the course of the detainee interviews may be of critical importance to national security, as detainees may reveal information leading to the identification and apprehension of other terrorist suspects and the prevention of additional terrorist acts. Thus, a protective order prohibiting the public dissemination of the detainee interview reports will, in this case, serve to prevent members of international terrorist organizations, including al Qaeda, from learning, from publicly available sources, the status of, the methods used in, and the information obtained from the ongoing investigation of the detainees.⁷⁰¹

Judge Ellis rejected the government's proposal that defense investigators and expert witnesses be pre-screened before information contained in the redacted reports could be disclosed to them.⁷⁰² Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.⁷⁰³

By signing such a memorandum of understanding, a defense investigator or expert would declare under penalty of perjury under the laws of the United States that she or he had (i) read and understood the protective order pertaining to these unclassified documents and materials and (ii) agreed to be bound by the terms of the protective order, which would remain binding during, and after the conclusion of these proceedings.⁷⁰⁴

On motion, and without objection from the defendant, Judge Ellis subsequently modified the protective order to require of persons seeing the reports a "brief, basic background investigation, performed by law enforcement personnel independent of the prosecution team and reporting directly to the Court through the Court Security Officer."⁷⁰⁵

Judge Ellis determined that showing the reports to a detainee witness, however, would additionally require notice to the government and court approval "to assure that the Court is fully apprised of the risks attendant to disclosure of unclassified protected information to a specific detainee."⁷⁰⁶

Later in the case, Judge Ellis agreed with the government that a set of additional detainee reports did not need to be disclosed to the defense. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974284 (E.D. Va. June 17, 2002).

700. *Lindh*, 198 F. Supp. 2d at 744.

701. *Id.* at 742.

702. *Id.*

703. *Id.* at 742–43; *see id.* at 743 (noting that "defendant will be at liberty to disclose information from the redacted interview reports to investigators and expert witnesses who are not pre-screened by, or known to, the government").

704. *Id.* at 742–43.

705. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974184 (E.D. Va. May 6, 2002).

706. *Lindh*, 198 F. Supp. 2d at 743.

Challenge: Classified Evidence

In order to determine what evidence the government had to produce to the defendant, Judge Ellis had to review a substantial amount of classified material.⁷⁰⁷ It was stored in the court's sensitive compartmented information facility (SCIF).⁷⁰⁸

Judge Ellis's career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.⁷⁰⁹ The chambers has a rule requiring classified documents to be within eyesight at all times.⁷¹⁰ Even a law clerk's brief trip outside chambers requires taking the classified documents securely along.⁷¹¹ But classified materials are *never* taken home.⁷¹²

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.⁷¹³ Judge Ellis denied counsel face-to-face access to the detainees, but established a procedure allowing counsel to submit questions to "firewall" attorneys, who passed them on to the detainees.⁷¹⁴

Firewall attorneys included attorneys from the Department of Justice and the Department of Defense "who are separate and independent from the attorneys who represent the government" in the case, including two assistant U.S. attorneys from another district.⁷¹⁵

Defense counsel submitted questions for each detainee to the firewall attorneys.⁷¹⁶ The firewall attorneys could object to any questions, and the court would resolve any objections on sealed noticed filings.⁷¹⁷ Approved questions were submitted to interrogators who interwove the questions into the interrogations.⁷¹⁸ Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.⁷¹⁹ Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.⁷²⁰

Judge Ellis monitored the procedure to ensure that it protected Lindh's rights to a defense.⁷²¹

707. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

708. *Id.*; see Reagan, *supra* note 165, at 19 (describing SCIFs).

709. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

710. *Id.*

711. *Id.*

712. *Id.*

713. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1298601 at *1 (E.D. Va. May 30, 2002); see Masters, *supra* note 672; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

714. *Lindh*, 2002 WL 1298601 at *1–2; Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Masters, *supra* note 672.

715. *Lindh*, 2002 WL 1298601 at *1 & n.1.

716. *Id.* at *1.

717. *Id.*

718. *Id.*

719. *Id.*

720. *Id.*

721. *Id.*; see Masters, *supra* note 672.

Challenge: Witness Security

Lindh pleaded guilty on a day the court was prepared to take testimony from a covert agent in a hearing on Lindh's motion to suppress his confession.⁷²² To protect the witness by shielding the witness's identity, Judge Ellis worked with the court information security officers and the Marshal Service to make adjustments to the courtroom.⁷²³ The courtroom was outfitted with special draperies and screens.⁷²⁴ The witness box was shielded from the public, as was the path to the door through which prisoners often are brought—a door that would be used in this case for the witness.⁷²⁵

The plan was for the defendant and his counsel to sit in the jury box so that they could see the witness, but the draperies shielded the witness from the public's view.⁷²⁶ The courtroom was equipped with an electronic device that would distort the witness's voice, but the words would be audible to the parties and the public.⁷²⁷

722. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Jackman, *supra* note 670; Lewis, *supra* note 692; Romero & Temple-Raston, *supra* note 226, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing).

723. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Section Staff, Nov. 6, 2007.

724. *Id.*; see Jackman, *supra* note 670; Lewis, *supra* note 692.

725. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

726. *United States v. Rosen*, 520 F. Supp. 2d 786, 795 n.15 (E.D. Va. 2007) ("the court indicated that it would allow a clandestine government intelligence agent to appear at an evidentiary hearing under an assumed name, and the courtroom would be arranged in such a way that the government, the defendant and defense counsel would see and confront the agent, while others in the courtroom would be able to [hear], but not [see] the agent"); Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

727. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

September 11 Damages

In re Terrorist Attacks on September 11, 2001
(Richard Conway Casey and George B. Daniels,
S.D.N.Y.) and *In re September 11 Litigation and*
related actions (Alvin K. Hellerstein, S.D.N.Y.)

Actions for damages resulting from the terrorist attacks on September 11, 2001, include a couple dozen actions against the terrorists and a few thousand actions against airlines, airport security companies, and property managers.

Actions Against the Terrorists

On September 4, 2002, 318 survivors of the September 11, 2001, attacks on the United States filed in the U.S. District Court for the Southern District of New York a 91-page civil complaint for damages resulting from the attacks.⁷²⁸ The plaintiffs were 44 persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.⁷²⁹ The 141 defendants were (1) the “Al Qaeda Islamic Army” and 38 affiliated persons and entities, including Osama bin Laden; (2) the 19 deceased hijackers and Zacarias Moussaoui; (3) the Taliban and Muhammad Omar; (4) the Republic of Iraq and 15 affiliated persons and entities, including Saddam Hussein; and 64 “entities or individuals who provided financial or other support to Al Qaeda and its terrorist activities.”⁷³⁰

Also on September 4, the law firm representing plaintiffs in the first suit filed a second action on behalf of seven estates and more than 1,000 firefighters, police officers, paramedics, and others against the Al Qaeda Islamic Army.⁷³¹ On September 10, the plaintiffs amended their complaint to include 300 estates and 51 individuals as plaintiffs.⁷³² On the same day, four other actions were filed against similar defendants.⁷³³

728. Compl., Ashton v. Al Qaeda Islamic Army, No. 1:02-cv-6977 (S.D.N.Y. Sept. 4, 2002) [hereinafter *Ashton* Compl.]; see Discovery Mem. Dec. 1, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Jan. 13, 2010); Marcia Coyle, *How Two Lawyers Brought a Suit They Just Might Win*, Nat'l L.J., Nov. 11, 2002, at A1; Tina Kelley, *Suit by Victims' Kin Says Iraq Knew of 9/11 Plans*, N.Y. Times, Sept. 5, 2002, at A15.

729. *Ashton* Compl., *supra* note 728.

730. *Id.*; *id.* at 29; see Coyle, *supra* note 728.

731. Docket Sheet, *Beyer v. Al Qaeda Islamic Army* No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); see Coyle, *supra* note 728; Kelley, *supra* note 728.

732. First Am. Compl., *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002).

733. Docket Sheet, *Bauer v. Al Qaeda Islamic Army*, No. 1:02-cv-7236 (S.D.N.Y. Sept. 10, 2002) (action by one individual and two estates); Docket Sheet, *Burlingame v. Bin Laden*, No. 1:02-cv-7230 (S.D.N.Y. Sept. 10, 2002) (action by 114 individuals and estates); Docket Sheet, *Mayore Estates, L.L.C. v. Al Qaeda Islamic Army*, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002) (action by the owners of a building across the street from the World Trade Center); Docket Sheet, *Schneider v. Al Qaeda Islamic Army*, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002) (action by 6 estates).

All six actions were consolidated before Judge Allen G. Schwartz in the Southern District of New York,⁷³⁴ and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.⁷³⁵ The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.⁷³⁶

The plaintiffs filed amended consolidated master complaints on August 1 and 13 and September 5, 2003; March 10, 2004; and September 20 and 30, 2005—ultimately naming 2,582 plaintiffs and 160 defendants.⁷³⁷

On December 9, 2003, the Judicial Panel on Multidistrict Litigation joined the consolidated action with three other actions in the Southern District of New York⁷³⁸ and two actions in the District of the District of Columbia,⁷³⁹ creating *In re Terrorist Attacks on September 11, 2001*⁷⁴⁰ in the U.S. District Court for the Southern District of New York.⁷⁴¹

The first panel-added New York case was a class action filed on September 11, 2002, by three named plaintiffs against Osama bin Laden, Saddam Hussein,

734. Consolidation Order, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002).

735. Consolidated Master Compl., *id.* (Mar. 6, 2003) [hereinafter Consolidated *Ashton* Master Compl.].

736. Reassignment Notice, *id.* (Apr. 16, 2003). The action was reassigned to Judge George B. Daniels after Judge Casey's March 22, 2007, death. Reassignment Notice, *id.* (Apr. 17, 2007); *see* *Obit., Richard Conway Casey, 74, Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

Tim Reagan interviewed Owen Smith, Judge Casey's law clerk from June 2006 through the transition of Judge Casey's cases, by telephone on May 17, 2007, and in Mr. Smith's office on June 26, 2007.

737. Sixth Am. Consolidated Master Compl., *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Fifth Am. Consolidated Master Compl., *id.* (Sept. 20, 2004); Fourth Am. Consolidated Master Compl., *id.* (Mar. 10, 2004); Third Am. Consolidated Master Compl., *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 5, 2003); Second Am. Consolidated Master Compl., *id.* (Aug. 13, 2003); First Am. Consolidated Master Compl., *id.* (Aug. 1, 2003).

738. Docket Sheet, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, *Salvo v. Al Qaeda Islamic Army*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003) [hereinafter *Salvo* Docket Sheet]; Docket Sheet, *Tremsky v. Bin Laden*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002).

739. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), refiled as *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *Havlish v. Bin-Laden*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), refiled as *Havlish v. Bin-Laden*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 11, 2003); *see Seven Families Sue bin Laden and Others for Billions*, N.Y. Times, Feb. 20, 2002, at A11 (reporting on the original filing of *Havlish*).

740. Docket Sheet, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003) [hereinafter S.D.N.Y. *In re Terrorist Attacks* Docket Sheet].

741. *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); *see* Consolidation and Transfer Mot., *In re Terrorist Attacks on Sept. 11, 2001*, No. 1570 (J.P.M.L. dated Aug. 7, 2003), filed in *Havlish*, No. 1:02-cv-305 (D.D.C. Aug. 11, 2003); *see also In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 78 (2d Cir. 2008); Discovery Mem. Dec., *supra* note 728, at 1 ("The plaintiffs in the civil actions comprising this multi-district litigation seek to recover damages arising out of the atrocities committed by terrorists on September 11, 2001."); John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 Rev. Litig. 315, 329 (2008).

the Taliban, and 98 other defendants.⁷⁴² The second New York case was filed on July 8, 2003, by an estate against the same 399 defendants as were named in the consolidated master complaint in the first consolidated action.⁷⁴³ The third New York case also was filed on July 8, 2003—by four estates against 222 defendants similar to the list in the original complaint in the first-filed action of the original consolidation.⁷⁴⁴

The first panel-added District of Columbia case was a class action filed on February 19, 2002, by seven estates against 167 defendants: Osama bin Laden; the Taliban; the countries of Afghanistan, Iran, and Iraq; the 19 hijackers and Zacarias Moussaoui; and more than 100 persons and entities identified by the government as global terrorists.⁷⁴⁵ An amended complaint listed 85 plaintiff estates and 27 defendants, omitting the “global terrorists.”⁷⁴⁶

The second District of Columbia case was based on a complaint filed on August 15, 2002, against 100 alleged financial supporters of the terrorist attacks on September 11, 2001.⁷⁴⁷ Listed as plaintiffs were 407 named estates, 37 named individuals, 73 “Doe” estates (specific estates given pseudonyms), nine “Doe” individuals (specific individuals given pseudonyms), and 159 additional “Doe” plaintiffs (identified as John and Jane Doe 42 through 200).⁷⁴⁸ Ultimately the case had 4,779 listed plaintiffs and 205 defendants.⁷⁴⁹ By the time this case had been in-

742. Compl., *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); see also Am. Compl., *id.* (Aug. 22, 2003) (same parties).

743. Compl., *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); see Consolidated *Ashton* Master Compl., *supra* note 735. The case was designated as related to the original consolidation and assigned to Judge Casey on Aug. 13, 2003. *Salvo* Docket Sheet, *supra* note 738.

744. Compl., *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003); see *Ashton* Compl., *supra* note 728. The case was designated as related to the original consolidation and assigned to Judge Casey on August 18, 2003. Assignment Notice, *York*, No. 1:03-cv-5493 (S.D.N.Y. Aug. 18, 2003); Docket Sheet, *id.* (July 8, 2003). The plaintiffs voluntarily dismissed this action as duplicative of the consolidation on March 22, 2004. Dismissal, *id.* (Mar. 22, 2004).

745. Class Action Compl., *Havlish*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002).

746. Second Am. Compl., *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Sept. 7, 2006), also filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 7, 2006); see Am. Compl., *Havlish*, No. 1:02-cv-305 (D.D.C. May 3, 2002) (listing 55 plaintiff estates and 20 defendants).

747. Compl., *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett* Compl.]; see *In re Terrorist Attacks* on September 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); Coyle, *supra* note 728.

748. D.D.C. *Burnett* Compl., *supra* note 747.

749. Pls.’ Addition of Parties, *id.* (Dec. 30, 2003) (adding two defendants); Pls.’ Addition and Removal of Parties, *id.* (Dec. 19, 2003) (adding 224 plaintiffs and removing eight plaintiffs and one defendant); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (Nov. 14, 2003, dismissal of two defendants); Pls.’ Fourth Addition and Removal of Defs., *Burnett*, No. 1:02-cv-1616 (D.D.C. Oct. 27, 2003) (removing one defendant); Pls.’ Addition and Removal of Parties, *id.* (Sept. 10, 2003) (adding 207 plaintiffs and removing three plaintiffs); Pls.’ Addition and Removal of Parties, *id.* (Sept. 5, 2003) (adding 489 plaintiffs and removing 11 plaintiffs); Pls.’ Third Addition and Removal of Defs., *id.* (Aug. 22, 2003) (removing six defendants); Pls.’ Addition and Removal of Parties, *id.* (Aug. 1, 2003) (adding 550 plaintiffs and removing one plaintiff); Pls.’ Second Addition and Removal of Parties, *id.* (May 23, 2003) (adding 375 plaintiffs and removing three plaintiffs); Pls.’ Second Addition and Removal of Defs., *id.* (May 2, 2003) (adding

cluded in the multidistrict consolidation, its plaintiffs already had filed a similar complaint in the Southern District of New York,⁷⁵⁰ which was added to the multidistrict consolidation as a tag-along case on March 10, 2004,⁷⁵¹ and then voluntarily dismissed as duplicative on February 12, 2008.⁷⁵²

Also consolidated as tag-along cases were one case filed in the District of the District of Columbia and three cases filed in the Southern District of New York: (1) an action filed on August 20, 2003, by the estate and four survivors of the World Trade Center's chief of security against 73 defendants, including Iraq, al-Qaeda, and the 19 September 11 hijackers;⁷⁵³ (2) an action filed on September 10, 2003, by 29 insurance companies against al-Qaeda and 524 alleged supporters;⁷⁵⁴ (3) an action filed on September 10, 2003, by 28 estates and 27 individuals against the defendants listed in the original consolidation's third amended master

27 defendants and removing one defendant); Pls.' Addition and Removal of Parties, *id.* (Feb. 21, 2003) (adding 245 plaintiffs and nine defendants and removing seven plaintiffs and 11 defendants); Third Am. Compl., *id.* (Nov. 22, 2002) (listing as plaintiffs 1,785 named estates, 799 named individuals, 129 Doe estates, nine Doe individuals, and 5,000 additional Doe plaintiffs, and listing 189 defendants); Am. Compl., *id.* (Sept. 4, 2002); *see* Jennifer Senior, *A Nation unto Himself*, N.Y. Times, Mar. 14, 2004, at 636.

750. Compl., *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); *see id.* at 265 (stating that the action "is commenced in this Court solely as a prophylactic measure to protect 9/11 victims whose rights have been threatened by certain New York workers' compensation insurance carriers and in the event that subject matter jurisdiction is lacking in the District of Columbia action"); *see also* Am. Compl., *id.* (Sept. 3, 2003).

751. Docket Sheet, *id.* (Aug. 1, 2003).

752. Notice of Voluntary Dismissal, *id.* (Feb. 12, 2008).

The New York action was filed as a jurisdictional precaution, but the complaint was never served. Status Conference, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 26, 2007) (representation by a plaintiff's attorney).

753. Compl., *O'Neill v. Republic of Iraq*, No. 1:03-cv-1766 (D.D.C. Aug. 20, 2003); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Jan. 27, 2004); *see also* First Consolidated Compl., *id.* (naming 109 defendants), filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Third Am. Compl., *O'Neill v. Republic of Iraq*, No. 1:04-cv-1076 (S.D.N.Y. June 7, 2005) (naming 108 defendants); Second Am. Compl., *id.* (Dec. 30, 2004) (naming 112 defendants); First Am. Compl., *id.* (Sept. 28, 2004) (naming 80 defendants); Docket Sheet, *id.* (Feb. 10, 2004) (noting multidistrict consolidation on Feb. 9, 2004).

It was reported that John O'Neill was an FBI expert on the terrorist plans of Osama bin Laden and al-Qaeda who was forced out of the FBI a few months before the September 11, 2006, attacks. *Frontline: The Man Who Knew* (PBS television broadcast Oct. 3, 2002).

754. Compl., *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on Mar. 10, 2004). At the time of consolidation, the complaint was amended to include 41 plaintiffs. First Am. Compl., *id.* (Mar. 10, 2004); *see also In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765, 780 n.2 (S.D.N.Y. 2005) ("forty-one insurance companies that have paid and reserved claims in excess of \$4.5 billion as a result of the September 11 attacks").

complaint;⁷⁵⁵ and (4) an action filed on October 30, 2003, by three insurance companies against Saudi Arabia and Syria.⁷⁵⁶

The multidistrict consolidation also includes nine cases subsequently filed in the Southern District of New York. After their District of Columbia case was transferred to New York, the security chief's survivors filed class actions on March 10, 2004, against Saudi Arabia, Syria, and Sudan,⁷⁵⁷ and 38 alleged financial supporters of the September 11 terrorists.⁷⁵⁸ Another seven cases were filed in August and September of 2004: (1) on August 6, 2004, an insurance company filed an action against 495 defendants;⁷⁵⁹ (2) on September 1, 2004, six insurance companies filed an action against 426 defendants;⁷⁶⁰ (3) on September 2, 2004, Cantor Fitzgerald filed an action against 88 defendants;⁷⁶¹ (4) on September 10, 2004, 10 insurance companies filed an action against Saudi Arabia and Syria;⁷⁶² (5) on September 10, 2004, 10 World Trade Center businesses filed an action against 201 defendants;⁷⁶³ (6) on September 10, 2004, the World Trade Center property managers filed an action against 201 defendants;⁷⁶⁴ (7) on September 10, 2004, plaintiffs filed a complaint against Riggs Bank for failure to notice suspicious financial transactions that aided the September 11 terrorists, and they

755. Compl., *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on Mar. 10, 2004).

756. Docket Sheet, *Vigilant Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:03-cv-8591 (S.D.N.Y. Oct. 30, 2003) (noting multidistrict consolidation on Nov. 12, 2003, which appears to be an error).

757. Class Action Compl., *O'Neill v. Kingdom of Saudi Arabia*, No. 1:04-cv-1922 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Apr. 4, 2004); *see also* First Am. Compl., *id.*, filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

758. Class Action Compl., *O'Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Apr. 4, 2004); *see also* First Am. Compl., *id.* (naming 95 defendants), filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

759. Compl., *New York Marine and Gen. Ins. Co. v. Al Qaida*, No. 1:04-cv-6105 (S.D.N.Y. Aug. 6, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004); *see also* Second Am. Compl., *id.* (Sept. 30, 2005) (listing 419 defendants); First Am. Compl., *id.* (Dec. 23, 2004) (listing 478 defendants).

760. Compl., *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004); *see also* Second Am. Compl., *id.* (420 defendants); First Am. Compl., *id.* (434 defendants); *see also* Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, N.Y. Times, Sept. 9, 2004, at B1.

761. Compl., *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004); *see also* Am. Compl., *id.* (Sept. 10, 2004).

762. Compl., *Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:04-cv-7216 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004).

763. Compl., *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004).

764. Compl., *World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004).

amended their complaint on March 24, 2005, to name 1,233 individuals and 1,117 estates as plaintiffs.⁷⁶⁵

On January 18, 2005, Judge Casey ruled that claims against Saudi Arabia and members of its royal family should be dismissed, largely as a result of foreign sovereign immunity and lack of personal jurisdiction.⁷⁶⁶ On September 21, 2005, Judge Casey dismissed additional Saudi royals and other defendants.⁷⁶⁷ The dismissals became final on January 10, 2006,⁷⁶⁸ and the court of appeals affirmed on August 14, 2008.⁷⁶⁹

765. Am. Compl., *Vadhan v. Riggs Nat'l Corp.*, No. 1:04-cv-7281 (S.D.N.Y. Mar. 24, 2005); see Docket Sheet, *id.* (Sept. 10, 2004) (noting multidistrict consolidation on Oct. 15, 2004).

766. *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); see Order of Dismissal, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. May 5, 2005) (applying the Jan. 18, 2005, ruling to dismiss all claims in all cases against the Kingdom of Saudi Arabia, members of its royal family, and the Al Rajhi Banking and Investment Corp.); see also *In re Terrorist Attacks* on September 11, 2001, 538 F.3d 71, 78–79 (2d Cir. 2008); Discovery Mem. Dec., *supra* note 728, at 3; Murphy, *supra* note 741, at 329.

767. *In re Terrorist Attacks* on Sept. 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); see *In re Terrorist Attacks*, 538 F.3d at 79; Discovery Mem. Dec., *supra* note 728, at 4; Mark Hamblett, *Saudi Charity Dropped from Suit over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

768. Judgment, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006); see *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2006 WL 708149 (S.D.N.Y. Mar. 20, 2006) (explaining that Judge Casey decided to certify appeals for defendants dismissed on Rule 12(b)(1) or 12(b)(2) grounds but not defendants dismissed on Rule 12(b)(6) grounds); see also *In re Terrorist Attacks*, 538 F.3d at 75.

769. *In re Terrorist Attacks*, 538 F.3d 71, *cert. denied*, ___ U.S. ___, 129 S. Ct. 2859 (2009); see Discovery Mem. Dec., *supra* note 728, at 4–6; Eric Lichtblau, *Supreme Court Refuses Case by Sept. 11 Victims' Families*, N.Y. Times, June 30, 2009, at A12.

The court resolved 18 appeals in an opinion by Chief Circuit Judge Dennis Jacobs, joined by Circuit Judge José A. Cabranes and District Judge Eric N. Vitaliano of the Eastern District of New York, sitting by designation:

1. An appeal by plaintiffs in the original consolidation against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-319 (2d Cir. Jan. 23, 2006); see Notice of Appeal, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Jan. 11, 2006).
2. An appeal by plaintiffs in the second District of Columbia action against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-657 (2d Cir. Feb. 9, 2006); see Notice of Appeal, *Burnett*, No. 1:03-cv-9849 (S.D.N.Y. Feb. 2, 2006).
3. Seven appeals by insurance companies against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-477 (2d Cir. Jan. 30, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-458 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-453 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-442 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-436 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-487 (2d Cir. Jan. 25, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-321 (2d Cir. Jan. 24, 2006); see Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Saudi Arabia); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Mohamed); Notice of Appeal, *Federal Ins. Co. v. Al Qai-*

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.⁷⁷⁰ Discovery and other matters have been referred to Magistrate Judge Frank Maas.⁷⁷¹

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- da, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against the Saudi High Commission); Notice of Appeal, Federal Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Crown Prince Sultan); Notice of Appeal, Federal Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Naif); Notice of Appeal, Federal Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Turki); Notice of Appeal, Federal Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Salman).
4. An appeal by three insurance companies against Saudi Arabia: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-461 (2d Cir. Jan. 30, 2006); *see* Notice of Appeal, Vigilant Ins. Co. v. Kingdom of Saudi Arabia, No. 1:03-cv-8591 (S.D.N.Y. Jan. 17, 2006).
 5. Two appeals by survivors of the World Trade Center's security chief: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-398 (2d Cir. Jan. 25, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-397 (2d Cir. Jan. 25, 2006); *see* Notice of Appeal, O'Neill v. Kingdom of Saudi Arabia, No. 1:04-cv-1922 (S.D.N.Y. Jan. 13, 2006) (appeal against Saudi Arabia); Notice of Appeal, O'Neill v. Kingdom of Saudi Arabia, No. 1:04-cv-1923 (S.D.N.Y. Jan. 13, 2006) (appeal against Prince Mohammed).
 6. An appeal by an insurance company against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-693 (2d Cir. Feb. 13, 2006); *see* Notice of Appeal, New York Marine & General Ins. Co. v. Al Qaida, No. 1:04-cv-6105 (S.D.N.Y. Feb. 9, 2006).
 7. An appeal by six insurance companies against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-674 (2d Cir. Feb. 10, 2006); *see* Notice of Appeal, Continental Cas. Co. v. Al Qaeda Islamic Army, No. 1:04-cv-5970 (S.D.N.Y. Feb. 8, 2006).
 8. An appeal by Cantor Fitzgerald against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-473 (2d Cir. Feb. 1, 2006); *see* Notice of Appeal, Cantor Fitzgerald & Co. v. Akida Bank Private Ltd., No. 1:04-cv-7065 (S.D.N.Y. Jan. 27, 2006).
 9. An appeal by other insurance companies against Saudi Arabia: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-348 (2d Cir. Jan. 25, 2006); *see* Notice of Appeal, Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia, No. 1:04-cv-7216 (S.D.N.Y. Jan. 17, 2006).
 10. An appeal by World Trade Center businesses against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-702 (2d Cir. Feb. 14, 2006); *see* Notice of Appeal, Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7279 (S.D.N.Y. Feb. 9, 2006).
 11. An appeal by the World Trade Center property managers against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-700 (2d Cir. Feb. 9, 2006); *see* Notice of Appeal, World Trade Ctr. Properties LLC v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7280 (S.D.N.Y. Feb. 9, 2006).

770. Reassignment Notice, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Apr. 17, 2007); *see* Obit., *supra* note 736.

Tim Reagan attended Judge Daniels' first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

771. S.D.N.Y. *In re Terrorist Attacks* Docket Sheet, *supra* note 740.

Actions Against Domestic Defendants

Meanwhile the U.S. District Court for the Southern District of New York has been handling many thousand lawsuits against airlines, airport security companies, and property managers for damages resulting from the September 11, 2001, terrorist attacks and their aftermath.

On September 22, 2001, the President signed the Air Transportation Safety and System Stabilization Act.⁷⁷² Title IV of the Act creates a “September 11th Victim Compensation Fund of 2001”⁷⁷³ to “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁷⁷⁴ The Attorney General appointed Kenneth Feinberg as a special master to administer the fund.⁷⁷⁵ The deadline for filing a claim against the fund was established as two years after the Attorney General and the special master promulgated implementing regulations,⁷⁷⁶ and after promulgation of the regulations the deadline became December 22, 2003.⁷⁷⁷ The Act required plaintiffs to elect either recovery from the fund or recovery by civil action.⁷⁷⁸ The Act also established exclusive juris-

Tim Reagan interviewed Judge Maas for this report in the judge’s chambers on June 26, 2007, and November 6, 2009.

772. 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230; *see In re Sept. 11 Litig.*, 236 F.R.D. 164, 166 (S.D.N.Y. 2006); *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 279 (S.D.N.Y. 2003); *see Jill Schachner Chanen & Margaret Graham Tebo, Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

773. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 401, 115 Stat. 230.

774. *Id.* § 403; *see United States v. Moussaoui*, 483 F.3d 220, 225 n.4 (4th Cir. 2007); *Schneider v. Feinberg*, 345 F.3d 135, 138–39 (2d Cir. 2003); *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *Colaio*, 262 F. Supp. 2d at 278–79.

775. *Schneider*, 345 F.3d at 138; *Colaio*, 262 F. Supp. 2d at 279, 281; *see Anemona Hartocollis, Little-Noticed 9/11 Lawsuits Will Get Their Day in Court*, N.Y. Times, Sept. 4, 2007, at A1; Chanen & Tebo, *supra* note 772, at 59.

The fund awarded \$7.049 billion to the families of 2,880 of the 2,973 victims killed on September 11, 2001, and to 2,680 persons injured that day. *In re Sept. 11 Litig.*, 236 F.R.D. at 166; Chanen & Tebo, *supra* note 772, at 59. “Ultimately, 97% of all potential individual wrongful death claimants presented their claims to the Special Master, Kenneth Feinberg.” *In re September 11th Litig.*, 590 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

776. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(a)(3), 115 Stat. 230; *see Schneider*, 345 F.3d at 139.

777. 28 C.F.R. § 104.62; *see Colaio*, 262 F. Supp. 2d at 278–79, 281; *see also* 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 407, 115 Stat. 230 (providing for promulgation of implementing regulations no later than 90 days after enactment of the Act); Hartocollis, *supra* note 775.

778. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(c)(3)(B), 115 Stat. 230; *see Schneider*, 345 F.3d at 139; *In re September 11 Litig.*, 567 F. Supp. 2d 611, 614 (S.D.N.Y. 2008); *Colaio*, 262 F. Supp. 2d at 279; *see also* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & Soc’y Rev. 645 (2008) (analyzing reasons survivors gave for their choices between the fund and litigation); Hartocollis, *supra* note 775 (describing parents of an 11-year-old girl killed when American Flight 77 struck the Pentagon as having “to choose between what they perceived as a minimal award from a federal fund set up to compensate victims or calling one of the many lawyers who had sent what [the mother] calls ‘advertising packages’ and filing a lawsuit.”).

diction in the Southern District of New York for civil actions,⁷⁷⁹ except for actions against the terrorists and their supporters.⁷⁸⁰

On December 20, 2001, the wife of a passenger aboard United Airlines Flight 175, which left Boston for Los Angeles and hit Two World Trade Center, filed a complaint in the Southern District of New York against United Airlines.⁷⁸¹ The court assigned the case to Judge Alvin K. Hellerstein.⁷⁸²

During the first six months of 2002, 12 additional actions were filed by estates of passengers,⁷⁸³ estates of workers in the World Trade Center,⁷⁸⁴ and operators of businesses in the World Trade Center⁷⁸⁵ against the airlines that operated the hijacked flights⁷⁸⁶ and the companies providing security for their departures.⁷⁸⁷

779. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230; see *In re September 11 Litig.*, 567 F. Supp. 2d at 619; *Moussaoui*, 483 F.3d at 225 n.4; *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004); *Colaio*, 262 F. Supp. 2d at 279; Chanen & Tebo, *supra* note 772, at 59.

780. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(c), 115 Stat. 230; see also *id.*, Pub. L. No. 107-71, 115 Stat. 646 (also exempting from exclusive jurisdiction “civil actions to recover collateral source obligations”).

781. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001).

782. *Id.*; see *Hartocollis*, *supra* note 775.

For this report, Tim Reagan interviewed Judge Hellerstein and his law clerk Brian Sutherland in the judge’s chambers on June 25, 2007, and again interviewed Judge Hellerstein in the judge’s chambers on November 5, 2009.

783. Docket Sheet, *Miller v. American Airlines, Inc.*, No. 1:02-cv-3676 (S.D.N.Y. May 14, 2002) (action by the estate of American Flight 11 passenger David Angell, a television screenwriter, against American Airlines and Globe Aviation Services); Docket Sheet, *Koutny v. United Airlines, Inc.*, No. 1:02-cv-2802 (S.D.N.Y. Apr. 12, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *Miller v. United Airlines, Inc.*, No. 1:02-cv-1728 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security); Docket Sheet, *Sweeney v. United Airlines, Inc.*, No. 1:02-cv-1727 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *Lopez v. United Airlines, Inc.*, No. 1:02-cv-458 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *O’Hare v. United Airlines, Inc.*, No. 1:02-cv-456 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security); Docket Sheet, *Doe v. American Airlines, Inc.*, No. 1:02-cv-454 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, voluntarily dismissed on Mar. 28, 2002); Docket Sheet, *Debeuneure v. American Airlines, Inc.*, No. 1:02-cv-452 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, dismissed as settled on May 16, 2006).

784. Docket Sheet, *Pitt v. American Airlines, Inc.*, No. 1:02-cv-4365 (S.D.N.Y. June 11, 2002) (action by the estate of an employee of Cantor Fitzgerald in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Dec. 31, 2003); Docket Sheet, *Smithwick v. American Airlines, Inc.*, No. 1:02-cv-2669 (S.D.N.Y. Apr. 8, 2002) (action by the estate of a worker in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Dec. 20, 2002).

785. Docket Sheet, *Tower Computer Servs., Inc. v. American Airlines, Inc.*, No. 1:02-cv-3295 (S.D.N.Y. Apr. 30, 2002) (action by the operators of a business in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Nov. 5, 2004);

On June 20, 2002, the government initiated a motion to intervene to ensure that transportation “sensitive security information” (SSI) would be protected in these lawsuits.⁷⁸⁸ The court granted the government’s motion and ordered the cases consolidated.⁷⁸⁹

Over the next four months (July through October 2002), 120 additional cases were filed.⁷⁹⁰ On November 1, 2002, Judge Hellerstein ordered the consolidation of “all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the [Air Transportation Safety and System Stabilization Act] against any defendant (including defendants

Docket Sheet, *World Trade Farmers v. United Air Lines, Inc.*, No. 1:02-cv-2987 (S.D.N.Y. Apr. 18, 2002) (action by the operators of a business at the World Trade Center against United Airlines, American Airlines, Globe Aviation Services, and Huntleigh USA).

786. American Airlines operated Flight 11 from Boston to Los Angeles, which hit One World Trade Center, and Flight 77 from Washington to Los Angeles, which hit the Pentagon. United Airlines operated Flight 175 from Boston to Los Angeles, which hit Two World Trade Center, and Flight 93 from Newark to San Francisco, which crashed in Pennsylvania. The 9/11 Commission Report 1–14, 32–33 (2004).

787. Argenbright Security provided security for United Airlines at Dulles International Airport, near Washington, D.C., which affected American Flight 77, and at Newark International Airport, which affected United Flight 93. The 9/11 Commission Report 3–4 (2004). Globe Aviation Services provided security for American Airlines at Logan International Airport in Boston, which affected American Flight 11, and Huntleigh USA provided security for United Airlines at Logan International Airport in Boston, which affected United Flight 175. The 9/11 Commission Report 2 (2004).

Damages for passengers in international travel are specified by the Warsaw Convention, which entitles their survivors to a minimum of 100,000 “special drawing rights” (equivalent to \$153,078 on July 30, 2007) and an opportunity to prove additional damages if the airline cannot prove it took all reasonable measures to prevent the incident. *In re Sept. 11 Litig.*, 500 F. Supp. 2d 356 (S.D.N.Y. 2007).

788. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (docket entry 10, dated June 26, 2002).

789. Order, *Mariani*, No. 1:01-cv-11628 (S.D.N.Y. July 25, 2002); see Benjamin Weiser, *Ruling Favors Limited Access to 9/11 Data*, N.Y. Times, July 13, 2002, at B1; Benjamin Weiser, *Security Cited in Proposals on Lawsuits from Sept. 11*, N.Y. Times, Sept. 20, 2002, at B5.

790. The cases were assigned the following docket numbers: 1:02-cv-5288, 1:02-cv-6186, 1:02-cv-6339, 1:02-cv-6358, 1:02-cv-6361 through 1:02-cv-6365, 1:02-cv-6378, 1:02-cv-6379, 1:02-cv-6658, 1:02-cv-6885, 1:02-cv-7031, 1:02-cv-7032, 1:02-cv-7048, 1:02-cv-7110 through 1:02-cv-7122, 1:02-cv-7134, 1:02-cv-7135, 1:02-cv-7143 through 1:02-cv-7156, 1:02-cv-7164, 1:02-cv-7165, 1:02-cv-7167, 1:02-cv-7170 through 1:02-cv-7172, 1:02-cv-7174, 1:02-cv-7176, 1:02-cv-7177, 1:02-cv-7179, 1:02-cv-7180, 1:02-cv-7182, 1:02-cv-7185, 1:02-cv-7188, 1:02-cv-7195, 1:02-cv-7196, 1:02-cv-7198, 1:02-cv-7201, 1:02-cv-7203 through 1:02-cv-7205, 1:02-cv-7208, 1:02-cv-7212, 1:02-cv-7219 through 1:02-cv-7227, 1:02-cv-7231 through 1:02-cv-7233, 1:02-cv-7243 through 1:02-cv-7246, 1:02-cv-7248 through 1:02-cv-7250, 1:02-cv-7252, 1:02-cv-7256, 1:02-cv-7258 through 1:02-cv-7262, 1:02-cv-7264, 1:02-cv-7267, 1:02-cv-7269 through 1:02-cv-7273, 1:02-cv-7275, 1:02-cv-7279, 1:02-cv-7289, 1:02-cv-7290, 1:02-cv-7296, 1:02-cv-7305, 1:02-cv-7314, 1:02-cv-7328, 1:02-cv-7331, 1:02-cv-7389, 1:02-cv-7608, 1:02-cv-7912, 1:02-cv-7920, 1:02-cv-8092, 1:02-cv-8100, 1:02-cv-8111, 1:02-cv-8434, 1:02-cv-8554, and 1:02-cv-8688.

airlines and airline security companies), except for alleged hijackers or terrorists” and established a master docket case entitled *In re September 11 Litigation*.⁷⁹¹

Judge Hellerstein also established a suspense docket to allow plaintiffs to file a civil action before expiration of its statute of limitation without impairing their ability to seek compensation from the fund instead.⁷⁹² After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.⁷⁹³

The plaintiffs filed five master complaints on December 11, 2002—four pertaining to personal injuries arising from the crash of each plane and one pertaining to property damage and business interruption.⁷⁹⁴ Both the court and the plaintiffs’ executive committee established publicly accessible Internet webpages to post information about the litigation and selected court filings.⁷⁹⁵

By February 11, 2003, an additional 38 cases had been filed.⁷⁹⁶ On that date, Judge Hellerstein divided the cases into two groups: (1) cases claiming damages arising from conduct through the September 11, 2001, attacks, and (2) cases claiming damages arising mostly from respiratory injuries during the cleanup and

791. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); see Docket Sheet, *id.*; see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167, 168 n.3 (S.D.N.Y. 2006).

The code “21” appears in place of the year in the case number because in the court’s records of miscellaneous cases “21” is the code for multidistrict litigation. Interview by e-mail with Southern District of New York Staff, Aug. 20, 2009.

792. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Dec. 2, 2003); Order, *id.* (Nov. 21, 2003); Order, *id.* (July 23, 2003); Order, *Mulligan v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6885 (S.D.N.Y. Sept. 6, 2002); *In re Sept. 11 Litig.*, 236 F.R.D. at 166–67; see Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. Times, Sept. 4, 2002, at B3.

“Proceedings [before Judge Hellerstein] began after the Victim Compensation Fund closed, so that the litigation did not compete with the workings of the Fund.” *In re September 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

793. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Feb. 20, 2004).

Subsequently the court resolved the suspense docket for cleanup and aftermath cases. Order, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Mar. 15, 2004); Corrective Order, *id.* (Mar. 3, 2004).

794. Docket Sheet, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); see Fourth Am. Compl., *id.* (Sept. 14, 2007) (concerning American Flight 11 from Boston to Los Angeles, which crashed into One World Trade Center); Fourth Am. Compl. *id.* (Aug. 1, 2007) (concerning American Flight 77 from Dulles to Los Angeles, which crashed into the Pentagon); Third Am. Compl., *id.* (Aug. 1, 2007) (concerning United Flight 93 from Newark to San Francisco, which crashed in Pennsylvania); Fourth Am. Compl., *id.* (Sept. 14, 2007) (concerning United Flight 175 from Boston to Los Angeles, which crashed into Two World Trade Center); Fourth Am. Compl., *id.* (Jan. 18, 2005) (concerning property injuries).

795. See <http://www.nysd.uscourts.gov/sept11litigation.htm> (the court’s website); <http://www.sept11tortlitigation.com/index.html> (the plaintiffs’ website).

796. The cases were assigned the following docket numbers: 1:02-cv-8916, 1:02-cv-8918, 1:02-cv-8919, 1:02-cv-8938, 1:02-cv-9126 through 1:02-cv-9128, 1:02-cv-9234, 1:02-cv-9935, 1:02-cv-10052, 1:02-cv-10054, 1:02-cv-10160, 1:02-cv-10270 through 1:02-cv-10275, 1:02-cv-10304, 1:03-cv-6 through 1:03-cv-8, 1:03-cv-29, 1:03-cv-33 through 1:03-cv-38, 1:03-cv-131, 1:03-cv-193 through 1:03-cv-195, 1:03-cv-332, 1:03-cv-439, 1:03-cv-644, 1:03-cv-645, and 1:03-cv-912.

aftermath period.⁷⁹⁷ Cases in the first group remained part of the original master docket, and cases in the second group were assigned to a new master docket case entitled *In re World Trade Center Disaster Site Litigation*.⁷⁹⁸

One of the cases filed in early 2003 was an action by an insurance company to determine its obligation to insure and provide defense costs for owners and operators of the World Trade Center.⁷⁹⁹ Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.⁸⁰⁰

By the end of June 2003, another 13 cases had been filed; eight of these were consolidated in the cleanup master docket,⁸⁰¹ and the other five were consolidated in the attacks master docket.⁸⁰²

Cleanup cases were filed in state court against the City of New York, the Port Authority of New York and New Jersey, or both, and were removed to federal court.⁸⁰³ The Southern District of New York's exclusive jurisdiction applies to suits for damages "resulting from or relating to" the terrorist attacks.⁸⁰⁴ Judge Hellerstein determined that with respect to actions in New York, his court's exclusive jurisdiction applied to injuries at the World Trade Center site from the time of the crashes on September 11, 2001, until the search for survivors ceased

797. Case Management Order, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

798. See Docket Sheet, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 168 n.3 (S.D.N.Y. 2006).

Judge Hellerstein denied the government defendants' motions to dismiss on immunity grounds, *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006), and the court of appeals affirmed, *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169 (2d Cir. 2008) (resolving *In re World Trade Center Disaster Site Litig.*, No. 06-5324 (2d Cir. Nov. 17, 2006)); see Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. Times, Mar. 30, 2008, at 18.

799. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

800. *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004).

Judge Hellerstein ruled that World Trade Center liability insurance policies did not include defense costs, except for one policy that would come into effect once \$265 million in damages had been paid. *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104 (S.D.N.Y. 2006). Judge Hellerstein resolved this part of the litigation by sanctioning insurance companies \$1,250,000 for denying coverage and by dismissing the action. *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007) (sanctions); Judgment, *Zurich American Ins. Co.*, No. 1:03-cv-332 (S.D.N.Y. July 23, 2007); Order, *id.* (Jan. 18, 2007) (dismissal). Appeals were settled subsequent to oral arguments. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-991 (2d Cir. Mar. 12, 2007) (settled Jan. 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-776 (2d Cir. Mar. 1, 2007) (settled Oct. 24, 2008); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-706 (2d Cir. Feb. 26, 2007) (settled Jan. 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-530 (2d Cir. Feb. 14, 2007) (settled Jan. 9, 2009).

801. The cases were assigned the following docket numbers: 1:03-cv-2067, 1:03-cv-2104, 1:03-cv-2447, 1:03-cv-2621 through 1:03-cv-2623, 1:03-cv-3040, and 1:03-cv-4064.

802. The cases were assigned the following docket numbers: 03-cv-1016, 03-cv-1040, 03-cv-2004, 03-cv-2104, 03-cv-2621, 03-cv-2622, 03-cv-2684, and 03-cv-3999.

803. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003).

804. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230.

on September 29, 2001.⁸⁰⁵ Judge Hellerstein remanded all actions that included only claims for injuries outside those geographical and temporal limits, but assumed supplemental jurisdiction over claims outside the limits in actions that included claims within the limits.⁸⁰⁶

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.⁸⁰⁷ Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands to state court are not reviewable.⁸⁰⁸ But the appellate court reviewed some plaintiffs' cross-appeals of Judge Hellerstein's denials of their remand motions and affirmed.⁸⁰⁹ The court noted that its reasoning implied that the remands were improper, because Judge Hellerstein's temporal and geographic distinctions had no basis in the Act.⁸¹⁰ The court of appeals, therefore, invited the district court to reconsider its remand orders, which were stayed, in light of the court of appeals' "view that the respiratory injury claims before the district court are preempted by" the Act.⁸¹¹ So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.⁸¹²

By March of 2005, more than 1,000 civil cases against defendants other than the terrorists and their supporters claimed damages related to the September 11, 2001, attacks. On March 10, the court created a third master docket case for complaints alleging property damage as a result of the terrorist attacks, calling the new consolidation *In re September 11 Property Damage and Business Loss Litiga-*

805. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

Judge Hellerstein previously remanded two clean-up cases that were never consolidated with the other September 11 damages cases described here. *Spagnuolo v. Port Auth. of N.Y. & N.J.*, 245 F. Supp. 2d 519 (S.D.N.Y. 2003) (remanding *Spagnuolo v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6360 (S.D.N.Y. Aug. 9, 2002)); *Graybill v. City of New York*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding *Graybill v. City of New York*, No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); see *In re World Trade Ctr.*, 270 F. Supp. 2d at 365.

806. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

807. *Id.* at 380–81.

808. *In re WTC Disaster Site*, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005); see 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."); see also *id.* § 1443 (providing for removal of certain civil rights cases).

809. *In re WTC Disaster Site*, 414 F.3d at 357, 371–81.

810. *Id.* at 380–81 ("we have noted our agreement with cross-appellants' contention that there was no appropriate basis for the district court's conclusion that their claims should be retained while those of plaintiffs who asserted claims of respiratory injury suffered at sites other than the World Trade Center site or after Sept. 29, 2001, were to be remanded."); see Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

811. *In re WTC Disaster Site*, 414 F.3d at 381.

812. See *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).

Judge Hellerstein subsequently relied on the court of appeals' dictum to deny motions to remand later-removed cases. *In re World Trade Ctr. Disaster Site Litig.*, 467 F. Supp. 2d 372 (S.D.N.Y. 2006).

tion.⁸¹³ The court created a fourth master docket case called *In re World Trade Center Lower Manhattan Disaster Site Litigation* on August 9, 2005, for claimed injuries outside the immediate World Trade Center area.⁸¹⁴

In time, many thousand cases were filed in this litigation. After many cases alleging both injuries at the World Trade Center and outside the immediate World Trade Center area were filed, the court created, on March 28, 2007, a fifth master docket case for these “straddlers,” called *In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation (straddler plaintiffs)*.⁸¹⁵

By July 2007, of the 95 actions included in the original master docket, 53 had settled and one was dismissed.⁸¹⁶ Judge Hellerstein limited attorney fees, at least among those cases settling during early phases, to 15% of settlement.⁸¹⁷ To facilitate settlements among the remaining cases, Judge Hellerstein selected six representative cases and ordered that they be tried for damages only, with liability to be determined later if the cases did not settle.⁸¹⁸ Judge Hellerstein believed that this would help the plaintiffs and defendants in all of the remaining cases assess the value of their claims.⁸¹⁹ But all six cases settled before damages trials were held.⁸²⁰

813. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 14, 2005); see Docket Sheet, *id.* (Mar. 21, 2005); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167 n.1, 168 n.3 (S.D.N.Y. 2006).

On March 14, 2007, the U.S. Court of Appeals for the Fourth Circuit ruled that a different district court hearing the case of *United States v. Moussaoui*, see *supra*, “Twentieth Hijacker,” did not have the power to grant the plaintiffs in these cases access to discovery produced to a criminal defendant in the other court. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007).

On December 11, 2008, Judge Hellerstein ruled that insurance recovery for loss of the World Trade Center towers would be fair market value at the time of destruction rather than replacement value. *In re September 11th Litig.*, 590 F. Supp. 2d 535 (S.D.N.Y. 2008).

814. Case Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Aug. 8, 2005); see First Am. Master Compl., *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. Apr. 18, 2008); Master Compl., *id.* (June 11, 2007); Docket Sheet, *id.* (Aug. 9, 2005); see also *In re Sept. 11 Litig.*, 236 F.R.D. at 168 n.3.

815. Case Management Order, *In re Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-103 (S.D.N.Y. Mar. 28, 2007); see Docket Sheet, *id.* (Mar. 28, 2007).

816. *In re Sept. 11 Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); see Hartocollis, *supra* note 775.

817. *E.g.*, Order Concerning Settlement, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Aug. 9, 2007), available at 2007 WL 2298352; Order Concerning Settlement, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. June 29, 2007); *In re September 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

818. Opinion, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), available at 2007 WL 1965559; Order, *id.* (July 2, 2007); *In re September 11 Litig.*, 600 F. Supp. 2d 549, 554 (S.D.N.Y. 2009) (“I determined that the problems of discovery delay arose in connection with issues of liability, not damages.”); *In re September 11 Litig.*, 567 F. Supp. 2d at 616.

819. Opinion at 4, *id.* (July 5, 2007), available at 2007 WL 1965559; Interview with Hon. Alvin K. Hellerstein, June 25, 2007; see Hartocollis, *supra* note 775 (reporting that, “The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.”).

820. *In re September 11 Litig.*, 600 F. Supp. 2d at 554 (“The experiment was successful. After some discovery, and without the need of any trials, all six cases settled and more followed.”); *In re*

By March 19, 2008, so many of the original actions had settled that Judge Hellerstein closed the original master docket consolidation, *In re September 11 Litigation*, and transferred remaining cases to the master docket consolidation for property damage caases, *In re September 11 Property Damage and Business Loss Litigation*.⁸²¹

A law firm representing four of the last remaining plaintiffs among the original wrongful death actions—modest-wage earners at the Pentagon—negotiated settlements totaling \$28.5 million, averaging much more than previous settlements, and negotiated a fee with each plaintiff of 25%.⁸²² As part of his policy to prevent early settlers from leveraging recoveries against later settlers and vice versa, Judge Hellerstein disapproved these settlements as excessive.⁸²³ The judge also disapproved the firm’s fee as out of line with others’ in the litigation.⁸²⁴ “The litigants then accepted the assistance of the mediator and agreed to settlements that were consistent with previous settlements. They also agreed to a 15% contingency fee.”⁸²⁵

By the end of 2008, only three of the original 95 wrongful death and personal injury cases remained unsettled,⁸²⁶ but there remained 9,090 cases by rescue and cleanup workers for respiratory and other injuries.⁸²⁷ In addition to delays resulting from interlocutory appeals, “[t]he inability of counsel to style useful pleadings, or to proceed with discovery relevant to the immunity defenses without excessive and wasteful disputes, made it necessary to develop an alternative manner of proceeding.”⁸²⁸ To help the parties assess the values of the claims, Judge Hellerstein again initiated a process for test trials: 30 cases, mostly representing the

September 11 Litig., 567 F. Supp. 2d at 617; Settlement Order, *Wilson v. American Airlines*, No. 1:03-cv-6968 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Shontere v. AMR Corp.*, No. 1:03-cv-6966 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Ambrose v. American Airlines*, No. 1:02-cv-7150 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Driscoll v. Argenbright Security, Inc.*, No. 1:02-cv-7912 (S.D.N.Y. Sept. 17, 2007); Settlement Order, *Carstanjen v. UAL Corp.*, No. 1:02-cv-7153 (S.D.N.Y. Sept. 17, 2007); Settlement Order, *O’Hare v. United Airlines*, No. 1:02-cv-456 (S.D.N.Y. Sept. 17, 2007).

821. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 18, 2008); Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Mar. 18, 2008).

822. *In re September 11 Litig.*, 567 F. Supp. 2d at 618; see *In re September 11 Litig.*, 600 F. Supp. 2d at 554.

823. *In re September 11 Litig.*, 567 F. Supp. 2d at 621; see *In re September 11 Litig.*, 600 F. Supp. 2d at 554; *New Ruling Sought in 9/11 Settlements*, Wash. Post, Aug. 7, 2008, at A5.

824. *In re September 11 Litig.*, 567 F. Supp. 2d at 618; see *In re September 11 Litig.*, 600 F. Supp. 2d at 554.

825. *In re September 11 Litig.*, 600 F. Supp. 2d at 554.

826. *In re September 11 Litig.*, 621 F. Supp. 2d 131, 140 (S.D.N.Y. 2009) (on July 16, 2009, “Three wrongful death cases and nineteen property damage cases . . . remain to be tried . . .”); *In re September 11 Litig.*, 600 F. Supp. 2d at 553–54; *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 504 n.9 (S.D.N.Y. 2009); *In re September 11th Litig.*, 590 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

827. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 499 n.1, 501, 503.

828. *Id.* at 501.

most severe cases but also representing other cases, would proceed through discovery for trial in May 2010.⁸²⁹

Challenge: Service of Process on International Terrorists

Plaintiffs in the actions against terrorists were faced with unusual service difficulties. Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.⁸³⁰

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.⁸³¹ The court agreed.⁸³²

The plaintiffs proposed that the government serve process on defendants in their custody.⁸³³ The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.⁸³⁴ The court agreed that the government's service on defendants in its custody would be effective, but declined to order the government to facilitate service, and agreed that the government need not disclose whether it had in custody those defendants it had not publicly acknowledged holding.⁸³⁵ The court ruled that service by publication would be effective for those individuals whom the government did not serve.⁸³⁶

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.⁸³⁷ The court ruled that this would be effective service, and agreed to request that the foreign ministries accept service, but declined to order them to do so.⁸³⁸

829. *Id.* at 504; see Mireya Navarro, *Effort to Settle Sept. 11 Lawsuits*, N.Y. Times, Feb. 5, 2010, at A1 ("Several hundred lawyers are working on the cases, and the court documents run to tens of millions of pages.").

The case management order called for division of the cases into five groups, depending upon when the case was filed, and the selection of six cases from each group. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–04. From the 200 cases in each group with the most severe injuries, the two sides of the litigation would each select two cases. *Id.* at 504. Special masters would identify an additional 25 representative cases, and Judge Hellerstein would select two cases from among the 196 severe cases not selected by the parties and the 25 other representative cases. *Id.*

830. *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2004 WL 1348996 (S.D.N.Y. June 14, 2004).

One process server was killed trying to serve process in Saudi Arabia. Interview with Owen Smith, law clerk to Hon. Richard Conway Casey, May 17, 2007.

831. *In re Terrorist Attacks*, No. 1:03-md-1570, 2004 WL 1348996, at *2.

832. *Id.*

833. *Id.*

834. *Id.*

835. *Id.* at *1–*3. The government acknowledged custody of 10 of the 23 defendants who the plaintiffs claimed were in the government's custody. *Id.* at *2.

836. *Id.* at *2–*3.

837. *Id.* at *3.

838. *Id.* at *3 & n.2.

Challenge: Classified Evidence

In the actions against alleged supporters of the terrorists, plaintiffs supported a discovery motion with documents that the plaintiffs knew were sensitive and suspected might be classified.⁸³⁹ It was reported that the documents had been anonymously leaked to the plaintiffs' attorneys.⁸⁴⁰ The attorneys delivered the documents to the court, sent copies to the U.S. Attorney, and provided defendants only with a copy of the transmittal letter.⁸⁴¹ The government determined that at least some of the documents were classified, so the court's copies were securely stored.⁸⁴² The plaintiffs were required to surrender their copies.⁸⁴³ Judge Daniels denied the plaintiffs' request that he review the documents.⁸⁴⁴

Challenge: Discovery of Sensitive Security Information

Litigation claiming inadequate security required discovery concerning security procedures. But the government decided that the Transportation Security Administration (TSA) should screen discovery for "sensitive security information" (SSI), which is secret information related to transportation security.⁸⁴⁵ This slowed substantially the progress of the litigation.⁸⁴⁶

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.⁸⁴⁷ It took the TSA two years to screen the discovery.⁸⁴⁸ The plaintiffs noticed deposi-

839. Discovery Mem. Dec., *supra* note 728, at 18.

840. Eric Lichtblau, *Documents Back Saudi Link to Extremists, But May Never Be Used in 9/11 Suit*, N.Y. Times, June 24, 2009, at A11; Discovery Mem. Dec., *supra* note 728, at 19.

841. Discovery Mem. Dec., *supra* note 728, at 18.

842. *Id.* at 18–19.

843. *Id.* at 19.

844. Order, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. July 16, 2009); *see* Discovery Mem. Dec., *supra* note 728, at 19; Lichtblau, *supra* note 840 ("The Justice Department had the lawyers' copies destroyed and now wants to prevent a judge from even looking at the material.").

845. *In re September 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

Regulations provide the following definition:

SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

49 C.F.R. § 1520.5(a); *see In re September 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); *In re Sept. 11 Litig.*, 236 F.R.D. 164, 169 (S.D.N.Y. 2006).

846. *In re September 11 Litig.*, 567 F. Supp. 2d at 616; Interview with Hon. Alvin K. Hellers-tein, June 25, 2007. "The TSA has reviewed over a million pages of documents and 121 deposition transcripts before allowing their release, in original or redacted form. As a result, discovery has become extended, and a number of judicial interventions were necessary to avoid impasse." *In re September 11 Litig.*, 621 F. Supp. 2d 131, 142 (S.D.N.Y. 2009) (citations omitted).

847. *In re Sept. 11 Litig.*, 236 F.R.D. at 167.

848. *Id.*

tions of the defendants for April 2006.⁸⁴⁹ TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.⁸⁵⁰ The defendants argued that it was in their interest to answer the plaintiffs' questions, and they objected to being held responsible for protecting the government's SSI.⁸⁵¹ Judge Hellerstein was sympathetic to the defendants' position.

Given the uncertainty of what is properly classifiable as SSI, and TSA's own changes of attitudes regarding prior classifications, the task of objecting and instructing is beyond the jurisdictional competence of defense counsel, particularly in light of the client's interests in fully responding to proper questions. Thus, the only lawyers who have the obligation to act as enforcers of TSA's policies are TSA's own lawyers, and it is they, and no one else, who have the responsibility to object and to instruct whenever they, in good faith, believe that SSI may be implicated in a question or an answer. Their attendance at depositions is critical. That is the very reason that they moved to intervene in the case, and the reason that I granted TSA's motion to intervene.⁸⁵²

Judge Hellerstein ruled that the depositions be conducted with only cleared counsel and witnesses present, that TSA be granted 30 days to redact the transcript, and that the original be filed under seal.⁸⁵³ Judge Hellerstein limited TSA's asserted "right to raise objections during the course of depositions, and instruct witnesses not to answer, where the questions posed to witnesses, and the answers elicited therefrom, might implicate information relevant to the case but potentially or actually SSI."⁸⁵⁴ Judge Hellerstein determined that "TSA's position will thwart the very purpose of conducting depositions, as witnesses, fearful that any answer provided might contain information subject to ultimate designation as SSI, would be unable to engage in the dynamic process of question and answer so essential to developing and defending a negligence action."⁸⁵⁵ So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.⁸⁵⁶

Judge Hellerstein determined that the parties, especially the plaintiffs, wanted to identify too many attorneys to participate in the depositions. Two problems Judge Hellerstein identified as resulting from the participation of too many attorneys were (1) a potential delay resulting from the TSA having to clear all of them and (2) a potential compromising of national security resulting from so many attorneys participating.⁸⁵⁷ So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.⁸⁵⁸ The plaintiffs' attorneys were unwilling to be represented by other

849. *Id.* at 169.

850. *Id.* at 165–66, 169.

851. *Id.* at 166, 169.

852. *Id.* at 173.

853. *Id.* at 173–74.

854. *In re* Sept. 11 Litig., 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

855. *Id.* at 410.

856. *Id.*

857. Order, *In re* Sept. 11 Litig., No. 1:21-mc-97, at 1 (S.D.N.Y. June 5, 2006).

858. *Id.* at 1–2.

parties' attorneys, but the government relaxed its insistence that deposition participation be limited, so depositions finally commenced in September 2006.⁸⁵⁹

In October of 2007, plaintiffs moved to set aside discovery confidentiality designations so that all discovery other than SSI could be made public.⁸⁶⁰ Plaintiffs subsequently withdrew this motion, but they renewed it on January 14, 2009.⁸⁶¹ On July 30, Judge Hellerstein denied the motion, ruling that the confidentiality protective order required that objections to confidentiality designations be made within 120 days of the designations.⁸⁶²

859. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

860. Opinion and Order 1–3, *In re* Sept. 11 Prop. Dam. and Bus. Loss Litig., No. 1:21-mc-101 (S.D.N.Y. July 30, 2009) [hereinafter July 30, 2009, S.D.N.Y. Opinion and Order].

861. July 30, 2009, S.D.N.Y. Opinion and Order, *supra* note 860, at 1.

862. *Id.* at 1, 4, 9.

Dirty Bomber

Padilla v. Rumsfeld (Michael B. Mukasey, S.D.N.Y.),⁸⁶³ *Padilla v. Hanft and Padilla v. Rumsfeld* (Henry F. Floyd, D.S.C.),⁸⁶⁴ and *United States v. Hassoun* (Marcia G. Cooke, S.D. Fla.)⁸⁶⁵

Jose Padilla was born in Brooklyn to Puerto Rican parents.⁸⁶⁶ On May 8, 2002, upon his landing at O'Hare International Airport in Chicago on a trip from Pakistan, federal authorities arrested him on a material witness warrant arising from a grand jury investigation of the September 11, 2001, attacks.⁸⁶⁷ Padilla was flown to Manhattan for detention and possible grand jury testimony.⁸⁶⁸

On June 10, Attorney General John Ashcroft announced that the government was holding in custody an enemy combatant who had been apprehended at O'Hare on suspicion of planning to build and detonate a "dirty bomb," which is a bomb made up of radioactive material and conventional explosives.⁸⁶⁹ The detainee was Padilla, and the government had transferred him the previous day to the high-security Consolidated Naval Brig in Charleston, South Carolina.⁸⁷⁰ As a result of this transfer, Padilla was denied access to counsel.⁸⁷¹

863. An appeal was heard by Second Circuit Judges Rosemary S. Pooler, Barrington D. Parker, Jr., and Richard C. Wesley.

864. An appeal was heard by Fourth Circuit Judges J. Michael Luttig, M. Blane Michael, and William B. Traxler, Jr.

865. An appeal was heard by Eleventh Circuit Judges James L. Edmondson and Gerald Bard Tjoflat and Eighth Circuit Judge John R. Gibson.

866. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002); see Dan Eggen & Susan Schmidt, "Dirty Bomb" Plot Uncovered, *U.S. Says*, Wash. Post, June 11, 2002, at A1; James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at A1; Jo Thomas & Dana Canedy, *A Hispanic's Odyssey into the Arms of Islam*, N.Y. Times, June 15, 2002, at A14; Jodi Wilgoren & Jo Thomas, *From Chicago Gang to Possible Al Qaeda Ties*, N.Y. Times, June 11, 2002, at A19.

867. *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004); *Padilla v. Hanft*, 423 F.3d 386, 388–90 (4th Cir. 2005); *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003); *Padilla*, 233 F. Supp. at 568–69, 571, 573; see Eggen & Schmidt, *supra* note 866; John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 Rev. Litig. 297, 304 (2008); Robert C. Herguth, *Former Chicagoan "Trained with the Enemy," U.S. Says*, Chi. Sun Times, June 10, 2002, at 3; Pohlman, *supra* note 175, at 76; Risen & Shenon, *supra* note 866; Wilgoren & Thomas, *supra* note 866.

868. *Padilla*, 542 U.S. at 431; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700 "On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent Padilla."); see Eggen & Schmidt, *supra* note 866; Gibbons, *supra* note 867, at 304.

869. *Padilla*, 233 F. Supp. at 572–73; see Eggen & Schmidt, *supra* note 866; Herguth, *supra* note 867; Risen & Shenon, *supra* note 866; *US Announces Arrest of Alleged Al-Qaeda Terrorist*, Morning Edition (NPR radio broadcast June 10, 2002).

870. *Padilla*, 542 U.S. at 431–32; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. at 569; see Eggen & Schmidt, *supra* note 866; Gibbons, *supra* note 867, at 304–05; Pohlman, *supra* note 175, at 76–77; Risen & Shenon, *supra* note 866.

871. *Padilla*, 233 F. Supp. at 574.

Padilla had been scheduled to appear on June 11 before the Southern District of New York's chief judge Michael B. Mukasey for a hearing on his motion to vacate the material witness warrant.⁸⁷² As a result of Padilla's change in status from material witness to enemy combatant, the government vacated the warrant.⁸⁷³ Padilla's attorney filed a habeas corpus petition on his behalf.⁸⁷⁴ Judge Mukasey ruled that she had standing to do that as Padilla's next friend.⁸⁷⁵ Judge Mukasey denied the government's motion to transfer the habeas case to the District of South Carolina.⁸⁷⁶

Judge Mukasey ruled that the President had the power to detain Padilla as an enemy combatant,⁸⁷⁷ but he also ruled that Padilla had a right to consult counsel and pursue a habeas corpus petition challenging the grounds for the detention.⁸⁷⁸ The government would have to show only "some evidence" to support its determination that Padilla was an enemy combatant.⁸⁷⁹ On reconsideration, Judge Mukasey upheld his original ruling on access to counsel.⁸⁸⁰ At the government's request, a month later, Judge Mukasey certified the issue for interlocutory appeal.⁸⁸¹

Over the dissent of Judge Richard C. Wesley, Judges Rosemary S. Pooler and Barrington D. Parker, Jr., determined Padilla's detention to be unlawful: "Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat."⁸⁸² The court ordered Padilla released from military custody, and the

872. *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. at 571; see Eggen & Schmidt, *supra* note 866; Gibbons, *supra* note 867, at 304–05; Risen & Shenon, *supra* note 866.

873. *Padilla*, 542 U.S. at 432 n.3; *Padilla*, 233 F. Supp. at 571.

874. *Padilla*, 542 U.S. at 432; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. at 571; Docket Sheet, *Padilla v. Rumsfeld*, No. 1:02-cv-4445 (S.D.N.Y. June 12, 2002); see Gibbons, *supra* note 867, at 305; Pohlman, *supra* note 175, at 77; Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect*, Wash. Post, June 13, 2002, at A11.

875. *Padilla*, 233 F. Supp. at 569, 575–78, 610; see Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, N.Y. Times, Dec. 5, 2002, at A24.

The court of appeals affirmed. *Padilla v. Rumsfeld*, 352 F.3d 695, 702–04, 724 (2d Cir. 2003).

876. *Padilla*, 233 F. Supp. at 569, 578–87, 610.

The court of appeals affirmed. *Padilla*, 352 F.3d at 704–10, 724.

877. *Padilla*, 233 F. Supp. at 569, 587–99, 610; see Pohlman, *supra* note 175, at 84–85; Weiser, *supra* note 875.

878. *Padilla*, 233 F. Supp. at 569, 588, 599–605, 610; see Pohlman, *supra* note 175, at 84–85; Weiser, *supra* note 875.

879. *Padilla*, 233 F. Supp. at 570, 605–10; see Pohlman, *supra* note 175, at 85; Weiser, *supra* note 875.

880. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (2003); see Pohlman, *supra* note 175, at 85–86.

881. *Padilla ex rel. Newman v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); see Benjamin Weiser, *New Turn in "Dirty Bomb" Case*, N.Y. Times, Apr. 10, 2003, at B15; see also Docket Sheet, *Padilla v. Rumsfeld*, No. 03-2235 (2d Cir. Apr. 21, 2003) (government's appeal); Docket Sheet, *Padilla v. Rumsfeld*, No. 03-2438 (2d Cir. June 10, 2003) (Padilla's cross-appeal).

882. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003); see Neil A. Lewis & William Glaberson, *U.S. Courts Reject Detention Policy in 2 Terror Cases*, N.Y. Times, Dec. 19, 2003, at A1; Pohlman, *supra* note 175, at 87–88.

court acknowledged that he could be held as a material witness or for criminal prosecution.⁸⁸³

On June 28, 2004, the Supreme Court reversed, holding that Padilla should have brought his habeas corpus petition in the District of South Carolina, where he was held.⁸⁸⁴ On the same day, however, the court held that foreign nationals apprehended abroad and held at the Guantánamo Bay Naval Base in Cuba could challenge their detention through habeas corpus.⁸⁸⁵

The court resolved a third case that day: a habeas corpus petition by Yaser Hamdi, who, like Padilla, was an American citizen held as an enemy combatant in a naval brig.⁸⁸⁶ But Hamdi was apprehended in Afghanistan.⁸⁸⁷ No opinion was endorsed by a majority of the court,⁸⁸⁸ but only Justice Thomas thought that Hamdi could be detained indefinitely without a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.⁸⁸⁹

Approximately four weeks before the Supreme Court issued its opinion in Padilla's case, the government released newly declassified information on Padilla.⁸⁹⁰ It was reported that Padilla admitted to attending a terrorist training camp, but his interest in a dirty bomb plot was only a ruse to avoid combat in Afghanistan.⁸⁹¹

On July 2, 2004, Padilla's New York attorney filed a habeas corpus petition on his behalf in the District of South Carolina.⁸⁹² The court assigned the case to

883. *Padilla*, 352 F.3d at 699, 724.

884. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (Chief Justice Rehnquist delivered the opinion of the court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Bryer joined.); see Gibbons, *supra* note 867, at 305; Linda Greenhouse, *Access to Courts*, N.Y. Times, June 29, 2004, at A1; Pohlman, *supra* note 175, at 120.

885. *Rasul v. Bush*, 542 U.S. 466 (2004) (Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined; Justice Kennedy filed an opinion concurring in the judgment; Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.); see Greenhouse, *supra* note 884.

886. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see Gibbons, *supra* note 867, at 303; Greenhouse, *supra* note 884; Pohlman, *supra* note 175, at 76, 120.

887. *Hamdi*, 542 U.S. at 510; see Gibbons, *supra* note 867, at 303; Greenhouse, *supra* note 884; Pohlman, *supra* note 175, at 86.

888. *Hamdi*, 542 U.S. 507 (Justice O'Connor announced the judgment of the court and delivered an opinion in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined; Justice Souter filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which Justice Ginsburg joined; Justice Scalia filed a dissenting opinion, in which Justice Stevens joined; Justice Thomas filed a dissenting opinion.); see Pohlman, *supra* note 175, at 120–21, 130.

889. *Hamdi*, 542 U.S. at 579–99 (Justice Thomas dissenting); see Gibbons, *supra* note 867, at 303; Greenhouse, *supra* note 884; Pohlman, *supra* note 175, at 121.

890. See Eric Lichtblau, *U.S. Spells Out Dangers Posed by Plot Suspect*, N.Y. Times, June 2, 2004, at A1; Pohlman, *supra* note 175, at 119–20.

891. See Lichtblau, *supra* note 890.

892. *Petition, Padilla v. Hanft*, No. 2:04-cv-2221 (D.S.C. July 2, 2004); see *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005); see Gibbons, *supra* note 867, at 305; Pohlman, *supra* note 175, at 131.

Judge Henry F. Floyd.⁸⁹³ On February 28, 2005, Judge Floyd declared Padilla's military detention improper.⁸⁹⁴ On September 9, a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit reversed, determining that the 2001 Authorization for Use of Military Force Joint Resolution gave the President the authority to indefinitely detain even U.S. citizens as enemy combatants.⁸⁹⁵

While Padilla's petition to the Supreme Court for a writ of certiorari was pending, on November 17, 2005, the government indicted him in the Southern District of Florida, adding him to a terrorism conspiracy case pending for nearly two years against four other defendants.⁸⁹⁶ The case had been assigned to Judge Marcia G. Cooke.⁸⁹⁷

The court of appeals denied the government's motion to transfer Padilla to civilian authority in Florida.⁸⁹⁸

[A] short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary in the interest of national security, the government determined that it was no longer necessary that Padilla be held militarily. Instead, it announced, Padilla would be transferred to the custody of federal civilian law enforcement authorities and criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla.⁸⁹⁹

893. Docket Sheet, *Padilla*, No. 2:04-cv-2221 (D.S.C. July 2, 2004).

For this report, Tim Reagan interviewed Judge Floyd, his law clerks Jeff Brown and Chase Samples, and the judge's judicial assistant Cindy Chapman on November 19, 2009, in Spartanburg, South Carolina, where Judge Floyd has his chambers.

Because of Judge Floyd's assignment to *Padilla v. Rumsfeld*, the court also assigned to him a later habeas petition filed by Ali Saleh Kahlah al-Marri. Docket Sheet, *Al-Marri v. Hanft*, No. 2:04-cv-2257 (D.S.C. July 8, 2004).

894. *Padilla*, 389 F. Supp. 2d 678; see Neil A. Lewis, *Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant*, N.Y. Times, Mar. 1, 2005, at A14; Pohlman, *supra* note 175, at 131.

895. *Padilla*, 423 F.3d 386; see Pub. L. No. 107-40, 115 Stat. 224; see Gibbons, *supra* note 867, at 306; Neil A. Lewis, *Court Gives Bush Right to Detain U.S. Combatant*, N.Y. Times, Sept. 10, 2005, at A1; Pohlman, *supra* note 175, at 132.

896. Superseding Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 17, 2005) [hereinafter Nov. 17, 2005, Indictment]; Docket Sheet, *id.* (Jan. 8, 2004) [hereinafter S.D. Fla. Docket Sheet]; *Trying Cases*, *supra* note 181, at 8; see Gibbons, *supra* note 867, at 306; Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. Times, Nov. 23, 2005, at A1; Pohlman, *supra* note 175, at 131; Jay Weaver, *Padilla to Face Terror Charges Here*, Miami Herald, Nov. 23, 2005, at A1.

The *Miami Herald* reported over a year earlier that Padilla might be indicted in Florida. Jay Weaver, *Padilla Could Be Charged in Miami*, Miami Herald, June 30, 2004, at 1A.

897. S.D. Fla. Docket Sheet, *supra* note 896; *Trying Cases*, *supra* note 181, at 8.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on October 8, 2009.

898. *Padilla v. Hanft*, 432 F.3d 582 (2005); see Neil A. Lewis, *Court Refuses U.S. Bid to Shift Terror Suspect*, N.Y. Times, Dec. 22, 2005, at A1; Pohlman, *supra* note 175, at 132.

899. *Padilla*, 432 F.3d at 584.

The Supreme Court, however, granted the government's request to transfer Padilla.⁹⁰⁰ In light of Padilla's removal from military detention, the court later denied his petition for a writ of certiorari.⁹⁰¹

First indicted on January 8, 2004, Adham Amin Hassoun was a Lebanese-born Palestinian charged with raising money and recruiting persons for jihad training.⁹⁰² He and Padilla became friends when they both attended a Fort Lauderdale mosque in the 1990s.⁹⁰³ Added by superseding indictment on September 16, 2004, Mohamed Hesham Youssef was charged as one of Hassoun's recruits; he was in custody in Egypt on other charges.⁹⁰⁴ Kifah Wael Jayyousi and Kassem Daher were named in a sealed material support complaint filed on December 1, 2004.⁹⁰⁵ The complaint was unsealed on March 30, 2005, when Jayyousi was apprehended in Detroit on his return from Qatar.⁹⁰⁶ Jayyousi was born in Jordan;⁹⁰⁷ Daher was a Canadian citizen in overseas custody.⁹⁰⁸ Jayyousi and Daher were added to the pending indictment on April 7, 2005.⁹⁰⁹

Even after Padilla was added to the indictment, there was no charge pertaining to a dirty bomb.⁹¹⁰ The dirty bomb issue never arose at all in the case.⁹¹¹ But there was an allegation that "On or about July 24, 2000, Padilla filled out a 'Mujahideen Data Form' in preparation for violent jihad training in Afghanistan."⁹¹² The government claimed that it was found in Afghanistan among dozens of other applications late in 2001.⁹¹³

900. Hanft v. Padilla, 546 U.S. 1084 (2006); see Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. Times, Jan. 5, 2006; Pohlman, *supra* note 175, at 133; Jay Weaver, *Dirty-Bomb Suspect Charged as Civilian*, Miami Herald, Jan. 6, 2006, at B5 ("Padilla was flown in a military jet to Homestead Air Base, then by helicopter to Watson Island, before a convoy of U.S. marshals escorted him to the Miami Federal Detention Center for his initial court hearing.").

901. Padilla v. Hanft, 547 U.S. 1062 (2006); see Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. Times, Apr. 4, 2006, at A1; Pohlman, *supra* note 175, at 133.

902. Indictment, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Jan. 8, 2004); *Trying Cases*, *supra* note 181, at 8; see Abby Goodnough, *After 5 Years, Padilla Goes on Trial in Terror Case*, N.Y. Times, May 15, 2007, at A14; Jay Weaver, *2 Men Facing Terror Charges*, Miami Herald, Sept. 17, 2004, at 1B.

903. See Weaver, *supra* note 896.

904. 2d Superseding Indictment, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 16, 2004); see Weaver, *supra* note 902.

905. Sealed Crim. Complaint, United States v. Jayyousi, No. 1:04-mj-3565 (S.D. Fla. Dec. 1, 2004); Docket Sheet, *id.* (Apr. 4, 2005); see *Trying Cases*, *supra* note 181, at 8.

906. See Hannah Sampson, *2 Men Held on Terror Charges*, Miami Herald, Mar. 30, 2005, at 9B.

907. See Goodnough, *supra* note 902.

908. See Sampson, *supra* note 906; Weaver, *supra* note 900.

909. Nov. 17, 2005, Indictment, *supra* note 896; see Jack Dolan, *Third Suspect Faces Terror Charges*, Miami Herald, Apr. 9, 2005, at 4B.

910. See Pohlman, *supra* note 175, at 133; Weaver, *supra* note 896.

911. *Trying Cases*, *supra* note 181, at 7; Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

912. Nov. 17, 2005, Indictment, *supra* note 896; see Weaver, *supra* note 900.

913. See Jay Weaver, *We Found al Qaeda Inquiry, U.S. Says*, Miami Herald, Jan. 13, 2006, at B2.

Hassoun and Jayyousi, the only two defendants in local custody, were held in solitary confinement because they were terrorism suspects; they complained of improper detention practices: not being permitted family visits on weekends when family members did not have to work, not being permitted family visits in the evenings, which meant that out-of-town family members had to pay for overnight lodging, not being permitted long-distance telephone calls to family members at times when the family members would be awake, severe mail delays, and various inconveniences in meetings with attorneys.⁹¹⁴ Judge Cooke denied the defendants' motion to be relieved of solitary confinement, but she said she would "hold the government's feet to the fire."⁹¹⁵

A few months later, deciding that he was not a flight risk, Judge Cooke granted Jayyousi's request for bail, setting the bond at \$1.3 million and imposing electronic monitoring.⁹¹⁶

On August 18, 2006, Judge Cooke dismissed the first count of the 11-count indictment, a charge that the defendants conspired to murder, kidnap, and maim persons in a foreign country, as impermissibly multiplicitous of other counts.⁹¹⁷ The court of appeals reversed.⁹¹⁸

On January 4, 2007, the *New York Times* printed a front-page story based, in part, on discovery that Padilla's attorneys improperly provided to the newspaper:

Tens of thousands of conversations were recorded. Some 230 phone calls form the core of the government's case, including 21 that make reference to Mr. Padilla, prosecutors said. But Mr. Padilla's voice is heard on only seven calls. And on those seven, which The Times obtained from a participant in the case, Mr. Padilla does not discuss violent plots.⁹¹⁹

Padilla's attorneys said that the error resulted from a person in the federal defender's office's not understanding the operable protective order, and Judge Cooke reprimanded the attorneys.⁹²⁰

Jury selection began on April 16, 2007.⁹²¹ Judge Cooke had decided that the court should send out 3,000 jury duty letters for the trial.⁹²² Jurors were selected

914. Joint Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. June 15, 2005) [hereinafter Joint Motion]; see Jay Weaver, *Two Men Claim Prison Abuse*, Miami Herald, June 18, 2005, at 1B.

915. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 21, 2005) [hereinafter Sept. 21, 2005, S.D. Fla. Order]; see Jay Weaver, *Judge Backs Confinement of Two Terror Suspects*, Miami Herald, Sept. 17, 2005, at B3.

916. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006); see Weaver, *supra* note 900.

917. United States v. Padilla, No. 0:04-cr-60001, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006); see Jay Weaver, *Padilla Terror Count Tossed*, Miami Herald, Aug. 22, 2006, at B1.

918. United States v. Hassoun, 476 F.3d 1181 (11th Cir. 2007) (resolving United States v. Hassoun, No. 06-15845 (11th Cir. Nov. 6, 2006)); see Jay Weaver, *Key Charge Against Padilla Restored*, Miami Herald, Jan. 31, 2007, at B1.

919. Deborah Sontag, *In Padilla Wiretaps, Murky View of "Jihad" Case*, N.Y. Times, Jan. 4, 2007, at A1; see Jay Weaver, *Padilla Lawyers Blasted for Wiretap Leak*, Miami Herald, Jan. 23, 2007, at B5.

920. See Jay Weaver, *Judge Scolds Padilla's Lawyers for Leak*, Miami Herald, Jan. 25, 2007, at B6.

from a pool of approximately 300.⁹²³ Voir dire lasted four weeks.⁹²⁴ Judge Cooke decided to use a jury questionnaire.⁹²⁵ On May 8, 2007, the jury was selected from a culled pool of 88 potential jurors.⁹²⁶

After about three weeks of testimony, it was discovered that one of the jurors was not a U.S. citizen.⁹²⁷ The jury summons was meant for his son, who had the same name.⁹²⁸ Another juror was excused because of injuries suffered when he tried to prevent a break-in of his daughter's car.⁹²⁹ Another juror's sister died, but she asked only for an early dismissal on Friday so that she could attend a memorial service in North Carolina on Saturday.⁹³⁰

The jury convicted all three defendants on August 16, 2007, one day after beginning deliberations.⁹³¹ Three months later, Hassoun attempted suicide.⁹³² On January 22, 2008, Judge Cooke sentenced Padilla to 17 years and four months, Hassoun to 15 years and eight months, and Jayyous to 12 years and eight months.⁹³³ Appeals were heard on January 12, 2010.⁹³⁴

During his criminal prosecution in Florida, Padilla filed civil suits challenging his conditions of confinement while designated an enemy combatant. On February 9, 2007, he and his mother filed an action in the District of South Carolina

921. S.D. Fla. Docket Sheet, *supra* note 896; see Jay Weaver, *Padilla Jury Picking Could Last 3 Weeks*, Miami Herald, Apr. 17, 2007, at B7.

922. *Trying Cases*, *supra* note 181, at 10; see *3,000 in Jury Pool for Terror Trial*, Miami Herald, Oct. 27, 2006.

923. *Trying Cases*, *supra* note 181, at 10; see Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. Times, May 9, 2007, at A18; Weaver, *supra* note 921.

924. See Goodnough, *supra* note 923.

925. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009; see Jay Weaver, *Padilla Terror Trial Is Ready to Unfold*, Miami Herald, Apr. 15, 2007, at A1.

926. See Jay Weaver, *Angry Lawyers Finally Pick Jury*, Miami Herald, May 9, 2007, at B1.

927. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

928. *Id.*

929. *Id.*

930. *Id.*

931. See Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. Times, Aug. 17, 2007, at A1; Pohlman, *supra* note 175, at 133; Jay Weaver & Larry Lebowitz, *Miami Jury Convicts Padilla*, Miami Herald, Sug. 17, 2007, at A1; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, Wash. Post, Aug. 17, 2007, at A1.

932. See Jay Weaver, *Padilla Codefendant Tries to Kill Himself*, Miami Herald, Dec. 4, 2007, at B5.

933. S.D. Fla. Docket Sheet, *supra* note 896; see Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. Times, Jan. 23, 2008, at A14; Jay Weaver, *Padilla Gets 17 Years in "Jihad" Conspiracy*, Miami Herald, Jan. 23, 2008, at A1; Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years*, Wash. Post, Jan. 23, 2008, at A3.

934. Docket Sheet, United States v. Hassoun, No. 08-10952 (11th Cir. Mar. 3, 2008) (government's cross-appeal); Docket Sheet, United States v. Hassoun, No. 08-10561 (11th Cir. Feb. 8, 2008) (Hassoun's appeal); Docket Sheet, United States v. Padilla, No. 08-10560 (11th Cir. Feb. 8, 2008) (Padilla's appeal); Docket Sheet, United States v. Jayyousi, No. 08-10494 (11th Cir. Feb. 4, 2008) (Jayyousi's appeal) [hereinafter 11th Cir. *Jayyousi* Docket Sheet]; see Gibbons, *supra* note 867, at 306; Jay Weaver, *Prosecutors Appeal Padilla's Sentence*, Miami Herald, Mar. 1, 2008, at B2.

against the government, and the court assigned the action to Judge Floyd.⁹³⁵ The following year, on January 4, 2008, Padilla and his mother filed an action against Boalt Hall law professor John Yoo, claiming that mistreatment of Padilla while in custody resulted from improperly crafted legal opinions Yoo wrote when he worked for the government's Office of Legal Counsel.⁹³⁶ The court assigned the case to Judge Jeffrey S. White,⁹³⁷ who denied Yoo's motion to dismiss.⁹³⁸ An appeal is pending.⁹³⁹

Challenge: Attorney–Client Contacts

Padilla was transferred from New York to South Carolina without notice to his attorney.⁹⁴⁰ Once Padilla was designated an enemy combatant, the government denied him access to counsel, arguing that access to counsel would interfere with Padilla's interrogation and that Padilla might use contacts with counsel to communicate with other terrorists.⁹⁴¹ Judge Mukasey ruled this restriction improper.⁹⁴²

[A]ccess to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so; no general right to counsel in connection with questioning has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent.⁹⁴³

Judge Mukasey characterized concerns about using the attorney as a communication conduit to terrorists “gossamer speculation.”⁹⁴⁴ “[T]here is no reason that military personnel cannot monitor Padilla's contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one.” Further, there is nothing to suggest that a member of the court's Criminal Justice Act panel, such as Padilla's attorney, “would ever be inclined to act as conduits for their client, even if he wanted them to do so.”⁹⁴⁵

Unwilling to allow Padilla access to counsel, the government filed a motion to reconsider, violating local rules by filing the motion late and submitting a sup-

935. Compl., *Padilla v. Rumsfeld*, No. 2:07-cv-410 (D.S.C. Feb. 9, 2007); see Third Am. Compl., *id.* (July 23, 2008).

936. Compl., *Padilla v. Yoo*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008); see Am. Compl., *id.* (June 2, 2008).

937. Docket Sheet, *Padilla*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008).

938. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); see Adam Liptak, *Padilla Sues U.S. Lawyer over Detention*, N.Y. Times, Jan. 5, 2008, at A9.

939. Docket Sheet, *Padilla v. Yoo*, No. 09-16478 (9th Cir. July 14, 2009) (noting that the reply brief was filed Feb. 19, 2010).

940. See Chris Hedges, *Speaking for Terror Suspect, and for the Constitution*, N.Y. Times Feb. 11, 2003, at B2.

941. *Padilla*, 233 F. Supp. at 603.

942. *Id.* at 569, 599–605, 610; see Weiser, *supra* note 875.

943. *Padilla*, 233 F. Supp. at 603.

944. *Id.* at 604.

945. *Id.*

porting affidavit without leave of court.⁹⁴⁶ The government argued that access to counsel would interfere with the psychological pressure on Padilla employed as part of the interrogation process and access to counsel was furthermore unnecessary because the court could rely on the government's evidence alone to decide Padilla's habeas corpus petition.⁹⁴⁷ Judge Mukasey was not persuaded.⁹⁴⁸

In Florida, Hassoun and Jayyousi complained of insufficient access to counsel; Judge Cooke ordered that they be permitted two 15-minute telephone calls with their attorneys each week.⁹⁴⁹ "During these legal telephone calls the [Federal Detention Center] officials shall stay a reasonable distance away from the Defendant to allow for sufficient privacy."⁹⁵⁰ As trial approached, Judge Cooke ordered the detention center to provide a bigger conference table for meetings between the defendants and their attorneys.⁹⁵¹

Challenge: Mental Health During Detention

One month before the scheduled commencement of trial, Padilla's attorneys filed a motion to determine whether their client was competent to stand trial: "he appears to be incapacitated by post traumatic stress disorder, stemming from the circumstances surrounding his time at the Naval Brig and, as a result of this incapacitation, is unable to assist his attorneys by providing relevant information to his defense."⁹⁵²

Special administrative measures for Padilla's detention (SAMs) made his psychiatric evaluation difficult,⁹⁵³ so Judge Cooke had the evaluation conducted in her courtroom.⁹⁵⁴ Judge Cooke was not present for the evaluation.⁹⁵⁵

Judge Cooke found Padilla competent to stand trial.⁹⁵⁶

946. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 43–49 (S.D.N.Y. 2003).

947. Padilla, 243 F. Supp. 2d at 43.

948. *Id.* at 43, 53–57; see Benjamin Weiser, *Judge Is Angered by U.S. Stance in Case of "Dirty Bomb" Suspect*, N.Y. Times, Jan. 16, 2003, at A16.

949. Joint Motion, *supra* note 914.

950. Sept. 21, 2005, S.D. Fla. Order, *supra* note 915.

951. See Jay Weaver, *Padilla Judge: I Don't Want to Run a Prison*, Miami Herald, Feb. 4, 2006, at B1.

952. Mot. for Mental Competency Hearing, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006); see Deborah Sontag, *Federal Judge Is Asked to Decide if Padilla Is Competent for Trial*, N.Y. Times, Dec. 14, 2006, at A24; Jay Weaver, *Terror Suspect to Undergo Mental Testing*, Miami Herald, Dec. 19, 2006, at B4.

953. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

954. *Id.*; see Jay Weaver, *Padilla Mental Evaluation to Be Done in Court*, Miami Herald, Dec. 22, 2006, at B5.

955. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

956. Order of Competency, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 1, 2007), available at 2007 WL 610175; see Deborah Sontag, *U.S. Judge Finds Padilla Competent to Face Trial*, N.Y. Times, Mar. 1, 2007, at A11; Jay Weaver, *Judge Rules Padilla Fit for Trial*, Miami Herald, Mar. 1, 2007, at B1; Peter Whoriskey, *Judge Rules Padilla Is Competent to Stand Trial*, Wash. Post, Mar. 1, 2007, at A3.

Challenge: Classified Arguments

In response to Padilla's habeas corpus petition in New York, the government submitted both a public redacted declaration describing evidence supporting the designation of Padilla as an enemy combatant and an ex parte, in camera classified unredacted declaration.⁹⁵⁷ Judge Mukasey reviewed the classified declaration to assess the validity of the government's denial of Padilla's access to counsel.⁹⁵⁸ The only information in the unredacted declaration not in the public declaration was the identity of sources and some circumstantial evidence corroborating facts in the redacted declaration.⁹⁵⁹ The classified declaration did not refer to conduct by Padilla not described in the redacted declaration.⁹⁶⁰

Judge Mukasey ruled that it was proper to deny Padilla access to the classified declaration unless Padilla rebutted the facts in the redacted declaration justifying his designation as an enemy combatant and fairness demanded his access to the unredacted declaration, at which time the government could elect to withdraw the unredacted declaration instead of granting Padilla access to it, if the government so wished.⁹⁶¹

The government also presented in camera an ex parte unredacted declaration in support of its motion to reconsider Judge Mukasey's granting Padilla access to counsel.⁹⁶² The court of appeals reviewed both unredacted declarations, but did not rely on them.⁹⁶³

In the Eleventh Circuit appeal by Padilla, Hassoun, and Jayyousi, the court instructed the parties to give notice whether classified matters would be presented at oral argument.⁹⁶⁴

Challenge: Witness Security

To show chain of custody for Padilla's alleged Mujahideen Data Form, the government offered testimony from the CIA agent who found it.⁹⁶⁵ The government asked that the witness's identity be protected by use of (1) a pseudonym; (2) light disguise (which "may involve the witness wearing a wig, eyeglasses or minor facial hair"); (3) a separate entrance; (4) a prohibition on sketch artists "recording the witness' likeness"; and (5) a prohibition on "questioning the witness in a manner that would expose either his classified identity, the classified identities of

957. *Padilla*, 233 F. Supp. at 569–70, 572–73 604–10; see Benjamin Weiser, *Lawyers for Detainee Ask Judge Not to Review Classified Papers*, N.Y. Times, Oct. 24, 2002, at A15.

958. *Padilla*, 233 F. Supp. at 604.

959. *Id.* at 609.

960. *Id.*

961. *Id.* at 608–10.

962. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

963. *Padilla v. Rumsfeld*, 352 F.3d 695, 701 n.4 (2d Cir. 2003).

964. 11th Cir. *Jayyousi* Docket Sheet, *supra* note 934.

965. Mot. in Limine, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 22, 2007).

other covert CIA personnel, or the specific location of the covert CIA site in Quandahar, Afghanistan where the witness worked.”⁹⁶⁶

At trial, the witness wore black-rimmed glasses and a closely cropped beard.⁹⁶⁷ He came to the courtroom from the basement by way of the prisoner elevator.⁹⁶⁸

Challenge: Court Security

For Padilla’s Miami trial, federal deputy marshals were brought in from around the country.⁹⁶⁹ An extra metal detector was set up outside Judge Cooke’s courtroom.⁹⁷⁰

Challenge: Jury Security

To shield potential jurors from the public during jury selection, the court erected a screen in the courthouse lobby.⁹⁷¹ The jury was semi-sequestered.⁹⁷² Their identities were known to the court and the parties, but identifying information was not presented in open court or otherwise made public.⁹⁷³ Jurors did not report directly to the courthouse; each reported to a specific secret location—one on the north side of town and one on the south side—from which they were shuttled to the courthouse.⁹⁷⁴ Instead of going their own way for lunch, they always ate together.⁹⁷⁵ Once a week or so, the deputy marshals took them out for lunch.⁹⁷⁶

Restrooms on the courtroom’s floor were reserved for use by jurors and court staff only.⁹⁷⁷ Cubicle walls were used to screen off a rest area outside the jury room, a table and chairs were set up outside on a porch, and extra games and magazines were brought in.⁹⁷⁸

Challenge: Classified Evidence

District of South Carolina

Padilla’s attorneys wanted his habeas petition decided on legal grounds rather than factual grounds, so evidence was never an important issue in the case.⁹⁷⁹

966. *Id.*; see Jay Weaver, *Padilla Trial CIA Witness May Testify in Disguise*, Miami Herald, Mar. 22, 2007.

967. See Jay Weaver, “Secret Agent” Testifies about Padilla Document, Miami Herald, May 16, 2007, at A3.

968. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

969. See Goodnough, *supra* note 902.

970. See Weaver, *supra* note 921.

971. See *id.*

972. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

973. *Id.*

974. *Id.*

975. *Id.*

976. *Id.*

977. *Id.*

978. *Id.*

979. Interview with Hon. Henry F. Floyd, Nov. 19, 2009.

However, this could not be known with certainty at the outset, so Judge Floyd's two law clerks and his judicial assistant obtained security clearances.⁹⁸⁰ Judge Floyd sits in Spartanburg, but he anticipated a possible evidentiary hearing at the larger courthouse in Charleston, about 200 miles away.⁹⁸¹ For this reason, a courtroom deputy and a court reporter there obtained security clearances.⁹⁸² As it happened, oral arguments were held in Spartanburg, and they did not refer to classified information.⁹⁸³

Judge Floyd examined some classified evidence at a sensitive compartmented information facility (SCIF) at the courthouse in Charleston, but there was no need for his staff to do so.⁹⁸⁴

Southern District of Florida

All defense attorneys in the criminal case received security clearances.⁹⁸⁵ There was already a SCIF in the basement of the courthouse, and defense attorneys could review classified information in this room.⁹⁸⁶

More than two years after Padilla's indictment, Judge Cooke granted him access to classified evidence created during his military confinement. Although it is common to grant defense attorneys access to classified evidence relevant to a prosecution, it is very unusual for courts to grant such access to terrorism defendants.⁹⁸⁷ Both Judge Cooke and defense attorneys viewed classified videos of Padilla's interrogation in the basement SCIF.⁹⁸⁸

All of Judge Cooke's staff received security clearances for this case.⁹⁸⁹ The last of her cleared law clerks left in 2009, but her permanent staff—her assistant, courtroom deputy, and court reporter—all retain top secret clearances.⁹⁹⁰ During this case, Judge Cooke did not use interns, because they would not have security clearances.⁹⁹¹

Challenge: FISA Evidence

FISA warrants resulted in evidence against each of the defendants.⁹⁹² On February 14, 2006, Hassoun moved the court

to undertake a careful review of all applications for electronic surveillance of defendant Hassoun conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as

980. *Id.*

981. *Id.*

982. *Id.*

983. *Id.*

984. *Id.*; see Reagan, *supra* note 165, at 19 (describing SCIFs).

985. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

986. *Id.*

987. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. July 5, 2006); see *Judge Allows Padilla to See Secrets*, Wash. Post, July 14, 2006, at A12.

988. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

989. *Id.*

990. *Id.*

991. *Id.*

992. *Trying Cases*, *supra* note 181, at 8; Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

well as applications for such surveillance of any third-party target which intercepted defendant, and based upon that review, disclose the applications [and] orders to the defense, hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and, as [a] result, suppress all intercepts of defendant Hassoun derived from illegally authorized FISA surveillance.⁹⁹³

Judge Cooke referred the matter to Magistrate Judge Stephen T. Brown,⁹⁹⁴ who “examined *in camera* every application from which the Government has indicated that it derived evidence that will be used in its case against the Defendants.”⁹⁹⁵ Judge Brown found

that each individual application contain[ed] probable cause that the subject of the surveillance was “an agent of a foreign power.” The Court additionally [found] that with respect to any target who is a “United States person,” the probable cause finding(s) were not based solely on activities which are protected under the First Amendment.

On April 4, 2007, Judge Cooke affirmed Judge Brown’s findings: “Although the Magistrate Judge carefully reviewed the FISA applications and other materials that are the subject of the instant motions, I also reviewed the applications. On review, I agree with Magistrate Judge Brown.”⁹⁹⁶ When she was not looking at them, Judge Cooke stored the warrant applications in a safe in her chambers.⁹⁹⁷

Judge Cooke was also called upon to review an evidentiary substitute for classified evidence, as provided by the Classified Information Procedures Act (CIPA).⁹⁹⁸ An agent of the intelligence agency with authority over the evidence, accompanied by a court information security officer, brought the original evidence to Judge Cooke’s chambers for her private review in her office while the agent and the security officer waited outside her door.⁹⁹⁹

993. Hassoun FISA Mot., *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 14, 2006).

994. FISA Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Apr. 4, 2007), available at 2007 WL 1068127.

995. Report & Recommendation 3, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Dec. 15, 2006), available at 2007 WL 1068127.

996. FISA Order, *supra* note 994.

997. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

998. *Id.*; see 18 U.S.C. app. 3; Reagan, *supra* note 165 (discussing CIPA).

999. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

Lackawanna

United States v. Goba
(*William M. Skretny and H. Kenneth Schroeder, Jr., W.D.N.Y.*)

In May 2001, the Buffalo office of the FBI received an anonymous tip that six young men of Yemeni descent in Lackawanna, New York, had been to an al-Qaeda training camp in Afghanistan that spring.¹⁰⁰⁰ The men, who were all American citizens, were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.¹⁰⁰¹ The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.¹⁰⁰² Although they trained at the camp and lied about it afterwards, it does not appear that they ever performed or intended to perform an act of terrorism.¹⁰⁰³

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.¹⁰⁰⁴ Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.¹⁰⁰⁵ In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yassein Taher, Mukhtar al-Bakri, Shafel Mosed, and Faysal Galab.¹⁰⁰⁶

Juma al-Dosari—a friend of Derwish's—was a traveling imam who gave a sermon in Lackawanna in the spring of 2001 urging the Muslim men there to fight side-by-side with their brothers in Kosovo, Chechnya, and Kashmir.¹⁰⁰⁷ The sermon, and Derwish's encouragement, persuaded the "Lackawanna Six" to travel to Afghanistan to train for jihad.¹⁰⁰⁸ They told their families and friends, however, that they would go to Pakistan for religious study.¹⁰⁰⁹

1000. See *Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) [hereinafter *Sleeper Cell*]; Michael Powell, *No Choice but Guilty*, *Wash. Post*, July 29, 2003, at A1; Matthew Purdy & Lowell Bergman, *Where the Trail Led*, *N.Y. Times*, Oct. 12, 2003, at 11; Temple-Raston, *supra* note 134, at 153.

1001. See *United States v. Goba*, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Sleeper Cell*, *supra* note 1000; Powell, *supra* note 1000; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, *N.Y. Times*, May 20, 2003, at A17; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 4.

1002. See *Sleeper Cell*, *supra* note 1000; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000.

1003. See Powell, *supra* note 1000; Purdy, *supra* note 1001; Purdy & Bergman, *supra* note 1000; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, *N.Y. Times*, Oct. 22, 2002, at A19.

1004. See *Sleeper Cell*, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 31–32, 44–46.

1005. See Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 37.

1006. See Temple-Raston, *supra* note 134, at 44–45.

1007. See Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 81–87.

1008. See *Sleeper Cell*, *supra* note 1000; Temple-Raston, *supra* note 134, at 88–89.

1009. See *Sleeper Cell*, *supra* note 1000; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 89.

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28, 2001.¹⁰¹⁰ Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.¹⁰¹¹ Derwish, who had moved his family to Yemen, arranged for the six to cross into Afghanistan to attend the al-Farooq training camp near Kandahar.¹⁰¹² Shortly after arriving, however, the men began to look for opportunities to leave.¹⁰¹³

Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June 2001; Goba returned in August.¹⁰¹⁴

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.¹⁰¹⁵ Bahraini authorities arrested him from his wedding bed on September 9, 2002.¹⁰¹⁶ The other five men were arrested back home on September 13 and 14, on a criminal complaint for material support of terrorism.¹⁰¹⁷

The defendants appeared before the U.S. District Court for the Western District of New York's Magistrate Judge H. Kenneth Schroeder, Jr., on September 14 and 16.¹⁰¹⁸ All six defendants received appointed counsel; Judge Schroeder made a deliberate effort to appoint well-known and well-respected attorneys, appointing the Federal Defender to represent Goba and attorneys from the court's Criminal Justice Act panel to represent the other defendants.¹⁰¹⁹

1010. *United States v. Goba*, 240 F. Supp. 2d 242, 251 (W.D.N.Y. Jan. 16, 2003); *United States v. Goba*, 220 F. Supp. 2d 182, 189 (W.D.N.Y. 2002); *see id.* at 197, 207–08, 210–11, 213; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 94.

1011. *Goba*, 240 F. Supp. 2d at 252; *Goba*, 220 F. Supp. 2d at 189; *see id.* at 197–98, 202, 216; *Sleeper Cell*, *supra* note 1000; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 94.

1012. *See* Powell, *supra* note 1000; Temple-Raston, *supra* note 134, at 88–89, 99–109.

1013. *See* *Sleeper Cell*, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 110–25.

1014. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; *see id.* at 211; *Sleeper Cell*, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 129.

1015. *See* Temple-Raston, *supra* note 134, at 7.

1016. *See* *Sleeper Cell*, *supra* note 1000; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Purdy & Bergman, *supra* note 1000; Santora, *supra* note 1003; Temple-Raston, *supra* note 134, at 1, 3, 154, 205.

1017. *Goba*, 240 F. Supp. 2d at 244–45 & n.2; *Goba*, 220 F. Supp. 2d at 184; Docket Sheet, *United States v. Goba*, No. 1:02-cr-214 (W.D.N.Y. Oct. 21, 2002) [hereinafter *Goba* Docket Sheet]; *see* *Sleeper Cell*, *supra* note 1000; Powell, *supra* note 1000; Santora, *supra* note 1003; Temple-Raston, *supra* note 134, at 160–61.

1018. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 1017.

Tim Reagan interviewed Judge Schroeder for this report in the judge's chambers on October 31, 2007.

1019. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 1017; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

All pretrial matters in criminal cases are referred to magistrate judges in this district.¹⁰²⁰ On September 18 through 20, Judge Schroeder held a detention hearing in the court's large ceremonial courtroom.¹⁰²¹ The prosecution of alleged al-Qaeda trainees near the first anniversary of the September 11, 2001, attacks drew international notice. The federal courthouse in Buffalo is located on Niagara Square, which is a plaza in front of Buffalo's city hall approximately 100 yards across. On the days of the detention hearing, the Square was filled with large media vans for news media from all over the world.¹⁰²² Public picketers also occupied space in the plaza and around the courthouse; a popular picket read, "Jail, No Bail."¹⁰²³ Judge Schroeder strove to provide the government and the defendants with a fair and peaceful hearing, mindful that the world was watching how we treated criminal defendants.¹⁰²⁴ Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.¹⁰²⁵

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.¹⁰²⁶ Told that supporters were willing to post \$600,000 bond per defendant, Judge Schroeder set Alwan's bail at \$600,000.¹⁰²⁷ But Alwan was unable to post such an amount after all, so he remained detained.¹⁰²⁸

The six men were indicted on October 21.¹⁰²⁹ The court assigned the case to District Judge William M. Skretny for trial.¹⁰³⁰

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002.¹⁰³¹ He traveled to Yemen instead of returning from Afghanistan and became one of the FBI's 26 most-wanted terrorism suspects.¹⁰³² He

1020. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1021. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 1017; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1022. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1023. *Id.*

1024. *Id.*

1025. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 1017; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1026. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 1017; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

1027. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 1017; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1028. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

1029. *Goba*, 240 F. Supp. 2d at 244; *see Purdy & Bergman*, *supra* note 1000; Santora, *supra* note 1003; Temple-Raston, *supra* note 134, at 193.

1030. *Goba* Docket Sheet, *supra* note 1017.

Tim Reagan interviewed Judge Skretny for this report in Judge Schroeder's chambers on October 31, 2007, following a private interview with Judge Schroeder.

1031. Docket Sheet, *United States v. Elbaneh*, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002).

1032. *See Sleeper Cell*, *supra* note 1000; Temple-Raston, *supra* note 134, at 200, 206–10; *U.S. Fugitive Born in Yemen Surrenders in Terror Case*, N.Y. Times, May 25, 2007, at A11 [hereinaf-

was arrested in Yemen by Yemeni authorities in 2004, but he escaped two years later.¹⁰³³ He was surrendered to Yemeni authorities in May 2007, who agreed not to extradite him to the U.S.¹⁰³⁴ He was observed in public in Yemen in February 2008.¹⁰³⁵ Yemeni authorities arrested him again following American press reports of his boasting that his freedom was protected by Yemen's president.¹⁰³⁶

A significant obstacle to the men's defense was the government's refusal, for national-security reasons, to allow them to seek interviews with Derwish and al-Dosari.¹⁰³⁷ This matter, however, was not presented to the court.¹⁰³⁸

Each of the men agreed to plead guilty in early 2003 and was sentenced in December 2003 to from seven to ten years in prison followed by three years of supervised release.¹⁰³⁹ Galab, the first to plead, was sentenced to the shortest term—seven years.¹⁰⁴⁰ Mosed and Taher each were sentenced to eight years; Alwan was sentenced to nine and one-half years.¹⁰⁴¹ Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.¹⁰⁴² As a reward for subsequent assistance in other prosecutions, Goba's

ter *U.S. Fugitive*]; Craig Whitlock, *Al-Qaeda Operative Loses Freedom in Yemen*, Wash. Post, May 19, 2008, at A10.

1033. See Whitlock, *supra* note 1032; Craig Whitlock, *Bounties a Bust in Hunt for Al-Qaeda*, Wash. Post, May 17, 2008, at A1.

1034. See Temple-Raston, *supra* note 134, at 254; *U.S. Fugitive*, *supra* note 1032; Whitlock, *supra* note 1032; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

1035. See Whitlock, *supra* note 1033; Worth, *supra* note 1034.

1036. See Whitlock, *supra* note 1032; Whitlock, *supra* note 1033.

1037. See Temple-Raston, *supra* note 134, at 189, 193.

1038. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1039. *Goba* Docket Sheet, *supra* note 1017; see Temple-Raston, *supra* note 134, at 198–205.

1040. *Goba* Docket Sheet, *supra* note 1017; see David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 134, at 198–99.

Galab was released from prison on October 17, 2008. <http://www.bop.gov>; see Lou Michel, *U.S. Gives Half of the Lackawanna Six a Fresh Start*, Buffalo News, June 13, 2009, at A1.

1041. *Goba* Docket Sheet, *supra* note 1017; see David Staba, *Last in Group Gets Sentence for Aiding Al Qaeda*, N.Y. Times, Dec. 18, 2003, at A41 (reporting a sentence of nine and one-half years for Alwan); David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. Times, Dec. 10, 2003, at A28 (reporting a sentence of eight years for Mosed); David Staba, *Qaeda Trainee Is Sentenced to 8-Year Term*, N.Y. Times, Dec. 5, 2003, at A32 [hereinafter *Qaeda Trainee*] (reporting a sentence of eight years for Taher); Temple-Raston, *supra* note 134, at 199.

1042. Sentence Reduction Order at 1, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Dec. 14, 2007); *Goba* Docket Sheet, *supra* note 1017; see United States v. Goba, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); Purdy & Bergman, *supra* note 1000 (reporting that Goba and al-Bakri were the only two who finished training); David Staba, *Judge Questions Sentence in al Qaeda Case*, N.Y. Times, Dec. 11, 2003, at A37 (reporting a sentence of ten years for Goba); Staba, *Qaeda Trainee*, *supra* note 1041 (reporting a sentence of ten years for al-Bakri); Temple-Raston, *supra* note 134, at 199.

Al-Bakri was the last to plead. See Purdy, *Sixth Man Pleads*, *supra* note 1001.

sentence was reduced to nine years.¹⁰⁴³ It was reported that Goba, Alwan, and Taher have been offered entry into the witness protection program in recognition of their cooperation in other prosecutions.¹⁰⁴⁴

It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.¹⁰⁴⁵

Derwish apparently was killed on November 3, 2002, in a U.S. military action in Yemen.¹⁰⁴⁶ Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.¹⁰⁴⁷ He attempted suicide four times while there.¹⁰⁴⁸ The government released him to Saudi Arabia on July 16, 2007.¹⁰⁴⁹

Challenge: Classified Evidence

As a precaution in case Judge Schroeder was called upon to review classified evidence, security officers discreetly performed a background check on him.¹⁰⁵⁰ Article III judges are automatically cleared to see classified evidence, but magistrate judges are not.¹⁰⁵¹

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.¹⁰⁵² Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.¹⁰⁵³

1043. Amended Judgment, *United States v. Goba*, No. 1:02-cr-214 (W.D.N.Y. Jan. 3, 2008); Sentence Reduction Order, *supra* note 1042; *see* Order, *id.* (Jan. 7, 2008) (denying Goba's motion for a further reduction of sentence).

As one example of Goba's cooperation, on May 18, 2007, Goba testified at the trial of Jose Padilla about the terrorist training camp Padilla allegedly applied to join. *See* Abby Goodnough, *Witness Describes Training Padilla Reportedly Received*, N.Y. Times, May 19, 2007, at A9; Jay Weaver, *Jihadist Testifies in Padilla Trial*, Miami Herald, May 19, 2007, at A3; Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A6; *see also supra*, "Dirty Bomber."

1044. Michel, *supra* note 1040.

1045. Powell, *supra* note 1000 ("U.S. Attorney Michael Battle, whose region encompasses Lackawanna, said his office never explicitly threatened to invoke enemy combatant status but that all sides knew the government held that hammer."); Temple-Raston, *supra* note 134, at 200 ("The threat was unspoken . . .").

1046. *See* Sleeper Cell, *supra* note 1000; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 195–98, 249–50, 252.

1047. *See* Sleeper Cell, *supra* note 1000; Powell, *supra* note 1000; Purdy & Bergman, *supra* note 1000; Temple-Raston, *supra* note 134, at 139–40, 148.

1048. *See* Temple-Raston, *supra* note 134, at 247–49.

1049. *See id.* at 252.

1050. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1051. Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information ¶ 4, 18 U.S.C. app. 3 § 9 note, issued Feb. 12, 1981; Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; Interview with Dep't of Justice Litig. Sec. Section Staff, Apr. 24, 2007; *see* Reagan, *supra* note 165, at 3.

1052. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1053. *Id.*

Challenge: Court Security

For this high-profile terrorism prosecution, the Marshal established extra security at the courthouse doors.¹⁰⁵⁴ The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.¹⁰⁵⁵ During the days of pleas and sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.¹⁰⁵⁶

Challenge: Religious Accommodation

The court timed hearings to accommodate both daily prayers and religious holidays for the Muslim defendants.

All testimony at the detention hearing before Judge Schroeder was taken from government witnesses under oath.¹⁰⁵⁷ But the defendants' pleas before Judge Skretny were taken by affirmation.¹⁰⁵⁸

1054. Interview with Hon. William M. Skretny, Oct. 31, 2007.

1055. *Id.*; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1056. Interview with Hon. William M. Skretny, Oct. 31, 2007.

1057. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1058. Interview with Hon. William M. Skretny, Oct. 31, 2007.

A Plot to Kill President Bush

United States v. Abu Ali
(*Gerald Bruce Lee, E.D. Va.*)¹⁰⁵⁹

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding al-Qaeda.¹⁰⁶⁰ Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.¹⁰⁶¹

Abu Ali, whose parents are Jordanian, was born in Houston, Texas, and raised in Falls Church, Virginia.¹⁰⁶² He was a 1999 valedictorian at the Islamic Saudi Academy, a school funded by Saudi Arabia in Alexandria, Virginia, and then he studied engineering at the University of Maryland.¹⁰⁶³ In 2002, he went to Saudi Arabia to attend the University of Medina.¹⁰⁶⁴ He apparently had significant contacts with al-Qaeda.¹⁰⁶⁵ He was arrested in Saudi Arabia, by officers of Saudi Arabia's counterterrorism Mabahith, on June 8, 2003, as part of an investigation of the May 12, 2003, Riyadh bombings.¹⁰⁶⁶ He was held in Saudi Arabia until February 21, 2005, when he was transported back to the United States following a

1059. An appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

1060. Sentencing Order at 1 & n.1, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006); see Caryle Murphy, *Man Given 30 Years in Plot Against Bush*, Wash. Post, Mar. 30, 2006, at A3; David Stout, *American Is Sentenced to 30 Years in Terror Case*, N.Y. Times, Mar. 30, 2006, at A18.

1061. Docket Sheet, *Abu Ali*, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005) [hereinafter E.D. Va. Docket Sheet]; see Murphy, *supra* note 1060; Stout, *supra* note 1060; see also Gerald Bruce Lee, *United States v. Abu Ali*: Jury Questionnaire (Oct. 25, 2005); Gerald Bruce Lee, *United States v. Abu Ali*: Preliminary Venire Instructions (Oct. 25, 2005).

Tim Reagan and Joy Richardson interviewed Judge Lee for this report in the judge's chambers on October 2, 2006.

1062. *United States v. Abu Ali*, 528 F.3d 210, 221; Sentencing Order, *supra* note 1060; see Paul Bradley, *Prosecutors Say Terror Suspect Lied*, Rich. Times-Dispatch, Feb. 24, 2005, at A5; Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32; Murphy, *supra* note 1060; Stout, *supra* note 1060.

Abu Ali's father was a computer analyst for Saudi Arabia's embassy. *Abu Ali*, 528 F.3d at 221; see Isikoff, *supra*.

1063. *Abu Ali*, 528 F.3d at 221; Sentencing Order, *supra* note 1060, at 7; Josh Meyer, *Student Allegedly Talked of Assassination Plots*, L.A. Times, Mar. 2, 2005, at A19; Joel Mowbray, *Why Strike Canada? Jihadists Want an Islamic State*, Wash. Times, June 12, 2006, at A19.

1064. *Abu Ali*, 528 F.3d at 221; *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005); Sentencing Order, *supra* note 1060, at 12; see Meyer, *supra* note 1063; Stout, *supra* note 1060.

1065. *Abu Ali*, 528 F.3d at 221–24; see Isikoff, *supra* note 1062; Mowbray, *supra* note 1063.

1066. *Abu Ali*, 528 F.3d at 223–24, 238; *Abu Ali*, 395 F. Supp. 2d at 341, 344, 367, 384; see Bradley, *supra* note 1062; Isikoff, *supra* note 1062; Murphy, *supra* note 1060; Stout, *supra* note 1060.

February 3 indictment for conspiracy to establish terrorist operations.¹⁰⁶⁷ The indictment later was expanded to include conspiracy to kill the President.¹⁰⁶⁸

Abu Ali argued unsuccessfully that he was tortured while held in Saudi Arabia, resulting in an inadmissible confession.¹⁰⁶⁹

Although sentencing guidelines would dictate a life sentence, Judge Lee sentenced him on March 29, 2006, to 30 years in prison followed by 30 years of supervised release.¹⁰⁷⁰ The court of appeals vacated the sentence;¹⁰⁷¹ Judges J. Harvie Wilkinson III and William B. Traxler, Jr., determined that the sentence insufficiently reflected the gravity of the crime,¹⁰⁷² but Judge Diana Gribbon Motz determined that the sentence was within Judge Lee's discretion.¹⁰⁷³ On July 27, 2009, Judge Lee resentenced Abu Ali to life in prison.¹⁰⁷⁴ Another appeal is pending.¹⁰⁷⁵

Challenge: Examination of Foreign Witnesses and Witness Security

To decide whether Abu Ali's confession should be suppressed, Judge Lee arranged for seven days of video depositions of Mabath officers in Saudi Arabia.¹⁰⁷⁶ Because the identities of Mabath officers are secret,¹⁰⁷⁷ the Saudi gov-

1067. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 395 F. Supp. 2d at 341 & n.1, 357, 367, 385; *United States v. Abu Ali*, 396 F. Supp. 2d 703, 704 (E.D. Va. 2005); see Bradley, *supra* note 1062; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 1060.

1068. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 396 F. Supp. 2d at 704.

1069. *Abu Ali*, 528 F.3d at 231–34; *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; see Bradley, *supra* note 1062; Isikoff, *supra* note 1062; Markon, *supra* note 1071; Markon & Priest, *supra* note 1067; Meyer, *supra* note 1063; Murphy, *supra* note 1060.

Portions of the confession can be viewed on MSNBC's website: <http://www.msnbc.msn.com/id/10266654/> (click on "launch").

1070. Sentencing Order, *supra* note 1060; see Stout, *supra* note 1060.

It was reported that Abu Ali was sent to the "Super Max" prison in Florence, Colorado. Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to "Superjail,"* London Times, June 20, 2006, at 8.

1071. *Abu Ali*, 528 F.3d at 269, *cert. denied*, ___ U.S. ___, 129 S. Ct. 1312 (2009) (resolving No. 08-464); see Jerry Markon, *Conviction Upheld in Terror Plot*, Wash. Post, June 7, 2008, at B3.

1072. *Abu Ali*, 528 F.3d at 258–69.

Tim Reagan interviewed Judge Traxler for this report at the Federal Judicial Center on November 12, 2008.

1073. *Id.* at 269–82 (Motz, dissenting).

1074. E.D. Va. Docket Sheet, *supra* note 1061; see Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, Wash. Post, July 28, 2009, at A3.

1075. Docket Sheet, *United States v. Abu Ali*, No. 09-4705 (4th Cir. Aug. 3, 2009) (noting oral argument scheduled for May 2010).

1076. *Abu Ali*, 395 F. Supp. 2d at 344; Order at 2, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005) [hereinafter E.D. Va. Sept. 16, 2005, Order]; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; see David H. Laufman, *Terror Trials Work*, L. Times, Nov. 5, 2007, at 58 (op-ed by a prosecuting attorney in the case) ("for the first time, the Saudi government permitted Saudi security officers (including a general) to testify in an American criminal proceeding and to face rigorous cross-examination by defense attorneys—even though the officers would have

ernment would not permit them to come to the United States to testify.¹⁰⁷⁸ There also is the risk that dangerous groups in Saudi Arabia would object to the officers' cooperation with an American prosecution.¹⁰⁷⁹

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.¹⁰⁸⁰ A live video feed was established between Saudi Arabia and the U.S., and the judge, additional counsel for both sides, and the court reporter were in Alexandria.¹⁰⁸¹ The video image was constructed as a split screen with the defendant on one side and the witness on the other, so that the defendant could see the witness and the witness could see the defendant.¹⁰⁸²

Portions of the deposition were put into evidence at a suppression hearing, in addition to live testimony from FBI agents (who had interviewed the Mabath officers when Abu Ali was transported from Saudi Arabia to the United States), expert witnesses, and other percipient witnesses.¹⁰⁸³ The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.¹⁰⁸⁴ So the split-screen video deposition evidence was played to the jury as well.¹⁰⁸⁵

The Mabath officers testified pseudonymously.¹⁰⁸⁶ In court, the judge, the attorneys, the defendant, and the jury could see the images, but the public had access only to the audio portions of the depositions.¹⁰⁸⁷

Taking the video depositions of foreign witnesses was challenging for several reasons.¹⁰⁸⁸ First, there was a time-zone challenge.¹⁰⁸⁹ Second, a secure communi-

to answer questions about Saudi interrogation methods said to violate international human rights standards”).

1077. E.D. Va. Sept. 16, 2005, Order, *supra* note 1076; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006. The Saudi domestic security service is called the *Mabath*. E.D. Va. Sept. 16, 2005, Order, *supra*.

1078. *Abu Ali*, 528 F.3d at 239; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 1076, at 2.

1079. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 1076, at 5.

1080. *Abu Ali*, 528 F.3d at 239; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1081. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1082. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1083. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1084. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1085. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see Abu Ali*, 528 F.3d at 238–39.

1086. *Abu Ali*, 395 F. Supp. 2d at 344; E.D. Va. Sept. 16, 2005, Order, *supra* note 1076, at 4–5; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1087. E.D. Va. Sept. 16, 2005, Order, *supra* note 1076, at 4, 7, 9–10; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1088. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1089. *Id.*

cation line was necessary, and the availability of a secure line was not reliable.¹⁰⁹⁰ Third, the heat in Saudi Arabia sometimes caused technical difficulties.¹⁰⁹¹

Judge Lee acknowledges something he would do differently if he had it to do over: He would send at least one more interpreter.¹⁰⁹² One interpreter was not enough, because, at the very least, interpreters need breaks.¹⁰⁹³

Challenge: Attorney–Client Contacts

During the video depositions of the Mabath officers, “Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings. In addition, the court was willing to stop the depositions if Abu Ali’s counsel in Saudi Arabia wanted to consult with their client.”¹⁰⁹⁴

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali’s trial was classified.¹⁰⁹⁵ Classified evidence was stored in the court’s sensitive compartmented information facility (SCIF).¹⁰⁹⁶ One of Abu Ali’s attorneys was denied a security clearance and the other did not apply for one, so the court appointed an attorney who already had one.¹⁰⁹⁷ Only the cleared attorney, and not Abu Ali or either uncleared attorney, was allowed to see classified evidence.¹⁰⁹⁸

The court of appeals held that it was improper, but harmless error in this case, for the district court to permit classified evidence that the defendant could not see to be shown to the jury.¹⁰⁹⁹ At issue were two messages that the government claimed were coded communications between the defendant and fellow jihadists.¹¹⁰⁰

The government produced unredacted copies of the messages to cleared counsel. Uncleared counsel and the defendant received declassified copies complete in content and designating the dates of the messages, but “redacted to omit certain identifying and forensic information.”¹¹⁰¹ Uncleared counsel were concerned that the redacted information might be relevant to when the government acquired the messages, which would be material to the defendant’s unsuccessful argument that the government’s cooperation with Saudi Arabia triggered a requirement of *Mi-*

1090. *Id.*

1091. *Id.*

1092. *Id.*

1093. *Id.*

1094. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008).

1095. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1096. *Id.*

1097. *Abu Ali*, 528 F.3d at 248–49; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1098. *Abu Ali*, 528 F.3d at 248–55; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1099. *Abu Ali*, 528 F.3d at 248–55.

1100. *Id.* at 236–37, 248.

1101. *Id.* at 249.

randa warnings upon Abu Ali's arrest.¹¹⁰² The district court denied uncleared counsel access to the classified evidence at a hearing pursuant to the Classified Information Procedures Act (CIPA), from which Abu Ali and his uncleared counsel were excluded, and at which Abu Ali was represented by cleared counsel.¹¹⁰³

Although the defendant was only permitted to see redacted messages, the jury was shown unredacted versions, which the court of appeals held "was clearly contrary to the rights guaranteed to Abu Ali by the Confrontation Clause."¹¹⁰⁴

If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial. However, the government must at a minimum provide the same version of the evidence to the defendant that is submitted to the jury. We do not balance a criminal defendant's right to see the evidence which will be used to convict him against the government's interest in protecting that evidence from public disclosure. If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.¹¹⁰⁵

The court held, however, that the error was harmless beyond a reasonable doubt.¹¹⁰⁶

Challenge: Classified Arguments

In the appeal, part of the record and part of the briefing concerning classified evidence were classified.¹¹⁰⁷ Classified materials were filed through the court infor-

1102. *Id.* at 250; *see id.* at 227–31 (holding that *Miranda* warnings were not required).

1103. *Id.* at 250; *see* 18 U.S.C. app. 3 (text of CIPA); Reagan, *supra* note 165 (describing CIPA procedures).

1104. *Abu Ali*, 528 F.3d at 253; *see id.* at 255 ("CIPA does not . . . authorize courts to provide classified documents to the jury when only . . . substitutions are provided to the defendant.").

1105. *Id.* at 255.

1106. *Id.* at 255–57; *id.* at 256 ("In this case, we are satisfied that the jury's decision to convict Abu Ali was not substantially swayed by the jury's access to the limited information redacted from the documents given to Abu Ali.").

1107. *Id.* at 244 n.13; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see, e.g.*, Order, *United States v. Abu Ali*, Nos. 06-4334 & 06-4521 (4th Cir. Nov. 27, 2006) [hereinafter 4th Cir. Classified Briefing Order] (accepting for filing classified portions of the appellant's brief and joint appendix); Docket Sheet, *Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) (appeal by the government, noting Abu Ali's filing of a classified supplemental brief on Mar. 5, 2007, and a classified supplemental appendix on Mar. 6, 2007, and noting the government's filing of a classified supplemental brief and a classified supplemental appendix on April 27, 2007); Docket Sheet, *Abu Ali*, No. 06-4334 (4th Cir. Apr. 10, 2006) (appeal by the defendant, same).

mation security officer.¹¹⁰⁸ Part of oral argument was conducted in closed session.¹¹⁰⁹

All of Judge Traxler's law clerks are career clerks, and two of them have top secret security clearances.¹¹¹⁰ One of the two clerks with security clearances was assigned to help with the case.¹¹¹¹ Judge Traxler reviewed most of the classified materials for the case in his Greenville, South Carolina, chambers;¹¹¹² there is a SCIF in the Greenville courthouse.¹¹¹³ Occasionally, classified material would be submitted at a time when Judge Traxler was in Richmond, Virginia, to hear other matters, and he reviewed the materials in his Richmond chambers.¹¹¹⁴ Some material presented to the judges in this appeal was for judges' eyes only, and even law clerks with security clearances could not see it.¹¹¹⁵

Judge Traxler observed two important challenges presented by classified materials: (1) constraints on communication and (2) burdens on protecting documents. The second challenge requires, for example, a law clerk at lunch to leave classified materials she is working with in the judge's office under his watch.¹¹¹⁶ Or a judge or law clerk taking a break to get coffee must take classified documents along.¹¹¹⁷ The communication challenge has many forms: (1) conversations in chambers about classified portions of the case must be held behind closed doors, excluding staff members not cleared; (2) judges'-eyes-only material cannot be discussed even with cleared clerks; and (3) communications among members of the panel about classified matters can generally happen only in person or by secure fax—the latter was accomplished by Judge Traxler's cleared clerk taking documents to the FBI's office in town for faxing.¹¹¹⁸

Anticipating that the appellate court's opinion would require a classification review, the court ordered that the government determine "whether internal court documents proposed for public release by the Court contain any classified information . . . within 72 hours after submission of the documents to the Court Security Officer."¹¹¹⁹ The court also ordered that the court information security officer and all who participate in the classification review be "walled off from govern-

1108. 4th Cir. Classified Briefing Order, *supra* note 1107.

An "under seal, in camera, ex parte notice" was filed in the district court on April 27, 2007. Docket Sheet, *United States v. Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) (noting that an original document was filed with the court information security officer).

1109. *Abu Ali*, 528 F.3d at 244 n.13; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Larry O'Dell, *Torture Alleged in Bush-Plot Case*, Rich. Times-Dispatch, June 24, 2007, at B3.

1110. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1111. *Id.*

1112. *Id.*

1113. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

1114. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1115. *Id.*

1116. *Id.*

1117. *Id.*

1118. *Id.*

1119. Order at 2, *United States v. Abu Ali*, Nos. 06-4334 & 06-4521 (4th Cir. Aug. 29, 2007).

ment counsel” and “otherwise protect the confidentiality of . . . internal court documents during the pendency of this appeal and thereafter.”¹¹²⁰

While the appeal was pending, the government filed in the district court an in camera ex parte notice, and the court of appeals denied Abu Ali’s motion to compel disclosure of it.¹¹²¹

1120. *Id.* at 1–2.

1121. E.D. Va. Docket Sheet, *supra* note 1061.

Paintball

United States v. Royer and United States v. Al-Timimi
(*Leonie M. Brinkema, E.D. Va.*), *United States v.*
Chandia (*Claude M. Hilton, E.D. Va.*), and *United*
States v. Benkahla (*James C. Cacheris, E.D. Va.*)

On June 27, 2003, the United States began arresting and charging 11 men who had been playing paintball to train for jihad since 2000 in Spotsylvania County, Virginia, about 60 miles south of Washington, D.C.¹¹²² The indictment listed 32 terrorism counts.¹¹²³ In sum, six defendants pleaded guilty; the court acquitted two defendants and convicted three defendants at bench trials before Judge Leonie M. Brinkema in the Eastern District of Virginia.¹¹²⁴ One related case was prosecuted before Judge Brinkema,¹¹²⁵ and another related case was prosecuted before Judge Claude M. Hilton.¹¹²⁶

Nine defendants are American citizens, and three served in the U.S. military.¹¹²⁷ At core, they were charged with conspiracy, in violation of the Neutrality Act,¹¹²⁸ to support Lashkar-e-Taiba (LET), a terrorist group that opposes Indian rule over Kashmir.¹¹²⁹ The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.¹¹³⁰

1122. *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008); *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); Docket Sheet, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. June 25, 2003) [hereinafter *Royer* Docket Sheet]; see Eric Lichtblau, *Group of Muslims Charged With Plotting Against India*, N.Y. Times, June 28, 2003, at A7; Jerry Markon, "Virginia Jihad" Defendant Sentenced, S.J. Mercury News, Aug. 26, 2006, at A7; Milton Viorst, *The Education of Ali al-Timimi*, Atlantic Monthly, June 2006, at 69, 77.

1123. *United States v. Khan*, 461 F.3d 477, 485 n.3 (4th Cir. 2006); *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004).

1124. *Benkahla*, 530 F.3d at 303–04; *Khan*, 461 F.3d at 485–86; *Khan*, 309 F. Supp. 2d 789; *Chandia*, 514 F.3d at 370; see Paul Bradley, *Lengthy Sentences for Two in "VA Jihad,"* Rich. Times-Dispatch, June 16, 2004, at B1; Jerry Markon, "Va. Jihad" Case Hailed As Key in War on Terror, Wash. Post, June 8, 2006, at A3; Markon, *supra* note 1122; Larry O'Dell, *Court Hears Appeal of Jihad Cases*, Rich. Times-Dispatch, May 26, 2006, at B10.

Tim Reagan interviewed Judge Brinkema for this report in the judge's chambers on January 5, 2007.

1125. Docket Sheet, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter E.D. Va. *Al-Timimi* Docket Sheet].

1126. Docket Sheet, *United States v. Chandia*, No. 1:05-cr-401 (E.D. Va. Sept. 14, 2005) [hereinafter E.D. Va. *Chandia* Docket Sheet].

Ahmed Omar Abu Ali apparently was at one time a suspect in the paintball case. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005); see Isikoff, *supra* note 1062. Subsequently he was tried for other crimes. See *supra*, "A Plot to Kill President Bush."

1127. See Lichtblau, *supra* note 1122.

1128. 18 U.S.C. § 960.

1129. *Khan*, 461 F.3d at 484; see Lichtblau, *supra* note 1122; Markon, *supra* note 1122; Mary Beth Sheridan, *Hardball Tactics in an Era of Threats*, Wash. Post, Sept. 3, 2006, at A1.

Judge Brinkema tried four defendants in one bench trial,¹¹³¹ acquitting one on February 20, 2004,¹¹³² and convicting three on March 4.¹¹³³ The convicted defendants were sentenced on June 15, 2004,¹¹³⁴ and were resentenced on July 29, 2005,¹¹³⁵ in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.¹¹³⁶

Judge Brinkema convicted Masoud Ahmad Khan, a native-born American citizen of Pakistani descent residing in Gaithersburg, Maryland, of eight counts and sentenced him to life in prison without the possibility of parole.¹¹³⁷ Khan spent time at an LET training camp in Pakistan.¹¹³⁸ LET is the military wing of Markaz Dawa Wa'al Irshad, which was founded to organize Pakistani Muslims to conduct violent jihad against Russians in Afghanistan.¹¹³⁹ Beginning in 1999, LET's primary focus was combating India's control in Kashmir.¹¹⁴⁰ But the court found that the defendants' participation in the LET training camps was to prepare to fight against the United States in Afghanistan on behalf of the Taliban.¹¹⁴¹ At the training camp, Khan fired an AK-47 antiaircraft gun and a rocket-propelled grenade.¹¹⁴² By December 2001, the United States had substantially defeated the Taliban¹¹⁴³ and declared LET a terrorist organization.¹¹⁴⁴ Khan returned to the United States that month.¹¹⁴⁵ After returning to the United States, Khan made a ghost purchase of a robotic surveillance airplane on behalf of a prominent member of LET, who used the plane in Kashmir.¹¹⁴⁶ Judge Brinkema found Khan guilty of conspiracy, conspiracy to levy war against the United States, conspiracy to contribute services to the Taliban, conspiracy to provide material support to LET, conspiracy to possess and use firearms in connection with a crime of violence,

The name of the group means "army of the pure." Brendan Smith, *Chandia Challenges Law on Terror Group*, L. Times, Oct. 29, 2007, at 10. It was designated a terrorist organization in 2001 after a deadly attack on India's parliament building in New Delhi. *Id.*

1130. *United States v. Khan*, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); *see also* Lichtblau, *supra* note 1122.

1131. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 309 F. Supp. 2d at 796.

1132. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; *see Judge Acquits Muslim Accused of Taliban Ties*, L.A. Times, Feb. 21, 2004, at 24 [hereinafter *Judge Acquits*].

1133. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827.

1134. *Royer Docket Sheet*, *supra* note 1122; *see Bradley*, *supra* note 1124.

1135. *Khan*, 461 F.3d at 486; *Royer Docket Sheet*, *supra* note 1122.

1136. 543 U.S. 220 (2005) (decided Jan. 12, 2005).

1137. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; *see Bradley*, *supra* note 1124; *Sheridan*, *supra* note 1129.

1138. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807.

1139. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

1140. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; *see Sheridan*, *supra* note 1129.

1141. *Khan*, 309 F. Supp. 2d at 810.

1142. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1143. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1144. *Khan*, 309 F. Supp. 2d at 812.

1145. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1146. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14; *see United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008).

and three counts of using and discharging a weapon in relation to a crime of violence.¹¹⁴⁷ A pro se petition for habeas corpus relief is pending.¹¹⁴⁸

Judge Brinkema convicted Seifullah Chapman, a former Marine and police officer residing in Alexandria, Virginia, of five counts and sentenced him to 65 years in prison.¹¹⁴⁹ Chapman also spent time at the LET training camp in Pakistan.¹¹⁵⁰ In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LET member.¹¹⁵¹ Judge Brinkema found Chapman guilty of conspiracy, conspiracy to provide material support to LET, conspiracy to possess and use firearms in connection with a crime of violence, possession of firearms in furtherance of a crime of violence, and using and discharging a weapon in relation to a crime of violence.¹¹⁵² Chapman's petition for habeas corpus relief was unsuccessful.¹¹⁵³

Judge Brinkema convicted Hammad Abdur-Raheem, residing in Falls Church, Virginia, and formerly a soldier in the U.S. Army, of three counts and sentenced him to four and one-third years in prison.¹¹⁵⁴ Judge Brinkema found Abdur-Raheem guilty of conspiracy, conspiracy to provide material support to LET, and conspiracy to possess and use firearms in connection with a crime of violence.¹¹⁵⁵ Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded for resentencing,¹¹⁵⁶ Judge Brinkema reimposed the same 52-month sentence, determining that she had not clearly articulated her reasons for the downward departure the first time.¹¹⁵⁷ The government appealed

1147. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820, 821, 823, 826–27, 827; *Royer* Docket Sheet, *supra* note 1122 (noting a court verdict against Masoud Ahmad Khan on Mar. 4, 2004).

1148. Docket Sheet, *Khan v. United States*, No. 1:08-cv-533 (E.D. Va. May 23, 2008).

1149. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 803, 816; *see* Bradley, *supra* note 1124; Markon, *supra* note 1124; Sheridan, *supra* note 1129. The original sentence of 85 years was reduced to 65 years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1122 (July 29, 2005, minute entry).

1150. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811.

1151. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13.

1152. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 824, 826, 827; *Royer* Docket Sheet, *supra* note 1122 (noting a court verdict against Seifullah Chapman on Mar. 4, 2004).

1153. *Royer* Docket Sheet, *supra* note 1122 (noting Dec. 23, 2009, dismissal of petition).

1154. *Khan*, 309 F. Supp. 2d at 796, 803, 814; *see* Bradley, *supra* note 1124. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1122 (July 29, 2005, minute entry).

1155. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 1122 (noting a court verdict against Hammad Abdur-Raheem on Mar. 4, 2004).

1156. *Khan*, 461 F.3d at 483, 498–501; *see* Jerry Markon, *Resentencing Is Ordered for "Jihad" Defendant*, Wash. Post, Sept. 2, 2006, at B5.

1157. Tr., *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. Aug. 16, 2007, filed Aug. 14, 2006) [hereinafter *Royer* Aug. 16, 2007, Tr.]; *Royer* Docket Sheet, *supra* note 1122 (noting resentencing on Aug. 16, 2007). Resentencing was delayed by a petition to the Supreme Court for certiorari, which the Court denied on May 21, 2007. Docket Sheet, *Chapman v. United States*, No. 06-9398 (U.S. Feb. 12, 2007).

again,¹¹⁵⁸ but withdrew the appeal¹¹⁵⁹ in light of the Supreme Court's holding on December 10, 2007, in *Gall v. United States*, that even sentences outside Sentencing Guidelines are reviewed for abuse of discretion.¹¹⁶⁰ Abdur-Raheem was released on November 30, 2007.¹¹⁶¹

The court of appeals affirmed the convictions of Khan, Chapman, and Abdur-Raheem.¹¹⁶²

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem, of Arlington, Virginia.¹¹⁶³

Randall Todd Royer pleaded guilty to and was sentenced on April 9, 2004, to 20 years in prison for using firearms and explosives in relation to a crime of violence.¹¹⁶⁴ In April 2000, Royer attended an LET training camp in Pakistan, where he fought on the front lines against India and he fired AK-47 and PK weapons.¹¹⁶⁵

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to 15 years in prison.¹¹⁶⁶ Al-Hamdi attended an LET training camp in Pakistan.¹¹⁶⁷

Yong Ki Kwon, who resided in Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-half years in prison.¹¹⁶⁸ After Kwon cooperated with the government, his sentence was reduced to three years and two

1158. Docket Sheet, *United States v. Abdur-Raheem*, No. 07-4941 (4th Cir. Oct. 2, 2007).

1159. Gov't Mot. to Dismiss, *id.* (Dec. 18, 2007).

1160. *Gall v. United States*, 552 U.S. 38 (2007).

1161. <http://www.bop.gov>; *see Royer* Aug. 16, 2007, Tr., *supra* note 1157 (noting expected release date of Dec. 1, 2007).

1162. *Khan*, 461 F.3d 477 (resolving *United States v. Khan*, No. 04-4519 (4th Cir. July 15, 2004) (appeal of Khan's original conviction and sentence)); *United States v. Chapman*, No. 04-4520 (4th Cir. July 15, 2004) (appeal of Chapman's original conviction and sentence); *United States v. Abdur-Raheem*, No. 04-4521 (4th Cir. July 15, 2004) (appeal of Abdur-Raheem's original conviction and sentence); *United States v. Khan*, No. 05-4811 (4th Cir. Aug. 10, 2005) (appeal of Khan's post-*Booker* resentencing); *United States v. Chapman*, No. 05-4818 (4th Cir. Aug. 10, 2005) (appeal of Chapman's post-*Booker* resentencing); *United States v. Abdur-Raheem*, No. 05-4893 (4th Cir. Sept. 2, 2005) (government's appeal of Abdur-Raheem's sentence)); *see Markon*, *supra* note 1156; *Sheridan*, *supra* note 1129.

The Supreme Court denied petitions for certiorari on May 21, 2007. Docket Sheet, *Chapman*, No. 06-9398 (U.S. Dec. 28, 2006); Docket Sheet, *Khan v. United States*, No. 06-1116 (U.S. Feb. 12, 2007).

1163. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; *see Judge Acquits*, *supra* note 1132.

1164. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 1122; *see Sheridan*, *supra* note 1129.

1165. *Khan*, 309 F. Supp. 2d at 796, 808.

1166. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer* Docket Sheet, *supra* note 1122; *see Sheridan*, *supra* note 1129.

1167. *Khan*, 309 F. Supp. 2d at 807, 811.

1168. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

months.¹¹⁶⁹ He is now out of prison.¹¹⁷⁰ Kwon attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹¹⁷¹

Khawaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-quarter years in prison.¹¹⁷² After Hasan cooperated with the government, his sentence was reduced to three years and one month.¹¹⁷³ He is now out of prison.¹¹⁷⁴ Hasan attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹¹⁷⁵

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to 10 and one-half years in prison.¹¹⁷⁶ After he cooperated with the government, his sentence was reduced to three years and two months.¹¹⁷⁷ He was released from prison on March 31, 2006.¹¹⁷⁸

Donald Thomas Surratt II, a former Marine Corps instructor residing in Maryland, pleaded guilty and was sentenced on November 7, 2003, to three years and ten months in prison.¹¹⁷⁹ After he cooperated with the government, his sentence was reduced to one year and 11 months.¹¹⁸⁰

Judge Brinkema also acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.¹¹⁸¹ Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.¹¹⁸² Judge Brinkema found that Benkahla attended an LET training camp, but the government did not prove that he did so at a time when LET was designated a terrorist organization or at a place in Afghanistan under Taliban control, as alleged in the

1169. *Royer* Aug. 16, 2007, Tr., *supra* note 1157; *Royer Docket Sheet*, *supra* note 1122 (noting a reduction-of-sentence order on Feb. 24, 2006); *see Sheridan*, *supra* note 1129.

1170. *See Viorst*, *supra* note 1122, at 77.

1171. *Khan*, 309 F. Supp. 2d at 811.

1172. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 1122.

1173. *Royer* Aug. 16, 2007, Tr., *supra* note 1157; *Royer Docket Sheet*, *supra* note 1122 (noting a reduction-of-sentence order on Feb. 24, 2006).

1174. *See Viorst*, *supra* note 1122, at 77; *see also Sheridan*, *supra* note 1129 (reporting that Hasan spent less than three years in jail).

1175. *Khan*, 309 F. Supp. 2d at 811.

1176. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer Docket Sheet*, *supra* note 1122.

1177. *Royer* Aug. 16, 2007, Tr., *supra* note 1157; *Royer Docket Sheet*, *supra* note 1122 (Aug. 26, 2005, reduction of sentence for Muhammed Aatique); *see Sheridan*, *supra* note 1129.

1178. <http://www.bop.gov>.

1179. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 1122; *see Sheridan*, *supra* note 1129.

1180. *Royer* Aug. 16, 2007, Tr., *supra* note 1157.

1181. *United States v. Benkahla*, 530 F.3d 300, 303–04 (4th Cir. 2008); *Khan*, 461 F.3d at 485; *United States v. Benkahla*, 437 F. Supp. 2d 541, 544–46 (E.D. Va. 2006); *Khan*, 309 F. Supp. 2d at 796 n.2; *Royer Docket Sheet*, *supra* note 1122; *see Matthew Barakat, Va. Man Convicted of Lying in Terror Probe*, *Rich. Times-Dispatch*, Feb. 6, 2007, at B2.

1182. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544–45.

indictment.¹¹⁸³ After his acquittal, Benkahla was interviewed by the FBI twice—on April 22 and on July 7—and called to testify before a grand jury twice—on August 26 and on November 16—all in 2004.¹¹⁸⁴ His Fifth Amendment right not to testify was removed by a grant of use immunity, which would prevent the government from prosecuting him for truthful revelations.¹¹⁸⁵ He denied attending any training camp, and he denied using any firearms.¹¹⁸⁶ On February 9, 2006, he was indicted for perjury during his grand jury testimony and for obstruction of justice.¹¹⁸⁷ On July 13, the indictment was expanded to charge him for false statements to the FBI.¹¹⁸⁸ The court assigned Benkahla’s perjury case to Judge James C. Cacheris,¹¹⁸⁹ who told the jury at various times during the trial that it was a perjury case, not a terrorism case, that they were deciding.¹¹⁹⁰ The jury found Benkahla guilty on February 5, 2007; Judge Cacheris sentenced him on July 24 to ten years and one month in prison.¹¹⁹¹ The court of appeals affirmed.¹¹⁹²

On the one hand, there is some potential for abuse in the government’s procedure of acquittal, questioning on matters related to the acquittal, and second prosecution for some form of perjury. . . . [P]rosecutors frustrated at an acquittal should not lightly be able to take a second bite at the apple by bringing perjury charges afterwards. . . .

On the other hand, a defendant does not win with acquittal a license to commit perjury.¹¹⁹³

Ali al-Timimi was regarded as the paintballers’ spiritual leader.¹¹⁹⁴ He was a cofounder of a Muslim center in Falls Church called the Dar al-Arqam Center,

1183. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 545–46; see Matthew Barakat, *Jihadist Suspect on Trial*, Rich. Times-Dispatch, Jan. 30, 2007, at B2 [hereinafter *Jihadist Suspect*]; Barakat, *supra* note 1181.

1184. *Benkahla*, 530 F.3d at 303; *United States v. Benkahla*, 501 F. Supp. 2d 748, 750–51 (E.D. Va. 2007); Mem. Op. at 1–3, *United States v. Benkahla*, No. 1:06-cr-9, (E.D. Va. Oct. 2, 2006), available at 2006 WL 2871234 [hereinafter *Benkahla Dismissal Denial*]; see Barakat, *Jihadist Suspect*, *supra* note 1183.

1185. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544 n.1 & 555; *Benkahla*, 501 F. Supp. 2d at 750 n.1; see Barakat, *supra* note 1181.

1186. *Benkahla*, 530 F.3d at 304–05; *Benkahla*, 437 F. Supp. 2d at 544–45; see Barakat, *supra* note 1181.

1187. *Benkahla*, 530 F.3d at 305; *Benkahla*, 437 F. Supp. 2d at 544; Docket Sheet, *Benkahla*, No. 1:06-cr-9 (E.D. Va. Feb. 9, 2006) [hereinafter E.D. Va. *Benkahla* Docket Sheet]; see Jerry Markon, Va. “Jihad” Probe Sees New Charge, Wash. Post, Fe. 23, 2006, at B4.

1188. *Benkahla*, 530 F.3d at 305; *Benkahla Dismissal Denial*, *supra* note 1184, at 1, 3–4; E.D. Va. *Benkahla* Docket Sheet, *supra* note 1187.

1189. Tim Reagan interviewed Judge Cacheris for this report in the judge’s chambers on November 6, 2008.

1190. Interview with Hon. James C. Cacheris, Nov. 6, 2008; see James C. Cacheris, *United States v. Benkahla: Voir Dire Questions* (Jan. 25, 2007).

1191. *Benkahla*, 530 F.3d at 305–06; *Benkahla*, 501 F. Supp. 2d at 751, 762; E.D. Va. *Benkahla* Docket Sheet, *supra* note 1187; see Barakat, *supra* note 1181; Jerry Markon, *10-Year Sentence for Perjury*, Wash. Post, July 25, 2007, at B5.

1192. *Benkahla*, 530 F.3d 300 (resolving *United States v. Benkahla*, No. 07-4778 (4th Cir. Aug. 9, 2007)), *cert. denied*, ___ U.S. ___, 129 S. Ct. 950 (2009).

1193. *Id.* at 306; see *id.* at 308 (“the investigations in which Benkahla was interviewed and the questions he was asked show no sign of having been manufactured for the sake of a second prosecution”).

where many of the paintballers met each other.¹¹⁹⁵ He was sentenced in 2005 to life in prison on an April 26, 2005, conviction of soliciting others to wage war against the United States and providing services to the Taliban.¹¹⁹⁶ His pending appeal to the U.S. Court of Appeals for the Fourth Circuit was interrupted by a remand to the district court on April 25, 2006, for a determination of whether the prosecution of al-Timimi relied on undisclosed surveillance.¹¹⁹⁷

Al-Timimi was born in the United States to Iraqi immigrants.¹¹⁹⁸ His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.¹¹⁹⁹ When al-Timimi was a teenager, his family spent some time in Saudi Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Islam.¹²⁰⁰ A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.¹²⁰¹

On June 6, 2006, a jury convicted Ali Asad Chandia, a former personal assistant to al-Timimi, of aiding LET by supplying them with paintballs and other equipment.¹²⁰² Judge Hilton sentenced him to 15 years in prison on August 25, 2006, applying a terrorism sentencing enhancement.¹²⁰³ The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in this case.¹²⁰⁴ On January 23, 2008, the court of appeals remanded the case for resen-

1194. See Markon, *supra* note 1124; Markon, *supra* note 1122; Viorst, *supra* note 1122, at 69, 79.

1195. United States v. Chandia, 514 F.3d 365, 369 (4th Cir. 2008); United States v. Khan, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004).

1196. *Chandia*, 514 F.3d at 369 n.1; see Markon, *supra* note 1124; Markon, *supra* note 1122; Viorst, *supra* note 1122, at 78; see also Khan, 309 F. Supp. 2d at 821 (“As we have found, the government’s evidence established beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon’s house to heed the call of Mullah Omar for all Muslims to help defend the Taliban.”); Donahue, *supra* note 517, at 168 (“Dr. Ali al-Timimi was sentenced to life in prison for urging young men at a dinner party to go on jihad.”).

To select jurors for his trial, Judge Brinkema used a jury questionnaire. See Leonie M. Brinkema, United States v. Al-Timimi: Jury Questionnaire (Mar. 28, 2005).

1197. Order, United States v. Al-Timimi, No. 05-4761 (4th Cir. Apr. 25, 2006) [hereinafter *Al-Timimi* Remand Order]; Tr., United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Jan. 16, 2007, filed May 17, 2007) [hereinafter *Al-Timimi* Jan. 16, 2007, Tr.]; see E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125 (noting May 19, 2006, reopening of district court case); see also Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

1198. See Viorst, *supra* note 1122, at 69.

1199. See Sheridan, *supra* note 1129; Viorst, *supra* note 1122, at 69.

1200. See Sheridan, *supra* note 1129; Viorst, *supra* note 1122, at 72.

1201. See Viorst, *supra* note 1122, at 73.

1202. United States v. Chandia, 514 F.3d 365, 370 (4th Cir. 2008); see Matthew Barakat, *Teacher Convicted of Aiding Terror Group*, Cincinnati Post, June 7, 2006, at A9; Jerry Markon, *Final Defendant Guilty in “Va. Jihad,”* Wash. Post, June 7, 2006, at A12 [hereinafter *Final Defendant*]; Markon, *supra* note 1124; Markon, *supra* note 1122; Sheridan, *supra* note 1129; Smith, *supra* note 1129 (“Chandia provided material support to LET by paying \$622 to ship 50,000 paintballs to Pakistan.”).

1203. *Chandia*, 514 F.3d at 370–71; E.D. Va. *Chandia* Docket Sheet, *supra* note 1126; see Markon, *supra* note 1122.

1204. E.D. Va. *Chandia* Docket Sheet, *supra* note 1126.

tencing, because Judge Hilton had not supported the enhancement with a finding of specific intent.¹²⁰⁵ On May 2, 2008, Judge Hilton again sentenced Chandia to 15 years in prison,¹²⁰⁶ and an appeal was heard on December 2, 2009.¹²⁰⁷ Chandia is a Pakistani citizen who taught third grade at an Islamic school called the al-Huda School in College Park, Maryland.¹²⁰⁸ Although linked to the paintballers, he did not actually play the game.¹²⁰⁹

Challenge: Classified Evidence

Approximately three months before the beginning of his trial, al-Timimi filed a sealed motion, and then he moved under the Classified Information Procedures Act (CIPA) to use classified information.¹²¹⁰ Judge Brinkema conducted a sealed CIPA hearing on January 19, 2005, and issued a sealed protective order on March, 21, 2005, ten days before the commencement of voir dire.¹²¹¹

According to the remand order in al-Timimi's appeal, "The motion to vacate and to remand raises appellant's concern, based on recent developments, that the government may have undisclosed intercepts of either the appellant or various individuals material to his trial."¹²¹²

A problem that developed for the court in determining whether all discoverable information had been disclosed to al-Timimi's attorneys was the fact that the attorneys representing the government in the case did not necessarily have access to all of the information.¹²¹³

Challenge: Closed Proceedings

On July 21, 2006, Judge Brinkema conducted a closed hearing on administrative motions in al-Timimi's remand, but the transcript of the hearing was unsealed the

1205. *Chandia*, 514 F.3d at 369, 375–77 (resolving *United States v. Chandia*, No. 06-4997 (4th Cir. Sept. 26, 2006)); see E.D. Va. *Chandia* Docket Sheet, *supra* note 1126 (noting resentencing scheduled for Apr. 18, 2008).

1206. E.D. Va. *Chandia* Docket Sheet, *supra* note 1126.

1207. Docket Sheet, *United States v. Chandia*, No. 08-4529 (E.D. Va. May 1, 2008) (noting oral argument heard by Circuit Judges M. Blane Michael, Diana Gribbon Motz, and Robert B. King).

1208. See Barakat, *supra* note 1202; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 1202; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing Profiles of Accused Jihad Network Member*, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 1129.

1209. *Chandia*, 514 F.3d at 373; see Barakat, *supra* note 1202.

1210. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125 (noting the filing of a sealed motion on Dec. 23, 2004, and the filing of a CIPA notice on Dec. 29, 2004.).

1211. *Id.*

1212. *Al-Timimi* Remand Order, *supra* note 1197, at 1; see E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125 (referring to warrants under the Foreign Intelligence Surveillance Act).

1213. Tr., *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. July 21, 2006, filed July 24, 2006) [hereinafter *Al-Timimi* July 21, 2006, Tr.].

following month after a classification review.¹²¹⁴ Another sealed hearing was held on January 16, 2007, and its transcript was unsealed seven months later.¹²¹⁵ The court again held closed hearings on October 8, 2008, and February 19, 2009.¹²¹⁶

The presence of al-Timimi in court sometimes necessitated cryptic dialogue. On one occasion, for example, Judge Brinkema, observed, “I want to try to do this hearing as much as possible with Mr. Timimi present, because obviously, it’s his case, and he has a right to be present as much as possible, so we may have to talk elliptically, all right?”¹²¹⁷

Challenge: Classified Arguments

On November 7, 2007, in al-Timimi’s case, the government filed a “Classified Supplemental Memorandum in Support of Government’s Response to Defendant’s Post-Remand Motions Concerning Surveillance by the National Security Agency.”¹²¹⁸ A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.¹²¹⁹ Judge Brinkema ordered the government to grant attorneys in the case and her law clerk clearance to examine at least some of the secret submissions.¹²²⁰

On October 10, 2008, al-Timimi filed with the court information security officer a sealed motion for a finding of materiality.¹²²¹

Challenge: Attorney–Client Contacts

The court of appeals noted in its *Al-Timimi* remand order that “appellant has also raised questions relating to alleged violations of attorney–client communications and access to evidence claimed as classified by the government.”¹²²²

1214. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125 (noting the unsealing of the transcript on Aug. 14, 2006); *see* Matthew Barakat, *Eavesdropping Did Not Taint Case*, Rich. Times-Dispatch, July 22, 2006, at B8.

Appearing at the hearing were four attorneys and a special agent for the government and one attorney for al-Timimi. *Al-Timimi* July 21, 2006, Tr., *supra* note 1213. Al-Timimi’s attorney’s secret clearance was signed an hour before the hearing. *Id.* Waiting in the hall was a second al-Timimi attorney, who had not yet received his clearance. *Id.*

1215. *Al-Timimi* Jan. 16, 2007, Tr., *supra* note 1197; E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125 (noting the unsealing of the transcript on Aug. 16, 2007).

By the time of this hearing, both defense attorneys had obtained secret clearances. *Al-Timimi* Jan. 16, 2007, Tr., *supra* note 1197.

1216. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125.

1217. Tr., *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 23, 2008, filed Oct. 30, 2008).

1218. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125.

1219. *See* Eric Lichtblau, *Wiretap Issue Leads Judge to Warn of Retrial in Terror Case*, N.Y. Times, Nov. 21, 2007, at A18; Jerry Markon, *Government Secrecy May Lead to New Trial in Va. Terrorism Case*, Wash. Post, Nov. 21, 2007, at A8.

1220. *See* Lichtblau, *supra* note 1219; Markon, *supra* note 1219.

1221. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1125.

1222. *Al-Timimi* Remand Order, *supra* note 1197, at 1.

It was reported that “authorities” obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 1122, at 78.

According to al-Timimi's attorney, the Bureau of Prisons opened al-Timimi's clearly labeled attorney-client mail and transferred al-Timimi so frequently from prison to prison that it was difficult for his attorneys to know where he was and make arrangements to see him.¹²²³ Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.¹²²⁴

Challenge: Religious Accommodation

Judge Brinkema is concerned about possible bias against witnesses depending upon whether they swear on a Bible or a Quran before they offer testimony to a jury.¹²²⁵ Therefore, Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.¹²²⁶

1223. *Al-Timimi* July 21, 2006, Tr., *supra* note 1213.

1224. *Al-Timimi* Docket Sheet, *supra* note 1125; *Al-Timimi* July 21, 2006, Tr., *supra* note 1213.

1225. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

1226. *Id.*

Minneapolis

United States v. Warsame (John R. Tunheim, D. Minn.)

On December 8, 2003, the FBI interviewed Mohamed Abdullah Warsame, a Canadian citizen born in Mogadishu, Somalia, and studying at Minneapolis Community and Technical College as a permanent U.S. resident.¹²²⁷ He lived in Minneapolis with his wife, a naturalized U.S. citizen, and their daughter.¹²²⁸ The interview was prompted by information obtained by secretly monitoring Warsame's telecommunications and searching his home.¹²²⁹ On the following day, Warsame was arrested as a material witness in a Southern District of New York grand jury investigation.¹²³⁰

FBI agents approached Warsame's home on December 8 at a time they knew he would be alone.¹²³¹ Warsame invited the agents in.¹²³² The agents told Warsame that he was on a terrorist watch list and that an interview would enable them to take him off the list.¹²³³ During the interview, Warsame first denied having visited Pakistan and Afghanistan, but then admitted he had when he learned that the agents already knew it.¹²³⁴

In early 2000, Warsame illegally entered Afghanistan from Pakistan to attend an al-Qaeda training camp near Kabul.¹²³⁵ That summer, Warsame trained at another al-Qaeda training camp, in Kandahar, which was led by Osama bin Laden.¹²³⁶ In 2001, Warsame returned to the U.S., maintaining communication and financial contacts with al-Qaeda.¹²³⁷

1227. *United States v. Warsame*, 488 F. Supp. 2d 846, 849–50 (D. Minn. 2007); see Pam Louwagie, *Warsame, Al-Qaida Link Detailed*, Minneapolis-St. Paul Star Trib., Feb. 10, 2004, at 1A; Howie Padilla, Pam Louwagie & Greg Gordon, *Al-Qaida Suspect Identified*, Minneapolis-St. Paul Star Trib., Dec. 12, 2003, at 1A (noting that the Twin Cities area has one of the largest Somali communities in the U.S.); Susan Schmidt, *Canadian Held for Alleged Al Qaeda Ties*, Wash. Post, Jan. 22, 2004, at A3.

1228. *Warsame*, 488 F. Supp. at 849; see Todd Nelson, *Suspect Faces N.Y. Extradition*, St. Paul Pioneer Press, Dec. 13, 2003, at A1.

1229. *Warsame*, 488 F. Supp. at 850; see Pam Louwagie, *Terror Suspect's Case Debated in U.S. District Court*, Minneapolis-St. Paul Star Trib., Nov. 16, 2005, at 1B.

1230. *Warsame*, 488 F. Supp. at 854; see Greg Gordon & Howie Padilla, *Al-Qaida Associate Held in Hennepin County Jail*, Minneapolis-St. Paul Star Trib., Dec. 10, 2003, at 1A; Pam Louwagie & Howie Padilla, *Student Accused of Link to Al-Qaida*, Minneapolis-St. Paul Star Trib., Jan. 22, 2004, at 1A; Schmidt, *supra* note 1227.

1231. *Warsame*, 488 F. Supp. at 850.

1232. *Id.*

1233. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1234. *Warsame*, 488 F. Supp. at 851; see Bob von Sternberg, *Warsame's Statements Suppressed*, Minneapolis-St. Paul Star Trib., June 1, 2007, at 4B.

1235. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009) (quoting plea agreement).

1236. *Id.*

1237. *Id.* (p.3 of filed op.).

After substantial questioning during the December 2003 interview, the FBI agents asked Warsame to pack a bag and accompany them to a more secure location.¹²³⁸ Warsame consented.¹²³⁹ The agents drove Warsame to Camp Ripley, an Army National Guard military base in Little Falls, Minnesota, but they did not disclose to Warsame where they were taking him.¹²⁴⁰ After a night's sleep on the base, Warsame said that he wanted to go home.¹²⁴¹ For that reason, and because the several hours of questioning that day were immediately followed by an arrest, Judge John R. Tunheim would on May 31, 2007, come to suppress fruits of that day's interview.¹²⁴²

Warsame appeared before Magistrate Judge Earl Cudd at a closed proceeding, and his name was not reported publicly until a couple of days later.¹²⁴³ It was subsequently reported that Warsame's public identification thwarted the government's intentions to use him as an informant.¹²⁴⁴ At another closed proceeding, on December 16, 2003, the government received permission to transfer Warsame to Manhattan for grand jury testimony.¹²⁴⁵

A Minnesota grand jury indicted Warsame on January 20, 2004, for providing material support to al-Qaeda by attending training camps in Afghanistan.¹²⁴⁶ Warsame returned to Minnesota on the following day.¹²⁴⁷ The court assigned the case to Judge Tunheim.¹²⁴⁸ A superseding indictment was filed about a year and a half

1238. *Warsame*, 488 F. Supp. at 851.

1239. *United States v. Warsame*, 547 F. Supp. 2d 982, 984 (D. Minn. 2008); *Warsame*, 488 F. Supp. at 851.

1240. *Warsame*, 488 F. Supp. at 850–51; see von Sternberg, *supra* note 1234.

1241. *Warsame*, 488 F. Supp. at 853.

1242. *Id.* at 861; see von Sternberg, *supra* note 1234.

1243. See Gordon & Padilla, *supra* note 1230; Padilla *et al.*, *supra* note 1227.

1244. Greg Gordon, *FBI Hoped Warsame Would Act as Spy*, Minneapolis-St. Paul Star Trib., Feb. 14, 2004, at 1B; Schmidt, *supra* note 1227.

1245. See Pam Louwagie, *Balancing Security and Freedom*, Minneapolis-St. Paul Star Trib., Jan. 5, 2004, at 1A; Pam Louwagie, Howie Padilla & Margaret Zack, *Jailed Student Headed to N.Y.*, Minneapolis-St. Paul Star Trib., Dec. 17, 2003, at 1B; Todd Nelson, *Extradition to New York Approved for Warsame*, St. Paul Pioneer Press, Dec. 17, 2003, at B3.

1246. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009); Docket Sheet, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Jan. 20, 2004) [hereinafter D. Minn. Docket Sheet]; see Bill Gardner, *Student Indicted in Terror Probe*, St. Paul Pioneer Press, Jan. 22, 2004, at A1; Eric Lichtblau, *Terror Indictment*, N.Y. Times, Jan. 22, 2004, at A16; Louwagie, *supra* note 1227; Louwagie & Padilla, *supra* note 1230; Schmidt, *supra* note 1227.

1247. See Schmidt, *supra* note 1227.

1248. D. Minn. Docket Sheet, *supra* note 1246.

Tim Reagan interviewed Judge Tunheim for this report at the Federal Judicial Center on August 18, 2009.

later.¹²⁴⁹ Warsame's attorneys claimed that he went to Afghanistan in search of Muslim utopia, but he left after becoming disillusioned.¹²⁵⁰

The government appealed Judge Tunheim's suppression order, and the court of appeals heard arguments on March 13, 2008.¹²⁵¹ The case could not be brought to trial while the appeal was pending.¹²⁵²

Midway through his sixth year of detention, Warsame and the government agreed to a plea bargain.¹²⁵³ On July 9, 2009, Judge Tunheim sentenced Warsame to seven years and eight months and signed a stipulated deportation order.¹²⁵⁴

Challenge: Mental Health During Detention

Detention of terrorism suspects frequently amounts to solitary confinement.¹²⁵⁵ Concerned about the defendant's mental health, Judge Tunheim encouraged Warsame's attendance at proceedings to afford him time outside his cell and in the presence of other people under secure conditions.¹²⁵⁶ Judge Tunheim observed that visits by the Canadian consulate were also helpful.¹²⁵⁷

Challenge: Attorney-Client Contacts

For over a month, between Warsame's extradition to New York and a couple of weeks after his indictment, contact between Warsame and his attorneys was prevented by the government's insistence on conditions to which the attorneys could not agree.¹²⁵⁸ Warsame was represented by the Federal Public Defender's office, and the problematic restrictions would have curtailed who in the office could

1249. *Warsame*, 651 F. Supp. 2d at 979; D. Minn. Docket Sheet, *supra* note 1246; United States v. Warsame, 537 F. Supp. 2d 1005, 1009 (D. Minn. 2008); see Pam Louwagie, *Charges Added for Terror Suspect*, Minneapolis-St. Paul Star Trib., June 23, 2005, at 1A; Beth Silver, *New Charges Filed in Al-Qaida Case*, St. Paul Pioneer Press, June 23, 2005, at B3.

1250. See Pam Louwagie, *Terror Suspect's Case Questioned*, Minneapolis-St. Paul Star Trib., Aug. 29, 2005, at 1B.

1251. Docket Sheet, United States v. Warsame, No. 07-2560 (8th Cir. June 29, 2007) [hereinafter 8th Cir. Docket Sheet].

1252. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1253. *Warsame*, 651 F. Supp. 2d at 979; see Pam Louwagie, *Terror Suspect Pleads Guilty*, Minneapolis-St. Paul Star Trib., May 21, 2009, at 1B.

1254. *Warsame*, 651 F. Supp. 2d 978 (sentencing judgment); Order for Removal, United States v. Warsame, No. 0:04-cr-29 (D. Minn. July 9, 2009); Tr., *id.* (July 9, 2009, filed Aug. 10, 2009).

The court of appeals dismissed the government's pending appeal of Judge Tunheim's suppression order. 8th Cir. Docket Sheet, *supra* note 1251.

1255. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1256. *Id.*

1257. *Id.*

1258. See Lisa Donovan, *Civil Rights, Terror on Trial*, St. Paul Pioneer Press, Feb. 9, 2004, at B1 [hereinafter *Civil Rights*]; Lisa Donovan, *Warsame Has First Hearing in Open Courtroom*, St. Paul Pioneer Press, Feb. 3, 2004, at B2.

communicate with Warsame.¹²⁵⁹ In time, attorneys for both sides were able to strike an agreement.¹²⁶⁰

Challenge: Classified Evidence

The case against Warsame relied on classified evidence, and in addition a substantial amount of classified information was discoverable.¹²⁶¹ Warsame's attorneys and Judge Tunheim's staff all obtained security clearances.¹²⁶² A protective order governed defense handling of classified materials.¹²⁶³ Judge Tunheim decided to preside over pretrial matters rather than refer them to a magistrate judge to spare another chambers' having to obtain security clearances.¹²⁶⁴

Supporters of Warsame thought that retained counsel would provide better representation than the federal defender's office, so they hired a law professor in Chicago to represent him. But because the professor could not identify local counsel likely to obtain a security clearance, Judge Tunheim continued the appointment of the federal defender's office as second counsel.¹²⁶⁵

Early in the case, the government produced to defendants discoverable classified evidence, and Warsame's attorneys had to review the classified material in a secure room at the courthouse, which included a safe suitable for storing classified materials.¹²⁶⁶ The attorneys had to prepare any documents based on or referring to classified material in the secure room.¹²⁶⁷ The court reporter, who had a security clearance, also had to work on transcripts containing classified information in this room and store computer equipment she used for such transcripts in the safe.¹²⁶⁸ Judge Tunheim could keep classified materials in a safe in his chambers office.¹²⁶⁹

Later in the case, the government's presentation of classified evidence was mostly to Judge Tunheim for his approval of what could be presented at trial.¹²⁷⁰ Some information the government was willing to declassify, and for other information the government proposed unclassified substitutions—modifications to the evidence intended to redact classified information while retaining evidentiary val-

1259. See Pam Louwagie, *Feds Want Restrictions in Terror Case*, Minneapolis-St. Paul Star Trib., Feb. 3, 2004, at 1B.

1260. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Donovan, *Civil Rights*, *supra* note 1258; Lisa Donovan, *Warsame's Attorneys, Prosecutors Strike Deal*, St. Paul Pioneer Press, Feb. 5, 2004, at B4; Pam Louwagie, *Warsame, Lawyer Will Be Allowed to Confer on Case*, Minneapolis-St. Paul Star Trib., Feb. 5, 2004, at 3B.

1261. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1262. *Id.*

1263. Protective Order, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005).

1264. *Id.*

1265. *Id.*

1266. *Id.*; see Louwagie, *supra* note 1250.

1267. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Louwagie, *supra* note 1250.

1268. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1269. *Id.*

1270. *Id.*

ue.¹²⁷¹ Judge Tunheim compared all proposed substitutions with their corresponding originals and frequently asked for modifications.¹²⁷² On reflection, Judge Tunheim thinks it would have been better for him to keep the originals for possible later reference rather than let the government retrieve them.¹²⁷³ As a result of this process, Warsame’s attorneys saw only declassified evidence or unclassified substitutions.¹²⁷⁴

Challenge: FISA Evidence

Some evidence against Warsame was obtained as a result of warrants granted pursuant to the Foreign Intelligence Surveillance Act (FISA).¹²⁷⁵ The FISA court issued secret warrants for surveillance of persons with whom Warsame was communicating, and later approved a tap of Warsame’s telephone and a physical search of his apartment.¹²⁷⁶ The government notified Warsame that it intended to use some of this evidence against him at trial.¹²⁷⁷

In camera, Judge Tunheim conducted an ex parte “comprehensive and careful review of the FISA applications, orders, and other related materials,” reviewing probable cause determinations de novo, and he determined that FISA procedures were followed properly.¹²⁷⁸

1271. *Id.*; Substitution Protective Order 3, United States v. Warsame, No. 0:04-cr-29 (D. Minn. July 9, 2009) (approving specific unclassified substitutions as providing the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information); Substitution Protective Order 2, *id.* (Oct. 3, 2008) (same); Substitution Protective Order 1, *id.* (Mar. 8, 2005) (same).

1272. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1273. *Id.*

1274. *Id.*

1275. United States v. Warsame, 547 F. Supp. 2d 982, 984–85 (D. Minn. 2008); see United States v. Warsame, 488 F. Supp. 2d 846, 850 n.1 (D. Minn. 2007); Pam Louwagie, *Eavesdropping Debate Touches Local Case*, Minneapolis-St. Paul Star Trib., Dec. 22, 2005, at 1B.

1276. *Warsame*, 547 F. Supp. 2d at 984; Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1277. *Warsame*, 547 F. Supp. 2d at 985–86.

1278. *Id.*, 547 F. Supp. 2d 982.

Mistaken Rendition

*El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)*¹²⁷⁹

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claims that the U.S. Central Intelligence Agency abducted him on December 31, 2003, while he was on vacation in Macedonia and imprisoned him for five months as part of its extraordinary rendition program and then abandoned him in Albania after realizing that it had apprehended the wrong person.¹²⁸⁰ El-Masri's captors thought he was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.¹²⁸¹ It apparently took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.¹²⁸²

On March 2, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal of el-Masri's civil suit for damages as precluded by the state-secrets privilege.¹²⁸³ The Supreme Court denied certiorari.¹²⁸⁴

El-Masri's complaint, which he filed on December 6, 2005, alleges that he was beaten, stripped, sodomized with a foreign object, and then flown to Kabul,

1279. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

1280. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006); see Compl. at 1–2, 7–17, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005), available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; see also David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. Times, Apr. 23, 2005, at A3; Bob Kemper, *A Privilege or a Free Pass?*, Wash. Lawyer, Nov. 2009, at 24, 24 (reporting that “German investigators and a fellow detainee in the Afghan prison have confirmed El-Masri’s story and the identities of his captors”); Neil A. Lewis, *Federal Judge Dismisses Lawsuit by Man Held in Terror Program*, N.Y. Times, May 19, 2006, at A22 [hereinafter *Man Held*]; Neil A. Lewis, *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*, N.Y. Times, Nov. 29, 2006, at A15 [hereinafter *Mistakenly Abducted*]; Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 Rev. Litig. 479, 480 (2008); *The Passionate Eye: CIA’s Secret War* (CBC television broadcast Oct. 15, 2006); Dana Priest, *The Wronged Man*, Wash. Post, Nov. 29, 2006, at C1; Romero & Temple-Raston, *supra* note 226, at 66–69; Don Van Natta, Jr., & Souad Mekhennet, *German’s Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11.

1281. See Van Natta & Mekhennet, *supra* note 1280.

1282. See Johnston, *supra* note 1280; Lewis, *Man Held*, *supra* note 1280.

1283. *El-Masri*, 479 F.3d 296 (resolving *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006)); see *id.* at 310 (“virtually any conceivable response to El-Masri’s allegations would disclose privileged information”); *El-Masri*, 437 F. Supp. 2d at 539, 541 (district court’s dismissal); see also Kemper, *supra* note 1280, at 24; Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. Times, Mar. 3, 2007, at A6; Lewis, *Man Held*, *supra* note 1280; Lewis, *Mistakenly Abducted*, *supra* note 1280; Priest, *supra* note 1280.

1284. *El-Masri v. United States*, 552 U.S. 947 (2007); see Robert Barnes, *Supreme Court Won’t Review Alleged CIA Abduction*, Wash. Post, Oct. 10, 2007, at A4; Linda Greenhouse, *Justices Turn Aside Case of Man Accusing C.I.A. of Torture*, N.Y. Times, Oct. 10, 2007, at A16; Kemper, *supra* note 1280, at 24.

Afghanistan, where he was imprisoned in the “Salt Pit” for another four months.¹²⁸⁵ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.¹²⁸⁶ According to Judge Ellis,

Following his abduction, El-Masri alleges the Macedonia authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. . . .

. . . El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon.¹²⁸⁷

It took four days for el-Masri to find his wife and children.¹²⁸⁸ It was reported that el-Masri received very little psychiatric treatment for the trauma he experienced until he was indefinitely committed to a psychiatric institution following his setting fire to a supermarket in Ulm, Germany, on May 17, 2007.¹²⁸⁹

On January 31, 2007, it was reported that a German court issued arrest warrants for 13 CIA operatives who participated in el-Masri’s abduction.¹²⁹⁰

1285. *El-Masri*, 437 F. Supp. 2d at 533; Compl., *supra* note 1280, at 8–14; *see* Jane Mayer, *The Black Sites*, New Yorker, Aug. 13, 2007, at 46, 54–55 (describing the conditions of el-Masri’s detention); *see also* James Risen, *State of War* 30 (2006) (“CIA sources say that Salt Pit is in Afghanistan and is used to house low-level prisoners.”); Romero & Temple-Raston, *supra* note 226, at 69 (describing the Salt Pit as “a secret U.S.-run prison just north of Kabul” and noting that the suit was filed on a day that Rice, now Secretary of State, arrived in Berlin for a visit with Chancellor Angela Merkel).

1286. Docket Sheet, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005) [hereinafter E.D. Va. *El-Masri* Docket Sheet]; *see* Kemper, *supra* note 1280, at 24.

Tim Reagan interviewed Judge Ellis for this report in the judge’s chambers on September 5, 2007.

1287. *El-Masri*, 437 F. Supp. 2d at 532–34; *see* Compl., *supra* note 1280, at 7, 14–16; *see also* Johnston, *supra* note 1280; Van Natta & Mekhennet, *supra* note 1280.

It was reported that German officials may have known of el-Masri’s detention within a few days of his capture. Souad Mekhennet & Craig S. Smith, *German Spy Agency Admits Mishandling Abduction Case*, N.Y. Times, June 2, 2006, at A8; Don Van Natta, Jr., *Germany Weighs If It Played Role in Seizure by U.S.*, N.Y. Times, Feb. 21, 2006, at A1.

1288. *See* Van Natta & Mekhennet, *supra* note 1280.

1289. *See* Souad Mekhennet, *Ex-C.I.A. Detainee Held in Arson Attack*, N.Y. Times, May 18, 2007, at A8; Tony Paterson, *CIA Torture Victim Committed After Supermarket Arson Attack*, *Indep.*, May 19, 2007.

1290. *See* Jeffrey Fleishman & John Goetz, *Germany May Indict U.S. Agents in Abduction*, N.Y. Times, Jan. 31, 2007, at 1; Mark Landler, *German Court Challenges CIA over Abduction*, N.Y. Times, Feb. 1, 2007, at A1 (“They include the four pilots of the Boeing 737 that picked up Mr. Masri, a mechanic and several CIA operatives, people familiar with the case said.”); Lobel, *supra* note 1280, at 480; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, at A1.

Challenge: Classified Arguments

The government asserted the state-secrets privilege

by submitting an *ex parte* classified declaration labeled “JUDGE’S EYES ONLY,” and also an unclassified declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri’s allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege.¹²⁹¹

The classified declaration was delivered to the judge by a court information security officer, who took responsibility for its storage when the judge was not privately reviewing it.¹²⁹²

Without revealing the contents of classified submissions, Judge Ellis noted that

the substance of El-Masri’s publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security. This conclusion finds firm support in the details disclosed in the [Director of the CIA’s] classified *ex parte* declaration.¹²⁹³

The court of appeals also reviewed the classified declaration and announced that “the extensive information it contains is crucial to our decision in this matter.”¹²⁹⁴ The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.¹²⁹⁵ Sometime before oral argument, Judge King, who was to author the opinion, drove from his home in Charleston, West Virginia, to Richmond, Virginia, to review the classified declaration.¹²⁹⁶ A deputy clerk with a security clearance brought the declaration to Judge King’s chambers, where the judge reviewed the declaration in private, and a cleared deputy clerk returned the declaration to the court’s sensitive compartmented information facility (SCIF) when the judge was finished.¹²⁹⁷ Judges Shedd

1291. *El-Masri*, 437 F. Supp. 2d at 537; see E.D. Va. *El-Masri* Docket Sheet, *supra* note 1286 (noting a Mar. 23, 2006, notice of in camera submission).

1292. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

1293. *El-Masri*, 437 F. Supp. 2d at 537.

1294. *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

1295. Docket Sheet, *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006).

For this report, Tim Reagan interviewed Judge King in the judge’s Richmond chambers on March 19, 2008, interviewed Judge Shedd by telephone on September 3, 2009, and interviewed Judge Duncan by telephone on November 8, 2007.

1296. Interview with Hon. Robert B. King, March 19, 2008. The drive is approximately 320 miles.

1297. *Id.*; see Reagan, *supra* note 165, at 19 (describing SCIFs).

The court created the SCIF for the Zacarias Moussaoui case. Interview with 4th Cir. Clerk’s Office Staff, Feb. 26, 2008; see *supra*, “Twentieth Hijacker.”

and Duncan reviewed the declaration in their Richmond chambers when they were in town for a sitting.¹²⁹⁸

Two Supreme Court justices reviewed the classified declaration to consider el-Masri's petition for certiorari,¹²⁹⁹ which the court denied.¹³⁰⁰

1298. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009; Interview with Hon. Allyson Kay Duncan, Nov. 8, 2007.

1299. Interview with Dep't of Justice Litig. Sec. Section Staff, Nov. 6, 2007.

1300. *El-Masri v. United States*, 552 U.S. 947 (2007).

Detainee Documents

ACLU v. Dep't of Defense
(*Alvin K. Hellerstein, S.D.N.Y.*)

Several civil rights organizations—the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace—sought injunctive relief in aid of Freedom of Information Act (FOIA) requests to the government—specifically the Departments of Defense, Homeland Security, Justice, and State, and the CIA—by filing an action in the Southern District of New York on June 2, 2004.¹³⁰¹ The court assigned the case to Judge Alvin K. Hellerstein.¹³⁰²

The FOIA requests were presented to the various government agencies from October 2003 to May 2004.¹³⁰³ They sought records concerning three topics pertaining to terrorism suspects detained by the government at extraterritorial military facilities since September 11, 2001: (1) records of treatment, (2) records of deaths, and (3) records of rendition to countries known to use torture.¹³⁰⁴ The only document produced before the lawsuit was filed was a set of State Department talking points.¹³⁰⁵

A little over three months after the case was filed, Judge Hellerstein ordered the government agencies to “produce or identify all responsive documents” within one month.¹³⁰⁶ Judge Hellerstein scheduled a status conference for 10 days following that deadline.¹³⁰⁷

It is the duty of the court to uphold FOIA by striking a proper balance between plaintiffs’ right to receive information on government activity in a timely manner and the government’s contention that national security concerns prevent timely disclosure or identification. . . .

. . . Documents that have been classified as matters of national defense or foreign policy may be exempt from FOIA. However, before it can be determined if documents requested by plaintiffs fall under such exemptions, the documents must first be identified, by some form of log, to enable a specific claim of exemption to be asserted and justified. As to documents the existence of which the government contends it may be unable to confirm or deny, procedures can be established to identify such documents in camera or to a special master with proper clearance. . . .

1301. Compl., *ACLU v. Dep’t of Defense*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004); *see* Am. Compl., *id.* (July 6, 2004).

1302. Docket Sheet, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004).

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

1303. *ACLU v. Dep’t of Defense*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); Am. Compl. 2–3, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. July 6, 2004).

1304. *ACLU*, 339 F. Supp. 2d at 502; Am. Compl. 2, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. July 6, 2004).

1305. *See* Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 31, 2009, at A4.

1306. *ACLU*, 339 F. Supp. 2d at 505.

1307. *Id.*

....
I order that by October 15, 2004 defendants must produce or identify all responsive documents. . . . Documents that cannot be identified to plaintiffs because of their classified status shall be identified in camera on a log produced to the court, providing the document's classification status and justification thereof.¹³⁰⁸

The CIA moved to stay Judge Hellerstein's order as to CIA files on the ground that the CIA Information Act exempts CIA operational files from FOIA.¹³⁰⁹ Judge Hellerstein denied the stay, ruling that the CIA failed to satisfy the statutory requirement that the Director of the CIA explicitly claim the exemption with respect to specifically categorized files.¹³¹⁰ Moreover, the statute excepts from the exemption files relating to government investigations of illegal conduct.¹³¹¹ The documents sought by the plaintiffs related to an investigation by the CIA's Inspector General of the CIA's treatment of detainees.¹³¹²

The CIA cured the procedural defect, and Judge Hellerstein ruled that to comply with the FOIA request, the CIA needed only to search and review relevant documents already identified and produced to or collected by the Inspector General.¹³¹³

By September 2005, "The government, after being inattentive for many months to the obligations imposed on it by FOIA, [had] made large, but not complete, production, reviewing and turning over thousands of documents from various of its agencies."¹³¹⁴ Judge Hellerstein resolved some pending disputes concerning document production, including by reviewing some documents in camera.¹³¹⁵

Judge Hellerstein's June 2006 rulings on 29 "photographs taken by individuals serving in Iraq and Afghanistan"¹³¹⁶ received Supreme Court action.¹³¹⁷ On September 22, 2008, the court of appeals affirmed Judge Hellerstein's order that the government release 21 of these photographs, with redactions to protect the subjects' privacy.¹³¹⁸ On October 28, 2009, the President signed an appropriations bill for the Department of Homeland Security, which included the "Protected National Security Documents Act of 2009."¹³¹⁹ This act allows the Secretary of De-

1308. *Id.* at 504–05 (citation omitted).

1309. *ACLU v. Dep't of Defense*, 351 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

1310. *Id.* at 268, 272, 278.

1311. *Id.* at 271.

1312. *Id.* at 268, 271–73.

1313. Order, *ACLU v. Dep't of Defense*, No. 1:04-cv-4151 (S.D.N.Y. April 18, 2005).

1314. *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005) (citation omitted).

1315. *ACLU*, 389 F. Supp. 2d 547.

1316. Supp. Order, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 21, 2006), available at 2006 WL 1722574; Order, *id.*, No. 1:04-cv-4151 (S.D.N.Y. June 9, 2006), available at 2006 WL 1638025.

1317. Docket Sheet, *Dep't of Defense v. ACLU*, No. 09-160 (U.S. Aug. 7, 2009); see Adam Liptak, *Supreme Court Overturns Decision on Detainee Photos*, N.Y. Times, Dec. 1, 2009, at A18.

1318. *ACLU v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated*, ___ U.S. ___, 130 S. Ct. 777 (2009).

1319. Pub. L. No. 111-83, 123 Stat. 2142, § 565.

fense to protect from disclosure any detainee photograph taken from September 11, 2001, through January 22, 2009, if disclosure would endanger American citizens, military personnel, or employees abroad.¹³²⁰ The Supreme Court remanded the case back to the court of appeals for reconsideration in light of the act.¹³²¹

On December 7, 2007, news media reported that in 2005 the CIA destroyed videotapes of detainee interrogations.¹³²² Five days later, plaintiffs moved for contempt and sanctions.¹³²³ On January 2, 2008, Attorney General Michael Mukasey announced a criminal investigation into the destruction of the tapes.¹³²⁴ Judge Hellerstein stayed consideration of the contempt motion until February 2009 so as not to interfere with the criminal investigation.¹³²⁵ On July 30, 2009, Judge Hellerstein, finding that the investigation continued, ordered the government to prepare an index of documents relevant to the contempt motion.¹³²⁶

By the end of August 2009, the plaintiffs had obtained 2,814 documents from the Defense Department, 998 from the State Department, 872 from the FBI, 145 from other Justice Department units, and 49 from the CIA.¹³²⁷

Challenge: Classified Evidence

All of Judge Hellerstein's law clerks have security clearances.¹³²⁸ They begin the process of getting cleared at hiring, before they start work.¹³²⁹ However, the government did not extend the law clerks' need to know to all classified materials that Judge Hellerstein had to review.¹³³⁰ As a result, Judge Hellerstein developed a procedure where he could examine documents on the record by being the only one looking at them.¹³³¹ A court reporter without a clearance could record the proceeding and law clerks, who had clearances but still were not cleared to see the documents, could attend.¹³³² Judge Hellerstein did not retain the documents after he examined them and ruled on whether or not they had to be produced either redacted or unredacted.¹³³³

1320. *Id.*; see Liptak, *supra* note 1317.

1321. *Dep't of Defense v. ACLU*, ___ U.S. ___, 130 S. Ct. 777 (2009); see Liptak, *supra* note 1317.

1322. Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1.

1323. Mem. & Order 1, *ACLU v. Dep't of Defense*, No. 1:04-cv-4151 (S.D.N.Y. July 30, 2009) [hereinafter July 30, 2009, Me. & Order].

1324. See Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal Inquiry into C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, at A1.

1325. July 30, 2009, Me. & Order, *supra* note 1323, at 1.

1326. July 30, 2009, Mem. & Order, *supra* note 1323.

1327. See Shane, *supra* note 1305.

1328. Interview with Hon. Alvin K. Hellerstein, Nov. 5, 2009.

1329. *Id.*

1330. *Id.*

1331. *Id.*

1332. *Id.*

1333. *Id.*

Prosecution of a Charity

United States v. Holy Land Foundation

(A. Joe Fish and

Jorge A. Solis, N.D. Tex.)

On July 27, 2004, the government indicted the Holy Land Foundation for Relief and Development, once the largest Islamic charity in the United States, and seven of its leaders, for providing funds to Hamas.¹³³⁴ The court assigned the case to Judge A. Joe Fish.¹³³⁵

The Occupied Land Fund was established in 1989 by Shukri Abu Baker and Ghassan Elashi; in 1991, the fund reorganized as the Holy Land Foundation.¹³³⁶ The foundation was an offshoot of the Islamic Association for Palestine, an information group.¹³³⁷ Both groups were headquartered in Richardson, Texas, approximately 15 miles north of Dallas.¹³³⁸ The FBI had been investigating the foundation's ties to Hamas since shortly after its reorganization.¹³³⁹

Parents of David Boim, a 17-year-old boy killed in a 1996 terrorist attack in Israel, filed a federal civil action in Chicago in 2000 against the Holy Land Foundation and other defendants, alleging that the defendants provided financial support to Hamas, whom the parents alleged killed their son.¹³⁴⁰

1334. Indictment, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004); see James Brooke & Elaine Sciolino, *U.S. Muslims Say Their Aid Pays for Charity, Not Terror*, N.Y. Times, Aug. 16, 1995, at 1; Eric Lichtblau, *Arrests Tie Charity Group to Palestinian Terrorists*, N.Y. Times, July 28, 2004, at A10; Michelle Mittelstadt, Matt Stiles & Frank Trejo, *Muslim Charity, Leaders Indicted U.S. Says*, Dallas Morning News, July 28, 2004, at 1A.

1335. Docket Sheet, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004) [hereinafter N.D. Tex. *Holy Land Foundation* Docket Sheet].

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

1336. *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003); *Holy Land Foundation v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); see Brooke & Sciolino, *supra* note 1334; Steve McGonigle, *Tie to Hamas Leader Minimized*, Dallas Morning News, Dec. 16, 2001, at 35A; Gayle Reaves & Steve McGonigle, *Paper Trail Leads to Hamas*, Dallas Morning News, Apr. 8, 1996, at 1A.

1337. See Brooke & Sciolino, *supra* note 1334; Reaves & McGonigle, *supra* note 1336.

1338. See *id.*

1339. See Todd J. Gillman, *FBI Looks into Islamic Fund Raising*, Dallas Morning News, Nov. 18, 1994, at 29A; Steve McGonigle, *Charity Inquiry Dated to 1989*, Dallas Morning News, Dec. 20, 2002, at 33A; Jason Trahan, *Stakes High in Holy Land Trial*, Dallas Morning News, July 16, 2007, at 1A; Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, Wash. Post, Oct. 23, 2007, at A3.

1340. Compl., *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000); see *Boim v. Holy Land Found.*, 549 F.3d 685, 687 (7th Cir. 2008); *Boim v. Quranic Literacy Inst.*, 349 F. Supp. 2d 1097 (N.D. Ill. 2004) (resolving motions in limine); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004) (resolving motions for summary judgment); *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying motions to dismiss), *aff'd*, 291 F.3d 1000 (7th Cir. 2002) (resolving *Boim v. Quranic Literacy Inst.*, Nos. 01-1969 & 01-1970 (2d Cir. Apr. 19, 2001)); see also Steve McGonigle, *Suit Accuses Islamic Groups of Aiding in Ter-*

On November 29, 2004, the district court granted the plaintiffs summary judgment on liability against some of the defendants, including the foundation.¹³⁴¹ The jury returned a damages verdict of \$52 million,¹³⁴² which the court statutorily trebled to \$156 million.¹³⁴³ On December 3, 2008, however, the court of appeals, en banc, reversed the district court's summary judgment against the foundation, because the district court had improperly given preclusive effect to another district court's affirming a seizure of the foundation's assets.¹³⁴⁴

On December 4, 2001, the Treasury Department's Office of Foreign Asset Control designated the foundation a terrorist organization and froze its assets.¹³⁴⁵ On March 11, 2002, the foundation challenged the designation and the freezing in the U.S. District Court for the District of Columbia.¹³⁴⁶ On June 20, 2003, the court of appeals affirmed a judgment in the government's favor.¹³⁴⁷

Foundation CEO Baker; chairman Elashi; Mohammed El-Mezain, director of endowments; Mufid Abdulqader, a top fundraiser; Abdulrahman Odeh, the foundation's New Jersey representative; Haitham Maghawri; and Akram Mishal were

rorist Attack, Dallas Morning News, May 13, 2000, at 29A; Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, Chi. Trib., May 15, 2000, Metro Chicago, at 1.

1341. *Boim*, 549 F.3d at 688; *Boim*, 340 F. Supp. 2d 885; see Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, Chi. Trib., Nov. 11, 2004, Metro Chicago, at 1; Steve McGonigle, *Former Richardson Charities Tied to Hamas, Judge Rules*, Dallas Morning News, Nov. 11, 2004, at 14A.

1342. *Boim*, 549 F.3d at 688; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004).

1343. *Boim*, 549 F.3d at 688; Am. J., *Boim*, No. 1:00-cv-2905 (N.D. Ill. Feb. 25, 2005); see 18 U.S.C. § 2333(a); see also Matt O'Connor, *\$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

1344. *Boim*, 549 F.3d at 691 (resolving *Boim v. American Muslim Soc'y*, No. 05-1822 (7th Cir. Mar. 28, 2005); *Boim v. Quranic Literacy Inst.*, No. 05-1821 (7th Cir. Mar. 28, 2005); *Boim v. Salah*, No. 05-1816 (7th Cir. Mar. 28, 2005); *Boim v. Holy Land Found.*, No. 05-1815 (7th Cir. Mar. 28, 2005)), *cert. denied*, ___ U.S. ___, 130 S. Ct. 458 (2009).

1345. *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 159–60 (D.C. Cir. 2003) (resolving *Holy Land Foundation v. Ashcroft*, No. 02-5307 (D.C. Cir. Sept. 30, 2002); *Holy Land Foundation v. Ashcroft*, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002); see *United States v. Holy Land Foundation*, 493 F.3d 469, 471 n.3 (5th Cir. 2007); Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. Times, Oct. 23, 2007, at A1; David Jackson, *Holy Land Charity Shut Down*, Dallas Morning News, Dec. 5, 2001, at 1A; Whoriskey, *supra* note 1339.

Hamas, a word that means "zeal" in Arabic, is an acronym for "Harakat al-Muqawama al-Islamiyya," which means "The Islamic Resistance Movement." *Holy Land Foundation*, 493 F.3d at 471 n.1; see Tom Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Reaves & McGonigle, *supra* note 1336. The government declared Hamas a terrorist organization on January 23, 1995. *Holy Land Foundation*, 333 F.3d at 159; *Holy Land Foundation*, 219 F. Supp. at 64 n.2.

1346. Docket Sheet, *Holy Land Foundation v. Ashcroft*, No. 1:02-cv-442 (D.D.C. Mar. 8, 2002); see *Holy Land Foundation*, 219 F. Supp. at 64.

1347. *Holy Land Foundation*, 333 F.3d 156; see *Holy Land Foundation*, 219 F. Supp. 57; see Michelle Mittelstadt, *Ruling Keeps Charity's Assets Frozen*, Dallas Morning News, June 21, 2003, at 1A.

the Holy Land Foundation's co-defendants.¹³⁴⁸ Maghawi and Mishal were living abroad and considered fugitives.¹³⁴⁹

On December 17, 2002, the government indicted Elashi in a separate case against his family's computer company, Infocom, alleging that the Elashis and their company (1) violated export regulations in their export of goods to Libya and Syria, and (2) funneled money to Hamas through a cousin's husband, Mousa Abu Marzook, who was once the head of Hamas's political branch.¹³⁵⁰ Ghassan Elashi's indictment was included in a superseding indictment in a case against the computer company and Ghassan's brothers Bayan and Basman Elashi and Ihsan Elashyi, which was filed on February 20, 2002.¹³⁵¹ Also included in the superseding indictment were a fifth brother, Hazim Elashi; the men's cousin, Nadia Elashi; and her husband Abu Marzook.¹³⁵² The court assigned the case to Judge Sam A. Lindsay.¹³⁵³

On July 7, 2004, a jury found the brothers and their company guilty of export improprieties.¹³⁵⁴ On April 13, 2005, a separate jury found Ghassan, Bayan, and Basman Elashi, and their company, guilty of funneling funds to terrorists.¹³⁵⁵ Judge Lindsay sentenced Ghassan Elashi to a term of six years and eight months on October 16, 2006.¹³⁵⁶ The other brothers' sentences ranged from five to seven years.¹³⁵⁷ Nadia Elashi and Abu Marzook were fugitives.¹³⁵⁸

Jury selection in the Holy Land Foundation trial began on July 16, 2007.¹³⁵⁹ Judge Fish used a jury questionnaire.¹³⁶⁰

1348. Indictment, *supra* note 1334; see Mittelstadt *et al.*, *supra* note 1334; Trahan, *supra* note 1339.

1349. See Mittelstadt *et al.*, *supra* note 1334; Trahan, *supra* note 1339.

1350. United States v. Elashyi, 554 F.3d 480, 489–91 & n.2 (5th Cir. 2008); United States v. Elashi, 440 F. Supp. 2d 536, 541–43 (N.D. Tex. 2007); Docket Sheet, United States v. Elashi, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002) [hereinafter N.D. Tex. *Elashi* Docket Sheet]; see Eric Lichtblau & Judith Miller, *5 Brothers Charged with Aiding Hamas*, N.Y. Times, Dec. 19, 2002, at A19; Cam Simpson, *Tech Company Execs, Chief in Hamas Indicted by U.S.*, Chi. Trib., Dec. 19, 2002, News, at 14.

1351. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1350.

1352. *Id.*

1353. *Id.*

1354. *Id.*

1355. *Elashi*, 440 F. Supp. at 544; N.D. Tex. *Elashi* Docket Sheet, *supra* note 1350; see Roy Appleton & Matt Stiles, Dallas Morning News, Apr. 14, 2005, at 1B.

1356. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1350; see Michael Grabell, *Holy Land Founder Gets 6 Years*, Dallas Morning News, Oct. 13, 2006, at 5B.

1357. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1350 (noting Bayan Elashi's sentence of seven years and Basman Elashi's sentence of six years and eight months on Oct. 16, 2006; Hazim Elashi's sentence of five years on Feb. 1, 2006; and Ihsan Elashyi's sentence of six years on Jan. 27, 2006); see Michael Grabel, *Richardson Man Gets 7 Years in '04 Export Case*, Dallas Morning News, Oct. 12, 2006, at 11B; Tim Wyatt, *2 Sentenced for InfoCom Exports*, Dallas Morning News, Jan. 26, 2006, at 9B.

1358. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1350; see Appleton & Stiles, *supra* note 1355.

1359. See Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. Times, July 17, 2007, at A14; Trahan, *supra* note 1339.

During the first few days of jury selection, Judge Fish conducted proceedings to establish waivers of conflict relating to defense attorneys' representing both the Holy Land Foundation and Abu Baker, its CEO.¹³⁶¹ Elashi had signed a waiver of conflict on behalf of the foundation, but his attorney announced during these proceedings that he may not have had the authority to speak for the foundation.¹³⁶² The foundation's attorney said that she did not think there existed anyone who could speak for the foundation, so Judge Fish granted her firm's request to withdraw from representation of the foundation, and trial proceeded without the foundation's having counsel.¹³⁶³

On September 19, the jury began to deliberate.¹³⁶⁴ Jurors deliberated on 197 counts for 19 days.¹³⁶⁵ On Thursday, October 18, the jury announced a partial verdict, but Judge Fish was at a judges conference out of town.¹³⁶⁶ So the verdict was presented to Magistrate Judge Paul D. Stickney, who kept it sealed until Judge Fish's return.¹³⁶⁷

On Monday, Judge Fish unsealed the verdict.¹³⁶⁸ According to the verdict, one defendant was acquitted, but the jury was deadlocked on some charges for each of the other defendants.¹³⁶⁹ When the judge polled the jury, three jurors said that the verdict did not represent their views, so Judge Fish ordered the jury to resume de-

In advance of jury selection, Judge Fish granted defendants' motion for information on how the grand and petit jury were constituted so that the defendants' could assess whether or not there was a structural or statistical bias against Arabs or Muslims. Mem. Op. & Order, *Holy Land Foundation v. Ashcroft*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), available at 2007 WL 1452489.

1360. A. Joe Fish, *United States v. Holy Land Foundation: Jury Questionnaire* (July 16, 2007).

1361. Tr. at 1013–16, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 20, 2007, filed Sept. 25, 2008); Tr. at 821–23 *id.* (July 18, 2007, filed Sept. 25, 2008) [hereinafter N.D. Tex. *Elashi* July 18, 2007, Tr.]; Tr. at 523–26, *id.* (July 17, 2007, filed Sept. 25, 2008) [hereinafter N.D. Tex. *Elashi* July 20, 2007, Tr.]; Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1362. N.D. Tex. *Elashi* July 18, 2007, Tr., *supra* note 1361, at 822.

1363. N.D. Tex. *Elashi* July 20, 2007, Tr., *supra* note 1361, at 1013–16; Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Jason Trahan, *Lawyers Debate Holy Land Foundation's Right to Attorney for Appeal*, Dallas Morning News, Jan. 13, 2010, at B7.

1364. See Jason Trahan, *Jury in Complex Holy Land Case Begins Deliberations*, Dallas Morning News, Sept. 20, 2007, at 11B; see also A. Joe Fish, *United States v. Holy Land Foundation: Jury Instructions* (Sept. 19, 2007).

1365. See Leslie Eaton, *Reading of Verdict in Terror Case Is Delayed*, N.Y. Times, Oct. 19, 2007, at A18; Jason Trahan, *Holy Land Verdict Sealed*, Dallas Morning News, Oct. 19, 2007, at 1A.

1366. Interview with Hon. A. Joe Fish, Oct. 6, 2009 (Judge Fish was at an annual conference for judges handling multidistrict consolidations.); see Eaton, *supra* note 1365; Trahan, *supra* note 1365.

1367. *Id.*

Because they knew that Judge Fish would be out of town, several of the government's attorneys in the case were also away. See Trahan, *supra* note 1365.

1368. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1345; Jason Trahan, "There Was Not Enough Evidence," Dallas Morning News, Oct. 23, 2007, at 1A; Whoriskey, *supra* note 1339.

1369. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

liberations.¹³⁷⁰ After additional deliberation, the jury returned that day deadlocked on counts against all defendants, so Judge Fish declared a mistrial.¹³⁷¹ Mohammed el-Mezain, the foundation's former chairman, was acquitted of all but one charge.¹³⁷² Two defendants were acquitted of most of the charges against them.¹³⁷³ The jury was deadlocked on all counts against the charity and its president, Shukri Abu Baker, and chairman, Ghassan Elashi.¹³⁷⁴

On November 12, 2007, Judge Fish assumed senior status and took himself out of the draw for criminal cases, so Judge Jorge A. Solis assumed responsibilities for the retrial.¹³⁷⁵ Judge Solis also used a jury questionnaire.¹³⁷⁶

Opening arguments in the retrial began on September 22, 2008.¹³⁷⁷ On November 24, 2008, after eight days of deliberation, the jury found all defendants guilty on all 108 counts included in the retrial.¹³⁷⁸ Judge Solis sentenced Elashi to 65 years in prison, a sentence to be served consecutive to the sentence in his computer-company prosecution.¹³⁷⁹ Baker was also sentenced to 65 years; Abdulqader was sentenced to 20 years; el-Mezain and Odeh were each sentenced to 15 years.¹³⁸⁰ Appeals are pending.¹³⁸¹

1370. See Eaton, *supra* note 1345.

1371. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1345; Trahan, *supra* note 1368; Whoriskey, *supra* note 1339.

1372. See Eaton, *supra* note 1345; Trahan, *supra* note 1368.

1373. See *id.*

1374. See *id.*

1375. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>; Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Jason Trahan, *For Holy Land Judge, a Change*, Dallas Morning News, Nov. 13, 2007, at 1B; Jason Trahan, *Senate Attorney Named U.S. Judge*, Dallas Morning News, Nov. 26, 2007, at 1B.

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

1376. Jorge A. Solis, *United States v. Holy Land Foundation: Jury Questionnaire* (Sept. 4, 2008).

1377. See Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, Wash. Post, Sept. 21, 2008, at A2.

1378. See Tanya Eiserer & Jason Trahan, *5 Ex-Leaders Guilty in Holy Land Trial*, Dallas Morning News, Nov. 25, 2008, at 1A; Gretel C. Kovach, *U.S. Wins Convictions in Retrial of Terrorism-Financing Case*, N.Y. Times, Nov. 25, 2008, at A16; see also Jorge A. Solis, *United States v. Holy Land Foundation: Supplemental Jury Instructions* (Nov. 24, 2008); Jorge A. Solis, *United States v. Holy Land Foundation: Jury Instructions* (Nov. 10, 2008).

1379. Judgment, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009); see Jason Trahan, *5 Decry Jail Terms in Holy Land Case*, Dallas Morning News, May 28, 2009, at 1A.

1380. Judgment, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009) (Baker's sentence); Judgments, *id.*, No. 3:04-cr-240 (N.D. Tex. May 28, 2009) (Abdulqader, El-Mezain, and Odeh's sentences); see Trahan, *supra* note 1379.

1381. Docket Sheet, *United States v. El-Mezain*, No. 09-10560 (5th Cir. May 29, 2009) (lead case, appeal by el-Mezain and the Holy Land Foundation) [hereinafter 5th Cir. *Holy Land Foundation* Docket Sheet]; Docket Sheet, *United States v. Odeh*, No. 09-10569 (5th Cir. June 1, 2009); Docket Sheet, *United States v. Abdulqader*, No. 09-10565 (5th Cir. May 29, 2009); Docket Sheet, *United States v. Baker*, No. 09-10564 (5th Cir. May 29, 2009); Docket Sheet, *United States v. Elashi*, No. 09-10563 (5th Cir. May 29, 2009).

On September 24, 2009, the court of appeals remanded the case back to Judge Solis for findings on the prosecution of the foundation without representation.¹³⁸² Because the docket sheet showed the foundation to still be represented by its original attorneys, Judge Solis did not know that the foundation was not represented at trial until sentencing.¹³⁸³ Judge Solis held a hearing on the matter on January 12, 2010.¹³⁸⁴ A University of Texas law professor is seeking to represent the foundation pro bono on appeal.¹³⁸⁵

Challenge: Classified Evidence

Some of the government's evidence concerning the defendants was classified.¹³⁸⁶ This included information obtained under the Foreign Intelligence Surveillance Act (FISA) and information provided by the government of Israel.¹³⁸⁷

Judge Fish's law clerks received security clearances.¹³⁸⁸ Judge Fish could store classified documents in chambers safes.¹³⁸⁹ All defense counsel also received security clearances,¹³⁹⁰ but they were not allowed to reveal classified information to the defendants.¹³⁹¹ Judge Fish had to find space in the courthouse that could be fitted as a room for defense attorneys to review classified documents.¹³⁹²

Judge Solis's staff also received security clearances, including a career law clerk, his courtroom deputy, and his court reporter.¹³⁹³ Judge Solis also kept classified documents in a chambers safe.¹³⁹⁴

1382. Order, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Sept. 24, 2009).

1383. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

1384. N.D. Tex. *Holy Land Foundation* Docket Sheet, *supra* note 1335; *see* Trahan, *supra* note 1363.

1385. 5th Cir. *Holy Land Foundation* Docket Sheet, *supra* note 1381; Interview with Hon. Jorge A. Solis, Oct. 6, 2009; *see* Trahan, *supra* note 1363.

1386. Mem. Order & Op. 4, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Nov. 2, 2006) [hereinafter Nov. 2, 2006, Op.]; *see also id.* at 13 ("the defendants have thousands of pages of classified documents that they need to translate and digest in order to prepare for trial").

1387. Nov. 2, 2006, Op., *supra* note 1386, at 3.

1388. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1389. *Id.*

1390. Mem. Op. & Order 5–6, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Dec. 8, 2006) [hereinafter Dec. 8, 2006, Op.]; Nov. 2, 2006, Op., *supra* note 1386, at 17; *see* Steve McGonigle, *Attorney: Terror Case Not Derailed*, Dallas Morning News, Feb. 17, 2006, at 1B.

1391. Dec. 8, 2006, Op., *supra* note 1390, at 3; Nov. 2, 2006, Op., *supra* note 1386, at 17.

1392. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

Because of the level of classification of the documents with which defense attorneys worked, the secure room did not have to satisfy all of the technical specifications of a Sensitive Compartmented Information Facility (SCIF). Interview with Dep't of Justice Litig. Sec. Section Staff, Oct. 23, 2009

1393. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

1394. *Id.*

Challenge: FISA Evidence

Evidence against the defendants was based in part on wiretaps authorized by the FISA court.¹³⁹⁵

In April 2005, the government mistakenly disclosed to cleared defense counsel the contents of FISA warrant applications.¹³⁹⁶ This is not the usual procedure for affording a defendant an opportunity to challenge evidence based on FISA warrants.¹³⁹⁷ The usual procedure is for the government to present the FISA warrant records to the district judge *ex parte*.¹³⁹⁸ In fact, Judge Fish spent several days conducting an *in camera* review of FISA warrants resulting in evidence the government sought to use in the case.¹³⁹⁹

Judge Fish was at a conference in another city when he received, in the lobby of his hotel, an emergency motion from the FBI stating that FISA applications had been inadvertently disclosed to defense attorneys.¹⁴⁰⁰ The FBI asked the judge for relief because the attorneys refused to return them.¹⁴⁰¹ Judge Fish issued an order preserving the status quo and then ultimately granted the FBI substantially the relief requested.¹⁴⁰²

The government also produced to defense counsel evidence obtained as a result of the FISA warrants.¹⁴⁰³ Much of this evidence was in the form of declassified “tech-cuts,” which are English-language summaries of recorded conversations.¹⁴⁰⁴ Defense counsel discovered some errors in the summaries, and Judge Fish declared the errors to be “disturbing,” but the defendants did not present evidence of sufficient inaccuracies to require a remedy.¹⁴⁰⁵

The government also declassified some of the defendants’ recorded conversations, and that evidence could be shared with the defendants.¹⁴⁰⁶ The court approved an offer by the government to seek declassification of additional conversations specifically identified by the defendants.¹⁴⁰⁷ But defense counsel argued that the offer was unconstitutional because it required them to reveal too much about

1395. *See* McGonigle, *supra* note 1390.

1396. *See id.*

1397. *See id.*

1398. *See id.*

1399. Mem. Op. & Order 5, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), available at 2007 WL 2011319.

1400. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1401. *Id.*

1402. *Id.*

1403. Nov. 2, 2006, Op., *supra* note 1386, at 3.

1404. Dec. 8, 2006, Op., *supra* note 1390, at 7; Nov. 2, 2006, Op., *supra* note 1386, at 3, 18 no.6.

1405. Mem. Op. & Order 5, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), available at 2007 WL 628059.

1406. Nov. 2, 2006, Op., *supra* note 1386, at 17.

1407. Dec. 8, 2006, Op., *supra* note 1390, at 5–6; Nov. 2, 2006, Op., *supra* note 1386, at 17, 22.

their own conversations with their clients and their trial strategy.¹⁴⁰⁸ Judge Fish overruled this objection.¹⁴⁰⁹

It was understood that any FISA evidence the government presented at trial would have to be declassified and provided to the individual defendants in advance of trial.¹⁴¹⁰

Challenge: Witness Security

Two trial witnesses testified under cover.¹⁴¹¹ Judge Fish agreed to exclude the public from the courtroom during their testimony, permit the witnesses to enter and exit the courtroom through a non-public door, and permit the witnesses to testify under pseudonyms.¹⁴¹² The defendants and their immediate family members were permitted to see the witnesses, but members of the press and public could only listen to an audio feed in another courtroom.¹⁴¹³ The witnesses' identities were not disclosed to defense counsel.¹⁴¹⁴

Judge Fish also approved a government proposal, to which the defendants did not object, that the secret witnesses be permitted to consult counsel before answering questions under cross-examination that called on them to reveal classified information.¹⁴¹⁵ Judge Fish observed that "information that is classified under Israeli law is also classified under American law."¹⁴¹⁶

One witness was a lawyer in the counterterrorism section of the Israeli Security Agency (ISA), also known as Shin Bet, who was to testify as an expert on Hamas financing.¹⁴¹⁷ Israeli law prohibits the disclosure of ISA agents' identities.¹⁴¹⁸

1408. Nov. 2, 2006, Op., *supra* note 1386, at 17; *see* Mem. Op. & Order 5, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 5, 2007) ("as of the end of February, [2007,] defense counsel had presented no classified communications to the government for declassification"), available at 2007 WL 1974769; Nov. 2, 2006, Op., *supra* note 1386, at 4 ("To the court's knowledge, the defendants have yet to request that any specific FISA intercepts be declassified.").

1409. Nov. 2, 2006, Op., *supra* note 1386, at 19–20.

1410. Dec. 8, 2006, Op., *supra* note 1390, at 6.

1411. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1412. Mem. Op. & Order, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), available at 2007 WL 2004458; Mem. Op. & Order, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 5, 2007) [hereinafter May 5, 2007, Op.]; *see* Jason Trahan, *Another Anonymous Witness Testifies in Holy Land Case*, Dallas Morning News, Aug. 16, 2007, at 17B [hereinafter *Another Anonymous Witness*]; Jason Trahan, *Holy Land Trial Turns to Israeli Agent*, Dallas Morning News, Aug. 10, 2006, at 7B [hereinafter *Israeli Agent*]; Whoriskey, *supra* note 1345.

1413. May 5, 2007, Op., *supra* note 1412; *see* Trahan, *Israeli Agent*, *supra* note 1412.

Judge Fish observed that an advantage of providing a space for members of the public to watch a live audiovisual presentation of the trial is that members of the news media can use electronic devices without disturbing the proceedings. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1414. *See* Trahan, *Israeli Agent*, *supra* note 1412.

1415. May 5, 2007, Op., *supra* note 1412.

1416. *Id.* at 6.

1417. Mem. Op. & Order 3–5, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 16, 2007), available at 2007 WL 2059722; May 5, 2007, Op., *supra* note 1412; *see* Trahan, *Another Anonymous Witness Testifies*, *supra* note 1412.

1418. May 5, 2007, Op., *supra* note 1412.

He testified under the alias “Avi.”¹⁴¹⁹ The other witness was a secret agent for the Israeli Defense Forces, which looks to ISA rules for the protection of its agents.¹⁴²⁰ He testified as “Major Lior.”¹⁴²¹

Both witnesses testified under cover in the retrial as well.¹⁴²²

Challenge: Jury Security

So that jurors would not have to pass through a gauntlet of reporters, Judge Fish had them meet at a secret location from which they were shuttled to the courthouse, and they came to the courtroom floor in a secure elevator.¹⁴²³ Even Judge Fish did not know where the jurors met each morning.¹⁴²⁴ Jurors took lunch in the jury room.¹⁴²⁵

Judge Solis chose not to implement special procedures for jurors in the retrial so as not to communicate to the jurors that the case was unusual.¹⁴²⁶

1419. See Trahan, *Another Anonymous Witness Testifies*, *supra* note 1412.

1420. May 5, 2007, Op., *supra* note 1412; see Trahan, *Israeli Agent*, *supra* note 1412.

1421. See Trahan, *Israeli Agent*, *supra* note 1412.

1422. Interview with Hon. Jorge A. Solis, Oct. 6, 2009; see Jason Trahan, *Jurors to Hear Key Israeli Witnesses*, Dallas Morning News, Oct. 20, 2008, at 1B.

1423. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1424. *Id.*

1425. *Id.*

1426. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

Chicago

United States v. Abu Marzook (*Amy St. Eve, N.D. Ill.*)

On August 20, 2004, the United States indicted three men for helping to fund Hamas: Muhammad Abdul Hamid Khalil Salah, Abdelhaleem Hasan Abdelraziq Ashqar, and Mousa Mohammed Abu Marzook.¹⁴²⁷ The U.S. District Court for the Northern District of Illinois assigned the case to Judge Amy St. Eve, who already was presiding over a prosecution for obstruction of justice against Ashqar.¹⁴²⁸

The Defendants' Backgrounds

Muhammad Salah

Salah was born in a Palestinian refugee camp on the West Bank, and he became a United States citizen after he moved to the Chicago area from Jordan in 1970.¹⁴²⁹ He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip checkpoint and charged with providing aid to Hamas.¹⁴³⁰ Police found \$97,400 in his

1427. *United States v. Marzook*, 435 F. Supp. 2d 778, 779–80 (N.D. Ill. 2006) (denying Ashqar's motion to suppress evidence derived from a warrantless search of his home); *United States v. Marzook*, 435 F. Supp. 2d 708, 711–12 (N.D. Ill. 2006) (denying Salah's motion to suppress his confession); *United States v. Marzook*, 426 F. Supp. 2d 820 (N.D. Ill. 2006) (denying Salah's motion to dismiss count I); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 915 (N.D. Ill. 2006) (granting a motion to close a hearing); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1057 (N.D. Ill. 2005) (denying Salah's motion to dismiss count II); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 894 (N.D. Ill. 2004) (related civil action); Second Superseding Indictment, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004); see Eric Lichtblau, *U.S. Indicts 3 on Charges of Helping Militant Group*, *N.Y. Times*, Aug. 21, 2004, at A6; Todd Lighty & Laurie Cohen, *Hamas Probe Nearly Fell Apart*, *Chi. Trib.*, Aug. 22, 2004, Metro, at 1; Matt O'Connor & Laurie Cohen, *U.S. Says Bridgeview Man, 2 Others Financed, Recruited for Terror Group*, *Chi. Trib.*, Aug. 21, 2004, News, at 1.

1428. Docket Sheet, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter N.D. Ill. *Abu Marzook* Docket Sheet]; see Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, *Chi. Trib.*, Nov. 4, 2003, Metro, at 1; *Palestinian Activist Faces New Charge*, *Chi. Trib.*, June 26, 2004, at 16 [hereinafter *New Charge*].

The indictment against Salah, Ashqar, and Marzook was filed as the second superseding indictment in the preexisting case against Ashqar.

Tim Reagan interviewed Judge St. Eve for this report in the judge's chambers on July 2, 2007.

1429. See Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, *Chi. Trib.*, June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 1427; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, *N.Y. Times*, Oct. 20, 2006, at A16.

1430. *Marzook*, 435 F. Supp. 2d at 712, 716; *Abu Marzook*, 412 F. Supp. 2d at 916; *Boim*, 340 F. Supp. 2d at 917; *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 793–94 (N.D. Ill. 1999); see Drew Bailey, *Family Fears for Israeli-Held Chicagoan*, *Chi. Trib.*, Jan. 29, 1993, *Chicagoland*, at 4; David Jackson, Laurie Cohen & Robert Manor, *Money Trail Leads to Saudi*, *U.S. Says*, *Chi. Trib.*, Oct. 28, 2001, News, at 1; Libby Sander, *2 Men Cleared of Charges of Aiding Hamas Violence*, *N.Y. Times*, Feb. 2, 2007, at A16 [hereinafter *2 Men Cleared*]; Sander, *supra* note 1429.

Jerusalem YMCA hotel room.¹⁴³¹ In January 1995, after a trial lasting a year, he pleaded guilty in an Israeli military court to channeling funds to Hamas's military operation and was sentenced to five years in prison.¹⁴³² He was released in November 1997.¹⁴³³

On February 10, 1995, the United States froze Salah's assets, and on July 27 the United States classified Salah as a "Specially Designated Terrorist."¹⁴³⁴ On June 9, 1998, the government filed a civil forfeiture action against Salah and the Quranic Literacy Institute, for whom Salah volunteered, alleging that they laundered money for Hamas.¹⁴³⁵

Also arrested was another American citizen, Muhammad Jarad, a Chicago grocer. See Bailey, *supra*; Karen Brandon & Stephen Franklin, *Chicago Families Defend 2 Men, Denounce Arrests by Israeli Police*, Chi. Trib., Feb. 1, 1993, News, at 5. Jarad was released in July 1993 after six months in prison and a plea bargain requiring him to leave Israel after his release. See Sharman Stein, *Grocer Tied to Terrorists Comes Home*, Chi. Trib., July 28, 1993, Chicagoland, at 6. Contra James Brooke & Elaine Sciolino, *Bread or Bullets: Money for Hamas*, N.Y. Times, Aug. 16, 1995, at 1 ("After six months in jail, Mr. Jarad was released without charges.").

1431. *In re Ford Van*, 50 F. Supp. 2d at 794; see Jackson *et al.*, *supra* note 1430 (reporting \$96,400 found); Sander, *2 Men Cleared*, *supra* note 1430 (reporting \$97,000 found); Sander, *supra* note 1429 (same).

1432. *Boim*, 340 F. Supp. 2d at 918; see Mark Caro, *Man, 41, Gets Term in Israel*, Chi. Trib., Jan. 4, 1995, Metro Southwest, at 1; Jackson *et al.*, *supra* note 1430; Sander, *supra* note 1429.

1433. *In re Ford Van*, 50 F. Supp. 2d at 795.

Previously a used-car dealer and a grocer in the suburban Chicago community of Bridgeview, more recently Salah drove dialysis patients to and from treatment. See Jackson *et al.*, *supra* note 1430; Sander, *supra* note 1429. In 2003, he was fired from his job as a part-time lecturer on computer systems at City Colleges of Chicago, because he failed to disclose his Israeli conviction on his application. See Cohen & Ahmed-Ullah, *supra* note 1429; Lighty & Cohen, *supra* note 1427. The Chicago Public Schools also removed him from their roster of substitute teachers. See Laurie Cohen & Lori Oiszewski, *Schools Call Use of Sub Mistake*, Chi. Trib., June 8, 2003, Metro, at 3; Lighty & Cohen, *supra* note 1427.

1434. *Boim*, 340 F. Supp. 2d at 917; *In re Ford Van*, 50 F. Supp. 2d at 793; see Laurie Cohen, Stephen Franklin & Sam Roe, *Struggle for the Soul of Islam*, Chi. Trib., Feb. 8, 2004, News, at 1; Hamas, a word that means "zeal" in Arabic, is an acronym for "Harakat al-Muqawama al-Islamiyya," which means "The Islamic Resistance Movement." See William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Tom Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Matt O'Connor, *FBI Seizes \$1 Million Linked to Terrorism*, Chi. Trib., June 10, 1998, News, at 1.

1435. Docket Sheet, United States v. One 1997 E35 Ford Van, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998); see Cohen, *et al.*, *supra* note 1434; Gaines & Martin, *supra* note 1434; Jackson *et al.*, *supra* note 1430; Lighty & Cohen, *supra* note 1427.

The Quranic Literacy Institute's stated purpose was to translate Islamic texts. *In re Ford Van*, 50 F. Supp. 2d at 794; see Andrew Martin, *Religious Group Denies Terrorist Link*, Chi. Trib., Oct. 20, 1998, Metro Chicago, at 4.

The U.S. District Court for the Northern District of Illinois assigned the forfeiture action to Judge Wayne R. Andersen. Docket Sheet, *supra*; see Matt O'Connor, *Bridgeview Family Challenges Seizure*, Chi. Trib., June 16, 1998, Metro Chicago, at 3. On November 20, 2009, Judge Andersen signed a stipulated resolution of the action approving the forfeiture and permitting Salah's wife to buy from the government his forfeited share of their house. Stipulation, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. Nov. 20, 2009) (approving forfeiture of \$1 million and a

In 2000, Salah and the Quranic Literacy Institute were among the defendants in the civil action for the alleged 1996 Hamas killing of David Boim.¹⁴³⁶ The parents attached to their complaint the government's forfeiture action against Salah and the institute.¹⁴³⁷ On December 3, 2008, the court of appeals reversed a summary judgment against Salah, because he was in an Israeli prison between the time that providing material support to Hamas became a crime and Boim's killing.¹⁴³⁸

Abdelhaleem Ashqar

On February 23, 1998, Ashqar was jailed in Manhattan for refusing to testify before a grand jury investigating Hamas funding.¹⁴³⁹ Although offered immunity, Ashqar refused to cooperate and was jailed for civil contempt.¹⁴⁴⁰ Ashqar protested his jailing with a hunger strike.¹⁴⁴¹ Five months into the hunger strike, the U.S. Court of Appeals for the Second Circuit affirmed a refusal by the district court to release Ashqar.¹⁴⁴² He was released after six months in prison on a finding that continued confinement would not induce testimony.¹⁴⁴³

On June 25, 2003, Ashqar refused to testify before a Chicago grand jury investigating American links to Middle East terrorism, and he was jailed for civil contempt on September 5.¹⁴⁴⁴ Ashqar again protested his imprisonment for con-

van against the Quranic Literacy Institute and forfeiture of \$1.2 million and a house against Salah).

1436. *See supra*, "Prosecution of a Charity."

1437. Compl., United States v. One 1997 E35 Ford Van, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998), attached as Ex. A, Compl., Boim v. Quranic Literacy Inst., No. 1:00-cv-2905 (N.D. Ill. May 12, 2000).

1438. Boim v. Holy Land Found., 549 F.3d 685, 691 (7th Cir. 2008), *cert. denied*, ___ U.S. ___, 130 S. Ct. 458 (2009).

1439. United States v. Ashqar, 582 F.3d 819, 821 (7th Cir. 2009); *In re Grand Jury Subpoena John Doe*, 150 F.3d 170, 171 (2d Cir. 1998); *see* Benjamin Weiser, *2 Men Jailed over Refusal to Aid Inquiry*, N.Y. Times, Apr. 18, 1998, at B1.

Ashqar was once a Howard University professor. *See* Dan Eggen, *Two Men Acquitted of Conspiracy to Fund Hamas Activities in Israel*, Wash. Post, Feb. 2, 2007, at A1; Stephen Franklin & Laurie Cohen, *Activist Charged with Contempt*, Chi. Trib., Oct. 11, 2003, Metro, at 20; Sander, *2 Men Cleared*, *supra* note 1430; Sander, *supra* note 1429. He came to the United States on an academic fellowship. *See* Sander, *supra* note 1429.

1440. Ashqar, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1439.

1441. Ashqar, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1439.

1442. *In re Grand Jury Subpoena*, 150 F.3d 170; *see* Docket Sheet, *In re Grand Jury*, No. 98-6137 (2d Cir. June 19, 1998); *see also* Benjamin Weiser, *Appeal Lost by Inmate Who Refuses to Testify*, N.Y. Times, July 22, 1998, at B7.

1443. Ashqar, 582 F.3d at 821; *In re Grand Jury Proceedings*, 347 F.3d 197, 200 (7th Cir. 2003); *see Court Upholds Jailing of Activist*, Chi. Trib., Oct. 5, 2003, Metro, at 3 [hereinafter *Jailing*] (reporting that Ashqar lost about 50 pounds in prison).

1444. Ashqar, 582 F.3d at 821–22; *In re Grand Jury Proceedings*, 347 F.3d at 201; *see* Indictment, United States v. Ashqar, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); *see also Jailing*, *supra* note 1443.

tempt with a hunger strike.¹⁴⁴⁵ After the court of appeals affirmed the holding of civil attempt against Ashqar,¹⁴⁴⁶ the government indicted him for criminal contempt.¹⁴⁴⁷ The U.S. District Court for the Northern District of Illinois assigned the prosecution of Ashqar for criminal contempt to Judge Amy St. Eve,¹⁴⁴⁸ who released Ashqar to home detention in Virginia on bail after two months of confinement.¹⁴⁴⁹ On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.¹⁴⁵⁰ Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.¹⁴⁵¹

Mousa Abu Marzook

Abu Marzook, the third man named in the case, but not tried, was a Palestinian who once was the head of Hamas's political branch.¹⁴⁵²

Abu Marzook was an American resident detained in New York as a suspected terrorist on July 25, 1995, while returning from a five-month trip abroad.¹⁴⁵³ During his trip he was expelled from Jordan at the United States' urging after setting up a Hamas support office in Amman.¹⁴⁵⁴ Five days after his detention, Israel de-

1445. See *Jailing*, *supra* note 1443; Franklin & Cohen, *supra* note 1439.

1446. *In re Grand Jury Proceedings*, 347 F.3d 197; see *Jailing*, *supra* note 1443.

1447. Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); see *Ashqar*, 582 F.3d at 822; see also Franklin & Cohen, *supra* note 1439.

1448. Docket Sheet, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); see Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

1449. See O'Connor, *supra* note 1428.

1450. Superseding Indictment, *Ashqar*, No. 1:03-cr-978 (N.D. Ill. June 24, 2004); see *Ashqar*, 582 F.3d at 822; see also *New Charge*, *supra* note 1428.

1451. See *Bail Denial Stands for Man Held in Hamas Case*, Chi. Trib., Aug. 24, 2004, Metro, at 4; *Suspected Member of Palestinian Militant Group Pleads Not Guilty*, Chi. Trib., Aug. 27, 2004, Metro, at 9.

1452. *In re Extradition of Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996); *Marzook v. Christopher*, No. 1:96-cv-4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996); see Stephen Franklin, *Terror Bombs Rip Hopes in Mideast*, Chi. Trib., July 31, 1997, News, at 1 (identifying Marzook as Hamas's former political leader); Youssef M. Ibrahim, *Hamas Political Chief Says Group Can't Curb Terrorists*, N.Y. Times, Mar. 9, 1996, at 5 ("in his first interview since his detention, Mr. Abu Marzook, 45, a businessman, said he was the head of the political bureau of Hamas"); see also Jason Trahan, *Agent: Charity Was Part of Plot*, Dallas Morning News, Aug. 8, 2007, at 1B (reporting that Abu Marzook is "currently Hamas' No. 2 political leader").

1453. *In re Marzook*, 924 F. Supp. at 574; *Marzook*, 1996 WL 583378, at *1; see *United States v. Elashyi*, 554 F.3d 480, 490 (5th Cir. 2008); Steven Greenhouse, *U.S. Detains Arab Tied to Militants*, N.Y. Times, July 28, 1995, at 1; Neil MacFarquhar, *Terror Suspect Freed by U.S.*, N.Y. Times, May 6, 1997, at A1 ("legal resident of the United States since 1982").

It was reported that the suspicion of Abu Marzook was based in part on information provided by Salah during Salah's detention and prosecution in Israel. James C. McKinley, Jr., *U.S. Charges a Palestinian in Terror Case*, N.Y. Times, Aug. 9, 1995, at 5.

1454. See Greenhouse, *supra* note 1453; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 1453.

cided to seek his extradition.¹⁴⁵⁵ On May 7, 1996, the district court in Manhattan approved extradition.¹⁴⁵⁶

While his appeal was pending, Abu Marzook decided to stop challenging his extradition, which meant he would have to be extradited or freed within 60 days.¹⁴⁵⁷ A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.¹⁴⁵⁸ Fearing retaliatory terrorist attacks in Israel, Prime Minister Benjamin Netanyahu told the United States on April 2, 1997, that Israel no longer wanted Abu Marzook extradited to Israel.¹⁴⁵⁹ Abu Marzook remained detained pending immigration exclusion proceedings, and one month later, Jordan announced that it would accept Abu Marzook back.¹⁴⁶⁰ Abu Marzook was deported to Jordan on May 5.¹⁴⁶¹

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.¹⁴⁶² Jordan deported him in 1999.¹⁴⁶³ Abu Marzook was reported to be in Syria in 2001.¹⁴⁶⁴ In 2002, the fugitive Abu Marzook was indicted in the Northern District of Texas for con-

1455. See Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

1456. *In re Marzook*, 924 F. Supp. 565; see *Marzook*, 1996 WL 583378, at *2; see also Don Van Natta, Jr., *Judge Orders Hamas Leader Extradited to Israel*, N.Y. Times, May 9, 1996, at 9.

Abu Marzook became a specially designated terrorist on August 16, 1995. *Elashyi*, 554 F.3d 480, 490, 498 (5th Cir. 2008).

Judge Kevin Thomas Duffy also denied Abu Marzook's petition for habeas corpus. *In re Marzook*, 924 F. Supp. at 569; Docket Sheet, *Abu Marzook v. Christopher*, No. 1:95-cv-9799 (S.D.N.Y. Nov. 20, 1995). Abu Marzook's appeal of this decision was dismissed on August 4, 1997, for failure to comply with the scheduling order. Docket Sheet, *Abu Marzook v. Christopher*, No. 96-2372 (2d Cir. May 10, 1996). On October 10, 1996, Judge Kimba M. Wood denied another petition for habeas corpus. *Marzook*, 1996 WL 583378; Docket Sheet, *Abu Marzook v. Christopher*, No. 1:95-cv-4107 (S.D.N.Y. May 31, 1996); see *Judge Backs Extradition of a Palestinian to Israel*, N.Y. Times, Oct. 10, 1996, at 17. On February 6, 1997, the court of appeals granted Abu Marzook's motion to withdraw his appeal of this decision. Docket Sheet, *Abu Marzook v. Christopher*, No. 96-2841 (2d Cir. Oct. 24, 1996).

1457. See Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

1458. See Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

1459. See Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

1460. See Neil MacFarquhar, *Jordan to Let Terror Suspect Held in U.S. into Kingdom*, N.Y. Times, May 1, 1997, at A7; MacFarquhar, *supra* note 1453; Storer H. Rowley, *Jordan's Hussein Steps in, Agrees to Take Hamas Leader Jailed in U.S.*, Chi. Trib., May 1, 1997, News, at 3.

1461. See MacFarquhar, *supra* note 1453.

1462. See William A. Orme, Jr., *Plot Report in Israel and Arrests in Jordan Renew Fear of Hamas*, N.Y. Times, Sept. 23, 1999, at A7.

1463. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006-07 (N.D. Ill. 2001).

1464. William Glaberson, *Defending Muslims in Court and Drawing Death Threats As Well As a High Profile*, N.Y. Times, Sept. 28, 2001, at B8; see *Hamas Official Denies Accusations*, N.Y. Times, Aug. 22, 2004, at 110 (reporting Abu Marzook to be in Syria in 2004); Scott Wilson, *Hamas to Choose Top Gaza Figure as Prime Minister*, Wash. Post, Feb. 17, 2006, at A14 (identifying Abu Marzook as speaking from Syria in 2006).

spiriting with a computer business owned by his wife's cousins to fund terrorism.¹⁴⁶⁵ He published an op-ed in the *Washington Post* on January 31, 2006,¹⁴⁶⁶ and an op-ed in the *Los Angeles Times* on July 10, 2007.¹⁴⁶⁷

The Main Trial

At the time of the 2004 indictment, Salah was a resident of Bridgeview, Illinois, a suburb of Chicago; Ashqar was a resident of Alexandria, Virginia, a suburb of Washington, D.C.; and Marzook was believed to reside in Syria.¹⁴⁶⁸ Judge St. Eve allowed friends and relatives of Salah and Ashqar to post nearly \$4 million worth of property to secure detention by home confinement.¹⁴⁶⁹

Salah's prosecution was based, in part, on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.¹⁴⁷⁰ But Salah argued that the confession was obtained by more than 50 days of torture by the Israeli secret police.¹⁴⁷¹ Salah also argued that his financial activity was humanitarian, intended to aid the Palestinian people and not to support terrorism.¹⁴⁷² Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.¹⁴⁷³

Ashqar's prosecution was based, in part, on recorded telephone conversations he had with Hamas officials and records seized from his home without a warrant while he was a graduate student at the University of Mississippi in 1993.¹⁴⁷⁴ Judge St. Eve denied Ashqar's motion to suppress evidence seized, because the search

1465. *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying co-defendants' post-trial motions for acquittal); Docket Sheet, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002); *see supra*, "Prosecution of a Charity"; Lichtblau & Miller, *supra* note 1350; Simpson, *supra* note 1350.

1466. Mousa Abu Marzook, Op-Ed, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections, and identifying Abu Marzook as "the deputy political bureau chief of the Islamic Resistance Movement (Hamas)").

1467. Mousa Abu Marzook, Op-Ed, *Hamas' Stand*, L.A. Times, July 10, 2007 (concerning the release of a BBC journalist, identifying Abu Marzook as "the deputy of the political bureau of Hamas").

1468. *See* Lichtblau, *supra* note 1427; Lighty & Cohen, *supra* note 1427; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 1427.

1469. *See* O'Connor, *supra* note 1468.

1470. *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 918–19 (N.D. Ill. 2004); *see* Michael Higgins, *Israeli Files Sought in Terrorism Case*, Chi. Trib., Dec. 13, 2005, Metro, at 3; Sander, *2 Men Cleared*, *supra* note 1430; Sander, *supra* note 1429.

1471. *See* Sander, *2 Men Cleared*, *supra* note 1430; Sander, *supra* note 1429.

1472. *See* Eggen, *supra* note 1439; Jackson *et al.*, *supra* note 1430; Sander, *2 Men Cleared*, *supra* note 1430; Sander, *supra* note 1429.

1473. *United States v. Marzook*, 435 F. Supp. 2d 708 (N.D. Ill. 2006); *see* Jeff Coen, *Hamas Suspect Loses on Key Issue*, Chi. Trib., June 9, 2006, Metro, at 1.

1474. *Marzook*, 435 F. Supp. 2d at 780–81; *see* Michael Higgins, *ACLU Filing Challenges Hamas-Case Evidence*, Chi. Trib., Jan. 11, 2006, Metro, at 6; Sander, *2 Men Cleared*, *supra* note 1430.

was reasonable and in good faith, and exclusion would not deter such searches, as such searches later became legal.¹⁴⁷⁵

The trial began on October 12, 2006.¹⁴⁷⁶ The jury began to deliberate on January 11, 2007,¹⁴⁷⁷ and on February 1, the jury acquitted Salah and Ashqar of aiding terrorists.¹⁴⁷⁸ The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.¹⁴⁷⁹ Judge St. Eve sentenced Salah to one year and nine months in prison,¹⁴⁸⁰ and she sentenced Ashqar to eleven years and three months.¹⁴⁸¹ The court of appeals affirmed.¹⁴⁸²

Challenge: Foreign Government Evidence

Salah sought to discover Israeli police documents to support his claim that his Israeli confession was obtained by torture and coercion.¹⁴⁸³ Judge St. Eve suggested that he follow rogatory-letter procedures, but Salah ultimately relied on testimony from Israeli police officers.¹⁴⁸⁴

1475. *Marzook*, 435 F. Supp. 2d at 788–94.

1476. Minute Entry, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006).

1477. Minute Entry, *id.* (Jan. 11, 2007); see Jury Instructions, *id.* (Jan. 12, 2007); see also Azam Ahmed, *Deliberations Begin in Hamas Case*, Chi. Trib., Jan. 12, 2007, Metro, at 8.

1478. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007); see *United States v. Ashqar*, 582 F.3d 819, 822 (7th Cir. 2009); see also Rudolph Bush & Jeff Coen, *Two Found Not Guilty of Supporting Hamas*, Chi. Trib., Feb. 2, 2007, News, at 1; Eggen, *supra* note 1439; Sander, *2 Men Cleared*, *supra* note 1430.

1479. *Ashqar*, 582 F.3d at 822; see Bush & Coen, *supra* note 1478; Eggen, *supra* note 1439; Sander, *2 Men Cleared*, *supra* note 1430.

Salah's conviction for obstruction of justice was for false answers to interrogatories in the Boims' civil case against him. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 25, 2007); see Bush & Coen, *supra* note 1478; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

1480. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2007); see Michael Higgins, *21-Month Sentence for Salah*, Chi. Trib., July 12, 2007, Metro, at 1; Sander, *American Gets Prison*, *supra* note 1479.

Salah was released from prison on April 10, 2009. <http://www.bop.gov>.

1481. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007); see *Ashqar*, 582 F.3d at 822; see also *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

1482. *Ashqar*, 582 F.3d at 821, 827.

Ashqar's petition for a writ of certiorari is pending. Docket Sheet, *United States v. Ashqar*, No. 09-899 (U.S. Jan. 27, 2010) (noting distribution for conference of Feb. 26, 2010).

1483. Salah's Disc. Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005); see Michael Higgins, *supra*, note 1470.

1484. Interview with Hon. Amy St. Eve, July 2, 2007; see 28 U.S.C. § 1781; Fed. R. Civ. P. 28(b).

Challenge: Witness Security

To prove that Salah's Israeli confession was obtained by torture and coercion, Salah sought testimony from two agents of the Israel Security Agency (ISA).¹⁴⁸⁵ It was unprecedented for such officers to provide testimony outside of Israel.¹⁴⁸⁶

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.¹⁴⁸⁷ The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.¹⁴⁸⁸ All other persons in court during the testimony had security clearances.¹⁴⁸⁹

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.¹⁴⁹⁰ The agents and their Israeli attorneys were identified in court documents by code names.¹⁴⁹¹ But Judge St. Eve denied a request that they testify in "light disguise," because Salah had already seen them, the public would not see them, and the government had presented no evidence of security concerns respecting the attorneys and court staff who would see them.¹⁴⁹²

The hearing was open for the testimony of other witnesses, including Israeli police officers.¹⁴⁹³

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.¹⁴⁹⁴ Again Judge St. Eve permitted the wit-

1485. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 916 (N.D. Ill. 2006); see Michael Higgins, *Terror Funds Hearing May Need Special Rules*, Chi. Trib., Dec. 20, 2005, Metro, at 3.

"The ISA is an intelligence agency for the State of Israel that provides for Israel's internal security." *Abu Marzook*, 412 F. Supp. 2d at 916. It is also known as the General Security Service. *United States v. Marzook*, 435 F. Supp. 2d 708, 712 (N.D. Ill. 2006); *Abu Marzook*, 412 F. Supp. 2d at 916. "Israel maintains the secrecy of the true identities of the ISA agents, as well as identifying characteristics." *Abu Marzook*, 412 F. Supp. 2d at 918.

1486. *Abu Marzook*, 412 F. Supp. 2d at 918 ("Israel has never before permitted ISA agents to give live testimony in the United States."); Gov't's Time Extension Mot. at 2, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004) ("The appearance of the ISA operational personnel as witnesses in a proceeding outside the State of Israel is unprecedented."); see Michael Higgins, *supra* note 1485 (quoting the government's brief).

1487. *Marzook*, 435 F. Supp. 2d at 714; *Abu Marzook*, 412 F. Supp. 2d 913; see Michael Higgins, *Ruling Backs Closed Court*, Chi. Trib., Feb. 1, 2006, Metro, at 3.

1488. *Abu Marzook*, 412 F. Supp. 2d at 917; see Minute Entry at 4, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 29, 2006) [hereinafter Aug. 29, 2006, *Abu Marzook* Minute Entry] ("[T]hese ISA agents and their families face a serious, legitimate risk of grave danger if they are publicly identified. . . . Terrorist organizations have targeted ISA agents.").

1489. *Abu Marzook*, 412 F. Supp. 2d at 919.

1490. *Id.* at 928; see Higgins, *supra* note 1487.

1491. See Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

1492. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

1493. *Id.* at 928; see Higgins, *supra* note 1487.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1428.

1494. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 2–3; see Rudolph Bush, *Hamas-Case Defense Says U.S. Conspiring with Israel*, Chi. Trib., Aug. 30, 2006, Metro, at 6 [hereinafter *Conspiring with Israel*]; Rudolph Bush, *Torture of Salah Denied*, Chi. Trib., Nov. 2, 2006, Metro, at 3 [hereinafter *Torture Denied*]; Eggen, *supra* note 1439.

nesses to use private entrances.¹⁴⁹⁵ She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.¹⁴⁹⁶ Because of the presence of the family members and the jury, Judge St. Eve agreed to let the agents testify in light disguise, so long as the disguise did not interfere with the jurors' ability to judge their credibility.¹⁴⁹⁷ But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.¹⁴⁹⁸ Judge St. Eve decided that the rest of the trial would be public.¹⁴⁹⁹

Judge St. Eve undertook measures to keep the closed portion of the trial as open as possible. First, she established a live video and audio feed to another courtroom where spectators could listen to the closed session and see those in the courtroom, except for the witnesses.¹⁵⁰⁰ Second, to disguise from the jury that the courtroom was closed, Judge St. Eve told the jurors that the camera was a precaution in case of an overflow crowd and allowed the witnesses to use the private entrance before the jury was brought in.¹⁵⁰¹

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)¹⁵⁰² to a substantial amount of classified evidence.¹⁵⁰³ Classified documents were stored in a safe in Judge St. Eve's chambers, to which only the judge and a cleared court reporter had the combination.¹⁵⁰⁴ For hearings concerning classified documents, the court reporter used a laptop provided by the government, which was also stored in the safe.¹⁵⁰⁵

Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances.¹⁵⁰⁶ The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law clerk assistance.¹⁵⁰⁷

1495. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 6.

1496. *Id.* at 4; *see* Bush, *Conspiring with Israel*, *supra* note 1494.

1497. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 5–6; *see* Bush, *Conspiring with Israel*, *supra* note 1494.

1498. Interview with Hon. Amy St. Eve, July 2, 2007.

1499. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 5; *see* Bush, *Conspiring with Israel*, *supra* note 1494.

1500. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 4–5; *see* Bush, *Conspiring with Israel*, *supra* note 1494; Bush, *Torture Denied*, *supra* note 1494.

1501. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1488, at 5–6.

1502. 18 U.S.C. app. 3; *see* Reagan, *supra* note 165.

1503. Interview with Hon. Amy St. Eve, July 2, 2007.

1504. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 924 (N.D. Ill. 2006) (describing documents as kept under seal); Interview with Hon. Amy St. Eve, July 2, 2007 (noting that there are two cleared court reporters in the Chicago courthouse).

1505. Interview with Hon. Amy St. Eve, July 2, 2007.

1506. *Id.*

1507. *Id.*

Defense counsel elected not to seek security clearances, so Judge St. Eve resolved evidentiary issues by holding *ex parte* conferences with defense counsel to determine their defense needs and *ex parte* conferences with government counsel to determine what classified information the government held.¹⁵⁰⁸

Deputy marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.¹⁵⁰⁹

Judge St. Eve required the government to decide what documents admitted into evidence at Salah's suppression hearing could be released to the public within seven business days of the documents' admissions, and she required the government to decide within seven business days of the hearing transcript's preparation which portions of the transcript could be released to the public.¹⁵¹⁰

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.¹⁵¹¹ For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.¹⁵¹² Judge St. Eve approved these evidence substitutions.¹⁵¹³ She found that the substitutions were consistent with the agents' previous testimony, and Salah would be able to question the agents at trial about his specific treatment.¹⁵¹⁴ As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.¹⁵¹⁵

To explain to the jury why some topics were being skirted during examination of the witnesses, Judge St. Eve prepared a jury instruction to accompany presentation of the admissions:

This case involves certain classified information. Classified information is information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure. In lieu of disclosing specific classified information, I anticipate that you will hear certain substitutions for the classified information during this trial. These substitutions are admissions of relevant facts by the United States for purposes of this trial. The witnesses in this case as well as attorneys are prohibited from disclosing classified information and, in the case of the attorneys, are prohibited from asking questions to any witness which if answered would disclose classified information. Defendants may not cross examine a particular witness regarding the underlying classified matters set forth in these admissions. You must decide what weight, if any, to give to these admissions.¹⁵¹⁶

1508. *Id.*

1509. *Id.*

1510. United States v. Abu Marzook, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); *see* Higgins, *supra* note 1487.

1511. United States v. Salah, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

1512. *Id.* at 917.

1513. *Id.* at 925.

1514. *Id.* at 919–24.

1515. *Id.* at 925.

1516. *Id.* at 924.

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.¹⁵¹⁷ To support its motion, the government presented a classified affidavit from the FBI's Assistant Director for Counterintelligence, which was stored in Judge St. Eve's safe.¹⁵¹⁸

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession¹⁵¹⁹ occupies 70 pages of the *Federal Supplement*.¹⁵²⁰ Nineteen portions of the opinion are redacted.¹⁵²¹ The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.¹⁵²²

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.¹⁵²³ Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.¹⁵²⁴ Observing that the defendants were not in custody, had strictly adhered to the terms of their release, and otherwise posed no danger, Judge St. Eve denied the government's motion.¹⁵²⁵

1517. See Higgins, *supra* note 1487.

1518. Interview with Hon. Amy St. Eve, July 2, 2007; see Higgins, *supra* note 1487.

1519. Opinion, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. June 8, 2006).

1520. United States v. Marzook, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

1521. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51, 758, 767.

1522. Interview with Hon. Amy St. Eve, July 2, 2007.

1523. Gov't's Anon. Jury Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006); see Jeff Coen, *Anonymous Jury Urged in Hamas Funds Case*, Chi. Trib., June 28, 2006, Metro, at 4.

1524. Ashqar's Resp. Gov't's Anon. Jury Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006); Salah's Resp. Gov't's Anon. Jury Mot., *id.* (July 18, 2006); see Jeff Coen, *Hamas-Case Motion Challenged*, Chi. Trib., June 29, 2006, Metro, at 3.

1525. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006); Interview with Hon. Amy St. Eve, July 2, 2007; see Rudolph Bush, *Hamas-Case Jury To Be Named*, Chi. Trib., Aug. 10, 2006, Metro, at 3.

Giving State Secrets to Lobbyists

United States v. Franklin
(*T.S. Ellis III, E.D. Va.*)¹⁵²⁶

On August 27, 2004, the *CBS Evening News* reported that the FBI was investigating the possible passing of classified policy papers on Iran by a Defense Department analyst to the government of Israel through two men who worked for the American Israel Public Affairs Committee (AIPAC).¹⁵²⁷ On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.¹⁵²⁸

It was reported that for several years the FBI had been investigating not the analyst but two men who worked at AIPAC.¹⁵²⁹ The FBI interviewed the two men on the day that the story broke on the *CBS Evening News* as well as twice earlier that month.¹⁵³⁰ On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,¹⁵³¹ and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.¹⁵³²

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.¹⁵³³ It was reported that Franklin was seen

1526. An appeal was heard by Fourth Circuit Judges Robert B. King, Roger L. Gregory, and Dennis W. Shedd.

1527. *United States v. Rosen*, 471 F. Supp. 2d 651, 653 (E.D. Va. 2007); *United States v. Rosen*, 447 F. Supp. 2d 538, 552–53 (E.D. Va. 2006); *CBS Evening News* (CBS television broadcast Aug. 27, 2004).

1528. Bradley Graham & Thomas E. Ricks, *FBI Probe Targets Pentagon Official*, Wash. Post, Aug. 28, 2004, at A1; see Thomas E. Ricks & Robin Wright, *Analyst Who Is Target of Probe Went to Israel*, Wash. Post, Aug. 29, 2004, at A1 (reporting that Franklin served in the Air Force Reserve, rising to colonel, including service in Israel).

1529. David Johnston & Eric Schmitt, *F.B.I. Is Said to Brief Pentagon Bosses on Spy Case*, N.Y. Times, Aug. 31, 2004, at A14; Walter Pincus, *A Look at the Dropping of Espionage Charges*, Wash. Post, May 5, 2009, at A19 (“the [defense] lawyers said that Rosen and Weissman were under government surveillance, including telephone wiretaps, for five years, from 1999 to 2004”); Susan Schmidt & Robin Wright, *Leak Probe More Than 2 Years Old*, Wash. Post, Sept. 2, 2004, at A6; Warren P. Strobel, *Spy Probe Focuses on More Civilians*, Miami Herald, Aug. 29, 2004, at 1A.

1530. *United States v. Rosen*, 474 F. Supp. 2d 799, 800 (E.D. Va. 2007); see David Johnston, *F.B.I. Interviews 2 Suspected of Passing Secrets to Israel*, N.Y. Times, Sept. 1, 2004, at A15.

1531. Richard B. Schmitt & Tyler Marshall, *FBI Questions Israeli Lobbyists in Spying Probe*, L.A. Times, Aug. 31, 2004, at 12.

Rosen was AIPAC’s director of foreign policy issues and Weissman was a senior Middle East analyst. *E.g.*, *United States v. Rosen*, 487 F. Supp. 2d 721, 725 (E.D. Va. 2007).

1532. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 1530.

1533. See David Johnston & Eric Schmitt, *Pentagon Analyst Was Cooperating When Israel Spy Case Became Public*, N.Y. Times, Aug. 30, 2004, at A12; Pincus, *supra* note 1529 (“Franklin, wearing a recording device, met with Weissman and ‘induced him into believing that he had to

joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.¹⁵³⁴ An investigation of Franklin revealed that he had given classified information to Rosen and Weissman and he had improperly stored classified information in his West Virginia home.¹⁵³⁵ His security clearance was suspended in June 2004.¹⁵³⁶ In July, Franklin cooperated in a recorded sting meeting with Weissman in which Franklin gave the lobbyist classified information.¹⁵³⁷ Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.¹⁵³⁸

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.¹⁵³⁹ The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.¹⁵⁴⁰ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.¹⁵⁴¹ Franklin pleaded guilty on October 5 to conspiracy to communicate secret information and wrongfully keeping classified documents at home, saying that his motive in passing classified information to lobbyists was to create a back channel of influence over President Bush's policies on confronting Iran.¹⁵⁴² On January 20, 2006, Judge Ellis provisionally sentenced Franklin to 12 years and seven months in prison, leaving room for an adjustment

communicate certain information right away in order to save innocent lives,' according to the [defense] lawyers.”)

1534. Michael Isikoff & Mark Hosenball, *And Now a Mole?*, Newsweek, Sept. 6, 2004, at 50; David Johnston & David E. Sanger, *Pro-Israel Lobby Said to Have Been Inquiry Target*, N.Y. Times, Sept. 3, 2004, at A16.

1535. See Jerry Markon, *Defense Analyst Charged With Sharing Secrets*, Wash. Post, May 5, 2005, at A1 [hereinafter *Defense Analyst Charged*]; see also Jerry Markon, *Defense Worker Charged Again in Secrecy Case*, Wash. Post, May 25, 2005, at A4 (reporting that it had been known since 1997 that Franklin improperly took classified documents home).

1536. See Markon, *Defense Analyst Charged*, *supra* note 1535.

1537. United States v. Rosen, 445 F. Supp. 2d 602, 609–10 (E.D. Va. 2006); see Joel Brinkley, *Lobbyist in Espionage Inquiry Says That He Broke No Laws*, N.Y. Times, May 22, 2005, at 130; Jerry Markon, *FBI Tapped Talks About Possible Secrets*, Wash. Post, June 3, 2005, at A7 (reporting that Franklin warned Rosen and Weissman “that Iranian agents were planning attacks against American soldiers and Israeli agents in Iraq”).

1538. *Rosen*, 445 F. Supp. 2d at 609–10; see Markon, *supra* note 1537.

1539. Docket Sheet, United States v. Franklin, No. 1:05-cr-225 (E.D. Va. May 26, 2005) [hereinafter E.D. Va. Docket Sheet]; see David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. Times, May 5, 2005, at A1.

1540. E.D. Va. Docket Sheet, *supra* note 1539.

1541. *Id.*

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

1542. United States v. Rosen, 599 F. Supp. 2d 690, 693 & n.4 (E.D. Va. 2009); *Rosen*, 445 F. Supp. 2d at 608 n.3; E.D. Va. Docket Sheet, *supra* note 1539; see Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. Times, Oct. 6, 2005, at A21; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, Wash. Post, Oct. 6, 2005.

after the completion of Franklin's assistance in a trial against Rosen and Weissman.¹⁵⁴³ Franklin's sentence ultimately was reduced to two years' probation.¹⁵⁴⁴

AIPAC fired Rosen and Weissman on March 21, 2005.¹⁵⁴⁵ The August 4 superseding indictment added Rosen and Weissman as defendants.¹⁵⁴⁶ The indictment alleged a conspiracy that began in 1999 when Rosen and Weissman had conversations with an unnamed foreign official (FO-1) about terrorist activities in Asia.¹⁵⁴⁷ In 2000, Rosen and Weissman allegedly met with an unnamed government official (USGO-1),

who had access to classified information relating to U.S. strategy pertaining to a certain Middle East country. Following this meeting, Rosen allegedly had a conversation with a member of the media in which he communicated classified information relating to the U.S. government's deliberations on its strategy towards that particular Middle Eastern country.

The next overt act in furtherance of the alleged conspiracy occurred over one year later, when, on January 18, 2002, Rosen met with another U.S. government official (USGO-2). After this meeting, Rosen prepared a memorandum referencing classified information provided by USGO-2 to a foreign national. Rosen met again with USGO-2 on March 12, 2002 and discussed classified information regarding Al-Qaeda. Rosen allegedly disclosed this classified information to a fellow AIPAC employee the next day, and to another foreign embassy official (FO-2) the day after that.¹⁵⁴⁸

According to the indictment, Rosen met Franklin in 2002.¹⁵⁴⁹ Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."¹⁵⁵⁰ Rosen allegedly passed information about the document to foreign officials, journalists, and a think-tank fellow.¹⁵⁵¹ Weissman allegedly participated in several of these conversations.¹⁵⁵²

Judge Ellis ruled that at trial the government would have to prove that the information passed by the defendants qualifies as national defense information

1543. E.D. Va. Docket Sheet, *supra* note 1539; see David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

1544. E.D. Va. Docket Sheet, *supra* note 1539 (noting sentencing on June 11, 2009).

1545. United States v. Rosen, 487 F. Supp. 2d 721, 725–26 (E.D. Va. 2007); see David Johnston, *Israeli Lobby Reportedly Fires 2 Top Aides in Spying Inquiry*, N.Y. Times, Apr. 21, 2005, at A14.

Rosen and Weissman claimed that the government pressured AIPAC to fire them and stop paying their legal fees or AIPAC itself would face prosecution. *Rosen*, 487 F. Supp. 2d at 724–25. Judge Ellis ruled that this would be a violation of the Sixth Amendment, except that it clearly had no negative effect on the defendants' very able representation by defense counsel. *Id.* at 726–36.

1546. E.D. Va. Docket Sheet, *supra* note 1539; see David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

1547. *Rosen*, 599 F. Supp. 2d at 693; *Rosen*, 445 F. Supp. 2d at 608.

1548. *Rosen*, 445 F. Supp. 2d at 608–09; see David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. Times, Aug. 18, 2005 (identifying USGO-2).

1549. *Rosen*, 445 F. Supp. 2d at 609.

1550. *Id.*

1551. *Id.*

1552. *Id.*

(NDI).¹⁵⁵³ “To qualify as NDI, information must be closely held by the government and potentially damaging to national security if disclosed.”¹⁵⁵⁴ “It is important to recognize that NDI and classified material may not be coextensive sets.”¹⁵⁵⁵ “In short, the government designates what information is labeled and treated as classified, while a court or jury determines what information qualifies as NDI”¹⁵⁵⁶

Rosen and Weissman’s trial was originally scheduled to begin in April 2006,¹⁵⁵⁷ but it was postponed several times as the court dealt with constitutional issues and the handling of classified information.¹⁵⁵⁸ Judge Ellis ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.¹⁵⁵⁹

In light of Judge Ellis’s other pretrial rulings, the government dismissed the indictment against Rosen and Weissman on May 1, 2009, approximately ten years after launching the investigation.¹⁵⁶⁰

Challenge: Classified Evidence

A large amount of classified evidence is at issue in this case.¹⁵⁶¹ Judge Ellis’s career law clerk has a top-secret security clearance, and she can help the judge deal with issues concerning classified information.¹⁵⁶² One of Judge Ellis’s temporary

1553. United States v. Rosen, 599 F. Supp. 2d 690, 694–95 (E.D. Va. 2009) (enforcing a subpoena for expert testimony from the government’s former classification czar); United States v. Rosen, 471 F. Supp. 2d 651, 652 (E.D. Va. 2007); see 18 U.S.C. § 793.

1554. United States v. Rosen, 487 F. Supp. 2d 703, 705 n.1 (E.D. Va. 2007).

1555. *Id.*

1556. *Rosen*, 599 F. Supp. 2d 690; see Walter Pincus, *Opinion Could Dampen Zeal to Classify Government Information*, Wash. Post, Feb. 23, 2009, at A17.

1557. See Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

1558. See Jerry Markon, *Classified Documents Allowed in Espionage Trial*, Wash. Post., Feb. 25, 2009, at A4 [hereinafter *Classified Documents Allowed*] (reporting a tentative trial date of Apr. 21, 2009); Jerry Markon, *Judge Rejects Dismissal of Pro-Israel Lobbyists Case*, Wash. Post, Aug. 11, 2006, at A5 [hereinafter *Judge Rejects Dismissal*]; Pincus, *supra* note 1529 (“Seven separate trial dates were set and postponed during the past 3½ years before the date of June 2[, 2009,] was established.”); Pincus, *supra* note 1556 (reporting a tentative trial date of Apr. 21, 2009); Richard B. Schmitt, *Lobbyists’ Lawyers Say Rice Leaked Information*, L.A. Times, Apr. 22, 2006, at 24 [hereinafter *Rice Leaked*] (reporting that the trial was postponed from May 23, 2006, to Aug. 7, 2006); Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case*, L.A. Times, Aug. 11, 2006, at 13 [hereinafter *Lobbyists to Stand Trial*] (reporting that the trial was postponed indefinitely from Aug. 7, 2006).

1559. See Markon, *Judge Rejects Dismissal*, *supra* note 1558; Schmitt, *Lobbyists to Stand Trial*, *supra* note 1558.

1560. E.D. Va. Docket Sheet, *supra* note 1539; see Neil A. Lewis & David Johnston, *U.S. Moves to End Secrets Case Against Israel Lobbyists*, N.Y. Times, May 2, 2009, at A11; Pincus, *supra* note 1529.

1561. United States v. Rosen, 557 F.3d 192, 195 (4th Cir. 2009).

1562. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

law clerks, however, was a Canadian citizen, and so he was not eligible for a security clearance.¹⁵⁶³

Defense attorneys and witnesses with appropriate security clearances were able to review classified evidence in a Sensitive Compartmented Information Facility (SCIF) designated for their use in the courthouse.¹⁵⁶⁴ Witnesses were required to visit the SCIF after hours.¹⁵⁶⁵

Pursuant to the Classified Information Procedures Act (CIPA),¹⁵⁶⁶ the court of appeals heard the government's interlocutory appeal concerning the admissibility of information in two documents, identified as an "FBI Report" and an "Israeli Briefing Document."¹⁵⁶⁷ The appellate court affirmed Judge Ellis's rulings.¹⁵⁶⁸

As required by section 5(a) of CIPA, the defendants gave notice of their intent to introduce classified evidence at trial.¹⁵⁶⁹ Pursuant to section 6 of CIPA, Judge Ellis "determined that a substantial volume of the classified information was indeed relevant and admissible."¹⁵⁷⁰ As permitted by section 6(c)(1), the government proposed substitutions for the classified evidence "by redacting and otherwise summarizing classified information in the original documents."¹⁵⁷¹ Judge Ellis

ruled that, although some of the government's proposed redactions were acceptable, other such redactions would not afford the defendants the same opportunity to defend themselves as would the admission of the unredacted documents containing classified information. In some instances, the court concluded that less extensive redactions, or the use of replacements for particular names, places, or terms, would adequately protect the defendants' rights while simultaneously offering adequate protection for classified information. The court thus directed the parties to fashion substitutions for the classified documents in accordance with the oral rulings it made during the hearing. Thereafter, the court entered an order adopting the parties' agreed-to substitutions, over the government's objection.¹⁵⁷²

1563. *Id.*; see 28 C.F.R. § 17.41(b) ("Eligibility for access to classified information is limited to United States citizens . . .").

1564. E.D. Va. Docket Sheet, *supra* note 1539; see Reagan, *supra* note 165, at 19 (describing SCIFs).

1565. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

1566. 18 U.S.C. app. 3; see Reagan, *supra* note 165 (discussing CIPA).

1567. *United States v. Rosen*, 557 F.3d 192, 196 (4th Cir. 2009); see Markon, *Classified Documents Allowed*, *supra* note 1558 ("Sources familiar with the documents said the FBI report was on the 1996 Khobar Towers bombing in Saudi Arabia that killed 19 Americans and that the other paper describes a briefing by the Israeli government.").

For this report, Tim Reagan interviewed Judge Shedd by telephone on September 3, 2009, and he interviewed Judge Gregory in the judge's chambers on September 25, 2009.

1568. *Rosen*, 557 F.3d at 194, 199–200; see Neil A. Lewis, *Ex-Lobbyists in U.S. Case of Espionage Win a Round*, N.Y. Times, Feb. 25, 2009, at A15; Markon, *Classified Documents Allowed*, *supra* note 1558.

1569. *Rosen*, 557 F.3d at 195 ("a large volume of classified evidence"); see 18 U.S.C. app. 3 § 5(a).

1570. *Rosen*, 557 F.3d at 195; see 18 U.S.C. app. 3 § 6.

1571. *Rosen*, 557 F.3d at 196; see 18 U.S.C. app. 3 § 6(c)(1).

1572. *Rosen*, 557 F.3d at 196.

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the “silent witness rule.”¹⁵⁷³ The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public.¹⁵⁷⁴ It is a partial closing of the trial.¹⁵⁷⁵ The identities of persons and countries, for example, are withheld by referring to them by codes known only to the judge, the jury, the parties, and the witness, such as “person 1” or “country A.”¹⁵⁷⁶

The silent witness rule would be appropriate

only when the government established (i) an overriding reason for closing the trial, (ii) that the closure is no broader than necessary to protect that interest, (iii) that no reasonable alternatives exist to closure, and (iv) that the use of the [silent witness rule] provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence, presented without the use of codes.¹⁵⁷⁷

Challenge: Subpoenaing a Cabinet Officer

The defendants requested that subpoenas be issued to 20 current and former high-ranking government officials, including Secretary of State Condoleezza Rice, because of her former position as National Security Advisor, and convicted former Defense Department employee Franklin.¹⁵⁷⁸ The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the others would be at best cumulative.¹⁵⁷⁹ Judge Ellis sustained the government’s objection as to five witnesses, but overruled its objection as to Secretary Rice; current National Security Advisor Stephen Hadley, who was her deputy; Paul Wolfowitz and Richard Armitage, each formerly Deputy Secretary of State; and seven others.¹⁵⁸⁰

[N]othing in the Sixth Amendment right to compulsory process requires, nor should it require, an accused to refrain from calling government officials as witnesses until he has exhausted possible non-governmental witnesses to prove a fact. Inconvenience to public officials in the performance of their official duties is not a basis for infringing a defendant’s Sixth Amendment compulsory process rights. And this point is particularly clear where, as here, the forecasted testimony would likely be more credible and probative were it to come from a government official, as compared to an AIPAC employee.¹⁵⁸¹

1573. *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007).

1574. *Id.* at 793–94.

1575. *Id.* at 794.

1576. *Id.* at 793–94.

1577. *Id.* at 799.

1578. *United States v. Rosen*, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007); *see Pincus, supra* note 1556.

1579. *Rosen*, 520 F. Supp. 2d at 807 & n.8, 810.

1580. *Id.* at 814–15; *see* Neil A. Lewis, *Trial to Offer Look at World of Information Trading*, N.Y. Times, Mar. 3, 2008, at A14; Philip Shenon, *Defense May Seek U.S. Testimony in Secrets Case*, N.Y. Times, Nov. 3, 2007, at A14.

1581. *Rosen*, 520 F. Supp. 2d at 811–12 (footnote omitted); *see id.* at 812 (“to warrant the issuance of these disputed subpoenas, defendants must simply make a ‘plausible showing’ that each current or former government official sought to be subpoenaed would provide testimony that would be (i) relevant to the charged crimes, (ii) material, in that the testimony might have an impact on the outcome of the trial, and (iii) favorable to the defense.”) (footnote omitted).

Challenge: Classified Orders

In a classified order, subsequently made public, Judge Ellis ordered an investigation into how reporters knew that Rosen and Weissman were under investigation before they were charged.¹⁵⁸²

Because so many issues in this case concern classified information, Judge Ellis filed separate orders under seal stating (1) how the silent witness rule would be applied¹⁵⁸³ and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.¹⁵⁸⁴

As the final trial date approached, and shortly before the government dropped the case, Judge Ellis issued a sealed order concerning the defendants' evidence.¹⁵⁸⁵

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.¹⁵⁸⁶ But the court held several closed hearings, each of which required a court reporter with a security clearance.¹⁵⁸⁷

The court of appeals granted the government's motion to hear parts of oral arguments under seal in the government's appeal of Judge Ellis's rulings on the admissibility of the "FBI Report" and the Israeli Briefing Document."¹⁵⁸⁸ Eight portions of the court's published opinion resolving the appeal are redacted.¹⁵⁸⁹

Challenge: Classified Arguments

In the interlocutory appeal of Judge Ellis's rulings on admissibility of classified evidence, the parties filed classified briefs with the court information security officer and redacted briefs in the public record.¹⁵⁹⁰

Judge Gregory's chambers are at the court of appeals in Richmond, where classified materials can be stored in a SCIF. Judge Gregory can retrieve classified materials from the SCIF and bring them back to his chambers for a private review.¹⁵⁹¹

1582. See Jerry Markon, *Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

1583. *Rosen*, 520 F. Supp. 2d at 789, 802.

1584. *Rosen*, 520 F. Supp. 2d at 814; E.D. Va. Docket Sheet, *supra* note 1539.

1585. E.D. Va. Docket Sheet, *supra* note 1539 (noting a sealed order filed Apr. 14, 2009).

1586. *United States v. Rosen*, 487 F. Supp. 2d 703 (E.D. Va. 2007); see Walter Pincus, *Justice Dept. Given 2 Weeks to Weigh Use of Classified Data in Espionage Case*, Wash. Post, Apr. 20, 2007, at A16.

1587. E.D. Va. Docket Sheet, *supra* note 1539 (noting closed hearings on July 10, 2006; Jan. 9, June 7, July 18–19 and 23, Aug. 8–9, 15–17, and 30, Sept. 7, Nov. 7–8, and Dec. 6, 2007; Jan. 10 and 29, Feb. 7 and 8, May 22, June 24, July 16, Aug. 7, Sept. 25, and Nov. 20, 2008; and Jan. 14 and Apr. 1, 2009).

1588. Docket Sheet, *United States v. Rosen*, No. 08-4358 (4th Cir. Mar. 31, 2008) (government's appeal) [hereinafter 4th Cir. Docket Sheet]; see also Docket Sheet, *United States v. Rosen*, No. 08-4410 (4th Cir. Apr. 11, 2008) (defendants' cross-appeal, dismissed).

1589. *United States v. Rosen*, 557 F.3d 192, 197, 199–200 (4th Cir. 2009).

1590. 4th Cir. Docket Sheet, *supra* note 1588.

1591. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

Judge Shedd's chambers in Columbia are not in a courthouse.¹⁵⁹² When he needs to review classified materials, he reviews them at the FBI's SCIF in town.¹⁵⁹³ Both Judge Shedd and Judge King can also review classified materials in Richmond when they are there.¹⁵⁹⁴

1592. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

1593. *Id.*

1594. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with Hon. Robert B. King, March 19, 2008.

Lodi

United States v. Hayat (*Garland E. Burrell, Jr., E.D. Cal.*)

On June 5, 2005, the government arrested Hamid Hayat and his father, Umer, of Lodi, California, an agricultural town 40 miles south of Sacramento.¹⁵⁹⁵ Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.¹⁵⁹⁶

The saga began in 2001, when the government hired Naseem Khan, of Bend, Oregon, to spy on potential terrorist sympathizers in Lodi, where Khan once lived.¹⁵⁹⁷ A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.¹⁵⁹⁸ He is reported to have encouraged support of terrorism as part of his undercover work.¹⁵⁹⁹ The government is reported to have paid him approximately \$225,000.¹⁶⁰⁰

1595. See Randal C. Archibold & Jeff Kearns, *In California Terror Case, a Mistrial for a Father, but a Son Is Guilty*, N.Y. Times, Apr. 26, 2006, at A17; Greg Krikorian & Rone Tempest, *2 Men Held in Links to Terror*, L.A. Times, June 8, 2005, at 1; Dean E. Murphy & David Johnston, *California Father and Son Face Charges in Terrorism Case*, N.Y. Times, June 9, 2005, at A18.

1596. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *Enemy Within*]; Krikorian & Tempest, *supra* note 1595; Murphy & Johnston, *supra* note 1595; Rone Tempest, Greg Krikorian & Lee Romney, *Ties to Terror Camps Probed*, L.A. Times, June 9, 2005, at 1.

The younger Hayat's maternal grandfather was Pakistan's minister of religious affairs in the late 1980s. Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

1597. See Eric Bailey, *Attorney Says Lodi Terror Suspect Told Tall Tales to FBI Mole*, L.A. Times, Mar. 3, 2006, at 6; Rone Tempest, *FBI Informer Begins His Testimony in Terror Trial*, L.A. Times, Feb. 23, 2006, at 1 [hereinafter *FBI Informer*]; Rone Tempest, *Lodi Terror Trial Enters Final Round*, L.A. Times, Apr. 11, 2006, at 3 [hereinafter *Final Round*]; Rone Tempest, *Onetime Clerk Is at Center of Lodi Trial*, L.A. Times, Mar. 21, 2006, at 1 [hereinafter *Onetime Clerk*]; Rone Tempest, *Tape Recording Surfaces in Lodi Terrorism Trial*, L.A. Times, Apr. 5, 2006, at 3 [hereinafter *Tape Recording Surfaces*]; Denny Walsh, *Hayat Released from Custody*, Sacramento Bee, Aug. 26, 2006, at B1.

1598. See Bailey, *supra* note 1597; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 1597 ("Naseem Khan, then 28, rented an apartment overlooking the Lodi Mosque, befriended the town's Muslim religious leaders and, over the next three years, secretly taped hundreds of hours of conversations with members of the largely Pakistani American community as a paid undercover agent for the FBI."); Rone Tempest, *Lodi Man Describes Terrorist Training*, L.A. Times, Mar. 8, 2006, at 3 [hereinafter *Terrorist Training*]; Rone Tempest, *Man Trained To Be Terrorist, Prosecutor Says*, L.A. Times, Feb. 17, 2006, at 3 [hereinafter *Man Trained*]; Tempest, *Onetime Clerk*, *supra* note 1597.

1599. E.g., Redacted Gov't's Mot. for Protective Order at 4, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. dated Jan. 26, 2006, filed Feb. 1, 2006) ("in a second conversation, the CW [cooperating witness, namely Khan] congratulated Hamid on what is believed to be Hamid's acceptance into a training camp."); see Bailey, *Mixed Picture*, *supra* note 1598 ("But in tape-recorded telephone conversations, Naseem Khan, a paid government informant, accused Hayat of being 'a loafer' after his arrival in Pakistan during the summer of 2003. Khan pressed him to 'be a man' and fulfill his vow to attend a terrorist training camp."); *Enemy Within*, *supra* note 1596

The Hayats went to Pakistan in April 2003.¹⁶⁰¹ Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.¹⁶⁰² Federal agents discovered his trip while he was en route, and the plane was diverted to Japan, where agents detained him, interviewed him, and then let him continue on his trip.¹⁶⁰³ Four days after Hamid's return to California, federal agents interviewed him again.¹⁶⁰⁴ They also interviewed his father.¹⁶⁰⁵ Both denied the son's involvement with terrorists.¹⁶⁰⁶ After failing a polygraph examination, however, Hamid confessed to attending an al-Qaeda training camp in Pakistan for six months in 2003 and 2004.¹⁶⁰⁷ The father

("Narrator: And then there were the tapes of the informant talking to Hamid in Pakistan in which Naseem Khan was browbeating him about attending a Madrassa and going to a jihadi camp."); Tempest, *FBI Informer*, *supra* note 1597 ("Some Lodi residents contend that Khan was more than just a passive mole in the mosque. They said he was often an instigator, asking young men about waging jihad and encouraging travelers to Pakistan to bring back firebrand speeches and extremist documents.").

1600. Randal C. Archibold, *Diverging Views of Californian at Terror Trial*, N.Y. Times, Feb. 17, 2006, at A14 [hereinafter *Diverging Views*] (reporting a payment of \$250,000); Randal C. Archibold, *Prosecution Sees Setback at Terror Trial in California*, N.Y. Times, Apr. 10, 2006, at A20 (about \$225,000); Bailey, *supra* note 1597 (more than \$200,000); Bailey, *Mixed Picture*, *supra* note 1598 (about \$250,000); Enemy Within, *supra* note 1596 (hundreds of thousands of dollars); Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. Times, Apr. 27, 2007, at A1 (about \$225,000); Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. Times, Sept. 11, 2007 (more than \$200,000); Rone Tempest, *Al Qaeda in Lodi "Unlikely,"* L.A. Times, Mar. 30, 2006, at 9 (nearly \$230,000 in salary and expenses); Tempest, *FBI Informer*, *supra* note 1597 (nearly \$250,000 "for his efforts in Lodi alone"); Tempest, *Terrorist Training*, *supra* note 1598 (more than \$200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 1597 (about \$3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 1598 (\$250,000); Tempest, *Onetime Clerk*, *supra* note 1597 (more than \$200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 1597 (nearly \$230,000).

1601. Gov't's Trial Mem. at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); Second Superseding Indictment at 2, *id.* (Jan. 26, 2006); First Superseding Indictment at 3, *id.* (Sept. 22, 2005); *see* Enemy Within, *supra* note 1596; Krikorian & Tempest, *supra* note 1595; Tempest, *FBI Informer*, *supra* note 1597.

1602. Gov't's Trial Mem., *supra* note 1601, at 3-4; *see* Archibold, *Diverging Views*, *supra* note 1600; Krikorian & Tempest, *supra* note 1595; Murphy & Johnston, *supra* note 1595.

1603. Gov't's Trial Mem., *supra* note 1601, at 4; Second Superseding Indictment, *supra* note 1601, at 3; First Superseding Indictment, *supra* note 1601, at 3; *see* Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

1604. Gov't's Trial Mem., *supra* note 1601, at 4, 7; *see* Enemy Within, *supra* note 1596; Krikorian & Tempest, *supra* note 1595.

1605. Gov't's Trial Mem., *supra* note 1601, at 5, 9; *see* Enemy Within, *supra* note 1596; Krikorian & Tempest, *supra* note 1595.

1606. Gov't's Trial Mem., *supra* note 1601, at 4-5, 8-9; *see* Krikorian & Tempest, *supra* note 1595.

1607. Gov't's Trial Mem, *supra* note 1601, at 8; *see* Krikorian & Tempest, *supra* note 1595; Tempest, *supra* note 1603; Tempest *et al.*, *supra* note 1596.

The court did not permit a retired FBI agent to offer his expert opinion that the interrogation of the younger Hayat was so leading, and the defendant so suggestible, as to seriously call into question the reliability of the confession, because such testimony would have been cumulative of the cross-examination of the interrogation agents. Order at 41-55, *United States v. Hayat*, No. 2:05-

and son were indicted on June 16, 2005, for making false statements to federal officials.¹⁶⁰⁸ More than three months later, on September 22, Hamid's indictment was amended to include a charge of materially supporting terrorism by attending the training camp in Pakistan.¹⁶⁰⁹ The government added an additional false statement charge against each defendant on January 26, 2006.¹⁶¹⁰ The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.¹⁶¹¹

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.¹⁶¹² Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.¹⁶¹³ They agreed to return to Pakistan to avoid terrorism-related charges.¹⁶¹⁴

The two Hayats were tried together, but before separate juries.¹⁶¹⁵ The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.¹⁶¹⁶

cr-240 (E.D. Cal. May 17, 2007), available at 2007 WL 1454280 [hereinafter Order Den. New Trial]; see Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times, May 28, 2006, West Mag. at 16; Archibold, *Diverging Views*, *supra* note 1600; Enemy Within, *supra* note 1596.

1608. Indictment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005); see Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. Times, June 17, 2005, at 1; Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, *supra* note 1603; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

1609. First Superseding Indictment, *supra* note 1601; see Tempest, *supra* note 1603; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

1610. Second Superseding Indictment, *supra* note 1601.

1611. Docket Sheet, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005); see Tempest & Krikorian, *supra* note 1608.

Tim Reagan interviewed Judge Burrell for this report in the judge's chambers on February 13, 2007.

1612. See Tempest *et al.*, *supra* note 1596.

1613. See Murphy & Johnston, *supra* note 1595; Tempest, *supra* note 1603; Tempest *et al.*, *supra* note 1596.

1614. See Archibold, *Diverging Views*, *supra* note 1600 (reporting a voluntary return to Pakistan to avoid deportation); Enemy Within, *supra* note 1596 (reporting that the government did not have enough evidence to charge the imams with anything related to terrorism); Maria L. La Ganga & Rone Tempest, *2 Lodi Men To Be Deported*, L.A. Times, July 16, 2005, at 3 (reporting Khan and Adil's agreement to be deported); Lee Romney & Ann M. Simmons, *Pakistani Cleric Agrees to Leave U.S.*, L.A. Times, Aug. 16, 2005, at 1 (reporting Ahmed's agreement to be deported); Tempest, *Terrorist Training*, *supra* note 1598 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, *supra* note 1609 (reporting that Khan was deported in Aug. 2005).

1615. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 19, 2006) (ordering the empanelment of dual juries); see Rone Tempest, *Jury in Lodi Case Asks to See Video*, L.A. Times, Apr. 14, 2006, at 3.

1616. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006) (finding Hamid Hayat guilty); Docket Sheet, *supra* note 1611 (noting the granting of a mistrial as to Umer Hayat because the jury was not able to reach a verdict); see Order Den. New Trial, *supra* note 1607, at 1; see also

The son moved for a new trial, arguing, among other things, that one juror observed the foreperson gesture, before the end of the trial, that the defendant should be hanged.¹⁶¹⁷ After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.¹⁶¹⁸ A new trial was denied.¹⁶¹⁹ The son was sentenced on September 10, 2007, to 24 years in prison.¹⁶²⁰ His appeal was heard on June 10, 2009.¹⁶²¹

The government initially decided to retry the father,¹⁶²² but decided to drop the charges in exchange for his pleading guilty to a false customs declaration related to his taking too much money to his family on the 2003 trip to Pakistan.¹⁶²³ After his mistrial, the father's confinement was changed from prison to house arrest, and on August 25, 2006, he was sentenced to time served and three years of supervised release.¹⁶²⁴

Subsequent to his release, the father told reporters that his and his son's confessions resulted from exhaustion and leading questions—they told the agents what they wanted to hear so that they could go home after extensive questioning.¹⁶²⁵ Meanwhile, two family members—both U.S. citizens—who were trying to return to Lodi from Pakistan discovered that they were on the no-fly list, and initially they were not permitted to return without submitting to interrogation

Archibold & Kearns, *supra* note 1595; Enemy Within, *supra* note 1596; Walsh, *supra* note 1597 (“The jury split 7-5 for conviction on one count and 6-6 on a second count . . .”); Tempest, *supra* note 1603 (“But what the three federal prosecutors could—and did—show convincingly was that 23-year-old Hamid Hayat of Lodi, Calif., espoused strong anti-American sentiments, supported militant Muslim political parties in Pakistan and had a romantic attachment to the idea of jihad.”); Rone Tempest & Eric Bailey, *Conviction for Son, Mistrial for Father in Lodi Terror Case*, L.A. Times, Apr. 26, 2006, at 1 (“Although Hamid Hayat’s conviction was a clear victory for the prosecution, the facts in the nine-week trial of the Lodi father and son never matched the government’s repeated claims that it had discovered an active Al Qaeda terrorist cell embedded in California’s agricultural heartland, 35 miles south of Sacramento.”).

1617. Order Den. New Trial, *supra* note 1607, at 6, 8–13; see Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

1618. Order Den. New Trial, *supra* note 1607, at 8–13; see Demian Bulwa, *Lodi Man Loses Bid for New Terror Trial*, S.F. Chro., May 18, 2007, at B2; Denny Walsh, *Hayat Juror Was Biased, His Accuser Testifies*, Sacramento Bee, Apr. 14, 2007, at B1.

1619. Order Den. New Trial, *supra* note 1607; see Bulwa, *supra* note 1618.

1620. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007); see Marshall, *supra* note 1600.

1621. Docket Sheet, *United States v. Hayat*, No. 07-10457 (9th Cir. Sept. 21, 2007).

1622. See Carolyn Marshall, *Government Will Retry Terror Case*, N.Y. Times, May 6, 2006, at A11; Rone Tempest, *U.S. to Retry Father in Lodi Case*, L.A. Times, May 6, 2006, at 1.

1623. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006); Information, *id.* (May 31, 2006); see Enemy Within, *supra* note 1596; Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 1597.

1624. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006); see Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 1597.

1625. Enemy Within, *supra* note 1596; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 1597.

first.¹⁶²⁶ They declined to be interrogated¹⁶²⁷ and were permitted to return home five months later after intervention of counsel.¹⁶²⁸

Challenge: Classified Evidence

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)¹⁶²⁹ may apply to this case.¹⁶³⁰ Another nine days later, the government filed the following announcement:

Government counsel have been informed that there is at least one classified document that is in the possession, custody and control of the government which is potentially discoverable and it is reasonably likely that the government will submit this document to the Court *ex parte*, and *in camera*, pursuant to CIPA, for a determination of whether it is discoverable. The government's request for a review of pertinent agency evidence has just commenced. Thus, it is reasonably foreseeable that additional classified and potentially discoverable information will be encountered.¹⁶³¹

Six times the government noticed submission of material to the court *ex parte*, *in camera*, and under seal,¹⁶³² and twice the government noticed a hearing *ex parte*, *in camera*, and under seal.¹⁶³³

1626. See Randal C. Archibold, *U.S. Blocks Men's Return to California from Pakistan*, N.Y. Times, Aug. 29, 2006, at A17; Demian Bulwa, *2 Lodi Residents Refused Entry Back into U.S.*, S.F. Chron., Aug. 26, 2006, at A1.

The relatives are Muhammad Ismail, Hamid Hayat's uncle and apparently Umer Hayat's brother-in-law, and Muhammad's son Jaber Ismail, Hamid's cousin. See Archibold, *supra*; Bulwa, *supra*. Hamid Hayat had said during the interrogation that led to his prosecution that he thought some of his cousins, including Jaber Ismail, had attended terrorist training camps. See Archibold, *supra*; Bulwa, *supra*. The Ismails were detained on April 21, 2006, while the juries were deliberating in the Hayats' case, but Muhammad Ismail's wife and two younger children were permitted to return home. See Archibold, *supra*; Bulwa, *supra*.

1627. See Archibold, *supra* note 1626; Bulwa, *supra* note 1626.

1628. See Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. Times, Oct. 2, 2006, at A10; Demian Bulwa, *Men OK'd to Return to U.S. from Pakistan*, S.F. Chron., Sept. 13, 2006, at B5.

1629. 18 U.S.C. app. 3; see Reagan, *supra* note 165.

1630. CIPA Notice, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. June 27, 2005).

1631. CIPA Mot. at 3, *id.* (July 6, 2005).

1632. Six times the government noticed the submission of *ex parte*, *in camera*, under seal material:

1. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Oct. 6, 2005); see Redacted Gov't's In Camera, Ex Parte, Under Seal CIPA Mem., *id.* (Dec. 16, 2005) (specifying a hearing date of Oct. 7, 2005).
2. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Nov. 18, 2005).
3. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Dec. 9, 2005); see Redacted Gov't's CIPA Mot., *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of Dec. 9, 2005).
4. Notice of Ex Parte, In Camera, Under Seal CIPA Filings, *id.* (Jan. 28, 2006); see Redacted Gov't's CIPA Mot., *id.* (dated Jan. 26, 2006, filed Feb. 2, 2006) (specifying a hearing date of Jan. 27, 2005); Redacted Gov't's CIPA Mot., *id.* (dated Jan. 27, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005); Redacted Gov't's CIPA

When a trial date was set, the government announced that some evidence against the defendants was obtained using methods so secret that they could not be disclosed to anyone without a security clearance.¹⁶³⁴ The defendants argued that the government's call for a security clearance was a delay tactic:

Based on the discovery provided to date, the defense believes that there is currently only one item of evidence that may potentially invoke the Classified Information Procedures Act. . . .

. . . The government advised that if the defense wanted to object to the foundation of this item of evidence, classified information would be involved and security clearances would be needed.

. . . Based on [an] investigation, the defense will not object to the admissibility of the item of evidence. . . .

. . . .

. . . The government, however, is objecting to such a stipulation by suggesting that the defendants cannot make such a decision voluntarily. The defense believes that such an objection is insincere, unfounded and just another tactic by the government to force delays in this case.

. . . Now that the Court has set a trial date, the government is attempting to force defense counsel to undergo lengthy security clearances just to litigate an evidentiary issue that the defense has stated in open court it has no objections to.¹⁶³⁵

Judge Burrell considered whether he should order defense counsel to obtain security clearances or, alternatively, should appoint already cleared counsel to assist in the defense.¹⁶³⁶ The court information security officer could not find a local defense attorney with a security clearance, but he was able to identify two in the

Mot., *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005).

5. Notice of Ex Parte, In Camera Classified Filing, *id.* (Apr. 3, 2006); *see* Redacted Gov't's CIPA Mot., *id.* (Apr. 4, 2006) (specifying a hearing date of Apr. 4, 2006); Redacted Order, *id.* (Apr. 3, 2006).

6. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Dec. 13, 2006); *see* Order, *id.* (Dec. 21, 2006) (granting in camera ex parte motion for a protective order).

1633. Twice the government noticed an ex parte, in camera, under seal hearing:

1. Notice of Ex Parte, In Camera, Under Seal CIPA Hr'g, *id.* (Dec. 5, 2005) (specifying a hearing date of Dec. 9, 2005); *see* Redacted Gov't's CIPA Mot., *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of Dec. 9, 2005).

2. Notice of Ex Parte, In Camera, Under Seal CIPA Hr'g, *id.* (Dec. 9, 2005) (specifying a hearing date of Dec. 16, 2005); *see* Redacted Gov't's In Camera, Ex Parte, Under Seal CIPA Mem., *id.* (Dec. 16, 2005) (specifying a hearing date of Dec. 16, 2005).

There may have been a third sealed hearing. *See* Redacted Gov't's CIPA Mot., *id.* (dated Jan. 6, 2005 [sic], filed Jan. 6, 2006) (specifying a hearing date of Jan. 6, 2005 [sic]).

1634. *See Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of Feb. 14, 2006); *see also* Order at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 10, 2006) (announcing a trial date of Feb. 14, 2006, and discussing a government motion that defense counsel obtain a security clearance).

The evidence apparently resulted in four exhibits—satellite images in the vicinity of Balakot, Pakistan—that the parties ultimately stipulated were admissible. Ex. 4 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 3 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 2 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 1 Stipulated Order, *id.* (Feb. 3, 2006).

1635. Defs.' Joint CIPA Resp. at 2–3, *id.* (Jan. 16, 2006).

1636. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

Northern District of California who were cleared.¹⁶³⁷ Ultimately, Judge Burrell decided that cleared counsel for the defendants was not necessary.¹⁶³⁸

Within a few weeks, the parties and their attorneys agreed to a stipulated protective order stating that the case might require in camera proceedings concerning classified information, which would be held ex parte because defense counsel did not have security clearances and they did not want to delay the trial to obtain them.¹⁶³⁹ Judge Burrell's court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.¹⁶⁴⁰

Hamid Hayat's motion for a new trial¹⁶⁴¹ included eight main arguments, the third of which—"Hayat was deprived of his constitutional right to confront [the government informant] Khan by the Court's CIPA order of March 1, 2006"—was filed under seal because it referenced a sealed court order containing a discussion of potentially classified information.¹⁶⁴² Judge Burrell filed his ruling on this argument under seal.¹⁶⁴³

1637. *Id.*

1638. *Id.*

1639. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006).

1640. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1641. Def.'s Mem. in Supp. of Mot. for a New Trial, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006).

1642. Sealing Order, *id.* (Feb. 5, 2007); Def.'s Sealing Req., *id.* (Oct. 27, 2006); *see also* Order, *id.* (Mar. 21, 2007) (granting the plaintiff's motion to file an argument III reply under seal); Order, *id.* (Feb. 5, 2007) (granting the government's motion to file a response to argument III under seal).

1643. Order Den. New Trial, *supra* note 1607, at 35; Docket Sheet, *supra* note 1611 (noting that "counsel for the parties are authorized to obtain from the clerk's office a copy of the sealed order").

Warrantless Wiretaps

*Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and related actions (Vaughn R. Walker, N.D. Cal.) and Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.);*¹⁶⁴⁴ *ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.);*¹⁶⁴⁵ *Terkel v. AT&T and related actions (Matthew F. Kennelly, N.D. Ill.); Center for Constitutional Rights v. Bush (Gerard E. Lynch, S.D.N.Y.); Electronic Privacy Information Center v. Department of Justice and related action (Henry H. Kennedy, Jr., D.D.C.); and Electronic Frontier Foundation v. Department of Justice (Thomas F. Hogan, D.D.C.)*

On December 16, 2005, the *New York Times* reported that in 2002 President Bush secretly authorized the National Security Agency (NSA) to conduct warrantless wiretaps of international communications with people in the United States.¹⁶⁴⁶ President Bush acknowledged the existence of the program the following day.¹⁶⁴⁷

1644. An interlocutory appeal was heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown.

1645. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

1646. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1; see *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); *Jewel v. NSA*, ___ F. Supp. 2d ___, ___, 2010 WL 235075 (N.D. Cal. 2010) (p.3 of filed op.); see also Matthew M. Aid, *The Secret Sentry* 287 (2009).

“After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.” *Id.* The newspaper posted the story to the Internet the night before the story appeared in the paper to avoid the possibility of the government’s enjoining publication. Eric Lichtblau, *Bush’s Law* 210–11 (2008).

The story appeared 18 months after the newspaper received a tip from a Justice Department lawyer. See Michael Isikoff, *The Fed Who Blew the Whistle*, Newsweek, Dec. 22, 2008, at 40, 42. In the summer of 2007, FBI agents executed a classified search warrant in a raid of the lawyer’s home as part of an investigation into the leak. See Michael Isikoff, *Looking for a Leaker*, Newsweek, Aug. 13, 2007, at 8.

According to the 9/11 Commission, “The law requires the NSA to not deliberately collect data on U.S. citizens or on persons in the United States without a warrant based on foreign intelligence requirements.” The 9/11 Commission Report 87 (2004).

1647. President’s Radio Address, Dec. 17, 2005.

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they

On May 11, 2006, *USA Today* reported that “[t]he National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by AT&T, Verizon and BellSouth, people with direct knowledge of the arrangement told *USA Today*.”¹⁶⁴⁸ According to the *USA Today* report, the telephone companies were providing the government with records of who was calling whom, not information about the contents of the calls.¹⁶⁴⁹ Dozens of lawsuits followed these revelations.¹⁶⁵⁰ The Judicial Panel on Multidistrict Litigation (JPML) consolidated most of these cases in the U.S. District Court for the Northern District of California before Judge Vaughn R. Walker.¹⁶⁵¹

should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

Id.; see *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (it is undisputed that “the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties”). For a discussion of the *New York Times*’ and the government’s disclosures, see *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1192–94, 1198–200 (9th Cir. 2007); *ACLU*, 493 F.3d at 648 & n.1; *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218, 1221–22 (D. Or. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986–87 (N.D. Cal. 2006).

1648. Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, *USA Today*, May 11, 2006, at 1A. BellSouth and Verizon have denied participation in this program, but MCI, which Verizon recently acquired, may have participated. See Susan Page, *Lawmakers: NSA Database Incomplete*, *USA Today*, June 30, 2006, at 2A; see also *Al-Haramain Islamic Found.*, 507 F.3d at 1193 n.1; *Hepting*, 439 F. Supp. 2d at 988–89.

1649. Cauley, *supra* note 1648; see *Hepting*, 439 F. Supp. 2d at 988; see also Scott Shane & David Johnston, *Mining of Data Prompted Fight over U.S. Spying*, *N.Y. Times*, July 29, 2007, at A1 (reporting that the government has acknowledged warrantless wiretaps but has not acknowledged data mining in calling records, although the latter has been widely reported).

1650. *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (pp.3–4 of filed op.); *In re NSA*, 633 F. Supp. 2d at 955; see Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, *S.J. Mercury News*, Aug. 11, 2006, at A12; Jason McLure, *DOJ Losing Ground in Wiretap Fight*, *Legal Times*, Sept. 4, 2006, at 1.

1651. Conditional Transfer Order 6, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007) (transferring one action against a telephone company), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Apr. 17, 2007); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Feb. 15, 2007) (transferring actions by the federal government against states), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006) (transferring three actions against the government and one action against telephone companies), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 5, *In re NSA*, No. 1791 (J.P.M.L. issued Nov. 3, 2006, final Nov. 21, 2006) (transferring one action against a telephone company), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Nov. 27, 2006); Conditional Transfer Order 2, *In re NSA*, No. 1791 (J.P.M.L. issued Sept. 11, 2006, final Sept. 27, 2006) (transferring one action against a telephone company), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 4, 2006); Conditional Transfer Order 1, *In re NSA*, No. 1791 (J.P.M.L. issued Aug. 31, 2006, final Sept. 18, 2006) (transferring one action against the government and 15 actions against telephone companies), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Sept. 25, 2006); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial Aug. 9, 2006, transfer order transferring 17 actions against telephone companies, one transfer of which later was vacated because the case already was dismissed); see Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug.

The government has argued that these cases must be dismissed because they cannot be litigated without revealing state secrets.¹⁶⁵² This argument has been successful with respect to alleged transfers of communication records by the telephone companies to the government,¹⁶⁵³ but less successful with respect to the warrantless monitoring of the contents of communications, because the government acknowledged that it did that.¹⁶⁵⁴

31, 2006) (consolidating for pretrial purposes all cases already before Judge Walker); Docket Sheet, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006) [hereinafter N.D. Cal. *In re NSA* Docket Sheet]; see also *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (p.5 of filed op.); *In re NSA*, 633 F. Supp. 2d at 956; Carey, *supra* note 1650; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. Chron., Aug. 11, 2006, at B1; McLure, *supra* note 1650.

Tim Reagan interviewed Judge Walker for this report in the judge's chambers on February 15, 2007, and on September 29, 2008.

1652. *Al-Haramain Islamic Found.*, 507 F.3d at 1193; *ACLU*, 493 F.3d at 650 & nn.2–3; Mem. Mot. to Dismiss or for Summ. J., *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 20, 2007); Military & State Secrets Privilege P. & A., Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006); Military & State Secrets Privilege P. & A., *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. June 21, 2006); Defs.' Mot. to Dismiss or for Summ. J., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Defs.' Mot. to Dismiss or for Summ. J., *Center for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Mot. to Dismiss or for Summ. J., *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); see also U.S. Statement of Interest, *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex., July 17, 2006) (announcing intent to seek dismissal on state-secrets grounds).

1653. *ACLU v. NSA*, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing data-mining claims); Terkel v. AT&T, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing complaint with leave to amend); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995–98 (N.D. Cal. 2006) (provisionally denying discovery on transfers of communication records); see *ACLU*, 493 F.3d at 650 n.2 (“The alleged data mining, which has not been publicly acknowledged, might fall within [the state-secrets rule of non-justiciability.]”); *id.* at 719 (Gilman, dissenting) (“After a careful review of the record, I conclude that the district court’s analysis of this issue and of the preclusive effect of the state-secrets privilege is persuasive.”); see also Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps*, Wash. Post, Aug. 18, 2006, at A1; Adam Liptak, *Judge Rejects Customer Suit over Records from AT&T*, N.Y. Times, July 26, 2006, at A13; McLure, *supra* note 1650; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6.

1654. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1197–201; *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1220–24 (D. Or. 2006); *ACLU*, 438 F. Supp. 2d at 759, 764–66; *Hepting*, 439 F. Supp. 2d at 980, 991–94; Egelko, *supra* note 1651; Eric Lichtblau, *Court Bars Secret Papers in Eavesdropping Case*, N.Y. Times, Nov. 17, 2007, at A11; Adam Liptak, *Judge Allows Islamic Group to Challenge Wiretapping*, N.Y. Times, Sept. 8, 2006, at A17; John Markoff, *Judge Declines to Dismiss Privacy Suit Against AT&T*, N.Y. Times, July 21, 2006, at A13; McLure, *supra* note 1650; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9.

The New York University School of Law’s Center on Law and Security has described two types of “electronic surveillance,” which is a more formal term for wiretaps, and which implicitly acknowledges that not all electronic communications pass through wires: “We define ‘trawling surveillance’ as NSA interception of entire streams of communications, which are then subjected to computer analysis for particular names, internet addresses, and trigger words. ‘Targeted surveillance’ refers to intercepts focused on one person or phone number.” 1 *For the Record* 7 (Jan.

Judge Anna Diggs Taylor of the U.S. District Court for the Eastern District of Michigan declared the warrantless wiretap program unconstitutional and a violation of the Foreign Intelligence Surveillance Act (FISA).¹⁶⁵⁵ She issued a permanent injunction against the program,¹⁶⁵⁶ but a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed and ordered the challenge to the program dismissed.¹⁶⁵⁷ Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,¹⁶⁵⁸ but Judge Ronald Lee Gilman would have affirmed the injunction.¹⁶⁵⁹ The Supreme Court denied certiorari.¹⁶⁶⁰

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveiled, but the U.S. Court

2007), available at http://www.lawandsecurity.org/publications/ForTheRecord/NSA_jan_07.pdf; *see also* Aid, *supra* note 1646, at 287–88 (“It would appear that there are between ten and twelve programs being run by NSA dealing directly in some fashion with the agency’s warrantless SIGINT efforts, including at least a half-dozen strictly compartmentalized SIGINT collection, processing, analytic, and reporting projects handling different operational aspects of the problem.”); *id.* at 188 (“The only one of these NSA programs that the Bush administration has publicly acknowledged is the warrantless eavesdropping program, which the White House labeled in 2005 as the Terrorist Surveillance Program (TSP). All other aspects of NSA’s SIGINT collection work that touch on the domestic front have remained unacknowledged.”).

1655. *ACLU v. NSA*, 438 F. Supp. 2d 754, 775–76, 778–80, 782 (E.D. Mich. 2006); *ACLU*, 493 F.3d at 650; *see* Eggen & Linzer, *supra* note 1653; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcheson & Margaret Talev, *Wiretap Program Is Ruled Illegal*, S.J. Mercury News, Aug. 18, 2006, at A1; Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. Times, Aug. 18, 2006, at A1; McLure, *supra* note 1650; Romero & Temple-Raston, *supra* note 226, at 149, 195.

Tim Reagan interviewed Judge Taylor for this report in the judge’s chambers on December 7, 2006.

1656. *ACLU*, 438 F. Supp. 2d at 782; J. and Permanent Inj. Order, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006).

1657. *ACLU*, 493 F.3d at 648, 687–88 (resolving *ACLU v. NSA*, Nos. 06-2095 & 06-2140 (6th Cir. Aug. 17, 2006)); *see* *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (staying injunction pending appeal); Dismissal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Nov. 28, 2007); *see also* Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, Wash. Post, July 7, 2007, at A1; Adam Liptak, *Panel Dismissed Suit Challenging Secret Wiretaps*, N.Y. Times, July 7, 2007, at A1; Charlie Savage, *Court Gives Bush Win on Surveillance*, Boston Globe, July 7, 2007, at 1A.

1658. *ACLU*, 493 F.3d at 653 (“the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA”); *id.* at 692 (Gibbons, J., concurring in the judgment) (“Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.”).

1659. *Id.* at 693, 720 (Gilman, dissenting).

For this report, Tim Reagan interviewed Judge Batchelder in the judge’s Cincinnati chambers on October 30, 2007; interviewed Judge Gilman in the judge’s home chambers on October 29, 2007; and interviewed Judge Gibbons in the judge’s home chambers on October 29, 2007, and by telephone on November 1, 2007.

1660. *ACLU v. NSA*, ___ U.S. ___, 128 S. Ct. 1334 (2008); Docket Sheet, *ACLU v. NSA*, No. 07-468 (U.S. Oct. 9, 2007) (noting denial of the petition on Feb. 19, 2008, after consideration at conferences on Jan. 18 and Feb. 15, 2008); *see* Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

of Appeals for the Ninth Circuit held that the proffered evidence was too secret to afford them standing.¹⁶⁶¹ On remand, the district court ruled that an amended complaint alleged sufficient public information to create inferences supporting the plaintiffs' claims.¹⁶⁶²

The government announced in January 2007 that it abandoned the warrantless feature of the surveillance program and began receiving warrants for the taps from the Foreign Intelligence Surveillance Court (FISC).¹⁶⁶³

Six civil suits challenged the government directly, and dozens more challenged telephone companies' assistance to the government. In addition, the government sued five states to stop their investigations of the warrantless wiretaps.

On July 10, 2008, President Bush signed amendments to FISA expanding the government's statutory surveillance power and providing telephone companies with immunity for their assistance with pre-amendment surveillance.¹⁶⁶⁴ Judge

1661. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95, 1205(9th Cir. 2007) (pp.14959, 14961–62, 14969–73 of filed op.); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1110–15, (N.D. Cal. 2008); see Lichtblau, *supra* note 1654.

1662. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009).

1663. *Al-Haramain Islamic Found.*, 507 F.3d at 1194; *ACLU*, 493 F.3d at 651 n.4; Notice of Att'y Gen.'s Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 17, 2007); see Dan Eggen, *Court Will Oversee Wiretap Program*, Wash. Post, Jan. 18, 2007, at A1 (reporting "a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people"); Frontline: Spying on the Home Front (PBS television broadcast May 15, 2007) [hereinafter Home Front]; Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. Times, Jan. 18, 2007, at A1; Adam Liptak, *Secrecy at Issue in Suits Opposing Domestic Spying*, N.Y. Times, Jan. 26, 2007, at A1; Romero & Temple-Raston, *supra* note 226, at 195. *But see* Walter Pincus, *Intelligence Chief Decries Constraints*, Wash. Post, May 2, 2007, at A7 (reporting congressional testimony from the new director of national intelligence that the FISA court's January 2007 orders have prevented agencies from collecting intelligence that they should be collecting); James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007, at A16 (reporting congressional testimony from the new director of national intelligence that the President retained authority under Article II of the Constitution to resume warrantless wiretaps).

According to the government, on January 10, 2007, the FISA court issued classified negotiated orders, and the government decided that it no longer had to conduct its surveillance without warrants. Ex. 2, Notice of Filing, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 22, 2007) (also stating that "the number, nature, and contents of the specific orders described herein are highly classified"); see also NSA Dir. Decl., *ACLU*, Nos. 06-2095 & 06-2140 (6th Cir. Jan. 25, 2007) ("The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court."), also filed as Ex. 1, Notice of Filing, *supra*. But it was reported that another judge on the FISA court subsequently nullified some or all of the enabling orders. Charlie Savage, *Bush Urges Congress to Pass Wiretap Bill*, Boston Globe, Aug. 3, 2007, at 2A.

1664. FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008) (H.R. 6304); see *Jewel v. NSA*, ___ F. Supp. 2d ___, ___, 2010 WL 235075 (N.D. Cal. 2010) (p.6 of filed op.); Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008, at A1.

On the same day, the ACLU filed an action in the Southern District of New York challenging the amendments' constitutionality, Compl., *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), and a motion before the FISC seeking participation in that court's re-

Walker determined that the amendments required dismissal of all actions against telephone companies¹⁶⁶⁵ and summary judgment for the federal government in all actions against states.¹⁶⁶⁶

On January 21, 2010, Judge Walker dismissed two of the suits against the government as generalized grievances insufficient to afford the plaintiffs standing.¹⁶⁶⁷

Suits Against the Government

The American Civil Liberties Union (ACLU), other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's program of warrantless wiretaps on January 17, 2006, in federal court in Detroit.¹⁶⁶⁸ The court assigned the case to Judge Taylor,¹⁶⁶⁹ who enjoined the program on August 17.¹⁶⁷⁰ The government immediately appealed,¹⁶⁷¹ and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication

view of the amendments, Mot., *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (F.I.S.C. July 10, 2008). In the Southern District of New York, Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009), and an appeal is pending, Docket Sheet, *Amnesty Int'l USA v. McConnell*, No. 09-4112 (2d Cir. Oct. 2, 2009) (noting appellee brief filed on Feb. 17, 2010). The FISC denied the ACLU's motion, Mem. Op., *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (F.I.S.C. Aug. 27, 2008), available at http://www.aclu.org/pdfs/safefree/fisc_decision.pdf.

1665. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009).

1666. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

1667. *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (pp.2-3, 13-14, 16-17, 19 of filed op.).

1668. *ACLU*, 493 F.3d at 648-50; Compl., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); see David Ashenfelter & Niraj Wari, *Suits Filed to Stop Spying*, Det. Free Press, Jan. 18, 2006; Eric Lichtblau, *Two Groups Planning to Sue over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14; Romero & Temple-Raston, *supra* note 226, at 71-72.

1669. Docket Sheet, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006) [hereinafter E.D. Mich. *ACLU* Docket Sheet]; see Ashenfelter & Wari, *supra* note 1668.

1670. *ACLU*, 493 F.3d at 650; *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006); J. and Permanent Inj. Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); see Eggen & Linzer, *supra* note 1653; Gibson, *supra* note 1655; Hutcheson & Talev, *supra* note 1655; Liptak & Lichtblau, *supra* note 1655; McLure, *supra* note 1650; Romero & Temple-Raston, *supra* note 226, at 149. The court of appeals stayed the injunction pending appeal. *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006); see *Court Allows Warrantless Wiretapping During Appeal*, Wash. Post, Oct. 5, 2006, at A18; *U.S. Eavesdropping Is Allowed to Continue During Appeal*, N.Y. Times, Oct. 5, 2006, at A23.

1671. Docket Sheet, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006); Defs.' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); see Gibson, *supra* note 1655; Hutcheson & Talev, *supra* note 1655; Liptak & Lichtblau, *supra* note 1655.

records claims.¹⁶⁷² On July 6, 2007, the court of appeals vacated the injunction and ordered the case dismissed,¹⁶⁷³ with one judge dissenting.¹⁶⁷⁴

Also on January 17, 2006, the Center for Constitutional Rights, a public-interest law firm in New York, and members of its legal staff filed a similar suit in Manhattan, which the U.S. District Court for the Southern District of New York assigned to Judge Gerard E. Lynch.¹⁶⁷⁵ Judge Lynch heard arguments on the plaintiffs' motion for partial summary judgment¹⁶⁷⁶ and the government's motion for dismissal on state-secrets grounds¹⁶⁷⁷ on September 5,¹⁶⁷⁸ but did not rule before the case was transferred to Judge Walker.¹⁶⁷⁹

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.¹⁶⁸⁰

The Al-Haramain Islamic Foundation—a charity the government accused of aiding terrorists—and its attorneys filed a federal suit in Portland, Oregon, on February 28, 2006, claiming not that the plaintiffs' communications *might* be tapped, but that their communications actually were tapped, according to inadvertently disclosed top-secret evidence.¹⁶⁸¹ The secret evidence was improperly in-

1672. *ACLU*, 493 F.3d at 648, 650; Docket Sheet, *ACLU v. NSA*, No. 06-2140 (6th Cir. Aug. 30, 2006); Pls.' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006).

In the appeal, eleven amicus curiae briefs were filed. Docket Sheets, *ACLU*, Nos. 06-2095 & 06-2140 (6th Cir. Aug. 17 & 30, 2006) [hereinafter 6th Cir. *ACLU* Docket Sheets].

1673. *ACLU*, 493 F.3d at 648, 687–88; see Goldstein, *supra* note 1657; Liptak, *supra* note 1657; Savage, *supra* note 1657.

1674. *ACLU*, 493 F.3d at 693–720 (Gilman, dissenting).

1675. Compl., Center for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *id.*; see Ashenfelter & Wari, *supra* note 1668; Lichtblau, *supra* note 1668.

Tim Reagan interviewed Judge Lynch for this report by e-mail on May 16, 2007.

1676. Pls.' Partial Summ. J. Mem., *Center for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

1677. Military & State Secrets Privilege P. & A., *id.* (May 27, 2006).

1678. Tr., *id.* (Sept. 5, 2006) [hereinafter *Center for Constitutional Rights* Sept. 5, 2006, Tr.]; Order, *id.* (Aug. 8, 2006); see Adam Liptak, *Judge Hears Arguments on Federal Spying Program*, N.Y. Times, Sept. 6, 2006, at A14.

1679. Interview with Hon. Gerard E. Lynch, May 16, 2007.

1680. Mem. of Law of Certain Members of Congress, *Center for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. May 31, 2006); Mem. of Law of Certain Members of Congress, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 10, 2006).

1681. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95 (9th Cir. 2007); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Compl., *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) (describing the document as “United States Treasury Office of Foreign Assets Control logs of . . . conversations”); see *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (“In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted.”); see also Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, *The Oregonian*, Apr. 15, 2006, at B1 [hereinafter *U.S. Attacks Lawsuit*]; Patrick Radden Keefe, *State Secrets*, *New Yorker*, Apr. 28, 2008, at 28, 28, 31; Lichtblau, *supra* note 1654; Liptak, *supra* note 1654; Liptak, *supra* note 1657; McLure, *supra* note 1650; Justin Scheck, *NSA's Wiretaps Face Scrutiny in S.F. Courtroom*, S.F. Recorder, Apr. 10, 2006, at 1.

cluded in materials submitted to the foundation's attorneys in August 2004 in an action to freeze the foundation's assets because of its alleged support of terrorism.¹⁶⁸² The U.S. District Court for the District of Oregon assigned the case against the government to Judge Garr M. King,¹⁶⁸³ who denied a motion by the government to dismiss the case on state-secrets grounds and certified an imme-

"Al Haramain was established, with help from the Saudi royal family, in 1991." Keefe, *supra*, at 29. "Al Haramain Oregon was incorporated in 1991." *Id.* at 30; *see also* The 9/11 Commission Report 170 (2004) (describing the charity as a suitable source for al-Qaeda funds from sympathetic employees because of its "lax external oversight and ineffective internal controls"). It is one of the many defendants in actions pending in the Southern District of New York against the perpetrators of the September 11, 2001, attacks and their alleged supporters. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), refiled as *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003).

"The document's value to plaintiffs is in its confirmation that plaintiffs were targets of the President's warrantless electronic surveillance program—which establishes their standing to prosecute this lawsuit." Pls.' Reply to Defs.' Resp. to Objection to Filing Material Ex Parte and In Camera at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 22, 2006) (italics omitted). The document apparently reports clandestinely monitored telephone calls between the charity's director in Saudi Arabia and its lawyers in Washington, D.C. Compl. at 3–4, *id.* (Feb. 28, 2006); *see* Ashbel S. Green, *Lawsuits Challenge Feds' Stance on Secrets*, *The Oregonian*, June 7, 2006, at A1 [hereinafter *Feds' Stance*]; Keefe, *supra*, at 28, (the four-page document "appears to have been a summary of intercepted telephone conversations between two of Al Haramain's American lawyers, in Washington, and one of the charity's officers, in Saudi Arabia"); *id.* at 30–31 ("The document was dated May 24, 2004; the conversations took place in March and April—just as the Treasury Department was investigating the charity."); Pamela A. MacLean, *Critical Juncture for Spying Cases*, *Nat'l L.J.*, July 16, 2007, at 5 (describing the document as "a 2004 phone log from the spy program").

1682. *Al-Haramain Islamic Found.*, 507 F.3d at 1193–95; *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218–19; Defs.' Resp. to the Oregonian's Mot. to Intervene and to Unseal Records at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006); Acting Office of Foreign Assets Control Dir. Decl., Attach. A, *id.*; *see* Keefe, *supra* note 1681, at 28; Lichtblau, *supra* note 1654; Liptak, *supra* note 1654; Liptak, *supra* note 1657; MacLean, *supra* note 1681 ("According to published accounts, the alleged wiretap log covered March and April 2004, when former Attorney General John Ashcroft advised the president that the program was illegal."); Matthew Preusch, *U.S. Freezes a Charity's Assets*, *N.Y. Times*, Feb. 21, 2004, at A9; Scheck, *supra* note 1681 ("The most important piece of evidence in the Portland suit is a secret document accidentally disclosed by the FBI in 2004 through discovery in another lawsuit. It's currently being held in a secure location in Seattle, despite efforts by the federal government to take it back.").

The Saudi Arabian government announced in 2004 that it would shut down the charity, *see* Douglas Jehl, *Saudis Are Shutting Down a Charity Tied to Terrorists*, *N.Y. Times*, June 3, 2004, at A12, and the United States government dismissed the case against the charity, *see* Joseph B. Frazier, *Gonzales Against Releasing Evidence: Case Involved Islamic Charity*, *Seattle Times*, Mar. 31, 2006, at B2.

1683. Docket Sheet, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter *D. Or. Al-Haramain Islamic Found. Docket Sheet*]; *see* Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Cases*, *The Oregonian*, Apr. 25, 2006, at A1.

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on February 14, 2007.

ciate appeal.¹⁶⁸⁴ The U.S. Court of Appeals for the Ninth Circuit affirmed in an opinion authored by Circuit Judge M. Margaret McKeown and joined by Judges Harry Pregerson and Michael Daly Hawkins, but the court ruled that the plaintiffs could not rely on the secret evidence.¹⁶⁸⁵

The court of appeals determined that the warrantless wiretap program revealed by the *New York Times* in December 2005 was not a secret, because the government had publicly disclosed and discussed so many of its details, so a suit challenging the program could not be dismissed on state-secrets grounds.¹⁶⁸⁶ The state-secrets privilege does apply, however, to the evidence that the charity and its attorneys proffered to establish standing.¹⁶⁸⁷ The court remanded the case for a determination of whether FISA affords the plaintiffs a statutory mechanism for challenging the legality of the alleged surveillance that preempts the privilege.¹⁶⁸⁸ Judge Walker, to whom the case has been transferred, determined that FISA does preempt the state-secrets privilege, but the plaintiffs would still have to establish standing without access to the secret evidence.¹⁶⁸⁹ On January 5, 2009, Judge Walker ruled that an amended complaint did that.¹⁶⁹⁰

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn¹⁶⁹¹ and Atlanta.¹⁶⁹² The government moved on July 18, 2006, to dis-

1684. *Al-Haramain Islamic Found.*, 507 F.3d at 1195–96; *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1220–28, 1233; see Liptak, *supra* note 1654. The court of appeals agreed to hear the appeal. Order, *Al-Haramain Islamic Found. v. Bush*, No. 06-80134 (9th Cir. Dec. 21, 2006) (granting permission to appeal); see Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Dec. 22, 2006) [hereinafter 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet].

Proceedings in the district court, which were transferred to the Northern District of California, were stayed pending the interlocutory appeal. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1684 (noting a stay order on Apr. 4, 2007).

1685. *Al-Haramain Islamic Found.*, 507 F.3d 1190; see *id.* at 1193 (describing the privilege as “an evidentiary privilege that protects national security and military information in appropriate circumstances”); see Keefe, *supra* note 1681, at 33; Lichtblau, *supra* note 1654.

For this report, Tim Reagan interviewed Judge McKeown and her law clerk Kathy Tran in the judge’s home chambers on January 9, 2008; interviewed Judge Pregerson in the judge’s home chambers on October 1, 2008; and interviewed Judge Hawkins in the judge’s San Francisco chambers on September 30, 2008.

1686. *Al-Haramain Islamic Found.*, 507 F.3d at 1192–95, 1197–201; *id.* at 1192 (“Though its operating parameters remain murky, and certain details may forever remain so, much of what is known about the Terrorist Surveillance Program (“TSP”) was spoon-fed to the public by the President and his administration.”); see Lichtblau, *supra* note 1654.

1687. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; see Lichtblau, *supra* note 1654.

1688. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; see Lichtblau, *supra* note 1654.

1689. *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008); see Eric Lichtblau, *Judge Rejects Bush’s View on Wiretaps*, N.Y. Times, July 3, 2008, at A15.

1690. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009); see Carrie Johnson, *Handling of “State Secrets” at Issue*, Wash. Post, Mar. 25, 2009, at A1.

1691. Compl., *Shubert v. Bush*, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006); see *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (p.4 of filed op.);.

1692. Compl., *Guzzi v. Bush*, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006).

miss the Atlanta case for lack of standing,¹⁶⁹³ and the government moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.¹⁶⁹⁴

The JPML consolidated all of these cases with the cases before Judge Walker, except for the Detroit action by the ACLU, which already was on appeal.¹⁶⁹⁵ Nearly two years later, an action was filed against the government by plaintiffs who filed the first action against a telephone company,¹⁶⁹⁶ and Judge Walker accepted assignment of the case as related to the others before him.¹⁶⁹⁷

On January 21, 2010, Judge Walker dismissed the last-filed action and the action originally filed in Brooklyn for lack of standing: “The two cases at bar are, in essence, citizen suits seeking to employ judicial remedies to punish and bring to heel high-level government officials for the allegedly illegal and unconstitutional warrantless electronic surveillance program or programs now widely, if incompletely, aired in the public forum.”¹⁶⁹⁸ Judge Walker ordered briefing on whether the Manhattan and Atlanta actions should also be dismissed.¹⁶⁹⁹

Suits Against Telephone Companies

In 2006 and 2007, 45 suits were filed against telephone companies for their assistance with the warrantless wiretaps. Five were voluntarily dismissed, one was a pro se prisoner suit dismissed by the court, and one was dismissed on state-secrets grounds with leave to amend the complaint. The latter case and 38 other active cases were consolidated in the Northern District of California before Judge Walker.

One suit filed against a telephone company predated the May 2006 *USA Today* article.¹⁷⁰⁰ The Electronic Frontier Foundation filed a class action complaint on behalf of telephone customers against AT&T on January 31, 2006, in federal court in San Francisco.¹⁷⁰¹ To support their case, the plaintiffs filed under seal

1693. Defs.’ Mot. to Dismiss, *id.* (July 18, 2006).

1694. Defs.’ Mot. to Dismiss or for Summ. J., *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. May 25, 2007).

1695. Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 2, *supra* note 1651; Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Center for Constitutional Rights v. Bush*, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) (action transferred from the Southern District of New York); Docket Sheet, *Shubert v. Bush*, No. 3:07-cv-693 (N.D. Cal. Feb. 2, 2007) (action transferred from the Eastern District of New York); Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Jan. 9, 2007) (action transferred from the District of Oregon); Docket Sheet, *Guzzi v. Bush*, No. 3:06-cv-6225 (N.D. Cal. Oct. 3, 2006) (action transferred from the Northern District of Georgia).

1696. Complaint, *Jewel v. NSA*, No. 3:08-cv-4373 (N.D. Cal. Sept. 18, 2008).

1697. Order, *id.* (Oct. 28, 2008).

1698. *Jewel v. NSA*, ___ F. Supp. 2d ___, ___, 2010 WL 235075 (N.D. Cal. 2010) (pp. 16–17 of filed op.).

1699. Order, *Center for Constitutional Rights v. Bush*, No. 3:07-cv-1115 (N.D. Cal. Jan. 20, 2010); Order, *Guzzi v. Bush*, No. 3:06-cv-6225 (N.D. Cal. Dec. 31, 2009).

1700. *See* Cauley, *supra* note 1648.

1701. Docket Sheet, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006) [hereinafter N.D. Cal. *Hepting* Docket Sheet]; *see* Am. Compl., *id.* (Feb. 22, 2006); *see also* *Jewel*,

evidence provided by a former AT&T employee.¹⁷⁰² The court assigned the case to Judge Walker.¹⁷⁰³

On May 30, another class action against AT&T was filed in federal court in San Francisco,¹⁷⁰⁴ and the court assigned this case to Judge Walker as related to the first case against AT&T.¹⁷⁰⁵

On June 5 and June 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.¹⁷⁰⁶

The later removed case was filed on May 26 by California affiliates of the ACLU and various individuals, including a former Republican member of Congress, a doctor, ministers, lawyers, and journalists, seeking relief under California state law, which the complaint alleged “provide[s] the most robust protection for the privacy of telephone customers.”¹⁷⁰⁷ AT&T removed the case “because federal law completely preempts any challenge Plaintiffs nominally could bring under state law and Plaintiffs’ right to relief depends on the resolution of substantial questions of federal law” and because AT&T is alleged to have acted at the direction of the federal government.¹⁷⁰⁸ This case was randomly assigned to Judge

___ F. Supp. 2d at ___, 2010 WL 235075 (pp.3–4 of filed op.); Home Front, *supra* note 1663; John Markoff, *AT&T Is Accused in Eavesdropping*, N.Y. Times, Feb. 1, 2006, at A20; Scott Shane, *Attention in N.S.A. Debate Turns to Telecom Industry*, N.Y. Times, Feb. 11, 2006, at A11.

The lead plaintiff was motivated to sue by the experiences of his father, whose international correspondence was monitored for years because of correspondence with communist China arising from his picking up a shortwave Chinese broadcast at age 13. *See Key Figure in Wiretapping Suit Goes Public*, Morning Edition (NPR radio broadcast Mar. 6, 2008).

1702. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); *see* McLure, *supra* note 1650; Scheck, *supra* note 1681.

Judge Walker denied motions by news media to unseal the declarations, Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 20, 2007), but they and portions of their exhibits were later unsealed by stipulation, Order, *id.* (Oct. 1, 2007); Stipulation, *id.* (Sept. 25, 2007).

1703. N.D. Cal. *Hepting* Docket Sheet, *supra* note 1701; *see* Scheck, *supra* note 1681.

1704. Compl., *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

1705. Related Case Order, *id.* (June 21, 2006).

1706. Notice of Removal, *Campbell v. AT&T Commc’ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006) [hereinafter *Campbell* Notice of Removal]; Docket Sheet, *Riordan v. Verizon Commc’ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006).

The government moved to intervene as a defendant in these cases in order to defeat motions to remand, U.S. Mot. to Intervene, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. Aug. 4, 2006); U.S. Mot. to Intervene, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. Aug. 4, 2006), and Judge Walker denied the remand motions, *In re NSA Telecomm. Records Litig.*, 483 F. Supp. 2d 934 (N.D. Cal. 2007) (finding three grounds for federal jurisdiction: (1) the state-secrets privilege as an embedded federal issue, (2) the telephone companies’ allegedly acting on government instructions as satisfying the federal officer removal statute, and (3) the futility of remands given that the state would permit the government to intervene as a defendant).

1707. Compl. at 1, *Campbell v. AT&T Commc’ns of Cal.*, No. 06-452626 (Cal. Sup. Ct. S.F. May 26, 2006), attached as Ex. A to *Campbell* Notice of Removal, *supra* note 1706.

1708. *Campbell* Notice of Removal, *supra* note 1706.

Walker,¹⁷⁰⁹ who reassigned it to himself as related to the first case against AT&T.¹⁷¹⁰

The earlier removed action was also filed in San Francisco Superior Court on May 26, 2006, by California affiliates of the ACLU and various individuals, and it also alleged violations of state law, but against Verizon Communications, Inc.¹⁷¹¹ The case was assigned to Judge Walker as related to the removed case against AT&T.¹⁷¹²

On July 7, 2006, yet another class action was filed in San Francisco federal court—this one against MCI.¹⁷¹³ Judge Walker took assignment of this case as related to the first case filed against AT&T.¹⁷¹⁴

In the first San Francisco case against AT&T, the court denied the government's motion to dismiss on state-secrets grounds.¹⁷¹⁵ The court certified an appeal of its order,¹⁷¹⁶ and the court of appeals granted petitions for interlocutory appeal by both the government and AT&T.¹⁷¹⁷ The appeal was heard on August 15, 2007, in San Francisco,¹⁷¹⁸ but the court remanded the case to the district court on August 21, 2008, in light of the July 10 amendments to FISA.¹⁷¹⁹

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in other districts.¹⁷²⁰ The JPML transferred those cases not voluntarily dismissed to Judge Walker.¹⁷²¹

1709. Docket Sheet, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); see Administrative Mot. at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

1710. Related Case Order, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 20, 2006).

1711. See Administrative Mot at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

1712. Related Case Order, *id.* (July 5, 2006).

1713. Class Action Compl., *Spielfogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006).

1714. Related Case Order, *id.* (July 17, 2006).

1715. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); see *Jewel v. NSA*, ___ F. Supp. 2d ___, ___, 2010 WL 235075 (N.D. Cal. 2010) (p.5 of filed op.); Markoff, *supra* note 1654; McLure, *supra* note 1650; Mohammed, *supra* note 1654.

1716. *Hepting*, 439 F. Supp. 2d at 1011; see *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (p.5 of filed op.); McLure, *supra* note 1650.

1717. Order, *United States v. AT&T Corp.*, Nos. 06-80109 & 06-80110 (9th Cir. Nov. 7, 2006), attached, e.g., as Attach. B to Joint Case Management Statement, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Nov. 7, 2006); see Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir. Nov. 8, 2006) (appeal by the government); Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17132 (9th Cir. Nov. 8, 2006) (appeal by AT&T).

The appeals were consolidated. Docket Sheets, *Hepting*, Nos. 06-17132 & 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 9th Cir. *Hepting* Docket Sheets]. Twelve amicus curiae briefs were filed. Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006).

1718. 9th Cir. *Hepting* Docket Sheets, *supra* note 1717; see Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. Times, Aug. 16, 2007, at A13; Karl Vick, *Judges Skeptical of State-Secrets Claim*, Wash. Post, Aug. 16, 2007, at A4.

1719. *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); see *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (p.7 of filed op.).

1720. *Jewel*, ___ F. Supp. 2d at ___, 2010 WL 235075 (p.4 of filed op.).

1721. *Supra* note 1651; see *Carey*, *supra* note 1650; *Egelko*, *supra* note 1651.

A Chicago attorney filed a class action against telephone companies on May 15, 2006.¹⁷²² The Northern District of Illinois assigned the case to Judge Matthew F. Kennelly.¹⁷²³ The ACLU's Illinois branch filed a class action against AT&T on May 22, with Studs Terkel and the Illinois House of Representatives' majority leader among the named plaintiffs.¹⁷²⁴ Judge Kennelly took assignment of this case as related to the first case.¹⁷²⁵ Judge Kennelly dismissed the second case on state-secrets grounds, but granted the plaintiffs leave to amend,¹⁷²⁶ which they did.¹⁷²⁷ A third class action against AT&T in Chicago federal court was filed on May 24¹⁷²⁸ and assigned to Judge Kennelly as related to the first two.¹⁷²⁹ All of these cases are now before Judge Walker.¹⁷³⁰

Among the cases filed in the Northern District of California, only the first action against AT&T was part of the multidistrict consolidation order. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006). But the others have also been consolidated before Judge Walker. Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 31, 2006); *see also* Aug. 14, 2006, docket sheet notations in Docket Sheet, *Spielfogel-Landis*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, *Campbell v. AT&T Commc'ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); Docket Sheet, *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006); Docket Sheet, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

"Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with local rules for the assignment of related actions." J.P.M.L. Rule 7.5(a).

1722. Compl., *Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006) (class action on behalf of the attorney and others against AT&T); *see also* Am. Compl., *id.* (May 22, 2006) (adding other telephone companies and the government as defendants); Second Am. Compl., *Joll v. AT&T Corp.*, *id.* (July 7, 2006) (removing the attorney as a plaintiff, which caused the case name to change, and removing the government as a defendant).

1723. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this report in the judge's chambers on May 24, 2007.

1724. Compl., *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006); *see also* Am. Compl., *id.* (June 5, 2006).

Studs Terkel died, while his action was pending, on October 31, 2008, at age 96. *See* Bart Barnes & Patricia Sullivan, *Celebrated Author Elevated Listening to an Art*, Wash. Post, Nov. 1, 2008, at A1; William Grimes, *Studs Terkel, Listener to Americans, Is Dead at 96*, N.Y. Times, Nov. 1, 2008, at B9.

1725. Executive Comm. Order, *id.* (June 2, 2006).

1726. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 1653; McLure, *supra* note 1650; Robinson, *supra* note 1653.

Judge Kennelly, however, denied AT&T's motion to dismiss on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903-04, 920.

1727. Second Am. Class Action Compl., *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006).

1728. Compl., *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006).

1729. Executive Comm. Order, *id.* (June 12, 2006).

1730. The first two cases were part of the original multidistrict consolidation. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, *Joll v. AT&T Corp.*, No. 3:06-cv-5485 (N.D. Cal. Sept. 7, 2006); Docket Sheet, *Terkel v. AT&T Corp.*, No. 3:06-cv-5340 (N.D. Cal. Aug. 30, 2006).

The third case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Waxman v. AT&T Corp.*, No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

Also transferred to Judge Walker were 31 cases¹⁷³¹ originally filed in the following districts:

- the Eastern District of California (one case);¹⁷³²
- the Southern District of California (one case);¹⁷³³
- the Southern District of Florida (two cases);¹⁷³⁴
- the Northern District of Georgia (one case);¹⁷³⁵
- the District of Hawaii (one case);¹⁷³⁶
- the Southern District of Indiana (two cases);¹⁷³⁷
- the Western District of Kentucky (one case);¹⁷³⁸

1731. In addition to the cases listed here, Verizon stated that it intended to remove one case filed against it in Nebraska's state court. Def.'s Administrative Mot., *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. Aug. 14, 2006) (expressing an intention to remove *Davis v. AT&T*, No. 1063569 (Neb. Dis. Ct. Douglas County)).

1732. Notice of Removal, *Conner v. AT&T*, No. 1:06-cv-632 (E.D. Cal. May 23, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, *Conner v. AT&T*, No. 3:06-cv-5576 (N.D. Cal. Sept. 12, 2006).

1733. Compl., *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, *Souder v. AT&T Corp.*, No. 3:06-cv-5067 (N.D. Cal. Aug. 22, 2006).

1734. Two cases were transferred from the Southern District of Florida:

1. Compl., *Fortnash v. AT&T Corp.*, No. 0:06-cv-60828 (S.D. Fla. June 12, 2006); *see* John Holland, *Hollywood Conservative Files Suit over NSA Wiretaps*, S. Fla. Sun-Sentinel, June 28, 2006, at 1B. This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Fortnash v. AT&T Corp.*, No. 3:06-cv-6385 (N.D. Cal. Oct. 12, 2006).
2. Notice of Removal, *Jacobs v. AT&T Corp.*, No. 0:07-cv-60365 (S.D. Fla. Mar. 14, 2007). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 6, *supra* note 1651; *see* Docket Sheet, *Jacobs v. AT&T Corp.*, No. 3:07-cv-2538 (N.D. Cal. May 14, 2007).

1735. Compl., *Lebow v. BellSouth Corp.*, No. 1:06-cv-1289 (N.D. Ga. May 25, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Lebow v. BellSouth Corp.*, No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007).

1736. Class Action Compl., *Crockett v. Verizon Wireless LLC*, No. 1:06-cv-345 (D. Haw. June 26, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Crockett v. Verizon Wireless LLC*, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006).

1737. Two cases were transferred from the Southern District of Indiana:

1. Compl., *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-847 (S.D. Ind. May 25, 2006).
2. Notice of Removal, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-932 (S.D. Ind. June 14, 2006).

These cases were transferred to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Cross v. AT&T Commc'ns, Inc.*, No. 3:06-cv-6224 (N.D. Cal. Oct. 3, 2006) (transfer of S.D. Ind. No. 1:06-cv-932); Docket Sheet, *Cross v. AT&T Commc'ns, Inc.*, No. 3:06-cv-6222 (N.D. Cal. Oct. 3, 2006) (transfer of S.D. Ind. No. 1:06-cv-847).

1738. Compl., *Suchanek v. Sprint Nextel Corp.*, No. 1:06-cv-71 (W.D. Ky. May 18, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation.

- the Eastern District of Louisiana (two cases);¹⁷³⁹
- the District of Maryland (one case);¹⁷⁴⁰
- the Western District of Michigan (one case);¹⁷⁴¹
- the District of Minnesota (one case);¹⁷⁴²
- the Eastern District of Missouri (one case);¹⁷⁴³
- the District of Montana (two cases);¹⁷⁴⁴
- the District of New Jersey (one case);¹⁷⁴⁵
- the Eastern District of New York (one case);¹⁷⁴⁶

Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, Suchanek v. Sprint Nextel Corp., No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006).

1739. Two cases were transferred from the Eastern District of Louisiana:

1. Compl., Herron v. Verizon Global Networks, Inc., No. 2:06-cv-2491 (E.D. La. May 12, 2006). This case was part of the original multidistrict consolidation. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, Herron v. Verizon Global Networks, Inc., No. 3:06-cv-5343 (N.D. Cal. Aug. 30, 2006).
2. Compl., Hardy v. AT&T Corp., No. 2:06-cv-2853 (E.D. La. May 30, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, Hardy v. AT&T Corp., No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006).

1740. Notice of Removal, Bready v. Verizon Md. Inc., No. 1:06-cv-2185 (D. Md. Aug. 23, 2006); *see* Pls.' Mot. for Remand, *id.* (Sept. 6, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Order, *id.* (Oct. 4, 2006) (administratively closing the action while the case is pending in the transferee court); Conditional Transfer Order 2, *supra* note 1651; *see* Docket Sheet, Bready v. Verizon Md. Inc., No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006).

1741. Am. Compl., Dubois v. AT&T Corp., No. 5:06-cv-85 (W.D. Mich. June 12, 2006); Compl., *id.* (May 30, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, Dubois v. AT&T Corp., No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006).

1742. Notice of Removal, Roche v. AT&T Corp., No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 5, *supra* note 1651; *see* Docket Sheet, Roche v. AT&T Corp., No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007).

1743. Notice of Removal, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 4:06-cv-1113 (E.D. Mo. July 20, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Transfer Order, *In re* NSA, No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re* NSA, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 1, *supra* note 1651 (noting objection to the transfer by the plaintiff); *see* Docket Sheet, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 3:06-cv-7934 (N.D. Cal. Dec. 29, 2006).

1744. Two cases were transferred from the District of Montana:

1. Compl., Fuller v. Verizon Commc'ns, Inc., No. 9:06-cv-77 (D. Mont. May 12, 2006).
2. Compl., Dolberg v. AT&T Corp., No. 9:06-cv-78 (D. Mont. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re* NSA, 444 F. Supp. 2d 1332; *see* Docket Sheet, Dolberg v. AT&T Corp., No. 3:06-cv-5269 (N.D. Cal. Aug. 28, 2006); Docket Sheet, Fuller v. Verizon Commc'ns, Inc., No. 3:06-cv-5267 (N.D. Cal. Aug. 28, 2006).

1745. Am. Notice of Removal, Chulsky v. Cellco P'ship, No. 2:06-cv-2530 (D.N.J. June 16, 2006); Notice of Removal, *id.* (June 6, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, Chulsky v. Cellco P'ship, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006).

- the Southern District of New York (four cases);¹⁷⁴⁷
- the District of Oregon (one case);¹⁷⁴⁸
- the Eastern District of Pennsylvania (one case);¹⁷⁴⁹
- the District of Rhode Island (three cases);¹⁷⁵⁰
- the Southern District of Texas (one case);¹⁷⁵¹

1746. Compl., Marck v. Verizon Commc'ns, Inc., No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Marck v. Verizon Commc'ns, Inc., No. 3:06-cv-5063 (N.D. Cal. Aug. 22, 2006).

1747. Four cases were transferred from the Southern District of New York:

1. Am. Compl., Mayer v. Verizon Commc'ns Inc., No. 1:06-cv-3650 (S.D.N.Y. June 23, 2006); Compl., *id.* (May 12, 2006).
2. Compl., Electron Tubes Inc. v. Verizon Commc'ns, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006).
3. Compl., Basinski v. Verizon Commc'ns Inc., No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006).
4. Compl., Payne v. Verizon Commc'ns, Inc., No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006).

The first case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Mayer v. Verizon Commc'ns, Inc., No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007). The other three cases were transferred to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; see Docket Sheet, Payne v. Verizon Commc'ns, Inc., No. 3:06-cv-6435 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Basinski v. Verizon Commc'ns Inc., No. 3:06-cv-6434 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Electron Tubes Inc. v. Verizon Commc'ns, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006).

One of these actions subsequently was dismissed. Notice of Voluntary Dismissal, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Feb. 16, 2007) (dismissing *Electron Tubes Inc.*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), transferred as *Electron Tubes Inc.*, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006)).

1748. Am. Compl., Hines v. Verizon Northwest, Inc., No. 3:06-cv-694 (D. Or. June 2, 2006); Compl., *id.* (May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Hines v. Verizon Northwest, Inc., No. 3:06-cv-5341 (N.D. Cal. Aug. 30, 2006).

1749. Compl., Solomon v. Verizon Commc'ns, Inc., No. 2:06-cv-2193 (E.D. Pa. May 24, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; see Docket Sheet, Solomon v. Verizon Commc'ns, Inc., No. 3:06-cv-6388 (N.D. Cal. Oct. 12, 2006).

1750. Three cases were transferred from the District of Rhode Island:

1. Compl., Bissitt v. Verizon Commc'ns, Inc., No. 1:06-cv-220 (D.R.I. May 15, 2006).
2. Compl., Mahoney v. AT&T Commc'ns, Inc., No. 1:06-cv-223 (D.R.I. May 15, 2006).
3. Compl., Mahoney v. Verizon Commc'ns, Inc., No. 1:06-cv-224 (D.R.I. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Bissitt v. Verizon Commc'ns, Inc., No. 3:06-cv-5066 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-220); Docket Sheet, Mahoney v. AT&T Commc'ns, Inc., No. 3:06-cv-5065 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-223); Docket Sheet, Mahoney v. Verizon Commc'ns, Inc., No. 3:06-cv-5064 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-224).

1751. Am. Compl., Trevino v. AT&T Corp., No. 2:06-cv-209 (S.D. Tex. May 19, 2006); Compl., *id.* (May 17, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Trevino v. AT&T Corp., No. 3:06-cv-5268 (N.D. Cal. Aug. 28, 2006).

The plaintiffs voluntarily dismissed the action on November 26, 2008. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008).

- the Western District of Texas (one case);¹⁷⁵² and
- the Western District of Washington (one case).¹⁷⁵³

Two of these actions subsequently were dismissed voluntarily.¹⁷⁵⁴

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.¹⁷⁵⁵

A few actions against telephone companies were dismissed early. The district court for the District of Nebraska dismissed a pro se case filed against AT&T, Verizon, and BellSouth in state court and removed to federal court.¹⁷⁵⁶ Plaintiffs voluntarily dismissed actions filed in the District of the District of Columbia (three cases),¹⁷⁵⁷ the Eastern District of Missouri (one case),¹⁷⁵⁸ and the Middle District of Tennessee.¹⁷⁵⁹

1752. Third Am. Compl., *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex. Aug. 14, 2006); Second Am. Compl., *id.* (June 12, 2006); First Am. Compl., *id.* (June 5, 2006); Compl., *id.* (May 18, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, *Harrington v. AT&T, Inc.*, No. 3:06-cv-5452 (N.D. Cal. Sept. 6, 2006).

1753. Compl., *Derosier v. Cingular Wireless LLC*, No. 2:06-cv-917 (W.D. Wash. June 28, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1651; *see* Docket Sheet, *Derosier v. Cingular Wireless LLC*, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006).

1754. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008); Voluntary Dismissal Order, *Electron Tubes Inc. v. Verizon Comm'ns*, No. 3:06-cv-6433 (N.D. Cal. Feb. 22, 2007) (dismissing *Electron Tubes Inc. v. Verizon Commc'ns*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006)).

1755. *See In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 956 (N.D. Cal. 2009). Plaintiffs filed consolidated master complaints against

1. defendants affiliated with Cingular, Master Consolidated Cingular Compl., *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 16, 2007);
2. defendants affiliated with Comcast, Master Comcast Consolidated Compl., *Id.* (Jan. 16, 2007);
3. defendants affiliated with Sprint, Master Consolidated Spring Compl., *Id.* (Jan. 16, 2007);
4. defendants affiliated with Verizon, Master Consolidated Verizon Compl., *Id.* (Jan. 16, 2007); and
5. defendants affiliated with BellSouth, Master Consolidated BellSouth Compl., *Id.* (Jan. 16, 2007).

1756. Mem. Op., *Tyler v. AT&T*, No. 8:06-cv-523 (D. Neb. Aug. 30, 2006) (finding that the complaint stated no facts and claimed no relief), *sum. aff'd*, Judgment, *Tyler v. AT&T*, No. 06-4174 (8th Cir. Feb. 28, 2007); *see* Am. Compl., *Tyler*, No. 8:06-cv-523 (D. Neb. Aug. 4, 2006); Notice of Removal, *id.* (July 31, 2006).

Upon learning of the dismissal, the JPML vacated its conditional transfer order. Order Vacating Conditional Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. Sept. 7, 2006), filed in *Tyler*, No. 8:06-cv-523 (D. Neb. Sept. 11, 2006).

1757. Notice of Voluntary Dismissal, *Phillips v. BellSouth Corp.*, No. 1:06-cv-918 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Ludman v. AT&T Inc.*, No. 1:06-cv-917 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Driscoll v. Verizon Commc'ns, Inc.*, No. 1:06-cv-916 (D.D.C. May 25, 2006); *see* Compl., *Phillips*, No. 1:06-cv-918 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Ludman*, No. 1:06-cv-917 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Driscoll*, No. 1:06-cv-916 (D.D.C. May 25, 2006).

In 2008, an additional action was filed in the Southern District of New York¹⁷⁶⁰ and transferred to Judge Walker.¹⁷⁶¹

On June 3, 2009, Judge Walker dismissed all actions against telephone companies in light of immunity granted by Congress for these cases.¹⁷⁶² Appeals are pending.¹⁷⁶³

Suits by the Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.¹⁷⁶⁴ The government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,¹⁷⁶⁵ Missouri,¹⁷⁶⁶

These cases were included in Verizon's original multidistrict consolidation motion. Verizon Transfer Mem. at 4–7, *In re NSA*, No. 1791 (J.P.M.L. May 24, 2006), filed, *e.g.*, in *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 15, 2006).

1758. Notice of Dismissal, *Mink v. AT&T Corp.*, No. 4:06-cv-831 (E.D. Mo. June 22, 2006); Docket Sheet, *id.* (May 26, 2006) (noting July 5, 2006, dismissal); *see* Am. Notice of Removal, *id.* (June 12, 2006); Notice of Removal, *id.* (May 26, 2006). The plaintiff refiled in state court, the action was removed again, it was conditionally transferred as part of the multidistrict consolidation, and the plaintiff challenged the transfer. *See supra* note 1743.

1759. Order, *Potter v. BellSouth Corp.*, No. 3:06-cv-469 (M.D. Tenn. July 17, 2006); Notice of Dismissal, *id.* (July 13, 2006); *see* Compl., *id.* (May 15, 2006). This case is listed in the multidistrict consolidation order, *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006), but the transfer was vacated because the case was dismissed before transfer. Order Vacating Transfer, *In re NSA*, No. 1791 (J.P.M.L. Aug. 17, 2006), filed in *Potter*, No. 3:06-cv-469 (M.D. Tenn. Aug. 21, 2006).

1760. Compl., *McMurray v. Verizon Commc'ns Inc.*, No. 1:08-cv-6264 (S.D.N.Y. July 10, 2008).

1761. Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Dec. 19, 2008), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Dec. 23, 2008); *see* Docket Sheet, *McMurray v. Verizon Commc'ns Inc.*, No. 3:09-cv-131 (N.D. Cal. Jan. 12, 2009).

1762. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009); *see id.* at 956 (“On July 7, 2008, after months of election-year legislative exertion that received considerable press coverage, Congress enacted [the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008) (H.R. 6304)].”); *see also* *Jewel v. NSA*, ___ F. Supp. 2d ___, ___, 2010 WL 235075 (N.D. Cal. 2010) (p.7 of filed op.);

1763. *E.g.*, Docket Sheet, *Hepting v. AT&T Corp.*, No. 09-16676 (9th Cir. Aug. 7, 2009) (listing 33 consolidated appeals).

1764. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093 (N.D. Cal. 2009); Order at 1, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. July 24, 2007) (denying summary judgment in state cases), available at 2007 WL 2127345 [hereinafter *State Cases Summ. J. Denial Order*]; *see* Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, Portland Press Herald, Aug. 22, 2006, at A1 (reporting that Maine is the third state sued, following suits against Missouri and New Jersey); Judy Harrison, *Wiretaps Lawsuit Moved to California*, Bangor Daily News, Feb. 17, 2007, at 1 (reporting similar suits filed in Maine, Missouri, New Jersey, Connecticut, and Vermont).

1765. Compl., *United States v. Farber*, No. 3:06-cv-2683 (D.N.J. June 14, 2006); *see id.* at 2 (“Compliance with the subpoenas issued by those officers would first place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security.”); *see also* Rick Hepp, *ACLU Petitions for Probe of Phone-Record Access*, Newark Star-Ledger, June 16, 2006, at 43.

Maine,¹⁷⁶⁷ Connecticut,¹⁷⁶⁸ and Vermont.¹⁷⁶⁹ Also filed in Missouri, and transferred to Judge Walker, is an action by the state against the telephone companies.¹⁷⁷⁰

Judge John A. Woodcock, Jr., of the District of Maine, granted the government a preliminary injunction against the state of Maine's investigation.¹⁷⁷¹

The JPML consolidated all of these actions before Judge Walker,¹⁷⁷² who denied the government's motions for summary judgment on supremacy and foreign affairs grounds.¹⁷⁷³ On the government's state-secrets motion, Judge Walker ruled that "some of the information sought [by the states in their] investigations may implicate the state secrets privilege," but "some questions posed in these investigations fall outside the privilege's scope."¹⁷⁷⁴ Judge Walker decided to await fur-

The name for the New Jersey case changed twice, because New Jersey's attorney general resigned, was initially replaced by an acting attorney general, and then was replaced by a permanent attorney general. Order Amending Caption, *United States v. Rabner*, No. 3:06-cv-2683 (D.N.J. Oct. 17, 2006) (substituting the new attorney general Stuart Rabner as the lead defendant); Letter, *United States v. Milgram*, No. 3:06-cv-2683 (D.N.J. Oct. 12, 2006) (identifying Anne Milgram as the acting attorney general); see Richard G. Jones, *In New Jersey, New Nominee to Top Law Job*, N.Y. Times, Aug. 25, 2006, at A20 (reporting on Governor Corzine's nomination of Stuart J. Rabner to replace Farber); Laura Mansnerus & David W. Chen, *New Jersey Attorney General Quits After Investigation Finds Ethics Breach*, N.Y. Times, Aug. 16, 2006, at A18.

1766. Compl., *United States v. Gaw*, No. 4:06-cv-1132 (E.D. Mo. July 25, 2006); see Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006.

1767. *United States v. Adams*, 473 F. Supp. 2d 108, 112 (D. Me. 2007); Compl., *United States v. Adams*, No. 1:06-cv-97 (D. Me. Aug. 21, 2006); see Aull, *supra* note 1764; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

1768. Compl., *United States v. Palermino*, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006).

1769. Compl., *United States v. Volz*, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006).

1770. Notice of Removal, *Gaw v. AT&T Commc'ns of the Southwest Inc.*, No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006); see *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093-94 (N.D. Cal. 2009); State Cases Summ. J. Denial Order, *supra* note 1764, at 3.

1771. *Adams*, 473 F. Supp. 2d 108.

1772. Transfer Order, *In re NSA Records Litig.*, No. 1791 (J.P.M.L. issued Feb. 15, 2007), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007); see State Cases Summ. J. Denial Order, *supra* note 1764, at 2; Docket Sheet, *United States v. Volz*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007) (action transferred from D. Vt.); Docket Sheet, *United States v. Palermino*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007) (action transferred from D. Conn.); Docket Sheet, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007) (action transferred from D.N.J.); Docket Sheet, *United States v. Adams*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007) (action transferred from D. Me.); Docket Sheet, *United States v. Gaw*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007) (action transferred from E.D. Mo.); Docket Sheet, *Clayton v. AT&T Commc'ns of the Southwest Inc.*, No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007) (action transferred from W.D. Mo.); see also Harrison, *supra* note 1764.

The name for the government's action against Missouri changed upon the expiration of Steve Gaw's term on the Missouri Public Service Commission; Commissioner Robert M. Clayton III remained a defendant. Order, *United States v. Clayton*, No. 3:07-cv-1242 (N.D. Cal. Dec. 12, 2007).

1773. State Cases Summ. J. Denial Order, *supra* note 1764, at 15-34.

1774. *Id.* at 35.

ther guidance from the court of appeals in the pending appeals before deciding the matter more precisely.¹⁷⁷⁵

On June 3, 2009, Judge Walker granted summary judgment to the federal government in all of these actions in light of immunity granted by Congress to the telephone companies.¹⁷⁷⁶

Suits to Discover Secret Documents

On the day the *New York Times* first reported on the warrantless wiretap program, the Electronic Privacy Information Center submitted requests under the Freedom of Information Act to four government agencies to obtain documents concerning the program.¹⁷⁷⁷ The ACLU and the National Security Archive Fund, Inc., submitted similar requests four days later.¹⁷⁷⁸ Disappointed by what was produced, the organizations sought relief in the U.S. District Court for the District of Columbia, which assigned the cases to Judge Henry H. Kennedy, Jr.¹⁷⁷⁹ On September 5, 2007, Judge Kennedy ruled that some of the withheld documents have been properly withheld and some need further justification to withhold.¹⁷⁸⁰ On October 31, 2008, Judge Kennedy ruled additional documents properly withheld, but he also ruled that he needed to review 10 documents in camera to determine whether they, or parts of them, should be disclosed.¹⁷⁸¹ Seventeen days later, the government lodged the documents for Judge Kennedy's review.¹⁷⁸²

The Electronic Frontier Foundation, who filed the first action against telephone companies, sued the Justice Department under FOIA for release of the secret FISC orders that the government claimed obviated the need for surveillance without warrants.¹⁷⁸³ The U.S. District Court for the District of the District of Co-

1775. *Id.*

1776. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

1777. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 62–63 (D.D.C. 2007); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 33–34 (D.D.C. 2006); Compl. at 3, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006) [hereinafter *Elec. Privacy Info Ctr. Compl.*].

1778. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 63; Compl. at 6, *ACLU v. Dep't of Justice*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006) [hereinafter *D.D.C. ACLU Compl.*]; see *Romero & Temple-Raston*, *supra* note 226, at 71.

1779. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; D.D.C. *ACLU Compl.*, *supra* note 1778; Docket Sheet, *ACLU*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006); *Elec. Privacy Info Ctr. Compl.*, *supra* note 1777; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006); see Dan Eggen, *A Judge Finds Administration's Secrecy "Baffling,"* Wash. Post, Sept. 7, 2007, at A19.

Tim Reagan interviewed Judge Kennedy for this report in the judge's chambers on November 12, 2008.

1780. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56 (D.D.C. 2007).

1781. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d, 65 (D.D.C. 2008); see *Judge Seeks Wiretapping Documents*, N.Y. Times, Nov. 2, 2008, at 18.

1782. Notice of Lodging, *ACLU*, No. 1:06-cv-214 (D.D.C. Nov. 17, 2008).

1783. Compl., *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

lumbia assigned the case to Judge Thomas F. Hogan,¹⁷⁸⁴ who on August 14, 2007, granted the government's motion for summary judgment, finding that the orders meet FOIA's national defense, statutory, and law enforcement exemptions.¹⁷⁸⁵

On August 9, 2007, the ACLU filed a motion directly with the FISC that its orders on warrantless wiretapping be made public.¹⁷⁸⁶ On August 16, the court's Presiding Judge Colleen Kollar-Kotelly issued an order that the government respond to the motion.¹⁷⁸⁷ Judge John D. Bates issued a public opinion on December 11 denying the motion.¹⁷⁸⁸ This was the third public opinion ever issued by the court, and it resolved the court's first proceeding in its history to which the government was not the only party.¹⁷⁸⁹ Judge Bates rejected the ACLU's suggestion that the court determine what need not be withheld to protect properly classified information.

[T]he proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review. The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, gov-

1784. Docket Sheet, *id.*

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010.

1785. Mem. Op. at 14–18, *id.* (Aug. 14, 2007) [hereinafter D.D.C. *Elec. Frontier Found. Summ. J. Op.*]; see Mem. Op., *id.* (Jan. 29, 2008) (denying motion for reconsideration based on new revelations in the press).

[FOIA] does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

....

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

....

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . .

5 U.S.C. § 552(b).

1786. *In re* Mot. for Release of Ct. Rs., 526 F. Supp. 2d 484, 485 (F.I.S.C. 2007); see Dan Eggen, *Secret Court Asks for White House View on Inquiry*, Wash. Post, Aug. 18, 2007, at A3; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. Times, Aug. 18, 2007, at A10.

1787. Scheduling Order, *In re* Motion for Release of Court Records, No. Misc. 07-01 (F.I.S.C. Aug. 16, 2007); see Eggen, *supra* note 1786; Lichtblau, *supra* note 1786.

1788. *In re* Ct. Rs., 526 F. Supp. 2d 484; see James Risen, *Surveillance Court Declines to Release Secret Opinions*, N.Y. Times, Dec. 12, 2007, at A27; Elizabeth Williamson, *Secret U.S. Intelligence Court Intends to Keep Wiretap Rulings Under Wraps*, Wash. Post, Dec. 12, 2007, at A27.

1789. *In re* Ct. Rs., 526 F. Supp. 2d 484, 488; see Williamson, *supra* note 1788.

ernment officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable.¹⁷⁹⁰

Challenge: Classified Evidence

The Portland case against the government concerns an evidentiary document so secret that it can be seen only by judges and has to be stored in a sensitive compartmented information facility (SCIF).¹⁷⁹¹ Government attorneys will not even disclose whether they are cleared to see it.

Judge King, District of Oregon

The plaintiffs attempted to file under seal a classified document inadvertently disclosed to them in an asset-freezing proceeding.¹⁷⁹² They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."¹⁷⁹³ More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.¹⁷⁹⁴ A government security officer reviewed the document in chambers and determined that it contained "sensitive compartmented information"—information at the highest level of classification—and, therefore, needed to be housed in a SCIF.¹⁷⁹⁵

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.¹⁷⁹⁶ Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.¹⁷⁹⁷ The government said that creating a SCIF for the court would be infeasible because of the time and expense re-

1790. *In re Ct. Rs.*, 526 F. Supp. 2d 484, 496.

1791. *See* Reagan, *supra* note 165, at 19 (describing SCIFs).

1792. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Mem. in Supp. to File Material Under Seal and Req. for In Camera Inspection, *Al-Haramain Islamic Found. v. Bush*, 3:06-cv-274 (D. Or. Feb. 28, 2006); *see* Green, *supra* note 1683; Green, *U.S. Attacks Lawsuit*, *supra* note 1681; Liptak, *supra* note 1657.

1793. Mem. in Supp. to File Material Under Seal and Req. for In Camera Inspection, *supra* note 1792; Interview with Hon. Garr M. King, Feb. 14, 2007; *see* Keefe, *supra* note 1681, at 31.

1794. Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Tr., *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21, 2006) [hereinafter *Al-Haramain Islamic Found. Mar. 21, 2006, Tr.*], also filed as Attach. C, Defs.' Resp. to Oregonian's Mot. to Unseal Records, *id.* (Apr. 14, 2006); *see also* Liptak, *supra* note 1654; Liptak, *supra* note 1657.

1795. *Al-Haramain Islamic Found. Mar. 21, 2006, Tr.*, *supra* note 1794; Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Gov't Lodging Reply at 4, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006); *see also* Keefe, *supra* note 1681, at 31; Liptak, *supra* note 1657.

1796. *Al-Haramain Islamic Found. Mar. 21, 2006, Tr.*, *supra* note 1794; Interview with Hon. Garr M. King, Feb. 14, 2007.

1797. *Al-Haramain Islamic Found. Mar. 21, 2006, Tr.*, *supra* note 1794; Interview with Hon. Garr M. King, Feb. 14, 2007; *see* Tim Fought, *Mystery Document Headed to Seattle*, *Seattle Times*, Mar. 24, 2006, at B5.

quired.¹⁷⁹⁸ So it was agreed that the document would be sent to the Western District of Washington’s U.S. Attorney’s SCIF in Seattle.¹⁷⁹⁹

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.¹⁸⁰⁰ The document would be stored in a sealed envelope addressed to Judge King, inside a locked bag to which only Judge King and a security officer—not the FBI—would have a key, at the FBI’s SCIF in Portland.¹⁸⁰¹

The government moved for an order (1) preventing the plaintiffs from having further access to the classified evidentiary document and (2) requiring the return of any copies of the document in the plaintiffs’ possession.¹⁸⁰² In opposition to the government’s motion, the plaintiffs filed under seal a declaration by one of their attorneys “describing the [classified evidentiary] document as he recalls seeing it.”¹⁸⁰³ The usual procedure for the court’s accepting a sealed filing is for the clerk’s office to unseal the filing to make a copy for the judge and then file the document under seal.¹⁸⁰⁴ Despite the plaintiffs’ including a cover letter with the sealed declaration asking that it be delivered to Judge King unopened, the clerk’s office followed its usual procedure.¹⁸⁰⁵ Judge King advised the parties of the situation, and the government stated that because the declaration described a classified document, it also should be treated as classified and stored in the SCIF.¹⁸⁰⁶ After the judge read the document, security officers picked it up and deposited it in the judge’s locked bag in the SCIF, using the judge’s key to do so.¹⁸⁰⁷

The government has said that it may be necessary to purge the plaintiffs’ attorneys’ computers of data associated with their declaration of what they remember about the classified document.¹⁸⁰⁸

Although he saw the classified evidentiary document,¹⁸⁰⁹ Judge King was careful not to rely on its contents in his ruling against dismissal.¹⁸¹⁰ Judge King

1798. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1794.

1799. *Id.*; see Fought, *supra* note 1797; Keefe, *supra* note 1681, at 31.

1800. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Hon. Garr M. King, Feb. 14, 2007.

1801. Tr. at 32–33, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006) [hereinafter *Al-Haramain Islamic Found.* Apr. 25, 2006, Tr.], also filed as Attach. 1, Gov’t Lodging Reply, *supra* note 1795; see Liptak, *supra* note 1657.

1802. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1229 (granting the government’s motion); Defs.’ Mot. to Prevent Pls.’ Access to Sealed Classified Doc., *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006).

1803. Pls.’ Resp. to Defs.’ Mot. to Deny Access to Sealed Doc. at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006).

1804. Interview with Hon. Garr M. King, Feb. 14, 2007.

1805. *Id.*

1806. *Id.*

1807. *Id.*

1808. *Id.*; see Liptak, *supra* note 1657.

1809. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1794; see Green, *Feds’ Stance*, *supra* note 1681.

granted the government's motion to deny the plaintiffs access to it, but he said that the plaintiffs may file in camera affidavits "attesting to the contents of the document from their memories," and that the government should consider providing the plaintiffs with access to a redacted version of the document under a protective order.¹⁸¹¹

It was difficult for the plaintiffs in this case to determine whom on the government side they could serve with papers describing the classified evidentiary document.¹⁸¹² The government said that the identities of persons with clearance to see such documents was a state secret.¹⁸¹³ On one occasion, the judge asked a government attorney before him if he had such clearance.¹⁸¹⁴ The attorney responded that he did not think he was permitted to answer that question.¹⁸¹⁵ The solution to this problem was to have the plaintiffs send classified information to the government on a secure fax line, leaving it up to the government to ensure that only authorized persons received the classified information.¹⁸¹⁶

Court of Appeals for the Ninth Circuit

Members of the appellate panel also reviewed the classified document in camera, pursuant to procedures established by court information security officers.¹⁸¹⁷

Having reviewed it *in camera*, we conclude that the Sealed Document is protected by the state secrets privilege, along with the information as to whether the government surveilled Al-Haramain. We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be—and has been—provided for us to make a meaningful examination. The process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open

1810. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1223 n.3 (D. Or. 2006); *but see id.* at 1231 ("it is no longer secret to plaintiffs whether their communications were intercepted as described in the Sealed Document").

1811. *Id.* at 1229; *see* Liptak, *supra* note 1654; Liptak, *supra* note 1657; MacLean, *supra* note 1681.

Although the plaintiffs' attorneys said that they had surrendered all copies of the document in their possession, they could not state whether their clients still had any copies without violating the attorney-client privilege. Pursuant to the government's request, Judge King ordered the plaintiffs to deliver to his chambers all copies of the sealed document in their possession or under their control. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1229. It was reported that "copies of the document appear to have been sent abroad, and the government concedes that it has made no efforts to contact people overseas who it suspects have them." Liptak, *supra* note 1657. In addition, it appears that a reporter for *The Washington Post* has reviewed the document. *Id.*; MacLean, *supra* note 1681.

1812. Interview with Hon. Garr M. King, Feb. 14, 2007.

1813. *Id.*; *see* Liptak, *supra* note 1657.

1814. Interview with Hon. Garr M. King, Feb. 14, 2007.

1815. *Id.*

1816. *Id.*

1817. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007).

court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.¹⁸¹⁸

The court of appeals concluded that it was not appropriate to substitute as evidence the plaintiffs' memories of the privileged document for the document itself; accurate memories would be as privileged as the document, and inaccurate memories would be worse.¹⁸¹⁹

Judge Walker, Central District of California

On January 5, 2009, Judge Walker ordered the government to present to him the classified document and to grant, within eight weeks, security clearances to one or more of the plaintiffs' attorneys.¹⁸²⁰

The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document *ex parte* and *in camera*. The court will then issue an order regarding whether plaintiffs may proceed—that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be *ex parte*. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders.¹⁸²¹

The government cleared two attorneys within the court's deadline.¹⁸²² But the government informed the court that whether the attorneys could see the classified document was a matter for the Executive Branch to decide, and the Executive Branch decided that the attorneys still could not see the document.¹⁸²³ On May 22,

1818. *Id.* at 1203.

1819. *Id.* at 1204.

1820. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089–90 (N.D. Cal. 2009); *see Johnson, supra* note 1690.

The court of appeals determined that this order was not appropriate for interlocutory appeal. Order, *Al-Haramain Islamic Found., Inc. v. Obama*, No. 09-15266 (9th Cir. Feb. 27, 2009).

1821. *In re NSA*, 595 F. Supp. 2d at 1089.

1822. Government's Response to Court Orders 1, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Feb. 27, 2009); Plaintiffs' Supplemental Case Management Statement 1, *id.* (Feb. 18, 2009) (noting that the attorneys were informed of their clearance on Feb. 12, 2009); *see Johnson, supra* note 1690.

1823. Government's Response to Court Orders 3–12, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Nov. 5, 2008).

2009, Judge Walker issued an order to show cause why he should not therefore rule in the plaintiffs' favor as to liability.¹⁸²⁴

On June 5, 2009, Judge Walker continued his order to show cause and instead ordered briefing on summary judgment for plaintiffs against the government.¹⁸²⁵

Plaintiffs shall base their motion on non-classified evidence. If defendants rely upon the Sealed Document or other classified evidence in response, the court will enter a protective order and produce such classified evidence to those of plaintiffs' counsel who have obtained top secret/sensitive compartmented information clearances . . . for their review. Otherwise, the court will consider the motion on non-classified evidence.¹⁸²⁶

Judge Kennedy, District of the District of Columbia

To decide the validity of exemption claims for documents withheld by the government in response to FOIA requests for information on the warrantless wiretap programs, Judge Kennedy reviewed itemized exemption claims in camera.¹⁸²⁷

The exemption claims were classified and submitted *ex parte*.¹⁸²⁸ Plaintiffs and their attorneys were not permitted to see them, and neither were Judge Kennedy's law clerks, although the clerks had secret security clearances.¹⁸²⁹

Review of the exemption claims required many hours of Judge Kennedy's time over several days without the assistance of staff.¹⁸³⁰ Doors were closed, windows were covered, and the documents were under the judge's immediate control at all times.¹⁸³¹ The documents were not stored in chambers; court information security officers, whose offices and storage facilities are a few blocks away from the federal courthouse in the District of Columbia, delivered and retrieved the documents on request.¹⁸³²

In denying the government's initial motion for summary judgment, Judge Kennedy expressed frustration that he was denied assistance of law clerks to review classified declarations supporting the motion:

Without expressing approval or disapproval of DOJ's use of these *ex parte* declarations—and without opining regarding whether the declaration redactions are legitimately classified (beyond a measure of skepticism as to some portions thereof)—the court does express substantial frustration with one aspect of the Executive's approach to this information: In part for purposes of this case, this judicial officer had his law clerk cleared through an extensive, high-level background investigation so that the clerk would have access to classified information, and specifically to the documents lodged in this case. Notwithstanding the clearance obtained, it has become apparent that the Executive will

1824. Order to Show Cause re Liability, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. May 22, 2009), available at 2009 WL 1468792; see Carrie Johnson, *Showdown Looming on "State Secrets,"* Wash. Post, May 26, 2009, at A4.

1825. Briefing Order, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. June 5, 2009); see Carrie Johnson, *Judge Revisits Warrantless Eavesdropping,* Wash. Post, June 4, 2009, at A4.

1826. Briefing Order, *Al-Haramain Islamic Found.*, No. 3:07-cv-109 (N.D. Cal. June 5, 2009).

1827. Interview with Hon. Henry H. Kennedy, Jr., Nov. 12, 2008.

1828. *Id.*

1829. *Id.*

1830. *Id.*

1831. *Id.*

1832. *Id.*

not grant the clerk access to the classified declarations filed here, at least not in the absence of vociferous resistance from this judicial officer. This stance is baffling and has been significantly disruptive to the court's review of this matter.¹⁸³³

Judge Hogan, District of the District of Columbia

Although Judge Hogan would later join the FISC, he was not on that court when it issued orders that became the object of the Electronic Frontier Foundation's 2007 FOIA action.¹⁸³⁴ To resolve the FOIA action, Judge Hogan examined the classified orders as well as classified affidavits supporting the government's objections to the FOIA request.¹⁸³⁵ When reviewing classified documents that are not kept in the court's file, Judge Hogan initials and dates each document he examines to facilitate assurances that the copies he examined can later be included in the appellate record, if necessary.¹⁸³⁶

Challenge: Classified Arguments

The government regards the classified arguments in these cases as so secret that it will not permit even attorneys or law clerks with security clearances to see them.¹⁸³⁷ It was reported that President Bush personally decided who was cleared to see documents related to the surveillance programs at issue in this litigation.¹⁸³⁸ It was also reported that information about these programs was closely held even at the NSA:

Intense and unwavering secrecy has been the hallmark of these programs since their inception, and even the number of people at NSA headquarters who know the details of the operations has deliberately been kept to a minimum for security reasons. Each of these programs operates from inside its own special "red seal" work center at Fort Meade, meaning that those NSA employees cleared for these specific programs must pass one at a time through a booth containing a retinal or iris scanner and other biometric sensors before they can get inside their operations center.¹⁸³⁹

1833. Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56, 63 n.5 (D.D.C. 2007); see Eggen, *supra* note 1779 (quoting text).

1834. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

1835. *Id.*

1836. *Id.*

1837. See Liptak, *supra* note 1657.

In addition to submitting classified arguments in the cases described here, the government offered to submit classified arguments to support its motion to enjoin Maine's investigation of Verizon's assistance in government surveillance if the court would not grant its motion on the basis of unclassified arguments. TRO Mem. at 13 n.3, United States v. Adams, No. 1:06-cv-97 (D. Me. Feb. 6, 2007). But because the court did grant the government's motion on the basis of unclassified arguments, the government did not present classified arguments. See United States v. Adams, 473 F. Supp. 2d 108 (D. Me. 2007).

1838. See Lichtblau, *supra* note 1219.

1839. Aid, *supra* note 1646, at 288.

Judge King, District of Oregon

The Oregonian intervened and filed a motion to unseal the classified evidentiary document in the Portland case against the government.¹⁸⁴⁰ In response, the government lodged a classified declaration for ex parte in camera review.¹⁸⁴¹ The government subsequently lodged a second classified declaration for ex parte in camera review “for reasons that must be explained in the superseding classified declaration.”¹⁸⁴² Judge King stated at a telephonic hearing, “I believe the Court should avoid, if possible, receiving secret declarations from one side and basing decisions on facts or arguments not disclosed to the other side. Now, I hasten to say that I understand that in issues involving national security that may be necessary.”¹⁸⁴³ Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian’s motion,¹⁸⁴⁴ which Judge King denied.¹⁸⁴⁵

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.¹⁸⁴⁶ Judge King ordered that the classified lodgings be brought to the Portland SCIF, but stated that he had not yet decided whether he was going to review them.¹⁸⁴⁷ Ultimately he decided to review the classified materials¹⁸⁴⁸ and permit the case to proceed.¹⁸⁴⁹

The classified lodgings by the government were deposited in the same locked bag in the FBI’s SCIF as housed the plaintiffs’ classified evidentiary document.¹⁸⁵⁰ The procedure for Judge King’s review of materials in the locked bag

1840. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006); D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1683 (noting the filing of the motion on Mar. 17, 2006); *see Green, U.S. Attacks Lawsuit*, *supra* note 1681.

1841. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1683 (noting the filing of a lodging notice on Apr. 14, 2006); *see Green, U.S. Attacks Lawsuit*, *supra* note 1681.

The government argued, “On the basis of the public record, therefore, the Oregonian’s Motion to Unseal Records (Mar. 17, 2006) [Docket Nos. 7 & 8] should be denied. Should the Court require additional detail regarding the sealed classified document in this case, however, such detail can only be conveyed in a classified format, which must be reviewed ex parte and in camera, and the Court’s review of Defendants’ classified declaration is appropriate in these circumstances.” Gov’t Lodging Reply, *supra* note 1795, at 3.

1842. Gov’t Lodging Reply, *supra* note 1795, at 2 n.1; *see* Notice of Lodging of Superseding Material, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. May 12, 2006).

1843. *Al-Haramain Islamic Found.* Apr. 25, 2006, Tr., *supra* note 1801.

1844. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

1845. *Id.* at 1218, 1232–33.

1846. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. July 25, 2006) (noticing the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006) (noticing the lodging of (1) a classified brief, (2) a classified declaration by the director of national intelligence, (3) a classified declaration by the director of the NSA, and (4) a classified opposition to the plaintiffs’ pending motion to compel discovery).

1847. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1683.

1848. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1683.

1849. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 1654.

1850. Interview with Hon. Garr M. King, Feb. 14, 2007.

was to request that the bag be brought to his chambers, where Judge King would review the materials in private.¹⁸⁵¹ When Judge King was finished reviewing the materials, he would lock them in the bag with any notes he took, and chambers staff would arrange for a security officer at the FBI to come back and retrieve the locked bag from Judge King.¹⁸⁵²

Judge King observed that it is difficult to handle a case if there is material the law clerk cannot see.¹⁸⁵³ He has to be careful what he tells her, and she cannot help him with the material she cannot see.¹⁸⁵⁴ The judge's law clerks were going to seek security clearances for this case, but they stopped looking into it when the case was transferred to Judge Walker.¹⁸⁵⁵

Judge Taylor, Eastern District of Michigan

In Detroit, on June 12, 2006, Judge Taylor heard arguments on the ACLU's motion for partial summary judgment against the government.¹⁸⁵⁶ The government filed a redacted brief in response to this motion, lodging a classified unredacted brief with classified supporting declarations in a secure location in Washington, D.C.¹⁸⁵⁷ The government filed a notice saying, "The Court may contact the undersigned counsel to assist in securing delivery of these submissions for review at the Court's convenience."¹⁸⁵⁸ Judge Taylor elected to wait until after the hearing to review the classified documents,¹⁸⁵⁹ but she considered them in issuing the injunction.¹⁸⁶⁰

1851. *Id.*

1852. *Id.*; Letter from Carr Sahler, law clerk to Hon. Garr M. King, Apr. 23, 2007.

1853. Interview with Hon. Garr M. King, Feb. 14, 2007.

1854. *Id.*

1855. *Id.*

1856. E.D. Mich. *ACLU* Docket Sheet, *supra* note 1669; *see* Pls.' Partial Summ. J. Mot., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006); *see also* David Ashenfelder, *Battle over Wiretaps to Begin Today*, Det. Free Press, June 12, 2006; Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, N.Y. Times, June 13, 2006, at A17; Niraj Warikoo, *Wiretap Suit All About Power*, Det. Free Press, June 12, 2006.

1857. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Mot. to Dismiss at 4 n.3, *id.* (May 26, 2006); *see* Liptak, *supra* note 1856; Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, L.A. Times, June 12, 2006, at 5.

Strictly speaking, the defendants' brief supported a separate motion and was not a response to the plaintiffs' motion, but the defendants said, "Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state-secrets privilege—were the appropriate response to Plaintiffs' Motion." Defs.' Mot. for Clarification at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 2, 2006); *see* Ashenfelder, *supra* note 1856.

1858. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006).

1859. Tr., *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 12, 2006); *see* Liptak, *supra* note 1856 (reporting that Judge Taylor did not review the classified documents before the hearing).

1860. *ACLU v. NSA*, 438 F. Supp. 2d 754, 764 (E.D. Mich. 2006) ("the court acknowledges that it has reviewed all of the materials Defendants submitted *ex parte* and *in camera*").

Judge Taylor reviewed classified documents three times.¹⁸⁶¹ Each time, she reviewed the documents in her chambers without assistance of chambers staff and under observation of the security officer who brought the documents to her.¹⁸⁶² The security officer told Judge Taylor that she could take notes, but the security officer would have to take them back with her.¹⁸⁶³ So the judge decided not to take notes.¹⁸⁶⁴

Judges Batchelder, Gilman, and Gibbons, Sixth Circuit

In the appeal of Judge Taylor's injunction against warrantless wiretaps, the court of appeals granted the government permission "to submit separate public and sealed versions of briefs to protect classified information."¹⁸⁶⁵ On each of the days that the government filed redacted versions of its opening and reply briefs, it filed a "Notice of Lodging of In Camera, Ex Parte Brief."¹⁸⁶⁶

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.¹⁸⁶⁷ The judges worked out with the parties procedures for the judges' review of classified information.¹⁸⁶⁸ Judges Gilman and Gibbons have chambers in Memphis, Tennessee, and Judge Batchelder has chambers in Medina, Ohio. The three judges met with the parties in a district court conference room in Memphis on January 8, 2007, approximately three weeks before oral argument.¹⁸⁶⁹ The meeting was transcribed, and the transcript was sealed.¹⁸⁷⁰ One concern of the judges addressed at the meeting was the integrity of the classified portion of the record over which the court did not have control.¹⁸⁷¹ One result of the meeting was the government's agreement to file a list of classified documents presented to the judges,¹⁸⁷² a list which the government updated upon each additional lodging.¹⁸⁷³

1861. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006; see E.D. Mich. *ACLU* Docket Sheet, *supra* note 1669 (noting the lodging of classified documents on May 26, June 30, and Sept. 1, 2006).

1862. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006.

1863. *Id.*

1864. *Id.*

1865. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting order filed Oct. 11, 2006).

1866. *Id.* (noting the government's filing of briefs on Oct. 16 and Dec. 5, 2006).

1867. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1868. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting an Oct. 19, 2006, letter from the court to the government concerning the filing of classified information with the court and a Nov. 1, 2006, motion by the government for approval of proposed procedures regarding classified information).

1869. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; see Liptak, *supra* note 1663.

1870. Interview with Hon. Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

1871. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; see Liptak, *supra* note 1663.

1872. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1873. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting the filing of classified-document lists on Jan. 12 and 25, Apr. 9, and June 11, 2007).

Approximately two weeks before oral argument, security officers delivered to the judges' chambers the government's unredacted opening and reply briefs.¹⁸⁷⁴

On January 17, the government announced to Congress and the courts that the President would not reauthorize the warrantless wiretap program at issue in this case, but instead would abide by new secret orders issued by the FISC one week earlier.¹⁸⁷⁵ Five days before this announcement, and two days after the FISC orders were issued, the government again lodged classified materials for the court's review.¹⁸⁷⁶ Security officers brought these materials to the judges at the same time as the briefs.¹⁸⁷⁷

The security officer who visited Judge Gilman's chambers presented the judge with the classified materials in the judge's office and waited elsewhere in the building for the judge's call saying he had completed his review.¹⁸⁷⁸ The officer asked Judge Gilman to close his window blinds and close the door to his office.¹⁸⁷⁹ Judge Gilman literally has an open-door policy, so although a doorway separates his office from the rest of the chambers, there is no physical door attached.¹⁸⁸⁰ Judge Gilman reviewed the materials privately in his office.¹⁸⁸¹

The security officer who visited Judge Gibbons's chambers also asked her to close her window blinds, but only on the windows facing other buildings, not the windows facing the Mississippi River.¹⁸⁸² Judge Batchelder, who is the only tenant in her small-town building, was not asked to close her blinds.¹⁸⁸³

No one on the judges' staffs saw the classified materials.¹⁸⁸⁴ Knowing that they would not be able to keep them, none of the judges took notes.¹⁸⁸⁵ The judges understood that if they needed extended access to the classified documents they could be stored in another agency's local SCIF, but the judges did not need that.¹⁸⁸⁶

1874. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; Interview with Dep't of Justice Litig. Sec. Section Staff, Apr. 24, 2007.

1875. *E.g.*, Notice of Att'y Gen.'s Letter to Congress, *In re* NSA Telecomm. Records Litig., No. M:06-cv-1791 (N.D. Cal. Jan. 17, 2007); *see* Eggen, *supra* note 1663; Lichtblau & Johnston, *supra* note 1663.

1876. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672; *see* *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

1877. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1878. Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007.

1879. *Id.*

1880. *Id.*

1881. *Id.*

1882. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1883. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007.

1884. *Id.*; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1885. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1886. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

Approximately one week after the government's announcement concerning the FISA court, and one week before oral argument, the government filed a "supplemental submission" and lodged a classified submission.¹⁸⁸⁷ The judges reviewed the classified submission in Cincinnati on the day of oral argument.¹⁸⁸⁸

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,¹⁸⁸⁹ and within days of these lodgings, court information security officers delivered the classified submissions to the judges' chambers.¹⁸⁹⁰

There were no ex parte communications with government attorneys in this appeal.¹⁸⁹¹

Judge Batchelder's opinion states,

At the behest of the government, I reviewed these privileged documents, but their contents—being privileged—are excluded from our consideration and I have not relied on any of that information in this opinion. The state secrets privilege granted by the district court has been maintained on appeal and this opinion is decided solely on the publicly available information that was admitted by the district court and made a part of its record.¹⁸⁹²

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.¹⁸⁹³

With one exception, this was the first time any of these judges had been called upon to review classified information.¹⁸⁹⁴ The exception was an appeal decided in 2004 by a panel including Judges Batchelder and Gibbons affirming the dismissal of a civil suit on state-secrets grounds.¹⁸⁹⁵ The secrets in that case were handled by ordinary sealing procedures.¹⁸⁹⁶

1887. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting the filing of a supplemental submission and the lodging of a classified submission on Jan. 25, 2007); see Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. Times, Jan. 27, 2007, at 14.

1888. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1889. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting the lodging of classified submissions on Apr. 9 and June 11, 2007).

1890. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007 (noting that technically the judges should not have reviewed this material, because it was outside the record); Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1891. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1892. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); see *id.* at 692 ("All three members of the panel have reviewed the documents filed by the government under seal that arguably are protected by the privilege.").

1893. 6th Cir. *ACLU* Docket Sheets, *supra* note 1672 (noting denial of the motion on July 6, 2007); see Weinstein, *supra* note 1887 (reporting the filing of the motion).

1894. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007. Judge Batchelder has been a circuit judge since 1991 and was a bankruptcy judge 1983–85 and a district judge 1985–91; Judge Gilman has been a circuit judge since 1997; and Judge Gibbons has been a circuit judge since 2002 and was a district judge 1983–2002. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>.

1895. *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004); Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1896. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

Judge Lynch, Southern District of New York

In the Manhattan case, as in the Detroit case, the government lodged, in a secure Washington, D.C., location for the court's ex parte in camera review, a classified brief and classified declarations supporting a motion to dismiss.¹⁸⁹⁷ Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,¹⁸⁹⁸ but Judge Lynch did not review the classified lodgings before the hearing on the motion.¹⁸⁹⁹ He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information during the hearing.¹⁹⁰⁰ The case was transferred to the Northern District of California as part of multidistrict litigation before Judge Lynch ruled on the motion,¹⁹⁰¹ and he never read the classified lodgings.¹⁹⁰²

Judge Kennelly, Northern District of Illinois

In a Chicago action against AT&T, Judge Kennelly granted the government's motion to dismiss on state-secrets grounds.¹⁹⁰³ In advance of this ruling, a court information security officer brought from Washington classified arguments supporting the motion.¹⁹⁰⁴ Judge Kennelly reviewed the documents in private while the security officer waited outside his office.¹⁹⁰⁵ When the judge was finished reviewing the documents, the security officer took them and the judge's notes for storage in the U.S. Attorney's SCIF in the same building.¹⁹⁰⁶ When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.¹⁹⁰⁷

Judge Kennelly's opinion states that he did not rely on classified submissions in reaching this decision.¹⁹⁰⁸ His opinion, however, describes how he reviewed the submissions.

1897. Military & State Secrets Privilege P. & A. Mem. at 4 n.3, Center for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Notice of Lodging, *id.* (May 26, 2006).

1898. Interview with Hon. Gerard E. Lynch, May 16, 2007.

1899. Center for Constitutional Rights Sept. 5, 2006, Tr., *supra* note 1678; Interview with Hon. Gerard E. Lynch, May 16, 2007.

1900. Center for Constitutional Rights Sept. 5, 2006, Tr., *supra* note 1678; Interview with Hon. Gerard E. Lynch, May 16, 2007.

1901. Transfer Order, *In re* NSA Telecomm. Records Litig., No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re* NSA Telecomm. Records Litig., No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Interview with Hon. Gerard E. Lynch, May 16, 2007.

1902. Interview with Hon. Gerard E. Lynch, May 16, 2007.

1903. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 1653; McLure, *supra* note 1650; Robinson, *supra* note 1653.

1904. Interview with Hon. Matthew F. Kennelly, May 24, 2007; *see* Notice of Lodging, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006).

1905. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1906. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

1907. *Id.*

1908. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

Only one copy of the materials was provided, and following our review, the materials were removed to a secure location outside the Court's control (we reviewed the materials again on later occasions under similar conditions). The court was not permitted to discuss the materials with other members of our staff, and notes that we took were removed and kept in a secure location outside the court's control. We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera, ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The court asked the government to provide further information about certain matters in the classified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.¹⁹⁰⁹

In order to avoid inadvertently disclosing information in the classified documents at the public hearing, Judge Kennelly carefully prepared all of his questions for counsel in advance.¹⁹¹⁰ On one occasion, the judge began to refer to how many additional pages the classified documents had compared with the public versions, and the government's attorney instructed the judge not to do so.¹⁹¹¹

The night before the classified proceeding, the judge's chambers were swept for surveillance devices.¹⁹¹² When the judge arrived for work on the morning of the hearing, he was greeted by an armed guard who demanded identification before the judge could enter his chambers.¹⁹¹³ During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.¹⁹¹⁴

Judge Walker, Northern District of California

In the first San Francisco action against AT&T, the government intervened and unsuccessfully argued that the state-secrets privilege required dismissal of the case.¹⁹¹⁵ The government sought to support its argument with classified documents.¹⁹¹⁶ An attorney for the government described the procedure for judicial review of classified documents as follows:

The classified brief and the classified declarations on which it relies are available, they are in the possession of a group called the Litigation Security Section of the Department of Justice, which is a subgroup of something called the Security and Emergency Program Staff. The brief, those materials, are in their possession. And when your Honor would

1909. *Id.* at 902 n.2.

1910. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1911. *Id.*

1912. *Id.*

1913. *Id.*

1914. *Id.*

1915. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); Mot. to Dismiss, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); First U.S. Statement of Interest, *id.* (Apr. 28, 2006); see Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, S.J. Mercury News, May 14, 2006, at A1; John Markoff, *U.S. Steps into Wiretap Suit Against AT&T*, N.Y. Times, Apr. 29, 2006, at A9; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. Times, May 14, 2006, at 4.

1916. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); see *Hepting*, 439 F. Supp. 2d at 979; see also Carey, *supra* note 1915.

like to look at those materials, you just call them up and they fly them out to San Francisco, allow you to take a look at them. When you're done with them, they take the materials back. They're maintained in a secure facility, just like all other documents relating to these materials would be.¹⁹¹⁷

On June 6, 2006, Judge Walker agreed to review the government's secret papers, ordering the government "to provide in camera and no later than June 9, 2006, the classified memorandum and classified declarations of John D. Negroponte and Keith B. Alexander for review by the [judge] and by any chambers personnel that he so authorizes."¹⁹¹⁸

Judge Walker reviewed the government's classified briefing in his chambers.¹⁹¹⁹ A security officer brought the documents to his chambers in a sealed pouch.¹⁹²⁰ Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.¹⁹²¹ Judge Walker took some notes, which the security officer took back with the classified documents.¹⁹²²

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.¹⁹²³ In part because of time constraints, instead of bringing classified documents to Judge Walker, a court information security officer arranged for an FBI agent to bring Judge Walker to an FBI SCIF in the same building as the courthouse, where Judge Walker received a secure fax containing the classified documents for his review and then shredded the fax.¹⁹²⁴

On the eve of, and concerning, the Attorney General's announcement that the government would seek warrants from the FISA court for surveillance of international communications with persons in the United States, the government again presented classified briefing materials to Judge Walker.¹⁹²⁵ Again a court infor-

1917. Tr., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006), filed in part as attach., Notice of Mot. for Transfer & Coordination, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 31, 2006).

1918. Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 6, 2006), available at 2006 WL 1581965; see *Hepting*, 439 F. Supp. 2d at 980; see also Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. Chron., June 8, 2006, at A4.

"Article III federal judges . . . , by virtue of their Constitutional office, may receive access to classified information in order to address questions before them." U.S. Resp. to Order to Show Cause, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

1919. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

The government also presented a classified reply brief with classified supporting declarations. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 16, 2006).

1920. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; see *Hepting*, 439 F. Supp. 2d at 1011 (noting that the classified arguments were hand carried to San Francisco and stored in a secure facility there for a few days while the court conducted its review).

1921. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

1922. *Id.*

1923. *Id.*; see Notice of Lodging, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

1924. *Id.*; Interview with Dep't of Justice Litig. Sec. Section Staff, Apr. 24, 2007.

1925. Notice of Lodging, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 13, 2007); Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

mation security officer brought them to his chambers, where Judge Walker reviewed them in private.¹⁹²⁶

On 13 additional occasions, the government lodged classified documents.¹⁹²⁷

The government lodged for Judge Walker's review a classified declaration that had been presented to the U.S. Court of Appeals for the Sixth Circuit in the appeals concerning Judge Taylor's injunction against the warrantless wiretap program.¹⁹²⁸

The next lodging supported a scheduling motion.¹⁹²⁹ The unclassified memorandum supporting the motion noted that the recent appointment of a new Director of National Intelligence complicated assertion of the state-secrets privilege, because the new director would have to make an independent decision on whether or how to assert it.¹⁹³⁰

The public record does not show the reason for the next lodging, and the plaintiffs objected to the government's lodging classified materials without providing any public information about what they are lodging or why.¹⁹³¹ The government responded that "nothing more may be said without compromising the Government's compelling interest in protecting the Nation's security."¹⁹³²

Judge Walker noted in his published opinion denying the government's motion to dismiss that his traveling to Washington to review classified documents might be a suitable future alternative.¹⁹³³ The next set of lodgings was an unredacted brief and unredacted declarations of the Director of National Intelligence and the Director of the NSA in support of a motion to dismiss actions against Verizon companies, including MCI, on state-secrets grounds.¹⁹³⁴ Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.¹⁹³⁵

1926. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1927. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 30, 2009); Notices of Lodging, *id.* (N.D. Cal. Feb. 27, 2009); Notice of Lodging, *id.* (Nov. 5, 2008); Notice of Lodging, *id.* (Sept. 19, 2008); Notice of Lodging, *id.* (Mar. 14, 2008); Notice of Lodging, *id.* (Oct. 25, 2007); Notice of Lodging, *id.* (Aug. 3, 2007); Notices of Lodging, *id.* (June 8, 2007); Notices of Lodging, *id.* (May 25, 2007); Notices of Lodging, *id.* (Apr. 21, 2007); Notice of Lodging, *id.* (Apr. 9, 2007); Notice of Lodging, *id.* (Mar. 13, 2007); Notice of Lodging, *id.* (Feb. 22, 2007).

1928. Notice of Lodging, *id.* (Feb. 22, 2007).

1929. Notice of Lodging, *id.* (Mar. 13, 2007).

1930. Scheduling Mot., *id.* (Mar. 12, 2007); *see* Mark Mazzetti, *In Shift, Director for Intelligence in State Dept. Post*, N.Y. Times, Jan. 4, 2007, at A1 (reporting the President's appointment of John D. Negroponte, then Director of National Intelligence, to be Deputy Secretary of State, and reporting J. Michael McConnell, a former Director of the National Security Agency, to be Negroponte's replacement).

1931. Letter, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 13, 2007).

1932. Gov't Resp. to Pls.' Letter, *id.* (Apr. 27, 2007).

1933. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

1934. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 21, 2007) (a separate notice for each document); *see* Mem. Mot. to Dismiss or for Summ. J., *id.* (Apr. 20, 2007) (unredacted brief and declarations).

1935. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Apr. 24, 2007.

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn¹⁹³⁶ and Manhattan.¹⁹³⁷ Another lodging was a classified reply brief supporting state-secrets motions to dismiss in several other cases.¹⁹³⁸

The government lodged a classified declaration in opposition to the plaintiffs' motion for an order requiring defendants to preserve evidence.¹⁹³⁹ The government argued that the motion should be denied because the state-secrets privilege prevented the defendants from confirming or denying that there was any evidence to preserve.¹⁹⁴⁰ The classified declaration specified "how potentially discoverable information, if any, is being preserved."¹⁹⁴¹ Determining that the the public briefing showed that the plaintiffs were entitled to a preservation order, Judge Walker issued the order without stating whether or not he reviewed the government's classified brief and declaration.¹⁹⁴²

Another lodging supported the government's motion to dismiss the action against the government by the Islamic charity on the grounds of standing, sovereign immunity, and state secrets.¹⁹⁴³

In September 2008, in open court, Judge Walker observed that classified lodgings had not yet been very helpful to him:

Well, let me tell you what has been my reaction to the filings in these cases here before. And that has been that the classified materials that I have viewed in connection with the state secrets issues that have been litigated here, frankly, have not been very helpful in resolving the issues that I have had to resolve.

And, consequently, I have come to the conclusion that what I should do, if at all possible, is to address the issues that are raised without resort to any classified information, if I can.¹⁹⁴⁴

Classified lodgings continued nevertheless. On September 19, 2008, the government lodged a classified certification by the Attorney General supporting its motion to dismiss actions against the telephone companies in light of immunity granted by the July 10, 2008, amendments to FISA.¹⁹⁴⁵ On November 5, 2008, the government both lodged a classified reply¹⁹⁴⁶ and filed a public redacted reply¹⁹⁴⁷

1936. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. May 25, 2007); see Mot. to Dismiss or for Summ. J., *id.* (May 25, 2007) (redacted brief and declarations).

1937. Notices of Lodging, *id.* (June 8, 2007); see Supplemental Mot. to Dismiss or for Summ. J., *id.* (May 25, 2007) (redacted brief).

1938. Notice of Lodging, *id.* (Aug. 3, 2007).

1939. Notice of Lodging, *id.* (Oct. 25, 2007).

1940. Opposition Br., *id.* (Oct. 25, 2007).

1941. *Id.* at 2.

1942. Preservation Order, *id.* (Nov. 6, 2007).

1943. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Mar. 14, 2008); Mot. to Dismiss, *id.*

1944. Tr., *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Sept. 12, 2008).

1945. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 957 (N.D. Cal. 2009); Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (Sept. 19, 2008).

1946. Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (Nov. 5, 2008).

1947. Reply, *id.*

in support of its motion. But Judge Walker did not review the classified lodgings in advance of oral arguments:

I have not read the classified certification. I concluded that I would attempt to see if the public filings would be sufficient to provide guidance to the Court as to how the action should come out, or, at least, this motion should come out, and, if possible, to make a determination without relying upon the classified certification, then I'd proceed in that fashion.

If I conclude that that is not possible, then I'll have to decide exactly what to do with that particular document. But, you should know, at the outset, that what has been filed in the public record is all that I've seen in connection with the present motions, and nothing else.¹⁹⁴⁸

Subsequently, the government lodged classified declarations in conjunction with case management statements.¹⁹⁴⁹ Most recently the government lodged a classified brief and classified declarations supporting a motion for dismissal of the action against the government originally filed in Brooklyn.¹⁹⁵⁰

No one on Judge Walker's staff has seen the classified documents.¹⁹⁵¹ Judge Walker's career law clerk has obtained a security clearance, but the classified warrantless wiretap briefs are for judges' eyes only.¹⁹⁵² The law clerk's clearance allows her to transport classified briefings between the FBI's SCIF and Judge Walker's chambers.¹⁹⁵³

Judge Walker observed that presentation of classified information embedded within unclassified material, with the classified information redacted in public versions, makes it difficult to remember what is classified and what is not.¹⁹⁵⁴ He would prefer that classified information be referred to in code in the public briefs with a separate document laying out what information is classified.¹⁹⁵⁵

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Prior to this litigation, presentation of classified information to Ninth Circuit judges involved delivery of the material to persons in the clerk's office with security clearances who stored it in a safe in San Francisco when the judges were not looking at it.¹⁹⁵⁶ Judges reviewed the material in San Francisco when they were in town.¹⁹⁵⁷

1948. Tr., *id.* (Dec. 2, 2008).

1949. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 27, 2009).

1950. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 30, 2009)

1951. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1952. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007, and Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 24, 2008. Judge Walker is his district's chief judge, and he uses his career law clerk as his administrative law clerk. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1953. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 24, 2008.

1954. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

Circuit Judge Hawkins, on the other hand, observed that this method facilitates comprehension. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008; *see infra*.

1955. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

1956. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

In the appeals of refusals to dismiss on state-secrets grounds by Judge Walker in the first action filed against AT&T and by Judge King in the action filed against the government based on classified evidence, the government lodged classified briefs, and the court of appeals agreed that only the judges on the reviewing panel would see them.¹⁹⁵⁸

This had an impact on the judges' work with their law clerks. The law clerks' memoranda had to remain somewhat abstract,¹⁹⁵⁹ and the judges had to take care that conversations with law clerks would not include topics that could give the clerks hints about the contents of the restricted materials.¹⁹⁶⁰

The classified information that the Ninth Circuit judges reviewed included classified briefing by the government to both the district judges and the circuit judges, the classified evidence submitted in Judge King's case, and classified briefing by the plaintiffs concerning the classified evidence submitted in Judge King's case.¹⁹⁶¹

Judge Hawkins observed that embedding classified information within the narrative structure of the briefs, redacting the classified information for public versions, facilitated comprehension.¹⁹⁶² A public brief written in code with a separate code sheet would have been more difficult to read.¹⁹⁶³

Judge Pregerson wished that he could have received some guidance from the plaintiffs on what to look for in the classified materials, but the plaintiffs could offer little guidance because they were denied access to the materials.¹⁹⁶⁴ Perhaps clearance could be granted to an attorney in the Federal Defender's Office to represent a party's interest in judges' review of classified material when the party is denied access to it.¹⁹⁶⁵

The same court information security officer delivered the classified materials to the judges' chambers both before and after oral argument.¹⁹⁶⁶ Unlike the officers who visited the Sixth Circuit judges, she provided no instructions on closing doors or windows.¹⁹⁶⁷ A separate set of materials was prepared for each judge so

Now there are safes suitable for storing top secret information in each of the court's four principal places of hearing cases: San Francisco, Pasadena, Seattle, and Portland. *Id.*; Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 24, 2008.

1957. *Id.*

1958. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1684; 9th Cir. *Hepting* Docket Sheets, *supra* note 1717; *see* Vick, *supra* note 1718.

1959. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

1960. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

1961. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

1962. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

District Judge Walker, on the other hand, observed that this method made it more difficult to remember what was classified and what was not. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; *see supra*.

1963. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

1964. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

1965. *Id.*

1966. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

1967. *Id.*

that they could make individual notes on the documents.¹⁹⁶⁸ The officer, whose office is in Washington, D.C., was able to bring the materials back to the judges whenever they wanted to see them on a couple days' notice.¹⁹⁶⁹

It is important that as court information security officers coordinate their visits to judges' chambers, they not disclose to persons other than the judges, such as attorneys representing the government, which judges they are visiting.¹⁹⁷⁰ This is a problem more serious for appellate proceedings than for trial court proceedings, because cases are assigned to judges well in advance of the assignments' becoming public information.¹⁹⁷¹ And the assignment of opinion authorship is regarded as confidential until the opinion is issued.¹⁹⁷²

The court agreed to permit C-SPAN to televise oral argument so long as the program was not aired until after the court had an opportunity to excise any inadvertently disclosed secrets, a contingency that did not occur.¹⁹⁷³ Court information security officers offered to review the court's opinion for inadvertently disclosed secret information before the opinion's release, but the court declined the offer.¹⁹⁷⁴

This was Judge Hawkins' first case as a judge involving classified information.¹⁹⁷⁵ Judge McKeown had to review classified information in approximately two previous cases.¹⁹⁷⁶ She had substantial experience as a practicing attorney in Seattle arguing trade secret cases in open court without revealing the secrets.¹⁹⁷⁷ In over 40 years as a federal judge, including nearly 30 years as a circuit judge, Judge Pregerson has occasionally reviewed classified information before.¹⁹⁷⁸

Even after the appeal had been resolved by a remand, the government lodged a classified declaration of the Director of National Intelligence to correct an inaccuracy in an earlier government submission.¹⁹⁷⁹ The court ruled, however, that it no longer had jurisdiction to receive the lodging.¹⁹⁸⁰

Judge Hogan, District of the District of Columbia

In the Electronic Frontier Foundation's unsuccessful FOIA suit to discover the secret FISC orders on which the government said it would rely to obtain warrants for what previously were warrantless wiretaps, the government lodged, on June 25, 2007, for ex parte in camera review, a classified declaration opposing the

1968. *Id.*

1969. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

1970. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008; Interview with Dep't of Justice Litig. Sec. Section Staff, Sept. 24, 2008.

1971. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

1972. *Id.*

1973. *Id.*

1974. *Id.*

1975. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

1976. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

1977. *Id.*

1978. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

1979. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Nov. 9, 2009).

1980. Order, *Id.* (Nov. 23, 2009).

plaintiff's motion that the court examine the secret orders.¹⁹⁸¹ Judge Hogan relied on this declaration both to grant the government summary judgment and to deny the motion to review the FISC orders.¹⁹⁸²

Challenge: Classified Opinion

Although Judge Kennelly did not rely on classified submissions in his decision to dismiss, with leave to amend, plaintiffs' suit against AT&T for facilitating warrantless surveillance, he did decide to respond to the submissions.

We are issuing on this date a separate Memorandum discussing various points arising from the classified materials; because that Memorandum discusses certain of the contents of those materials, it, too, is classified and will be unavailable for inspection by the public or any of the parties or counsel in this case other than counsel for the government. The court directs counsel for the government to cause the classified Memorandum be placed in a secure location and to ensure its availability in the event of appellate review.¹⁹⁸³

To write the classified opinion, Judge Kennelly was required to compose the opinion on a "clean" laptop computer provided by the court information security officer.¹⁹⁸⁴ The computer, and all drafts, were stored in the U.S. Attorney's SCIF in the same building.¹⁹⁸⁵ As the judge was preparing the classified opinion, he had additional questions for the government.¹⁹⁸⁶ It was arranged that he would ask them on a "secured telephone unit" in the U.S. Attorney's SCIF.¹⁹⁸⁷

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret memorandum.¹⁹⁸⁸

Challenge: Redacting Secrets

AT&T electronically filed a brief with several lines redacted, but the redacted text could be retrieved easily from the electronic document. It appears that when this was brought to the court's attention, two days after the filing, the electronic text file was replaced with an electronic image file.

At a May 17, 2006, hearing in the first case against telephone companies filed in San Francisco, Judge Walker issued the following order:

Plaintiffs are instructed to file by close of business on May 22, 2006, a memorandum that addresses: (1) whether this case can be litigated without deciding the state secrets issue, thereby obviating any need for the court to review the government's classified memorandum and declarations and (2) whether the state secrets privilege is implicated by plaintiffs' FRCP 30(b)(6) deposition request for information whether AT&T received any

1981. Notice of Lodging, *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. June 25, 2007).

1982. D.D.C. *Elec. Frontier Found.* Summ. J. Op., *supra* note 1785, at 11, 15, 18.

1983. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

1984. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1985. *Id.*

1986. *Id.*

1987. *Id.*

1988. Minute Entry, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007).

certification from the government. AT&T and the government may each file reply memoranda on these issues by close of business on May 24, 2006.¹⁹⁸⁹

As instructed, AT&T filed a reply brief on May 24, 2006.¹⁹⁹⁰ It appears that AT&T filed an electronic version of the brief, with several lines on three pages blacked out, and filed an unredacted paper version under seal.¹⁹⁹¹ Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.¹⁹⁹² On the day of the CNET report, the court filed a substitute electronic version of the redacted file.¹⁹⁹³

CNET's website provides a link to the originally filed Acrobat text file.¹⁹⁹⁴ Selecting the redacted sections and pasting them into a text file reveals the redacted text. The replacement version filed two days later is an Acrobat image file from which the redacted text cannot be selected.¹⁹⁹⁵

Challenge: Court-Appointed National Security Expert

In the first San Francisco action against AT&T, Judge Walker asked the parties for advice on whether he should name a court-appointed national security expert “to assist the court in determining whether disclosing particular evidence would create a ‘reasonable danger’ of harming national security.”¹⁹⁹⁶ The judge wrote: “The court contemplates that the individual would be one who had a security clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters.”¹⁹⁹⁷ Judge Walker did not believe that other judges previously used Federal Rule of Evidence 706(a) to appoint an expert of

1989. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006).

1990. N.D. Cal. *Hepting* Docket Sheet, *supra* note 1701.

1991. Notice of Manual Filing, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 24, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 1701.

The redacted text appeared in one of AT&T's three arguments—an argument spanning four pages of the 20-page brief: “II.B. The Court Cannot Adjudicate Plaintiffs’ Prima Facie Claims Until It Reviews The Classified Submissions.” Redacted Reply Mem., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006).

1992. Declan McCullagh, *AT&T Leaks Sensitive Info in NSA Suit*, May 26, 2006, http://news.com.com/AT38T+leaks+sensitive+info+in+NSA+suit/2100-1028_3-6077353.html.

1993. Redacted Reply Mem., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 1701.

1994. <http://www.politechbot.com/docs/att.not.redacted.brief.052606.pdf>.

1995. Redacted Reply Mem., *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006).

1996. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1010 (N.D. Cal. 2006); *see id.* at 1011 (ordering the parties to show cause in writing by July 31, 2006, why the court should not appoint such an expert).

1997. *Id.* at 1010–11; *see also id.* at 1011 (noting that the court has a specific candidate in mind). Judge Walker thinks that former CIA Director James Woolsey would be a good candidate, but one of the parties expressed concerns about Mr. Woolsey's having opined on the secret surveillance program. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

this type.¹⁹⁹⁸ Judge Walker decided, however, not to appoint such an expert “at this stage.”¹⁹⁹⁹

1998. *Hepting*, 439 F. Supp. 2d at 1010.

1999. Civil Minute Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Aug. 8, 2006).

Toledo

United States v. Amawi (James G. Carr, N.D. Ohio)

On Thursday, February 16, 2006, the government filed a sealed indictment against three Muslim men of Toledo for conspiracy to fight United States forces in Iraq.²⁰⁰⁰ Mohammad Zaki Amawi was a citizen of both the United States and Jordan, Marwan Othman El-Hindi was a naturalized citizen of the United States, and Wassim I. Mazloum was a permanent resident of the United States.²⁰⁰¹ El-Hindi and Mazloum were arrested in Toledo on Sunday; Amawi was arrested in Jordan on Sunday and flown to the United States on Monday; the indictment was unsealed on Tuesday.²⁰⁰² The U.S. District Court for the Northern District of Ohio assigned the case to Judge James G. Carr.²⁰⁰³

Amawi was born in the United States of Jordanian parents; the family moved back to Jordan when Amawi was two years old.²⁰⁰⁴ After the parents divorced, Amawi's mother moved with him to Toledo, about five years before the indictment.²⁰⁰⁵ In 2005, he worked at AZ Travel and Services.²⁰⁰⁶ Later that year, he returned to Jordan.²⁰⁰⁷ El-Hindi was born in Jordan.²⁰⁰⁸ In the U.S., he dropped out of Onondaga Community College.²⁰⁰⁹ He had been married twice before his current marriage.²⁰¹⁰ Mazloum was born in Lebanon and grew up in Venezuela.

2000. Indictment, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006); see Dan Eggen, *Ohio Men Accused of Plot to Kill Troops in Iraq*, Wash. Post, Feb. 22, 2006, at A3; Amanda Garrett *et al.*, *3 Ohioans Face Terror Charges*, Cleveland Plain Dealer, Feb. 22, 2006, at A1; Mike Wilkinson & Christina Hall, *3 Charged in Terror Plot*, Toledo Blade, Feb. 22, 2006, at A1; Neil A. Lewis, *3 Charged with Conspiring to Kill U.S. Troops in Iraq*, N.Y. Times, Feb. 22, 2006, at A12; Andrew Zajac, *Ohio Men Indicted on Terror Charges*, Chi. Trib., Feb. 22, 2006, News, at 3.

2001. See Indictment, *supra* note 2000; Eggen, *supra* note 2000; Lewis, *supra* note 2000; Zajac, *supra* note 2000.

2002. Docket Sheet, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Docket Sheet]; see Eggen, *supra* note 2000; Garrett *et al.*, *supra* note 2000; Wilkinson & Hall, *supra* note 2000; Zajac, *supra* note 2000.

2003. *Amawi* Docket Sheet, *supra* note 2002; see Mark Reiter, *Deadline Imposed in Local Terrorism Case*, Toledo Blade, Mar. 8, 2006, at B1.

Tim Reagan interviewed Judge Carr for this report at a district judges' workshop in San Antonio, Texas, on September 9, 2008.

2004. Interview with Hon. James G. Carr, Sept. 9, 2008.

2005. *Id.*; see Erika Ray, *Experts Say Terror Links Are Formed Overseas*, Toledo Blade, Feb. 23, 2006, at A6.

2006. See Ignazio Messina & Christina Hall, *Business Falls at Firms Tied to 3 Suspects*, Toledo Blade, Feb. 23, 2006, at A6.

2007. See Ray, *supra* note 2005.

2008. See Indictment, *supra* note 2000; *Few Clues Available on Accused Toledo Man*, Toledo Blade, Feb. 22, 2006, at A4 [hereinafter *Few Clues*].

2009. See Christopher Evans *et al.*, *Nickel-and-Dime Hustler, or Something Worse?*, Cleveland Plain Dealer, May 21, 2006, at A1.

2010. See Evans, *et al.*, *supra* note 2009; *Few Clues*, *supra* note 2008.

He moved to the United States in 2000.²⁰¹¹ With his brother, he operated City Auto Sales, a used-car business, and he studied computer science and engineering at the University of Toledo.²⁰¹²

Information about the conspiracy was provided to the government by a man called “the Trainer” in the indictment.²⁰¹³ According to the indictment, the Trainer was a United States citizen with a U.S. military background whom El-Hindi had solicited “to assist in providing security and bodyguard training.”²⁰¹⁴ The Trainer began passing information about the defendants to the government in 2004.²⁰¹⁵

On March 2, newspapers identified the Trainer as Darren Griffin, also known as Bilal, who had worked at a charity called KindHearts, which the government shut down the same week it indicted Amawi, El-Hindi, and Mazloun.²⁰¹⁶ Two days after Amawi’s indictment, the government obtained a warrant to search AZ Travel, where he worked.²⁰¹⁷ The supporting affidavit refers to Griffin as a paid cooperating witness who had been reporting to the FBI for four years.²⁰¹⁸ On June 6, 2006, Judge Carr issued an order forbidding public dissemination of Griffin’s image or identity.²⁰¹⁹

A year after the original indictment was filed, a superseding indictment added as defendants two Chicago men, cousins Zubair and Khaleel Ahmed.²⁰²⁰ A separate indictment charged El-Hindi and Ashraf Zaim, the owner of AZ Travel, with grant fraud.²⁰²¹ A third indictment charged Mazloun’s brother Bilal with making

2011. See Erica Blake, *Local Man in Terror Case Is Released on Bail*, Toledo Blade, Sept. 1, 2007, at B1.

2012. See Christina Hall, *Indictment of UT Student Shocks Family, Acquaintances*, Toledo Blade, Feb. 22, 2006, at A4; Messina & Hall, *supra* note 2006; David Yonke & Tom Troy, *Toledo-Area Muslims Ask for Justice, Fear Backlash*, Toledo Blade, Feb. 22, 2006, at A1.

2013. Indictment, *supra* note 2000; see Eggen, *supra* note 2000; Garrett *et al.*, *supra* note 2000; Lewis, *supra* note 2000; Wilkinson & Hall, *supra* note 2000; Zajac, *supra* note 2000.

2014. Indictment, *supra* note 2000

2015. See Joshua Boak, *Detainee Served as Imam at Prison*, Toledo Blade, Feb. 23, 2006, at A1.

2016. Mike Tobin *et al.*, *FBI’S Informant Worked at Muslim Charity 3 Years*, Cleveland Plain Dealer, Mar. 2, 2006, at A1; David Yonke, *Insider in Local Terror Arrests ID’d*, Toledo Blade, Mar. 2, 2006, at A1; Christopher D. Kirkpatrick & David Yonke, *Muslims Find Giving to Charity Now Harder*, Toledo Blade, Mar. 6, 2006, at A1.

2017. Search Warrant, *United States v. AZ Travel Inc.*, No. 3:06-mj-7025 (N.D. Ohio Feb. 18, 2006).

2018. Affidavit, *AZ Travel Inc.*, No. 3:06-mj-7025 (N.D. Ohio filed unsealed Apr. 17, 2006); see Mark Reiter, *Feds Suspected Plot by Toledo Trio in ’04*, Toledo Blade, Apr. 18, 2006, at A1.

2019. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio June 6, 2006).

2020. Superseding Indictment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 7, 2007); see Jeff Coen & Tonya Maxwell, *2 Arrested in Terror Conspiracy*, Chi. Trib., Feb. 22, 2007, Metro, at 1; Mark Reiter, *2 Tied to Terror Suspects Indicted*, Toledo Blade, Feb. 22, 2007, at A1; Libby Sander, *2 Chicago Cousins Are Charged with Plotting Overseas Attacks*, N.Y. Times, Feb. 22, 2007, at A20.

2021. Indictment, *United States v. El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007); see Reiter, *supra* note 2020; Sander, *supra* note 2020.

a false statement to federal agents during the investigation of Mazloun.²⁰²² The court assigned the two new cases to Judge Carr.²⁰²³ Judge Carr decided that the Ahmeds and Wassim Mazloun could be released on bond and electronic monitoring.²⁰²⁴ In December 2007, so that the trial against the original three defendants could proceed without impairing the Ahmeds' ability to mount defenses, the Ahmeds were dismissed from the superseding indictment, and a separate indictment was filed against them.²⁰²⁵

Jury selection for the trial of the original three defendants began on March 4, 2008.²⁰²⁶ Judge Carr allowed the attorneys to prepare and use a jury questionnaire.²⁰²⁷ Judge Carr permits attorneys to question potential jurors during voir dire, but he threatened to remove the privilege when the attorneys took too much time trying to develop challenges for cause against too many potential jurors.²⁰²⁸ Voir dire proceeded more efficiently after that.²⁰²⁹

Judge Carr gave both sides extra peremptory challenges, but he was not lenient with challenges for cause.²⁰³⁰ After all potential jurors had been questioned, there remained many more than needed for the jury, alternates, and peremptory challenges.²⁰³¹ So Judge Carr invited the attorneys to file a joint motion to reconsider denials of cause challenges.²⁰³² The attorneys accepted the invitation, potentially appealable issues were removed, and a jury satisfactory to both sides and the court heard the case.²⁰³³

On March 24, Judge Carr severed from the trial two counts that were against Amawi only for threats against the President,²⁰³⁴ and the government later dismissed those counts.²⁰³⁵ Opening statements began on April 1.²⁰³⁶ Griffin testified

2022. Indictment, *United States v. Mazloun*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007); see Reiter, *supra* note 2020; Sander, *supra* note 2020.

2023. Docket Sheet, *Mazloun*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007) [hereinafter *Mazloun* Docket Sheet]; Docket Sheet, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007) [hereinafter *El-Hindi* Docket Sheet].

2024. See Blake, *supra* note 2011.

2025. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Dec. 27, 2007); Indictment, *United States v. Ahmed*, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007).

2026. *Amawi* Docket Sheet, *supra* note 2002; see Erica Blake, *U.S. Jury Pool Draws 450 for Terror Conspiracy Trial*, Toledo Blade, Mar. 5, 2008, at B1; Damian G. Guevara, *Toledo Trio Accused in 2006 Terror Plot Head to Trial*, Cleveland Plain Dealer, Mar. 4, 2008, at B1.

2027. Interview with Hon. James G. Carr, Sept. 9, 2008.

Judge Carr wishes he had given the questions greater scrutiny, because some proved to be too confusing to the potential jurors. *Id.*

2028. *Id.*

2029. *Id.*

2030. *Id.*

2031. *Id.*

2032. *Id.*

2033. *Id.*

2034. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 24, 2008).

2035. Gov't Mot., *Amawi*, No. 3:06-cr-719 (N.D. Ohio July 15, 2008).

2036. *Amawi* Docket Sheet, *supra* note 2002.

Following opening statements, Judge Carr provided the jurors with preliminary instructions. James G. Carr, *United States v. Amawi: Preliminary Jury Instructions* (Apr. 1, 2008).

the following day.²⁰³⁷ He testified that for nearly \$56,000 a year he professed approval of overseas jihad to see who in the Toledo-area Muslim community would respond, and the three defendants took the bait.²⁰³⁸ Closing arguments concluded on Tuesday, June 10.²⁰³⁹ The jury reached guilty verdicts on Friday.²⁰⁴⁰

Judge Carr deferred sentencing of the three original defendants until after the separate indictment against El-Hindi was resolved.²⁰⁴¹ After a bench trial of five court days in November 2008,²⁰⁴² Judge Carr convicted El-Hindi on the fraud indictment and sentenced him to one year and a half.²⁰⁴³ El-Hindi's appeal is pending.²⁰⁴⁴ Zaim pleaded guilty,²⁰⁴⁵ and Judge Carr sentenced him to one day of custody.²⁰⁴⁶ In October 2009, Judge Carr sentenced the three original defendants:²⁰⁴⁷ 20 years for Amawi;²⁰⁴⁸ 12 years for El-Hindi,²⁰⁴⁹ to be served in advance of the sentence on the fraud indictment;²⁰⁵⁰ and eight years and four months for Mazloum.²⁰⁵¹ Appeals by both the defendants and the government are pending.²⁰⁵²

2037. See Erica Blake, "The Trainer" Begins Terror Trial Testimony, Toledo Blade, Apr. 3, 2008, at A1.

2038. See Blake, *supra* note 2037.

2039. Amawi Docket Sheet, *supra* note 2002; see Mark Reiter, *Terrorist Plot Case Is Handed to Jurors*, Toledo Blade, June 11, 2008, at B1.

For jury instructions, see James G. Carr, United States v. Amawi: Final Jury Instructions (June 10, 2008); James G. Carr, United States v. Amawi: Stipulated Definitions (June 4, 2008); James G. Carr, United States v. Amawi: Supplemental Jury Instruction (June 10, 2008) (concerning examination of original evidence).

2040. Jury Verdicts, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio June 13, 2008); see Mark Reiter, *3 Guilty in Plot to Kill Troops*, Toledo Blade, June 14, 2008, at A1.

2041. See Erica Blake, *Millions Spent on Terror Case*, June 22, 2008, at A1.

2042. *El-Hindi* Docket Sheet, *supra* note 2023; see Erica Blake, *Convicted Terrorist to Face Another Trial*, Toledo Blade, Nov. 5, 2008, at B1.

2043. Judgment & Commitment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009); see Erica Blake, *El-Hindi Guilty of Conspiracy, Theft Charges*, Toledo Blade, Nov. 13, 2008, at B1.

2044. Docket Sheet, United States v. El-Hindi, No. 09-4328 (6th Cir. Oct. 30, 2009) (nothing that the appellee brief is due Feb. 5, 2010).

2045. *El-Hindi* Docket Sheet, *supra* note 2023.

2046. Judgment & Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Dec. 8, 2008).

2047. See Erica Blake, *3 in Toledo Terror Plot Will Serve up to 20 Years*, Toledo Blade, Oct. 22, 2009, at A1.

2048. Am. J. & Commitment, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009).

2049. Judgment & Commitment, *id.* (Oct. 26, 2009).

2050. Judgment & Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009).

2051. Judgment & Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 27, 2009).

2052. Docket Sheet, United States v. Mazloum, No. 09-4345 (6th Cir. Nov. 4, 2009) (government's appeal of Mazoum's sentence); Docket Sheet, United States v. El-Hindi, No. 09-4342 (6th Cir. Nov. 4, 2009) (government's appeal of El-Hindi's sentence); Docket Sheet, United States v. Amawi, No. 09-4340 (6th Cir. Nov. 4, 2009) (government's appeal of Amawi's sentence); Docket Sheet, United States v. Mazloum, No. 09-4344 (6th Cir. Nov. 4, 2009) (Mazoum's appeal); Docket Sheet, United States v. El-Hindi, No. 09-4341 (6th Cir. Nov. 4, 2009) (El-Hindi's appeal); Docket Sheet, United States v. Amawi, No. 09-4339 (6th Cir. Nov. 4, 2009) (Amawi's appeal);

Bilal Mazloum was sentenced on August 26, 2008, to one year of probation on a guilty plea.²⁰⁵³ On January 15, 2009, the Ahmeds both pleaded guilty to a single count of material support to terrorists.²⁰⁵⁴ Sentencing is pending.²⁰⁵⁵ The Ahmeds surrendered to begin serving their sentences in advance of sentencing.²⁰⁵⁶

Challenge: Attorney–Client Contacts

As they began preparing their clients’ defenses, the defendants’ attorneys became concerned that their communications with their clients were being improperly monitored.²⁰⁵⁷ One month after the indictment was filed, the assistant federal defender representing Amawi filed a motion “to compel the United States to describe with particularity the extent to which attorney–client communications have been or may be monitored, or in the alternative, for pretrial release on bond.”²⁰⁵⁸ Mazloum’s attorney joined the motion on the next court day.²⁰⁵⁹ Government attorneys responded that they were not aware of any monitoring other than customary monitoring by the Bureau of Prisons.²⁰⁶⁰

Eight months into the case, Judge Carr reluctantly allowed Amawi to fire the federal defender’s office, which was representing him; Amawi was concerned that a government employee would not represent him adequately.²⁰⁶¹ Amawi was no more satisfied with newly appointed counsel and eventually requested to be represented by the federal defender’s office again, a request that Judge Carr granted.²⁰⁶² Balancing Amawi’s attorney’s desire for more time to prepare for trial and El-Hindi’s desire for a speedy trial, Judge Carr granted Amawi a short continuance to accommodate his reappointed attorney time to prepare.²⁰⁶³

Challenge: Court Security

Judge Carr was distressed to learn about unnecessarily visible court security.²⁰⁶⁴ For example, prospective jurors had to walk by an SUV conspicuously marked as

see Terror Trio File Notices of Appeal with Federal Court, Toledo Blade, Oct. 29, 2009, at B3; *U.S. Appeals Sentences in Local Terrorism Case*, Toledo Blade, Oct. 31, 2009, at B2.

2053. Mazloum Docket Sheet, *supra* note 2023.

2054. Docket Sheet, *United States v. Ahmed*, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007); *see w Men Plead Guilty in Local Terror Case*, Toledo Blade, Jan. 16, 2009, at B1.

2055. Quarterly Report, *Ahmed*, No. 1:07-cr-647 (N.D. Ohio May 1, 2009).

2056. Surrender Order, *id.* (Jan. 8, 2010); Quarterly Report, *supra* note 2055.

2057. *See* Christina Hall, *Scrutiny of Terror Suspects Strict*, Toledo Blade, Feb. 25, 2006, at A1.

2058. Amawi Mot. , *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 17, 2006); *see Attorney Seeks Data on Inmate Privacy*, Toledo Blade, Mar. 18, 2006, at B1.

2059. Mazloum Mot., *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 20, 2006).

2060. Gov’t Resps., *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 21, 2006).

2061. Amawi Docket Sheet, *supra* note 2002; *see* Mark Reiter, *Local Terror Suspect Will Get New Lawyer*, Toledo Blade, Oct. 20, 2006, at B3.

2062. Interview with Hon. James G. Carr, Sept. 9, 2008.

2063. *Id.*

2064. *Id.*

a Department of Homeland Security vehicle.²⁰⁶⁵ It did not help that one news station reported on the case with a graphic titled, “Terror in Toledo.”²⁰⁶⁶ Chief Judge Carr was able to persuade security forces to convey less of a siege image.²⁰⁶⁷

Challenge: Jury Security

Judge Carr used an anonymous jury and had jurors report off-site instead of to the courthouse during the trial.²⁰⁶⁸ To minimize prejudice, Judge Carr told the jurors that it was customary to use an anonymous jury in a criminal trial and that off-site reporting was necessitated by insufficient courthouse parking availability, which actually was true to some extent.²⁰⁶⁹

2065. *Id.*

2066. *Id.*

2067. *Id.*

2068. *Id.*

2069. *Id.*

Atlanta

United States v. Ahmed
(Clarence Cooper, William S. Duffey, Jr.,
and Gerrilyn G. Brill, N.D. Ga.)

On March 23, 2006, the FBI arrested Georgia Tech student Syed Haris Ahmed on a sealed material support indictment filed in the Northern District of Georgia.²⁰⁷⁰ The court initially assigned the case to District Judge Clarence Cooper and Magistrate Judge Joel M. Feldman.²⁰⁷¹ With the defendant's consent, the government obtained from Judge Feldman permission to proceed initially under seal with closed proceedings.²⁰⁷² But on the following day, April 20, the day Ahmed pleaded not guilty at a closed hearing,²⁰⁷³ the *Atlanta Journal-Constitution* reported Ahmed's arrest,²⁰⁷⁴ and as a result the government moved to unseal the case.²⁰⁷⁵

Also on April 20, Magistrate Judge Linda T. Walker took over for Judge Feldman,²⁰⁷⁶ because of Judge Feldman's impending retirement.²⁰⁷⁷ Two months later, because of Judge Walker's recusal, Magistrate Judge Gerrilyn G. Brill took over for Judge Walker.²⁰⁷⁸

Ahmed is an American citizen born in Pakistan.²⁰⁷⁹ He moved to the United States with his parents and siblings in 1997.²⁰⁸⁰ At Georgia Tech, he majored in mechanical engineering.²⁰⁸¹

2070. Indictment, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006); see Brenda Goodman, *Student Is Held in Terror Case*, N.Y. Times, Apr. 21, 2006, at A18; Bill Torpy, *Terror Charge for Student*, Atlanta J. & Const., Apr. 21, 2006.

2071. Docket Sheet, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006) [hereinafter N.D. Ga. Docket Sheet].

For this report, Tim Reagan interviewed Judge Cooper and his law clerk Nicole Jenkins in the judge's chambers on November 18, 2009.

2072. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

2073. Bill Torpy & Jeremy Redmon, *Path Traced in Suspects' Terror Case*, Atlanta J. & Const., Apr. 22, 2006, at A1.

2074. Bill Torpy & Mike Morris, *FBI Detains Tech Student, but Won't Say Why*, Atlanta J. & Const., Apr. 20, 2006, at A1.

2075. Mot. to Seal, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006); see Goodman, *supra* note 2070.

2076. N.D. Ga. Docket Sheet, *supra* note 2071.

2077. Reassignment Ord., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006) ("In light of the potential length required to dispose of the above-styled case which may extend beyond the undersigned's scheduled October 22, 2006 retirement, IT IS HEREBY ORDERED that this case be reassigned from the undersigned to the next magistrate scheduled to receive a long case, to wit: the Honorable Linda T. Walker."); see Order, *id.*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006) (declaring the case to be complex under 18 U.S.C. §§ 3161(h)(8)(A) and (B)(ii)).

2078. Reassignment Ord., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 21, 2006); Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2079. See Goodman, *supra* note 2070; Torpy & Morris, *supra* note 2074.

On July 19, 2006, the indictment against Ahmed was superseded to add Ehsanul Islam Sadequee as a defendant.²⁰⁸² Sadequee was arrested while shopping in Dhaka, Bangladesh, on April 17 and turned over to U.S. authorities.²⁰⁸³ The district court for the Eastern District of New York had issued a warrant for Sadequee's arrest on March 28.²⁰⁸⁴ American authorities transported him to the District of Alaska,²⁰⁸⁵ which committed Sadequee to the Eastern District of New York.²⁰⁸⁶ Sadequee was arraigned in Brooklyn on April 22.²⁰⁸⁷ On August 1, the Eastern District of New York committed Sadequee to the Northern District of Georgia.²⁰⁸⁸ Sadequee pleaded not guilty in Atlanta to the superseding indictment on August 9.²⁰⁸⁹

Ahmed and Sadequee met at Al-Farooq Masjid, a mosque near Georgia Tech.²⁰⁹⁰ They agreed to prepare for violent jihad, including by playing paintball in the north Georgia mountains.²⁰⁹¹

Sadequee is a U.S. citizen born in Fairfax, Virginia; his parents are Bangladeshi.²⁰⁹² He moved to the Atlanta area in 1988.²⁰⁹³ From 1999 to 2001, he studied at an Islamic seminary in Ajax, Ontario.²⁰⁹⁴ In August 2005, he traveled to Bangladesh to marry a cousin.²⁰⁹⁵ While there, he studied business administration at North South University in Dhaka.²⁰⁹⁶

2080. See Torpy & Morris, *supra* note 2074.

2081. See *id.*

2082. Superseding Indictment *Ahmed*, No. 1:06-cr-147 (N.D. Ga. July 19, 2006); see Jeffrey Scott, *Georgia Terror Suspects Accused of Dobbins Plot*, Atlanta J. & Const., July 20, 2006, at D1.

2083. See William K. Rashbaum & Brenda Goodman, *New Terror Accusations Keep a Georgia Man in Custody*, N.Y. Times, Apr. 29, 2006, at A12; Torpy, *supra* note 2070; Torpy & Redmon, *supra* note 2073.

2084. Arrest Warrant, United States v. Sadequee, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

2085. Docket Sheet, United States v. Sadequee, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006); see Jeremy Redmon & Bill Torpy, *Feds Trace Pair to D.C. in Terror Case*, Atlanta J. & Const., Apr. 29, 2006, at A1.

2086. Commitment to Another District, *Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006).

2087. Docket Sheet, *Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

2088. Docket Sheet, United States v. Sadequee, No. 1:06-mj-820 (E.D.N.Y. Aug. 1, 2006).

2089. N.D. Ga. Docket Sheet, *supra* note 2071; see Bill Torpy, *Terror Case Suspect Returned to Atlanta*, Atlanta J. & Const., Aug. 10, 2006, at D12.

2090. See Torpy & Redmon, *supra* note 2073.

2091. Specific Findings 2–4, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. June 10, 2009).

2092. See Bill Torpy, *Suspected Terrorists*, Atlanta J. & Const., June 11, 2006, at A1; Redmon & Torpy, *supra* note 2085.

2093. See Torpy, *supra* note 2092.

2094. See *id.*

2095. See Rashbaum & Goodman, *supra* note 2083; Redmon & Torpy, *supra* note 2085.

2096. See Redmon & Torpy, *supra* note 2085.

On March 6, 2005, Ahmed and Sadequee traveled together to Toronto, which has a very large Muslim community.²⁰⁹⁷ Two of the men they met were subsequently prosecuted by Canada after a 17-suspect terrorism sweep.²⁰⁹⁸

In April, Ahmed and Sadequee made casing videos of potential terrorism targets: the Capitol, the George Washington Masonic Memorial in Alexandria, the World Bank, and a fuel storage facility in Newington, Virginia.²⁰⁹⁹ A suspected terrorist in Britain, Younis Tsouli, was discovered to have received the videos over the Internet.²¹⁰⁰

On July 17, Ahmed traveled to Pakistan.²¹⁰¹ His family claimed the trip was for religious education, but the government claimed the purpose was military training.²¹⁰² On August 18, Sadequee traveled to Bangladesh.²¹⁰³

Ahmed returned to the U.S. on August 19, and federal agents interviewed him upon his arrival.²¹⁰⁴ They interviewed him again the following March.²¹⁰⁵

In October 2008, because of Judge Cooper's taking senior status four months later, District Judge William S. Duffey, Jr., became the presiding judge.²¹⁰⁶ The government decided to try Ahmed and Sadequee by separate indictments.²¹⁰⁷ As trial approached, each of the defendants expressed a desire to represent himself.²¹⁰⁸

2097. Specific Findings, *supra* note 2091, at 3; see Brenda Goodman, *U.S. Says 2 Georgia Men Planned a Terror Attack*, N.Y. Times, Apr. 22, 2006, at A12; Torpy, *supra* note 2092.

2098. See Ian Austen & David Johnston, *17 Held in Plot to Bomb Sites Across Ontario*, N.Y. Times, June 4, 2006, at 11; Bill Torpy, *Ga. Terror Case Tied to Arrests*, Atlanta J. & Const., June 4, 2006, at A1; Torpy, *supra* note 2092.

2099. Specific Findings, *supra* note 2091, at 5–6 (“That the videos were to advance and provide support for terrorism is demonstrated by Sadequee’s narration during the dusk videotaping of the Pentagon, when, referring to the Pentagon, Sadequee stated: ‘this is where our brothers attacked.’”); see Rashbaum & Goodman, *supra* note 2083; Redmon & Torpy, *supra* note 2085; Torpy, *supra* note 2092; Craig Whitlock & Spencer S. Hsu, *Terror Webmaster Sentenced in Britain*, Wash. Post, Jan. 24, 2008, at A10.

2100. Specific Findings, *supra* note 2091, at 13; see Torpy, *supra* note 2092.

On July 5, 2007, Tsouli was sentenced by a British court to 10 years in prison. See Whitlock & Hsu, *supra* note 2099.

2101. Specific Findings, *supra* note 2091, at 10; see Torpy, *supra* note 2092.

2102. See Torpy, *supra* note 2092.

2103. Specific Findings, *supra* note 2091, at 10.

2104. *Id.* at 11.

2105. *Id.* at 15.

2106. N.D. Ga. Docket Sheet, *supra* note 2071 (noting transfer on Oct. 1, 2008); Interview with Hon. Clarence Cooper, Nov. 18, 2009; see Tr. at 3–4, *United States v. Ahmed*, No. 1:06-cr-147 (Jan. 26, 2009, filed Feb. 12, 2009); Tr. at 2–3, *id.* (Jan. 26, 2009, filed Jan. 30, 2009); Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (noting Judge Cooper’s taking senior status on Feb. 9, 2009).

Tim Reagan interviewed Judge Duffey for this report in the judge’s chambers on June 16, 2009, and by telephone on February 18, 2010.

2107. Third Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 9, 2008) (superseding indictment against Sadequee); Second Superseding Indictment, *id.* (superseding indictment against Ahmed).

2108. See Bill Rankin, *Terror Suspects May Want to Defend Selves*, Atlanta J. & Const., Jan. 28, 2009, at C3.

Ahmed opted for a bench trial,²¹⁰⁹ which began on June 1, 2009.²¹¹⁰ On June 9, Judge Duffey announced that Ahmed was guilty.²¹¹¹

The trial received extensive coverage, especially by local news media.²¹¹² One status conference held in Judge Brill's chambers was attended by reporters from several news media because there had been talk of closing the proceeding.²¹¹³ Judge Brill observed that sealing documents and closing proceedings often intensifies news media interest.²¹¹⁴

One local journalist sat through the entire trial.²¹¹⁵ Judge Duffey reserved a row of seats for the press, and he permitted sketch artists to sit in the jury box.²¹¹⁶ News media had access to all of the evidence on the day that it was admitted; the U.S. Attorney's office was responsible for providing copies of the evidence to the media.²¹¹⁷ No one in Judge Duffey's chambers was permitted to convey information to news media, except to read those few answers provided by Judge Duffey to their questions about scheduling.²¹¹⁸

Judge Duffey sealed his special findings supporting the guilty verdict until after Sadequee's trial.²¹¹⁹ News media initially objected to the idea, but they came to accept the temporary sealing as proper.²¹²⁰

For Sadequee's trial, Judge Duffey used a jury questionnaire.²¹²¹ Prospective jurors filled out the questionnaire a week in advance of voir dire.²¹²² This gave the

2109. Specific Findings, *supra* note 2091, at 2; Interview with Hon. William S. Duffey, Jr., June 16, 2009; see Bill Rankin, *No Jury for Terror Suspect*, Atlanta J. & Const., May 20, 2009, at B1.

2110. N.D. Ga. Docket Sheet, *supra* note 2071; Specific Findings, *supra* note 2091, at 2; see Bill Rankin, *Defendant "Fell Prey" to Extremist, Lawyer Says*, Atlanta J. & Const., June 2, 2009, at A10.

2111. Verdict, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. June 10, 2009); Specific Findings, *supra* note 2091, at 2; see Robbie Brown, *Georgia Man Is Convicted in Conspiracy*, N.Y. Times, June 11, 2009, at A21; Bill Rankin, *Terror Trial Verdict: Guilty*, Atlanta J. & Const., June 11, 2009, at A1.

2112. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2113. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2114. *Id.*

2115. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2116. *Id.*

2117. *Id.*

2118. *Id.*

2119. Specific Findings, *supra* note 2091; N.D. Ga. Docket Sheet, *supra* note 2071; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2120. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2121. William S. Duffey, Jr., United States v. Sadequee: Jury Questionnaire (July 22, 2009) [hereinafter *Sadequee* Jury Questionnaire]; Interview with Hon. William S. Duffey, Jr., February 18, 2010.

A questionnaire was also prepared for Ahmed's trial, but it was not used because Ahmed's trial was before the bench. William S. Duffey, Jr., United States v. Ahmed: Jury Questionnaire (2009).

2122. Interview with Hon. William S. Duffey, Jr., February 18, 2010.

lawyers and the court ample time to review the questionnaires to focus follow-up voir dire on the most important issues.²¹²³

Judge Duffey bifurcated the questionnaire so that prospective jurors filled out the first part, which focused on general background issues and matters that might affect a panel member's service, before they filled out the second part, which focussed on issues related to the nature of the trial, beliefs about Islam, and other case-specific matters.²¹²⁴

Jury selection in Sadequee's trial began on August 3, 2009.²¹²⁵ That morning, Sadequee announced that he would represent himself.²¹²⁶ Judge Duffey appointed his attorneys as standby counsel.²¹²⁷ Sadequee cross-examined the government's witnesses but did not call any witnesses himself.²¹²⁸ For his defense, he offered only his own testimony and closing argument.²¹²⁹ On, August 12, the jury found Sadequee guilty on all four counts presented.²¹³⁰

The defendants represented themselves at sentencing, although their lawyers were allowed to argue some sentencing guidelines issues.²¹³¹ On December 14, Judge Duffey sentenced Ahmed to 13 years and sentenced Sadequee to 17 years.²¹³² Appeals are pending.²¹³³

Challenge: Closed Proceeding

When Ahmed entered a plea, Sadequee had not yet been indicted, and the government received permission from the court, with Ahmed's consent, to have the proceeding closed.²¹³⁴ Deputy marshals taped newspapers to the windows on the courtroom door so that no one could see inside.²¹³⁵

2123. *Id.*

Judge Duffey tries to minimize the amount of jurors' idle time at the courthouse. *Id.*

2124. *Sadequee* Jury Questionnaire, *supra* note 2121; Interview with Hon. William S. Duffey, Jr., February 18, 2010.

2125. N.D. Ga. Docket Sheet, *supra* note 2071.

2126. *Id.*; Tr., United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Aug. 3, 2009, filed Aug. 31, 2009); Interview with Hon. William S. Duffey, Jr., February 18, 2010.

2127. Interview with Hon. William S. Duffey, Jr., February 18, 2010.

2128. *Id.*

2129. *Id.*

2130. Jury Verdict, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Aug. 12, 2009) (guilty of conspiracy to provide material support to terrorists, providing and attempting to provide material support to terrorists, conspiracy to provide material support to a designated foreign terrorist organization, and attempting to provide material support to a designated foreign terrorist organization).

2131. N.D. Ga. Docket Sheet, *supra* note 2071; *see* Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 7, 2009).

2132. Judgment and Commitment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 15, 2009) (Ahmed's sentence); Judgment and Commitment, *id.*, (Dec. 14, 2009) (Sadequee's sentence); *see* Bill Rankin, *Two Terrorists Get Prison Sentences*, Atlanta J. & Const., Dec. 15, 2009, at A1.

2133. Docket Sheet, United States v. Ahmed, No. 09-16452 (11th Cir. Dec. 29, 2009); Docket Sheet, United States v. Sadequee, No. 09-16325 (11th Cir. Dec. 21, 2009).

2134. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

2135. *See* Torpy & Redmon, *supra* note 2073.

Judge Brill granted the news media's motion to intervene for the purpose of possibly challenging sealing and closure orders.²¹³⁶

Challenge: Attorney Appointment

Initially, one of the attorneys appointed to represent Sadequee was an attorney in the Federal Public Defender's office.²¹³⁷ But Sadequee was assaulted in detention by another inmate who was also represented by that office, so the office could no longer represent Sadequee.²¹³⁸ Judge Brill appointed a Muslim attorney with offices in Miami as a replacement.²¹³⁹

Challenge: Classified Evidence

Early in the case, Judge Feldman issued a protective order requiring the defense to keep confidential discovery that, although not classified, was sensitive.²¹⁴⁰ Judge Brill denied as overly broad and excessively burdensome for the court a subsequent government request for a protective order requiring defendants to file under seal, until the court could redact unclassified but sensitive information, all papers based on discovery.²¹⁴¹ News media were vigilant in arguing that the case be prosecuted openly.²¹⁴² Judge Brill insisted that specific reasons be articulated for the sealing of any filings.²¹⁴³ The parties subsequently agreed to a protective order that Judge Brill could sign.²¹⁴⁴

On June 16, 2006, before Sadequee was added to the indictment, the government filed a notice that it would use evidence obtained through the Foreign Intelligence Surveillance Act (FISA) and a motion for a protective order, pursuant to the Classified Information Procedures Act, laying out ground rules for defense access to classified evidence.²¹⁴⁵ On February 8, 2007, Judge Cooper signed a protective order laying out procedures for handling classified information.²¹⁴⁶

Defense counsel had to obtain security clearances.²¹⁴⁷ So did court staff.²¹⁴⁸ District judges have security clearances by virtue of their office, but magistrate judges must obtain security clearances to see classified information.²¹⁴⁹

2136. N.D. Ga. Docket Sheet, *supra* note 2071 (noting Sept. 1, 2006, minute order).

2137. Appointment Ord., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006).

2138. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2139. *Id.*

2140. Protective Ord., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

2141. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 26, 2006); see Bill Torpy, *Terror Case Files to Remain Open*, Atlanta J. & Const., Oct. 27, 2006, at D3.

2142. See Moni Basu, *Judge Seeks Balance on Terror Case Evidence*, Atlanta J. & Const., Dec. 16, 2006, at B3.

2143. See Basu, *supra* note 2142.

2144. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 20, 2006).

2145. N.D. Ga. Docket Sheet, *supra* note 2071; see Bill Torpy, *Lawyer in Georgia Terror Case Must Show "Need to Know,"* Atlanta J. & Const., June 20, 2006, at B3.

2146. Protective Ord., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 8, 2007).

2147. See Bill Torpy, *Security Clearance Slows Terror Case*, Atlanta J. & Const., Sept. 2, 2006, at D3.

Before classified evidence is presented at trial, and often before it can be shared with defendants themselves, in addition to their cleared counsel, the evidence is either declassified or substituted with court-approved summaries or admissions.²¹⁵⁰ At an early proceeding, the U.S. Attorney observed that “the intelligence community always wants the Government to wait as long as it possibly can before it declassifies or gets substitutions because every step in that discretion poses some risk of disclosure of sources, even if we do substitutions.”²¹⁵¹

Much pretrial work in criminal cases in the Northern District of Georgia is done by magistrate judges.²¹⁵² Judge Brill reviewed classified foundations for trial evidence at an in camera proceeding with counsel for both sides present.²¹⁵³

Some classified information in this case was designated sensitive compartmented information (SCI), which means that it is protected by special procedures compartmenting who has access to it.²¹⁵⁴ Judges, court staff, and defense counsel could view this information at a sensitive compartmented information facility (SCIF) at the U.S. Attorney’s office in the same building as the courthouse.²¹⁵⁵ Court staff with an SCI security clearance could transport material between the SCIF and a judge.²¹⁵⁶ Judges Duffey and Brill were permitted to keep some classified materials in chambers safes.²¹⁵⁷ Court information security officers reviewed any documents prepared based on classified information for possible redaction.²¹⁵⁸

From 2001 until his becoming a judge in 2004, Judge Duffey was the district’s U.S. Attorney.²¹⁵⁹ He was, therefore, familiar with the security staff at the U.S. Attorney’s office.²¹⁶⁰ To view classified materials for the case, Judge Duffey made an appointment with the U.S. Attorney’s security staff, and the judge usually complied with their request that he give them at least a day’s notice and not stay past 5:00 p.m.²¹⁶¹

2148. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2149. *See* Torpy, *supra* note 2147

2150. 18 U.S.C. §§ 4, 6(c)(1) (2000); *see* Reagan, *supra* note 165, at 12–14.

2151. Tr. at 16, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 18, 2008, filed Sept. 23, 2008)

2152. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2153. Rep. & Rec., *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 2, 2007), *adopted*, Order, *id.* (Dec. 19, 2008); *see* Minute Sheet, *id.* (Sept. 24, 2007).

2154. *See* Reagan, *supra* note 165, at 3 (describing sensitive compartmented information).

2155. *See* Torpy, *supra* note 2141; *see also* Reagan, *supra* note 165, at 19 (describing SCIFs).

2156. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2157. *Id.*; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2158. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009; *see* Torpy, *supra* note 2141.

2159. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>; *see* Rankin, *supra* note 2109.

2160. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2161. *Id.*

Challenge: FISA Evidence

Two months after the government provided notice that it would use FISA evidence in the case, Ahmed filed a motion to suppress FISA evidence.²¹⁶² Judge Brill issued a report and recommendation finding no errors in FISA procedures and finding that none of the FISA materials were discoverable.²¹⁶³ Judge Brill acknowledged that defense counsel is in a difficult position when arguing for suppression of FISA evidence, because they do not have access to the FISA records.²¹⁶⁴ On the other hand, a FISA suppression motion is easier for the judge than many other suppression motions, because collection of the FISA evidence has been subjected to prior judicial review.²¹⁶⁵

Ahmed also filed a motion that the government disclose whether he had been subject to warrantless surveillance by the National Security Agency outside FISA.²¹⁶⁶ The court denied the motion.²¹⁶⁷

2162. FISA Mot., *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).

2163. Rep. & Rec., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 22, 2007).

2164. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2165. *Id.*

2166. NSA Mot., *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).

2167. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 7, 2007).

Sears Tower

United States v. Batiste
(Joan A. Lenard, S.D. Fla.)

In an effort to thwart a suspected plot to topple the building formerly known as the Sears Tower in Chicago and attack other targets in Chicago, Washington, New York, Los Angeles, and Miami, the government indicted seven men with ties to the Liberty City neighborhood of Miami on June 22, 2006.²¹⁶⁸ Narseal Batiste, Burson Augustin, his brother Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor were American citizens.²¹⁶⁹ Phanor was already in jail for a probation violation; the others were arrested in Miami the day of indictment.²¹⁷⁰ Patrick Abraham was an illegal Hatian immigrant also arrested in Miami.²¹⁷¹ Lyg-lenson Lemorin was a legal Hatian immigrant who had moved to Atlanta approximately two months previously, and he was arrested there.²¹⁷² The defendants became known as the Liberty City Seven.²¹⁷³

Batiste, married with four children, was born in Chicago and grew up there and in Louisiana, where his father was a Baptist preacher.²¹⁷⁴ His mother died in 2000.²¹⁷⁵ At one time, he worked for FedEx in Chicago.²¹⁷⁶ Batiste and his wife operated a stucco and masonry business, and he held Bible readings at his ware-

2168. Indictment, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006); see Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. Times, July 1, 2006, at A1; David Ovalle, Evan S. Benn, Larry Lebowitz & Luisa Yanez, *Terrorism Raid Targets a Warehouse in Miami*, Miami Herald, June 23, 2006, at A1; Walter Pincus, *FBI Role in Terror Probe Questioned*, Wash. Post, Sept. 2, 2006, at A1; Scott Shane & Andrea Zarate, *F.B.I. Killed Plot in Talking State, a Top Aide Says*, N.Y. Times, June 24, 2006, at A1; Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts*, Wash. Post, June 24, 2006, at A3.

In 2009, the Sears Tower became known as the Willis Tower. See Mary Ellen Podmolik, *Tower Title Holds Power*, Chi. Trib., Mar. 13, 2009, News, at 5.

2169. See Shane & Zarate, *supra* note 2168; Whoriskey & Eggen, *supra* note 2168.

2170. See Trenton Daniel, Nicole White & Andres Viglucci, *Bible Their Book, Work Their Life, Family Says*, Miami Herald, June 24, 2006, at A1; Shane & Zarate, *supra* note 2168; Whoriskey & Eggen, *supra* note 2168.

2171. See Shane & Zarate, *supra* note 2168; Whoriskey & Eggen, *supra* note 2168.

2172. See Daniel *et al.*, *supra* note 2170; Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. Times, Dec. 14, 2007, at A22; Shane & Zarate, *supra* note 2168; Jay Weaver & Luisa Yanez, *Mistrial Called for 6 of "Liberty City 7"*, Miami Herald, Dec. 14, 2007, at A1; Peter Whoriskey, *Man Acquitted in Terror Case Faces Deportation*, Wash. Post, Mar. 2, 2008, at A3; Whoriskey & Eggen, *supra* note 2168.

2173. See Abby Goodnough, *Trial Starts for Men in Plot to Destroy Sears Tower*, N.Y. Times, Oct. 3, 2007, at A14.

2174. See Daniel *et al.*, *supra* note 2170; Drew & Lichtblau, *supra* note 2168; Charles Rabin & Susannah A. Nesmith, *Family: Suspect Grew Up Deeply Religious*, Miami Herald, June 27, 2006, at A1.

2175. See Rabin & Nesmith, *supra* note 2174.

2176. See Drew & Lichtblau, *supra* note 2168; Pincus, *supra* note 2168.

house.²¹⁷⁷ Batiste, also known as Prince Manna, followed the traditions of the Moorish Science Temple of America, founded in 1913 by the Prophet Noble Drew Ali, which blends Judaism, Christianity, and Islam, with an emphasis on self-discipline through martial arts.²¹⁷⁸ He called his religious group the Seas of David.²¹⁷⁹

Abraham was Batiste's right-hand man.²¹⁸⁰ Phanor was born in Miami of Haitian parents.²¹⁸¹ He attended Edison Senior High School and finished high school in Tallahassee.²¹⁸² At the time of his arrest, he was living in Batiste's warehouse.²¹⁸³ Herrera's parents were from the Dominican Republic.²¹⁸⁴ Lemorin, born in Haiti and married with two children, came to the U.S. as a child in 1993 and had permanent resident status.²¹⁸⁵

The case against the men was established by Elie Assad, a veteran government informant who posed as a representative of al-Qaeda.²¹⁸⁶ Assad provided the suspects with military boots and a video camera for casing targets.²¹⁸⁷ The FBI paid him \$17,000 plus \$19,570 in expenses, and the government granted him political asylum.²¹⁸⁸ Abbas al-Saidi, another informant, was paid \$10,500 plus \$8,815 in expenses.²¹⁸⁹

The court assigned the case to Judge Joan A. Lenard.²¹⁹⁰ Jury selection began on September 18, 2007.²¹⁹¹ Judge Lenard did not use a jury questionnaire; in over

2177. See Drew & Lichtblau, *supra* note 2168.

2178. See Drew & Lichtblau, *supra* note 2168; Charles Rabin & Alexandra Alter, *Group Denies Violent Doctrine*, Miami Herald, June 24, 2006, at A29; Whoriskey, *supra* note 2172; Peter Whoriskey, *Trial Begins for 7 Accused of Plotting to Destroy Sears Tower*, Wash. Post, Oct. 3, 2007, at A9.

2179. See Drew & Lichtblau, *supra* note 2168; Goodnough, *supra* note 2173; Shane & Zarate, *supra* note 2168.

2180. See Jay Weaver & David Ovalle, *How FBI Moles Snared Terror Suspects*, Miami Herald, July 16, 2006, at A1.

2181. See *id.*

2182. See *id.*

2183. See *id.*

2184. See *id.*

2185. See Daniel *et al.*, *supra* note 2170; Whoriskey, *supra* note 2172.

2186. See Goodnough, *supra* note 2173; Shane & Zarate, *supra* note 2168; Whoriskey, *supra* note 2178; Whoriskey & Eggen, *supra* note 2168.

Assad was born in Lebanon of Syrian descent. See Jay Weaver, *Liberty City Seven Defense Faces Setbacks*, Miami Herald, Oct. 23, 2007, at B1 (reporting that Assad was paid \$80,000 and al-Saidi was paid about \$40,000).

2187. See Goodnough, *supra* note 2173; Shane & Zarate, *supra* note 2168; Whoriskey & Eggen, *supra* note 2168.

2188. See Pincus, *supra* note 2168; Jay Weaver, *Trial for "Liberty City Seven" to Start March 3*, Miami Herald, July 27, 2006, at B3.

2189. See Pincus, *supra* note 2168; Weaver, *supra* note 2188.

2190. Docket Sheet, United States v. Batiste, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006); see Weaver, *supra* note 2188.

2191. Tim Reagan interviewed Judge Lenard for this report in the judge's chambers on October 8, 2009.

a dozen years on the bench, she has never used one.²¹⁹² She prefers face-to-face voir dire in three phases: first are questions directed to the whole panel, second are individual general qualification questions, and third are more sensitive case-specific individual questions.²¹⁹³

Opening statements began on October 2.²¹⁹⁴ Later that month, a Miami police counterterrorism pamphlet, which was distributed at a Metrorail station, was discovered in the jury room.²¹⁹⁵ Judge Lenard dismissed two jurors and an alternate who said they had read it.²¹⁹⁶

Jury deliberations began on December 3.²¹⁹⁷ On December 13, the jury acquitted Lemorin.²¹⁹⁸ But the jury deadlocked on the other defendants, and Judge Lenard declared a mistrial.²¹⁹⁹ On the following day, the government transferred Lemorin to an immigration detention center and initiated deportation proceedings against him.²²⁰⁰ On November 20, an immigration judge ruled him deportable.²²⁰¹

After 13 days of deliberation, a second jury deadlocked, on April 16, 2008, and Judge Lenard again declared a mistrial.²²⁰²

Jury selection in the third trial began on January 27, 2009.²²⁰³ Selection proceedings were interrupted by briefing on whether the government's using a peremptory challenge against a young Haitian-American man was improper.²²⁰⁴

2191. See Jay Weaver, *Proving Liberty City 7's Intentions Is Task for Feds*, Miami Herald, Sept. 18, 2007, at A1.

2192. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2193. Joan A. Lenard, *United States v. Batiste: Voir Dire Questions* (Sept. 18, 2007) [hereinafter *Voir Dire Questions*]; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (finding Judge Lenard's voir dire procedures in a previous case a meticulous model).

2194. See Goodnough, *supra* note 2173; Whoriskey, *supra* note 2178.

2195. See Weaver, *supra* note 2186.

2196. See *id.*

2197. See Kirk Semple, *Defense Ends Its Arguments in Terrorism Trial in Miami*, N.Y. Times, Dec. 1, 2007, at A12.

2198. See Semple, *supra* note 2172; Weaver & Yanez, *supra* note 2172; Peter Whoriskey, *Terrorism Case Ends in Mistrial; 1 Acquitted*, Wash. Post, Dec. 14, 2007, at A3.

2199. See Semple, *supra* note 2172; Weaver & Yanez, *supra* note 2172; Whoriskey, *supra* note 2198.

2200. See *Ex-Terror Suspect Is Charged Anew*, N.Y. Times, Feb. 7, 2008, at A27; Whoriskey, *supra* note 2172.

2201. See *Ex-Terror Suspect May Be Deported*, Wash. Post., Dec. 6, 2008, at A2; Andres Viglucci, *Haitian Acquitted in Liberty City 7 Case Is Ordered Deported*, Miami Herald, Dec. 6, 2008, at B5.

2202. See Damien Cave, *Mistrial for 6 in Sears Tower Terror Case*, N.Y. Times, Apr. 17, 2008, at A21; Julianne Gage, *2nd Mistrial in "Liberty City 7" Case*, Wash. Post, Apr. 17, 2008, at A2.

2203. See Jay Weaver, *Jurors Vetted in Liberty City 6 Trial*, Miami Herald, Jan. 28, 2009, at B3.

2204. See Jay Weaver, *Racial Concerns Halt Jury Selection in Third Liberty City Six Terrorism Trial*, Miami Herald, Feb. 12, 2009, at B3.

Opening statements began on February 19.²²⁰⁵ Jury deliberations were interrupted when one juror took ill and Judge Lenard replaced him with an alternate, which meant that deliberations had to begin again.²²⁰⁶ Then jurors reported that one of their members had refused to participate in deliberations.²²⁰⁷ After questioning all of the jurors, including the juror in question, and with consent of the parties, Judge Lenard replaced this juror as well.²²⁰⁸ Ultimately, on May 12, the jury acquitted Herrera and convicted each of the others on at least some of the pending counts.²²⁰⁹ On November 18 and 19, 2009, Judge Lenard sentenced Batiste to 13½ years, Abraham to nine years and four and a half months, Phanor to eight years, Rothschild Augustine to seven years, and Burson Augustin to six years.²²¹⁰ Appeals are pending.²²¹¹

Challenge: Classified Evidence

No part of this case involved classified information.²²¹²

Challenge: Jury Security

During the first trial, an attorney working for one of the defendants gave a list of the jurors' names to members of a defendant's family.²²¹³ Because of this and other inappropriate disclosures, Judge Lenard used an anonymous jury for the next two trials.²²¹⁴ For the second trial, she also used partial sequestration, which meant that jurors met at undisclosed locations and were shuttled to the courthouse.²²¹⁵ The court provided them with lunch.²²¹⁶

2205. See Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. Times, Feb. 19, 2009, at A18.

2206. Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Jury Deliberations in Terror-Conspiracy Retrial Delayed Again*, Miami Herald, May 2, 2009, at B3.

2207. Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Five Members of Liberty City Six Guilty in Terror Plot*, Miami Herald, May 13, 2009, at A11; Weaver, *supra* note 2206; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

2208. Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Weaver, *supra* note 2207; Weaver, *supra* note 2206; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

2209. See Damen Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. Times, May 13, 2009, at A19; Weaver, *supra* note 2207.

2210. Docket Sheet, *supra* note 2190.

2211. Docket Sheet, *United States v. Batiste*, No. 09-16081 (11th Cir. Dec. 4, 2009); Docket Sheet, *United States v. Augustine*, No. 09-15989 (11th Cir. Nov. 27, 2009); Docket Sheet, *United States v. Abraham*, No. 09-15987 (11th Cir. Nov. 27, 2009); Docket Sheet, *United States v. Phanor*, No. 09-15986 (11th Cir. Nov. 27, 2009); Docket Sheet, *United States v. Augustin*, No. 09-15985 (11th Cir. Nov. 27, 2009).

2212. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2213. *Id.*

2214. Voir Dire Questions, *supra* note 2193; Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2215. *Id.*

2216. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

For the third trial, Judge Lenard did not implement sequestration procedures, but monitored the situation to see if implementing them would be advisable after all.²²¹⁷ Even partial sequestration is a burden on the jurors—they have to gather extra early—and the drivers and the vans required to shuttle them are an added expense.²²¹⁸

²²¹⁷. *Id.*

²²¹⁸. *Id.*

Fort Dix

United States v. Shnewer (Robert B. Kugler, D.N.J.)

On May 7, 2007, the government filed criminal complaints in the District of New Jersey against six men, alleging a plot to attack Fort Dix.²²¹⁹ Authorities arrested them that evening.²²²⁰ The grand jury returned an indictment on June 5.²²²¹ The court assigned the case to Judge Robert B. Kugler.²²²²

Mohamad Shnewer, a taxi driver and U.S. citizen born in Jordan, was the alleged coordinator.²²²³ Also charged were his three brothers-in-law: Dritan, Shain, and Eljvir Duka, roofers who were ethnically Albanian, born in Yugoslavia, and who had been in the U.S. illegally since they were children.²²²⁴ The two other defendants were Serdar Tatar, a legal resident born in Turkey who worked as a 7-Eleven clerk, and Agron Abdullahu, a legal resident with Egyptian military training who was born in Yugoslavia and baked dough for a supermarket.²²²⁵ Fort Dix apparently was selected as a target because Tatar's family frequently delivered pizza there.²²²⁶

The group came to the government's attention in January 2006, when a video store clerk reported that the men were having copied a video showing them shout-

2219. Docket Sheet, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. June 5, 2007) [hereinafter D.N.J. Docket Sheet]; see George Anastasia, *Fort Dix Targeted in "Jihad," U.S. Says*, Phila. Inquirer, May 9, 2007, at A1; David Kocieniewski, *6 Men Arrested in a Terror Plot Against Ft. Dix*, N.Y. Times, May 9, 2007, at A1; Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, Wash. Post, May 9, 2007, at A1; John Shiffman & Jan Hefler, *Ordinary Lives, Radical Words*, Phila. Inquirer, May 9, 2007, at A1; John Shiffman & Jennifer Moroz, *Step by Step, Fort Dix Suspects Snared*, Phila. Inquirer, May 11, 2007, at A1.

2220. D.N.J. Docket Sheet, *supra* note 2219; see George Anastasia & Troy Graham, *Fort Dix Suspects Indicted*, Phila. Inquirer, June 6, 2007, at B1; Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219.

2221. D.N.J. Docket Sheet, *supra* note 2219; see Kareem Fahim, *Charges Filed Against 6 Men in Plot to Attack Base*, N.Y. Times, June 6, 2007, at B6.

2222. D.N.J. Docket Sheet, *supra* note 2219; see Kareem Fahim, *U.S. Judge Promises Speedy Trial, and Leg Shackles, in Fort Dix Terror Case*, N.Y. Times, June 15, 2007, at A21; Troy Graham, *An Oct. Trial for Ft. Dix Six*, Phila. Inquirer, June 15, 2007, at B1.

Tim Reagan interviewed Judge Kugler for this report in the judge's chambers on December 15, 2009.

2223. D.N.J. Docket Sheet, *supra* note 2219; see Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219; Shiffman & Hefler, *supra* note 2219.

2224. D.N.J. Docket Sheet, *supra* note 2219; see Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219; Shiffman & Hefler, *supra* note 2219.

2225. D.N.J. Docket Sheet, *supra* note 2219; see Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219; Shiffman & Hefler, *supra* note 2219.

2226. See Edward Colimore, *Dismay at Cookstown Pizzeria*, Phila. Inquirer, May 9, 2007, at A4; Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219; Shiffman & Hefler, *supra* note 2219.

ing about jihad while training with assault weapons in the Poconos.²²²⁷ The government sent Mahmoud Omar, an informant, to investigate the group, and by March the informant had befriended Shnewer.²²²⁸ Arrests immediately followed a sham sale of firearms by Omar to Dritan and Shain Duka.²²²⁹ It was reported that the government paid Omar more than \$230,000.²²³⁰ A second informant was reportedly paid \$150,000.²²³¹

On October 31, 2007, Abdullahu pleaded guilty to a charge of providing firearms to illegal aliens, and Judge Kugler sentenced him to one year and eight months on March 31, 2008.²²³²

Because of the news media's attention to this case, Judge Kugler and the court set up a public website where documents in the case file are posted.²²³³ This allowed access to the documents without going through PACER.²²³⁴ Evidence was posted the moment it was admitted.²²³⁵ Each side loaded digitized exhibits on a secure server in advance of moving for their admissibility.²²³⁶ Neither side had access to the other side's exhibits on the server until they were admitted.²²³⁷

The court also posted proceeding transcripts on the server in a way that permitted free access to the proceedings while protecting the reporters' proprietary rights in the transcripts.²²³⁸ Transcript text rolled on the public website in conti-

2227. See Anastasia, *supra* note 2219; Alan Feuer, *Practice in the Poconos*, N.Y. Times, May 9, 2007, at B6; Troy Graham, *Employee Who Played Key Role in Dix Case Moves On*, Phila. Inquirer, Dec. 24, 2008, at A6; Kocieniewski, *supra* note 2219; Russakoff & Eggen, *supra* note 2219.

2228. See Anastasia, *supra* note 2219; Feuer, *supra* note 2227; *Informer Appears at Trial, But His Recordings Talk*, N.Y. Times, Nov. 2, 2008, NJ, at 1 [hereinafter *Informer Appears*].

2229. See George Anastasia, *Details Emerge in Terror Sting*, Phila. Inquirer, May 10, 2007, at A1; Fahim, *supra* note 2221; *Informer Appears*, *supra* note 2228; Shiffman & Hefler, *supra* note 2219.

2230. See George Anastasia, *Terror Trial Opens for Ft. Dix 5*, Phila. Inquirer, Oct. 21, 2008, at A1; *Informer Appears*, *supra* note 2228; Paul von Zielbauer & Jon Hurdle, *Five Are Convicted of Conspiring to Attack Fort Dix*, N.Y. Times, Dec. 23, 2008, at A18; see also Geoff Mulvihill, *Defense Lawyers Question Informant in Terror Case*, Wash. Post, Nov. 6, 2008, at A10 ("Omar, an Egyptian who entered the U.S. illegally in the 1990s, is getting \$1,500 a week plus free rent for his aid to the government.").

2231. See von Zielbauer & Hurdle, *supra* note 2230.

2232. D.N.J. Docket Sheet, *supra* note 2219; see Kareem Fahim, *Gun Supplier Is Given 20-Month Sentence in Fort Dix Case*, N.Y. Times, Apr. 1, 2008, at B3; Kareem Fahim, *Tough Talk, and Hedging, in Taped Conversations of a Terrorism Defendant*, N.Y. Times, Mar. 31, 2008, at A21; Troy Graham, *First of Fort Dix Six Pleads Guilty*, Phila. Inquirer, Nov. 1, 2007, at B1; Troy Graham, *Man Who Supplied Guns in Alleged Fort Dix Terror Plot Sentenced to 20 Months*, Phila. Inquirer, Apr. 1, 2008, at B1.

Abdullahu was released from prison on March 24, 2009. <http://www.bop.gov>.

2233. <http://www.njd.uscourts.gov/FortDixTrial/index.html>; Decorum Order, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. July 13, 2007) [hereinafter *Decorum Order*]; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; see Graham, *supra* note 2222.

2234. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2235. *Id.*; see Graham, *supra* note 2222.

2236. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2237. *Id.*

2238. *Id.*

nuous loops so that a browser would see whatever few lines of text were displayed when the browser viewed the transcript and whatever lines of text scrolled by while the browser viewed.²²³⁹

Jury selection for the trial against the five remaining defendants began on September 29, 2008.²²⁴⁰ Judge Kugler used a jury questionnaire.²²⁴¹ For five days, approximately 150 prospective jurors reported to the courthouse each day to fill out the questionnaire in the jury room, where Judge Kugler greeted them.²²⁴² In the courtroom, Judge Kugler and the attorneys reviewed answered questionnaires.²²⁴³ Approximately two-thirds of the prospective jurors were disqualified on the basis of the questionnaires alone.²²⁴⁴

During the following week, 15 prospective jurors reported in the morning and 15 reported in the afternoon for individual voir dire.²²⁴⁵ Judge Kugler observed that once the questionnaires were filled out, there were few questions left to ask.²²⁴⁶ Although it is unusual for attorneys to ask questions directly during voir dire, Judge Kugler permitted it in this case.²²⁴⁷ Judge Kugler also granted the parties double the number of usual peremptory challenges.²²⁴⁸

Because of the trial's high profile, the court designated two overflow courtrooms: one for the news media and one for the rest of the public.²²⁴⁹ Because Judge Kugler permitted the media to use laptop computers in the main courtroom and gave them wireless Internet access, they did not use their overflow courtroom.²²⁵⁰ Recording devices were not permitted in the courtroom, nor were published likenesses of the jurors, and the general public were not permitted to bring in electronic equipment.²²⁵¹ The overflow courtroom was needed for the rest of the public on the first day of the trial and on the day of the verdict.²²⁵²

Trial began on October 20, 2008, with opening arguments.²²⁵³ On December 22, after six days of deliberation, a jury convicted Shnewer, the Dukas, and Tatar

2239. *Id.*

2240. D.N.J. Docket Sheet, *supra* note 2219; see George Anastasia, *Trial for Fort Dix Five Begins Tomorrow*, Phila. Inquirer, Sept. 28, 2008, at A1.

2241. Robert B. Kugler, *United States v. Shnewer: Jury Questionnaire* (Sept. 29, 2008); see Anastasia, *supra* note 2241.

2242. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2243. *Id.*

2244. *Id.*

2245. *Id.*

2246. *Id.*

2247. *Id.*

2248. *Id.*

2249. Decorum Order, *supra* note 2233; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2250. *Id.*; see Graham, *supra* note 2222.

Because of the court's wireless connection to the Internet, journalists were able to blog in real time from the courtroom. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2251. Decorum Order, *supra* note 2233; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2252. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

Because of the court's wireless connection to the Internet, journalists were able to blog in real time from the courtroom. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2253. See Anastasia, *supra* note 2230.

of conspiring to kill American soldiers.²²⁵⁴ On April 28 and 29, 2009, Judge Kugler sentenced Tatar to 33 years, and he sentenced the other defendants to life.²²⁵⁵ Appeals are pending.²²⁵⁶

In part because of the cold December weather, Judge Kugler did not want press conferences on the steps of the courthouse following the verdict, so the news media were asked to gather in the jury assembly room.²²⁵⁷ The government addressed the media for the first half hour, and defense counsel and families addressed the media thereafter.²²⁵⁸ The media could bring in cameras and recording devices for this purpose.²²⁵⁹ Because it worked well, a similar procedure was used after sentencing.²²⁶⁰

Challenge: Classified Evidence

Attorneys representing defendants who went to trial needed security clearances, but they were not permitted to share classified information with their clients.²²⁶¹ A secure room was set up in the courthouse for the attorneys to examine and work on classified documents—a separate safe was designated for each defendant.²²⁶² Judge Kugler’s staff—law clerks, court reporters, courtroom deputies, and judicial assistant—all received security clearances, and Judge Kugler observed that the clearance process went smoothly.²²⁶³

The Camden courthouse does not have a facility for storing sensitive compartmented information, but the defense attorneys did not have to examine such information and the little that Judge Kugler examined was brought to him by a court information security officer and taken away the same day.²²⁶⁴

2254. D.N.J. Docket Sheet, *supra* note 2219; see William Branigin, *5 Men Convicted in Plot to Kill Soldiers at Fort Dix*, Wash. Post, Dec. 23, 2008, at A2; Troy Graham, *Fort Dix Five Guilty of Conspiracy*, Phila. Inquirer, Dec. 23, 2008, at A1; von Zielbauer & Hurdle, *supra* note 2230.

2255. D.N.J. Docket Sheet, *supra* note 2219; see Troy Graham, *Final 2 Ft. Dix Defendants Sentenced*, Phila. Inquirer, Apr. 30, 2009, at A1; Troy Graham, *Three in Fort Dix Terrorist Plot Sentenced to Life*, Phila. Inquirer, Apr. 29, 2009, at A1; *3 Brothers Sentenced to Life for Holy War Plot at Ft. Dix*, N.Y. Times, Apr. 29, 2009, at A19.

2256. Docket Sheet, *United States v. Tatar*, No. 09-2302 (3d Cir. May 5, 2009) (Tatar’s appeal, noting consolidated appellant brief due Mar. 3, 2010); Docket Sheet, *United States v. Duka*, No. 09-2301 (3d Cir. May 5, 2009) (Shain Duka’s appeal); Docket Sheet, *United States v. Duka*, No. 09-2300 (3d Cir. May 5, 2009) (Dritan Duka’s appeal); Docket Sheet, *United States v. Shnewer*, No. 09-2299 (3d Cir. May 5, 2009) (Shnewer’s appeal); Docket Sheet, *United States v. Duka*, No. 09-2292 (3d Cir. May 5, 2009) (Eljvir Duka’s appeal).

2257. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2258. *Id.*

2259. *Id.*

2260. *Id.*

2261. *Id.*

2262. *Id.*

2263. *Id.*

2264. *Id.*

Challenge: FISA Evidence

Much of the case against the defendants was based on evidence obtained pursuant to FISA warrants.²²⁶⁵ Much of the FISA evidence was declassified, but the affidavits supporting the FISA warrants generally were not.²²⁶⁶ Judge Kugler reviewed FISA files to determine what was discoverable and to determine that the FISA surveillance was properly supported.²²⁶⁷ FISA discoverability decisions are somewhat hampered by the judge's not knowing, particularly early in the case, what the defenses might be.²²⁶⁸

Challenge: Classified Opinion

Judge Kugler's August 14, 2008, opinion on the validity of FISA evidence is classified.²²⁶⁹ A redacted opinion was filed publicly on December 29, 2009, after review by intelligence agencies was complete.²²⁷⁰ Redactions appear to conceal what agents of al-Qaeda were the targets of FISA surveillance resulting in evidence against the defendants.²²⁷¹

Challenge: Jury Security

Judge Kugler used an anonymous jury.²²⁷² Each juror met at one of two secret locations; deputy marshals shuttled the jurors to the courthouse.²²⁷³ During deliberations, the jurors were sequestered at a nearby hotel.²²⁷⁴

After the trial, jurors were given contact information for members of the news media, and they could contact them if they wished, but the media were not permitted to contact the jurors directly.²²⁷⁵

Challenge: Court Security

Court security was enhanced for the trial.²²⁷⁶ Additional precautions were taken during the two days of sentencing.²²⁷⁷ No other judge scheduled proceedings for

2265. FISA Evidence Order 2, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. July 13, 2007) [hereinafter FISA Evidence Order]; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; see George Anastasia, *More Ft. Dix Suspects Want to Suppress Evidence*, *Phila. Inquirer*, June 21, 2008, at B4.

2266. FISA Evidence Order, *supra* note 2265, at 2–9; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2267. FISA Evidence Order, *supra* note 2265, at 13–23; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2268. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2269. FISA Evidence Order, *supra* note 2265, at 1; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2270. D.N.J. Docket Sheet, *supra* note 2219; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2271. FISA Evidence Order, *supra* note 2265.

2272. Decorum Order, *supra* note 2233; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2273. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2274. Decorum Order, *supra* note 2233; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2275. *Id.*

2276. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

those days, and court staff were encouraged to work at home.²²⁷⁸ Because a jury was not present, there was a greater visible presence of security.²²⁷⁹

2277. Id.

2278. Id.

2279. Id.

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