

National Security Case Studies: Special Case-Management Challenges

Sixth Edition

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CONTENTS

Table of Case-Management Challenges	xi
Table of Judges	xiii
Introduction	1
Terrorism Prosecutions	3
First World Trade Center Bombing	
<i>United States v. Salameh (Kevin Thomas Duffy, S.D.N.Y.) and United States v. Abdel Rahman (Michael B. Mukasey, S.D.N.Y.)</i>	5
Challenge: Interpreters	25
Challenge: Court Security	25
Challenge: Pro Se Defendants	25
Challenge: Jury Security	26
Challenge: Classified Evidence	27
Challenge: Terrorist Communications	27
Kenya and Tanzania	
<i>United States v. El-Hage (Leonard B. Sand, Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)</i>	28
Challenge: Attorney–Client Contacts	47
Challenge: Interpreters	50
Challenge: Mental Health During Detention	50
Challenge: Jury Security	51
Challenge: Court Security	52
Challenge: Witness Security	53
Challenge: Religious Accommodation	54
Challenge: Classified Evidence	55
Challenge: Classified Arguments	58
Challenge: Classified Orders and Opinions	59
Challenge: Subpoenaing a Cabinet Officer	60
Challenge: Interviewing Detainees	61
Challenge: Foreign Evidence	62
Millennium Bomber	
<i>United States v. Ressam (John C. Coughenour, W.D. Wash.) and United States v. Haouari (John F. Keenan, S.D.N.Y.)</i>	64
Challenge: Classified Evidence	74
Challenge: Foreign Evidence	74
Challenge: Court Security	75

National Security Case Studies (6th ed.)

Challenge: Jury Security 75

Challenge: Witness Security 75

Mujahedeen Khalq

United States v. Afshari (Robert M. Takasugi and David O. Carter, C.D. Cal.) 76

Challenge: Classified Evidence 78

Detroit

United States v. Koubriti (Gerald E. Rosen, E.D. Mich.) 80

Challenge: Jury Security 85

Challenge: Sanctioning a Cabinet Officer 85

Challenge: Classified Evidence 87

Twentieth Hijacker

United States v. Moussaoui (Leonie M. Brinkema, E.D. Va.) 89

Challenge: Attorney Appointment 100

Challenge: Pro Se Defendant 100

Challenge: Court Security 100

Challenge: Jury Security 101

Challenge: Classified Evidence 102

Challenge: Classified Arguments 103

Challenge: Closed Proceedings 106

Challenge: Classified Opinion 107

Challenge: Terrorist Communications 107

American Taliban

United States v. Lindh (T.S. Ellis III, E.D. Va.) 109

Challenge: Sensitive Unclassified Information 112

Challenge: Classified Evidence 113

Challenge: Interviewing Guantánamo Bay Detainees 114

Challenge: Witness Security 114

Challenge: Religious Accommodation 115

Dirty Bomber

Padilla v. Rumsfeld (Michael B. Mukasey, S.D.N.Y.), Padilla v. Hanft and Padilla v.

Rumsfeld (Henry F. Floyd, D.S.C.), and United States v. Hassoun (Marcia G. Cooke, S.D. Fla.) 117

Challenge: Attorney–Client Contacts 126

Challenge: Mental Health During Detention 128

Challenge: Classified Arguments 129

Challenge: Witness Security 130

Challenge: Court Security 130

Challenge: Jury Security 130

Challenge: Classified Evidence 131

Challenge: FISA Evidence 132

Contents

Lackawanna

United States v. Goba (William M. Skretny and H. Kenneth Schroeder, Jr., W.D.N.Y.) 134

Challenge: Classified Evidence 139

Challenge: Court Security 140

Challenge: Religious Accommodation 140

A Plot to Kill President Bush

United States v. Abu Ali (Gerald Bruce Lee, E.D. Va.) 141

Challenge: Foreign Evidence and Witness Security 143

Challenge: Attorney–Client Contacts 144

Challenge: Classified Evidence 144

Challenge: Classified Arguments 146

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.) 148

Challenge: Classified Evidence 156

Challenge: Closed Proceedings 157

Challenge: Classified Arguments 158

Challenge: FISA Evidence 159

Challenge: Attorney–Client Contacts 159

Challenge: Religious Accommodation 159

Minneapolis

United States v. Warsame (John R. Tunheim, D. Minn.) 160

Challenge: Mental Health During Detention 162

Challenge: Attorney–Client Contacts 162

Challenge: Classified Evidence 163

Challenge: FISA Evidence 164

Ashland and Moscow

United States v. Al-Haramain Islamic Foundation, Inc. (Michael R. Hogan and Thomas M. Coffin, D. Or.), Al-Haramain Islamic Foundation, Inc. v. United States (Garr M. King, D. Or.), United States v. Al-Hussayen and Al-Kidd v. Gonzales (Edward J. Lodge and Mikel H. Williams, D. Idaho) 165

Challenge: Classified Evidence 177

Challenge: Classified Arguments 181

Challenge: Closed Proceedings 181

Challenge: Classified Orders and Opinions 182

Challenge: Foreign Evidence 182

Challenge: FISA Evidence 184

National Security Case Studies (6th ed.)

Prosecution of a Charity

United States v. Holy Land Foundation (A. Joe Fish and Jorge A. Solis, N.D. Tex.) 185

Challenge: Classified Evidence 191

Challenge: FISA Evidence 192

Challenge: Witness Security 194

Challenge: Jury Security 195

Chicago Fundraising

United States v. Abu Marzook (Amy St. Eve, N.D. Ill.) 196

Challenge: Foreign Evidence 203

Challenge: Witness Security 203

Challenge: Classified Evidence 205

Challenge: Classified Arguments 206

Challenge: Classified Opinion 206

Challenge: Jury Security 207

Lodi

United States v. Hayat (Garland E. Burrell, Jr., E.D. Cal.) 208

Challenge: Classified Evidence 212

Toledo

United States v. Amawi and Related Actions (James G. Carr, N.D. Ohio) 216

Challenge: Attorney–Client Contacts 220

Challenge: FISA Evidence 221

Challenge: Court Security 222

Challenge: Jury Security 222

Atlanta

United States v. Ahmed (Clarence Cooper, William S. Duffey, Jr., and Gerrilyn G. Brill, N.D. Ga.) 223

Challenge: Closed Proceeding 228

Challenge: Attorney Appointment 229

Challenge: Classified Evidence 229

Challenge: FISA Evidence 231

Sears Tower

United States v. Batiste (Joan A. Lenard, S.D. Fla.) 232

Challenge: Classified Evidence 236

Challenge: Jury Security 236

Challenge: Pro Se Defendant 237

Fort Dix

United States v. Shnewer (Robert B. Kugler, D.N.J.) 238

Challenge: Classified Evidence 242

Challenge: FISA Evidence 243

Contents

<i>Challenge: Classified Opinion</i>	243
<i>Challenge: Jury Security</i>	244
<i>Challenge: Court Security</i>	244
<i>Challenge: Attorney Appointment</i>	244
Triangle Takedown	
<i>United States v. Boyd (Louise W. Flanagan, Malcolm J. Howard, William Arthur Webb, and James E. Gates, E.D.N.C.) and United States v. Sherifi (W. Earl Britt, E.D.N.C.)</i>	245
<i>Challenge: Attorney Appointment</i>	252
<i>Challenge: Pro Se Defendants</i>	253
<i>Challenge: Interpreters</i>	256
<i>Challenge: Court Security</i>	256
<i>Challenge: Jury Security</i>	257
<i>Challenge: FISA Evidence</i>	258
<i>Challenge: Classified Evidence</i>	258
<i>Challenge: Sensitive Unclassified Evidence</i>	260
Espionage Prosecutions	263
Would-Be Spy	
<i>United States v. Regan (Gerald Bruce Lee, E.D. Va.)</i>	264
<i>Challenge: Classified Evidence</i>	265
Giving State Secrets to Lobbyists	
<i>United States v. Franklin (T.S. Ellis III, E.D. Va.)</i>	268
<i>Challenge: Classified Evidence</i>	272
<i>Challenge: Subpoenaing a Cabinet Officer</i>	274
<i>Challenge: Classified Orders</i>	274
<i>Challenge: Closed Proceedings</i>	275
<i>Challenge: Classified Arguments</i>	275
NSA Expenditures	
<i>United States v. Drake (Richard D. Bennett, D. Md.)</i>	277
<i>Challenge: Classified Evidence</i>	279
<i>Challenge: Closed Proceedings</i>	281
Other Criminal Cases	283
Interrogation Death in Afghanistan	
<i>United States v. Passaro (Terrence W. Boyle, E.D.N.C.)</i>	284
<i>Challenge: Classified Evidence</i>	287
<i>Challenge: Classified Arguments</i>	288
<i>Challenge: Subpoenaing Senior Government Officials</i>	289
<i>Challenge: Witness Security</i>	289
<i>Challenge: Closed Proceeding</i>	289

Castro Foe

United States v. Posada Carriles (Kathleen Cardone, W.D. Tex.) 290

Challenge: Classified Evidence 297

Challenge: Classified Orders 299

Challenge: Sensitive Unclassified Evidence 299

Challenge: Court Security 300

Challenge: Jury Security 300

Challenge: Witness Security 300

Habeas Corpus 301

Guantánamo Bay

In re Guantanamo Bay Detainee Litigation (Thomas F. Hogan, D.D.C.) and Related Actions (Louis F. Oberdorfer, Joyce Hens Green, Royce C. Lamberth, Paul L. Friedman, Gladys Kessler, Emmet G. Sullivan, Ricardo M. Urbina, James Robertson, Colleen Kollar-Kotelly, Henry H. Kennedy, Jr., Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton, John D. Bates, Richard J. Leon, Rosemary M. Collyer, and Alan Kay, D.D.C.) 302

Challenge: Attorney–Client Contacts 372

Challenge: Classified Evidence 385

Challenge: Sensitive Unclassified Information 393

Challenge: Classified Arguments 396

Challenge: Closed Proceedings and Remote Participation 399

Challenge: Classified Orders and Opinions 404

Challenge: Interpreters 411

Challenge: Mental and Physical Health During Detention 411

Challenge: Religious Accommodation 422

Challenge: Ordering Testimony from an Ambassador 422

Other Civil Cases 439

Burma

Horn v. Huddle (Royce C. Lamberth, D.D.C.) 440

Challenge: Classified Evidence 442

Challenge: Classified Arguments 443

September 11 Damages

In re Terrorist Attacks on September 11, 2001 (Richard Conway Casey, George B. Daniels, and Frank Maas, S.D.N.Y.) and *In re September 11 Litigation and Related Actions* (Alvin K. Hellerstein, S.D.N.Y.) 444

Challenge: Service of Process on International Terrorists 466

Challenge: Classified Evidence 467

Challenge: Sensitive Unclassified Information 468

Challenge: Witness Security 470

Challenge: Foreign Evidence 471

Contents

Mistaken Rendition

El-Masri v. Tenet (T.S. Ellis III, E.D. Va.) 472

Challenge: Classified Arguments 475

Detainee Documents

ACLU v. Department of Defense (Alvin K. Hellerstein, S.D.N.Y.) 477

Challenge: Classified Evidence 480

Challenge: Classified Arguments 481

No-Fly List

Ibrahim v. Department of Homeland Security (William Alsup, N.D. Cal.) 482

Challenge: Sensitive Unclassified Information 488

Challenge: Classified Evidence 492

Challenge: Closed Proceedings 494

Challenge: Subpoenaing Senior Government Officials 495

Surveillance Software

Montgomery v. eTrepid Technologies, Inc., In re Search Warrant, eTrepid Technologies, LLC v. Montgomery, and United States ex rel. Montgomery v. Trepp (Philip M. Pro and Valerie P. Cooke, D. Nev.) 497

Challenge: Classified Evidence 501

Warrantless Wiretaps

Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and Related Actions (Vaughn R. Walker and Jeffrey S. White, N.D. Cal.); Al Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.); ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.); Terkel v. AT&T and Related Actions (Matthew F. Kennelly, N.D. Ill.); Center for Constitutional Rights v. Bush (Gerard E. Lynch, S.D.N.Y.); Electronic Privacy Information Center v. Department of Justice and Related Action (Henry H. Kennedy, Jr., D.D.C.); and Electronic Frontier Foundation v. Department of Justice (Thomas F. Hogan, D.D.C.) 505

Challenge: Classified Evidence 533

Challenge: Classified Arguments 539

Challenge: Classified Opinion 557

Challenge: Redacting Secrets 557

Challenge: Court-Appointed National Security Expert 558

Muslim Surveillance

Islamic Shura Council of Southern California v. FBI and Fazaga v. FBI (Cormac J. Carney, C.D. Cal.) 560

Challenge: Classified Evidence 566

Challenge: Closed Proceedings 566

Challenge: Classified Arguments 566

Torture Flights

Mohamed v. Jeppesen DataPlan, Inc. (James Ware, N.D. Cal.) 568

Challenge: Classified Arguments 570

National Security Case Studies (6th ed.)

Milan

De Sousa v. Department of State (Beryl A. Howell, D.D.C.) 571

Challenge: Classified Evidence 575

Section 215

Electronic Frontier Foundation v. Department of Justice (Yvonne Gonzalez Rogers, N.D. Cal.) 578

Challenge: Classified Evidence 579

Challenge: Orders and Opinions 580

The Foreign Intelligence Surveillance Act and Article III Courts 583

Foreign Intelligence Surveillance Act Litigation 584

TABLE OF CASE-MANAGEMENT CHALLENGES

Attorney Issues

Attorney Appointment 100, 229, 244, 252

Attorney–Client Contacts 47, 126, 144, 159, 162, 220, 372

Foreign Evidence 62, 74, 143, 182, 203, 471

Information Protection

Classified Arguments 58, 103, 396, 129, 146, 158, 181, 206, 275, 288, 443,
475, 481, 539, 566, 570

Classified Evidence 27, 55, 74, 78, 87, 102, 113, 131, 139, 144, 156, 163, 191,
177, 205, 212, 229, 236, 242, 258, 265, 272, 279, 287, 297, 385, 442, 467,
480, 492, 501, 533, 566, 575, 579

Classified Orders and Opinions 59, 107, 182, 206, 243, 274, 299, 404, 557,
580

Closed Proceedings 106, 157, 181, 228, 275, 281, 289, 399, 494, 566

Court-Appointed National Security Expert 558

FISA Evidence 132, 159, 164, 192, 184, 221, 231, 243, 258

Interviewing Detainees 61, 114

Redacting Secrets 557

Remote Participation 399

Sensitive Unclassified Information 112, 260, 299, 393, 468, 488

Interpreters 25, 50, 256, 411

Mental and Physical Health During Detention 50, 128, 162, 411

Physical Security

Court Security 25, 52, 75, 100, 130, 140, 222, 244, 256, 300

Jury Security 26, 51, 75, 85, 101, 130, 195, 207, 222, 236, 244, 257, 300

Witness Security 53, 75, 114, 130, 143, 194, 203, 289, 300, 470

Pro Se Defendants 25, 100, 237, 253

Religious Accommodation 54, 115, 140, 159, 422

Senior Government Officers

Sanctions 85

Subpoenas 60, 274, 289, 422, 495

Terrorist Contacts

Service of Process on International Terrorists 466

Terrorist Communications 27, 107

TABLE OF JUDGES

Alsup, William (N.D. Cal.)	482
Batchelder, Alice M. (6th Cir.)	505
Bates, John D. (D.D.C.)	302
Bennett, Richard D. (D. Md.)	277
Boyle, Terrence W. (E.D.N.C.)	284
Brill, Gerrilyn G. (N.D. Ga.)	223
Brinkema, Leonie M. (E.D. Va.)	89, 148
Britt, W. Earl (E.D.N.C.)	245
Burrell, Garland E., Jr. (E.D. Cal.)	208
Cabranes, José A. (2d Cir.)	28
Cacheris, James C. (E.D. Va.)	148
Cardone, Kathleen (W.D. Tex.)	290
Carney, Cormac J. (C.D. Cal.)	560
Carr, James G. (N.D. Ohio)	216
Carter, David O. (C.D. Cal.)	76
Casey, Richard Conway (S.D.N.Y.)	444
Coffin, Thomas M. (D. Or.)	165
Collyer, Rosemary M. (D.D.C.)	302
Cooke, Marcia G. (S.D. Fla.)	117
Cooke, Valerie P. (D. Nev.)	497
Cooper, Clarence (N.D. Ga.)	223
Coughenour, John C. (W.D. Wash.)	64
Daniels, George B. (S.D.N.Y.)	444
Duffey, William S., Jr. (N.D. Ga.)	223
Duffy, Kevin Thomas (S.D.N.Y.)	5, 28
Duncan, Allyson K. (4th Cir.)	472
Ellis, T.S., III (E.D. Va.)	109, 268, 472
Feinberg, Wilfred (2d Cir.)	28
Fish, A. Joe (N.D. Tex.)	185
Flanagan, Louise W. (E.D.N.C.)	245
Floyd, Henry F. (D.S.C.)	117
Friedman, Paul L. (D.D.C.)	302

National Security Case Studies (6th ed.)

Gates, James E. (E.D.N.C.) 245
Gibbons, Julia Smith (6th Cir.) 505
Gilman, Ronald Lee (6th Cir.) 505
Gonzalez Rogers, Yvonne (N.D. Cal.) 578
Green, Joyce Hens (D.D.C.) 302
Gregory, Roger L. (4th Cir.) 89, 268
Hawkins, Michael Daly (9th Cir.) 505
Hellerstein, Alvin (S.D.N.Y.) 444, 477
Hilton, Claude M. (E.D. Va.) 148
Hogan, Michael R. (D. Or.) 165
Hogan, Thomas F. (D.D.C.) 302, 505
Howard, Malcolm J. (E.D.N.C.) 245
Howell, Beryl A. (D.D.C.) 571
Huvelle, Ellen Segal (D.D.C.) 302
Kaplan, Lewis A. (S.D.N.Y.) 28
Kay, Alan (D.D.C.) 302
Keenan, John F. (S.D.N.Y.) 64
Kennedy, Henry H., Jr. (D.D.C.) 302, 505
Kennelly, Matthew F. (N.D. Ill.) 505
Kessler, Gladys (D.D.C.) 302
King, Garr M. (D. Or.) 165, 505
King, Robert B. (4th Cir.) 472, 472
Kollar-Kotelly, Colleen (D.D.C.) 302
Krieger, Marcia S. (D. Colo.) 5
Kugler, Robert B. (D.N.J.) 238
Lamberth, Royce C. (D.D.C.) 302, 440
Lee, Gerald Bruce (E.D. Va.) 141, 264
Lenard, Joan A. (S.D. Fla.) 232
Leon, Richard J. (D.D.C.) 302
Lodge, Edward J. (D. Idaho) 165
Lynch, Gerard E. (S.D.N.Y.) 505
Maas, Frank (S.D.N.Y.) 444
McKeown, M. Margaret (9th Cir.) 505
Motz, Diana Gribbon (4th Cir.) 141

Table of Judges

Mukasey, Michael B. (S.D.N.Y.)	5, 117
Newman, Jon O. (2d Cir.)	28
Oberdorfer, Louis F. (D.D.C.)	302
Pregerson, Harry (9th Cir.)	505
Pro, Philip M. (D. Nev.)	497
Roberts, Richard W. (D.D.C.)	302
Robertson, James (D.D.C.)	302
Rosen, Gerald E. (E.D. Mich.)	80
St. Eve, Amy (N.D. Ill.)	196
Sand, Leonard B. (S.D.N.Y.)	28
Schroeder, H. Kenneth, Jr. (W.D.N.Y.)	134
Shedd, Dennis W. (4th Cir.)	89, 268, 472
Skretny, William M. (W.D.N.Y.)	134
Solis, Jorge A. (N.D. Tex)	185
Sullivan, Emmet G. (D.D.C.)	302
Takasugi, Robert M. (C.D. Cal.)	76
Taylor, Anna Diggs (E.D. Mich.)	505
Traxler, William B., Jr. (4th Cir.)	89, 141
Tunheim, John R. , (D. Minn.)	160
Urbina, Ricardo M. (D.D.C.)	302
Walker, Vaughn R. (N.D. Cal.)	505
Walton, Reggie B. (D.D.C.)	302
Ware, James. (N.D. Cal.)	568
Webb, William Arthur (E.D.N.C.)	245
White, Jeffrey S. (N.D. Cal.)	505
Wilkins, William W. (4th Cir.)	89
Wilkinson, J. Harvie, III (4th Cir.)	141
Williams, Karen J. (4th Cir.)	89
Williams, Mikel H. (D. Idaho)	165

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 that 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, news accounts, and interviews with the judges.

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

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

The current publication, the April 24, 2015, edition, supersedes the following:

- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (September 20, 2007)
- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (March 26, 2008)
- *National Security Case Studies: Special Case-Management Challenges* (February 22, 2010)
- *National Security Case Studies: Special Case-Management Challenges* (November 14, 2011)
- *National Security Case Studies: Special Case-Management Challenges* (June 25, 2013)

The following chapters are new: "NSA Expenditures" (espionage prosecutions) and "Milan," "No-Fly List," and "Section 215" (civil cases). Also, this edition adds an addendum chapter on "Foreign Intelligence Surveillance Act Litigation."

TERRORISM PROSECUTIONS

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

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

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

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

The original prosecutions for the 1998 bombings of American embassies in “Kenya and Tanzania” were interrupted by the stabbing of a detention guard, which resulted in another prosecution. Other defendant were not prosecuted until 2009 through the present.

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

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

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

2. Revised Security Procedures Established Pursuant to Pub. L. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 2 (2012); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers*, app. B (Federal Judicial Center, 2d ed. 2013).

Witnesses are sometimes afforded extra protection to conceal their identities from the public (“American Taliban,” “Chicago Fundraising”). It is also not uncommon for terrorism prosecutions to require foreign evidence (“Millennium Bomber,” “A Plot to Kill President Bush,” “Ashland and Moscow,” “Chicago Fundraising”).

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

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

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

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

First World Trade Center Bombing

United States v. Salameh (Kevin Thomas Duffy, 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.³

The Bombing of the World Trade Center

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

3. The 9/11 Commission Report 280 (2004); *id.* at 71 ("The ensuing explosion opened a hole seven stories up."); *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003); *United States v. Salameh*, 152 F.3d 88, 107–08 (2d Cir. 1998); *United States v. Salameh*, 54 F. Supp. 2d 236, 245 (S.D.N.Y. 1999); *United States v. El-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.

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

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

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

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

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

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

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

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

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

Ayyad anonymously contacted the New York Daily News by telephone and the New York Times by mail to take responsibility for the bomb as retaliation for the United States' support of Israel.¹⁵ His DNA was found on the New York

Lance, *supra* note 5, at 102; Terry McDermott, *Perfect Soldiers* 131–32 (2005); McDermott & Meyer, *supra* note 5, at 45.

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

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

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

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

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

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

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

Times envelope, and a draft of the letter to the Times was found on his computer.¹⁶

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

Abdul Rahman Yasin, another conspirator, also fled the country.²⁰ Abouhalima fled to Egypt after the explosion, and he was arrested by Egyptian authorities on March 13.²¹ He was returned to the United States on March 25.²²

It was not until February 7, 1995, that Yousef was captured in a guesthouse in Pakistan.²³ For a \$2 million reward, and to avoid prison, one of Yousef's recruits turned him in to the FBI.²⁴ Yousef's uncle, Khalid Sheikh Mohammed (KSM), was staying in the same guesthouse and was an on-the-scene witness to news me-

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

17. *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 3; Blumenthal, *Insistence on Refund*, *supra* note 13; McDermott, *supra* note 9, at 136; McDermott & Meyer, *supra* note 5, at 52; McFadden, *supra* note 13.

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

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

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

20. *Salameh*, 152 F.3d at 108; see Tabor, *supra* note 16 (reporting the government's offering \$2 million rewards each for Yousef and Yasin).

21. *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.

22. See Mitchell, *supra* note 21.

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

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

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

Lance, *supra* note 5, at 200–01.

dia about the arrest.²⁵ Ismoil was apprehended in Jordan on July 30.²⁶ Yasin, who was questioned but released by the FBI after the bombing, remains a fugitive.²⁷

Ajaj was released from his six-month sentence on March 1, 1993.²⁸ On March 9, he was rearrested on an immigration detainer.²⁹

Salameh and Ayyad were indicted in the Southern District of New York on March 17.³⁰ The district court assigned the case to Judge Kevin Thomas Duffy.³¹ On March 31, a superseding indictment added Abouhalima and Yousef as defendants.³² On the next day, the court ordered the parties and their attorneys not to discuss publicly anything related to the case.³³ The court of appeals vacated this gag order as overbroad on April 30.³⁴

25. *See id.* at 201–02.

26. *United States v. Yousef*, 327 F.3d 56, 79, 135 (2d Cir. 2003); *United States v. Yousef*, No. 1:93-cr-180, 1999 WL 714103, at *1 (S.D.N.Y. Sept. 13, 1999); *see* Docket Sheet, *United States v. Salameh*, No. 1:93-cr-180 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Salameh* Docket Sheet] (D.E. 380, Aug. 3, 1995, seventh superseding indictment against Yousef, Yasin, and Ismoil); *see also* James C. McKinley, Jr., *Suspect Is Said to Be Longtime Friend of Bombing Mastermind*, N.Y. Times, Aug. 4, 1995, at 1.

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

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

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

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

30. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 5); *see* Ralph Blumenthal, *Suspect in Blast Believed to Be in Pakistan*, N.Y. Times, Mar. 18, 1993, at B4; *see also* Mitchell, *Engineer Held*, *supra* note 11 (reporting on Ayyad's March 10, 1993, arrest).

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

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

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

32. *United States v. Yousef*, 327 F.3d 56, 135 (2d Cir. 2003); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 6); *see* Ralph Blumenthal, *Missing Suspect Charged in Trade Center Bombing*, N.Y. Times, Apr. 1, 1993, at B3.

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

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

Bilal Alkaiasi turned himself in on March 24,³⁵ and a second superseding indictment added him as a defendant on April 7.³⁶ Because evidence against him was weaker than evidence against the others, his prosecution was severed.³⁷ On May 9, 1994, he pleaded guilty to an immigration violation and agreed to deportation.³⁸ Judge Duffy sentenced him on July 13 to one year and eight months in prison, which was four months more than the time already served.³⁹

A third superseding indictment on May 26, 1993, added Ajaj as a defendant.⁴⁰ A fourth superseding indictment added the fugitive Yasin as a defendant on August 4.⁴¹ Salameh, Ayyad, Abouhalima, Ajaj, Yousef, and Yasin were named as defendants in a fifth superseding indictment filed on September 1.⁴²

Jury selection in the trial against Salameh, Ayyad, Abouhalima, and Ajaj began on September 14.⁴³ The court issued 5,000 extra jury summonses to assemble a jury pool for the case.⁴⁴ Opening arguments began on October 5.⁴⁵ The jury began its deliberations on February 23, 1994, and convicted the defendants on March 4.⁴⁶

Between conviction and sentencing, the defendants dismissed their attorneys.⁴⁷ Salameh, Abouhalima, and Ajaj sought to hire as sentencing attorneys the

35. See Blumenthal, *supra* note 3; Mitchell, *supra* note 21.

36. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 11).

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

A sixth superseding information against Alkaiasi was filed on May 9, 1994. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 225).

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

39. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *id.* (D.E. 325, judgment); 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. www.bop.gov (reg. no. 28065-054).

40. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 28); see Mitchell, *U.S. Widens Charges*, *supra* note 11.

41. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 46); see Mitchell, *supra* note 27.

42. *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 62).

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

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

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

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

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

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

law firm representing other defendants in a related trial, which is described below.⁴⁸ Judge Duffy ruled that this would present an unacceptable conflict,⁴⁹ so the four defendants appeared at sentencing pro se.⁵⁰

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

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

48. *Salameh*, 856 F. Supp. at 782 (noting a desire to hire William Kunstler and Ronald Kuby, who were counsel for Siddig Ibrahim Siddig Ali and Ibrahim el-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 47; Gross, *supra* note 31, at 10.

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

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

51. *Id.* at 108; *Salameh*, 856 F. Supp. at 782; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 311 to 314); see Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. Times, May 25, 1994, at A1; Gross, *supra* note 31, at 10–11; Wren, *supra* note 3.

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

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

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

55. *Id.* (noting sentences of 1,403 months for Salameh, 1,300 months for Abouhalima, 1,405 months for Ayyad, and 1,378 months for Ajaj); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (D.E. 773 to 776, same); see www.bop.gov (noting release dates of January 22, 2095, for Salameh, reg. no. 34338-054; September 20, 2087, for Mahmud Abouhalima, reg. no. 28064-054; April 3, 2095, for Ayyad, reg. no. 16917-050; and June 25, 2093, for Ajaj, reg. no. 40637-053); see also *United States v. Tocco*, 135 F.3d 116, 131–32 (2d Cir. 1998) (approving a sentencing scheme by Judge Jack B. Weinstein of the Eastern District of New York).

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

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

Plots to Bomb New York Landmarks

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

El-Gabrowny was indicted for assault in the Southern District of New York on March 17.⁶² The court assigned the case to Judge Michael B. Mukasey,⁶³ who tried to conduct this case as much like other criminal trials as possible.⁶⁴

57. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 957 N.E.2d 733 (2011); *see id.* at 446, 957 N.E.2d at 744 ("We . . . hold that the Port Authority acted within its governmental capacity because its security operations at the WTC constituted police protection."); *see also* Benjamin Weiser, *Port Authority Not Liable in '93 Bombing, Court Says*, N.Y. Times, Sept. 23, 2011, at A25.

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

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

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

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

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

62. *El-Gabrowny*, 35 F.3d at 64; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; *El-Gabrowny*, 825 F. Supp. at 39; Docket Sheet, *United States v. Abdel Rahman*, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Abdel Rahman* Docket Sheet] (D.E. 3; also noting the filing of a superseding indictment against El-Gabrowny on May 19, 1993, D.E. 9); *see* Blumenthal, *supra* note 30.

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

Judge Mukasey retired from the bench in 2006 and returned to the practice of law until President George W. Bush named him as his third Attorney General. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; *see* Michael Abramowitz & Dan Eggen, *Ex-Judge Is Said to Be Pick at Justice*, Wash. Post, Sept. 17, 2007, at A1; Dan Eggen, *Senate Confirms Mukasey by 53–40*, N.Y. Times, Nov. 9, 2007, at A1; Joseph Goldstein,

Nosair was in prison on a sentence of seven and one-third to twenty-two years for a state conviction on assault and weapons charges stemming from the killing of a “militant Zionist” and former member of the Israeli parliament, Rabbi Meir Kahane, at a November 5, 1990, speech that Kahane made in New York City.⁶⁵ There was evidence that projectiles found in the room where Kahane and others were shot came from Nosair’s gun, but Nosair was acquitted of the murder.⁶⁶

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

As Judge Leaves for Law Firm, His Legacy Is Remembered, N.Y. Sun, July 26, 2006, at 1; Carl Hulse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. Times, Nov. 9, 2007, at A1; Sheryl Gay Stolberg & Philip Shenon, *Bush to Appoint Ex-Judge as Head of Justice Dept.*, N.Y. Times, Sept. 17, 2007, at A1.

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

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

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

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

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

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

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

Abdel Rahman was tried but acquitted in Egypt as an accomplice in the October 6, 1981, murder of President Anwar el-Sadat.⁶⁹ He illegally entered the United States in 1990 and faced a deportation order at the time of the World Trade Center bombing.⁷⁰ His followers plotted to assassinate Egypt's president, Hosni Mubarak, during a March 1993 visit to the United Nations in New York City.⁷¹ Siddig Ibrahim Siddig Ali obtained Mubarak's itinerary from a source in the Sudanese government.⁷² But the plot was foiled when a confidant of Abdel Rahman's, Abdo Mohammed Haggag, informed the Egyptian government of the assassination plan, and Mubarak's New York trip was canceled.⁷³

Siddig Ali and Clement Rodney Hampton-El led paramilitary training on weekends between October 1992 and February 1993.⁷⁴ Participants included Amir and Fadil Abdelgani and Tarig Elhassan, as well as the Egyptian informant Haggag.⁷⁵ The training was for jihad, perhaps in Bosnia.⁷⁶ Hampton-El was observed by the FBI in July 1989 shooting weapons at a public rifle range on Long Island with World Trade Center bombers Abouhalima, Salameh, and Ayyad.⁷⁷

In May 1993, the informant Salem persuaded Siddig Ali to establish a bomb-making safehouse where the FBI had installed surveillance equipment.⁷⁸

69. See William E. Farrell, *5 in Sadat Trial Sentenced to Die*, N.Y. Times, Mar. 7, 1982, at 11; William E. Farrell, *Egypt Reports Plot to Kill Aides at Sadat's Funeral*, N.Y. Times, Oct. 31, 1981, at 13; McFadden, *supra* note 11; McFadden, *supra* note 13; Mitchell, *supra* note 60; Tabor, *supra* note 16; see also The 9/11 Commission Report 56 (2004) (Abdel Rahman's "preaching had inspired the assassination of Sadat"); Ali H. Soufan, *The Black Banners* 47 (2011) ("he was acquitted but expelled from Egypt").

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

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

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

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

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

73. *Id.*

74. *Id.* at 107.

75. *Id.*

76. *Id.*

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

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

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

On June 13, 1993, Fares Khallafalla and the informant Salem purchased timers for bombs.⁸⁰ On June 19 and 21, Amir Abdelgani, Victor Alvarez, and Salem unsuccessfully tried to steal cars to use as both bomb-delivery and getaway vehicles.⁸¹ On June 22 and 23, Mohammed Saleh, who owned two gas stations in Yonkers, provided nearly \$300 worth of diesel fuel to Siddig Ali and the Abdelganis to use for making bombs.⁸²

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

It was reported that the government allowed Abdel Rahman to remain free pending his deportation appeal because he was not considered a flight risk and the conspiracy evidence against him was weak.⁸⁵ But after his van evaded federal agents following him on June 30, the government decided to arrest him on an immigration detainer.⁸⁶ A negotiated surrender was agreed on for July 3.⁸⁷

On July 14, the indictment against el-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.”⁸⁸ Abdel Rahman, Nosair, Haggag, and Mohammed Abouhalima, the brother of World Trade Center bomber

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

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

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

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

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

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

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

86. *See id.*

87. *See id.*

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

88. United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (D.E. 19); see Ralph Blumenthal, *Court Says Tapes in Bomb Plot Fail to Support Some Charges*, N.Y. Times, July 8, 1993, at B3 (reporting that Wahid was still missing); Mitchell, *Bomb Informer*, *supra* note 67.

Mahmoud Abouhalima, were added as defendants by superseding indictment on August 25.⁸⁹

Gant, who was considered a minor player in the case, was arrested on July 1, 1993, and released on bail on October 19; he pleaded guilty on April 1, 1994.⁹⁰ He was sentenced on July 20, 1994, to time served, with three years of supervised release.⁹¹

“Wahid” turned out to be Matarawy Mohammed Said Saleh, who was arrested on July 22, 1993, and who is not related to codefendant Mohammed Saleh.⁹² Because prosecutors determined that Wahid joined the conspiracy only hours before the government began arresting codefendants, he pleaded guilty and was sentenced on December 19, 1995, to time served, with three years of supervised release.⁹³ Subsequently, the Egyptian was deported.⁹⁴

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 that he set in a cafe that he co-owned.⁹⁵

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 Mu- barak, and plans to bomb New York landmarks.⁹⁶

89. Rahman, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (D.E. 47); see Mary B.W. Tabor, *U.S. Indicts Egyptian Cleric as Head of Group Plotting “War of Urban Terror- ism,”* N.Y. Times, Aug. 26, 1993, at A1.

90. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; see *id.* (D.E. 221, information); see also 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.

91. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *id.* (D.E. 290, judgment); see Ronald Sullivan, *Minor Figure in Bomb Plot Sentenced to Time Served*, N.Y. Times, July 21, 1994, at B4 (re- porting that Gant said he thought the explosives he was providing would be used to combat the rape and massacre of Muslims in Bosnia); see also www.bop.gov (noting a release date of October 18, 1993, reg. no. 47042-066).

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

93. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *id.* (D.E. 492, judgment); see Fried, *supra* note 92.

94. See *Al-Qaida Suspect Had Nuclear Access in N.J.*, Press of Atlantic City, Mar. 13, 2010, at A1; see also www.bop.gov (noting a release date of November 19, 1996, reg. no. 10135-039).

95. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (noting sentencing on February 5, 1996; D.E. 521, judgment); see Joseph P. Fried, *In Plea Deal, Jersey to Testify in Terror Trial*, N.Y. Times, May 2, 1995, at 5.

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

Famed defender of the unpopular William M. Kunstler and his partner, Ronald L. Kuby, represented el-Gabrowny.⁹⁷ When the indictment was superseded to include Siddig Ali and others as defendants, Kunstler and Kuby appeared for both el-Gabrowny and Siddig Ali.⁹⁸ Judge Mukasey sought to ensure that conflict-of-interest waivers by the defendants were knowing.⁹⁹

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

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

. . .

. . . [B]oth defendants said they had understood the explanations of possible conflicts, and both expressed the desire to be represented by the Kunstler firm.¹⁰⁰

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.

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

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

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

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

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

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.¹⁰¹

Warren and Kunstler represented Nosair at his state murder trial,¹⁰² and Warren appeared for el-Gabrowny at el-Gabrowny's first appearance following the filing of a criminal complaint and preceding the filing of the indictment.¹⁰³ 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.¹⁰⁴ Judge Mukasey assigned Nosair a CJA panel attorney.¹⁰⁵

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.¹⁰⁶ The government moved to disqualify the Kunstler firm from representing more than one defendant.¹⁰⁷ On November 9, 1993, Judge Mukasey ruled that the firm could either represent el-Gabrowny and Siddig Ali, as they had, or Abdel Rahman, but not all three.¹⁰⁸ Abdel Rahman opted to represent himself, and the court appointed a panel attorney to assist him.¹⁰⁹ By the time the trial commenced, he was represented by Lynne Stewart,¹¹⁰ who had represented Ajaj at Ajaj's arraignment in the bombing case.¹¹¹

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

102. *See* Lance, *supra* note 5, at 62–65, 81; Selwyn Raab, *Jury Selection Seen as Crucial to Verdict*, N.Y. Times, Dec. 23, 1991, at B8; Ruben, *supra* note 97, at 90.

103. *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (noting the filing of a criminal complaint against El-Gabrowny on March 5, 1993, D.E. 1, and the filing of an indictment against El-Gabrowny on March 17, D.E. 3).

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

In denying Nosair's request on reconsideration, Judge Mukasey also denied an application by Lynne Stewart to represent Mouhammed Abouhalima. *United States v. Rahman*, No. 1:93-cr-181, 1993 WL 410449 (S.D.N.Y. Oct 13, 1993); *see* Gross, *supra* note 31, at 8.

105. *Rahman*, 861 F. Supp. at 270; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (D.E. 102).

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

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

108. *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 the ruling); *see also* Ralph Blumenthal, *Judge Rules That Sheik and Two Other Defendants Cannot Share Lawyers*, N.Y. Times, Nov. 11, 1993, at B3.

109. *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.

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

On February 8, 1994, Mohammed Abouhalima was released in a sealed proceeding.¹¹² But he was indicted on September 18, 1996, for aiding his brother's escape.¹¹³ He was convicted on May 28, 1997, and sentenced on November 24, 1998, to eight years in prison.¹¹⁴

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.¹¹⁵ The substitute counsel asked to be relieved as Siddig Ali's attorney, because his knowledge of Siddig Ali's proffers to the government would constrain what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.¹¹⁶ The government objected.¹¹⁷ Judge Mukasey ruled that Kunstler and Kuby could no longer represent Siddig Ali.¹¹⁸ 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.¹¹⁹ Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.¹²⁰

Voir dire began on January 9, 1995.¹²¹ To facilitate jury selection, Judge Mukasey used a jury questionnaire, which he had seldom done before, and he

111. See Tabor, *supra* note 6.

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

113. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (D.E. 816); see Joseph P. Fried, *U.S. Says Man Helped Brother Flee in Trade Center Bombing*, N.Y. Times, Sept. 19, 1996, at 8.

114. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *id.* (D.E. 867, judgment); 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. www. bop.gov (reg. no. 28173-054).

115. *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.

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

117. *Id.* at 267-68.

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

119. *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.

120. See Joseph P. Fried, *Sheik Called an Architect of Terrorism*, N.Y. Times, Sept. 6, 1995, at 3; Ruben, *supra* note 97, at 11, 98; David Stout, *William Kunstler, 76, Dies*, N.Y. Times, Sept. 5, 1995, at 6 (reporting that Kunstler died of a heart attack).

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

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

found it very helpful.¹²² 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.¹²³

Opening statements commenced on January 30.¹²⁴ 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.¹²⁵ For example, it was important for the jury to understand up front that seditious conspiracy did not necessarily include an intent to overthrow the government.¹²⁶ As was his general practice, Judge Mukasey permitted jurors to take notes.¹²⁷

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.¹²⁸ He was sentenced to eleven years in prison on October 15, 1999, on a finding that he provided the government with extensive assistance in the case.¹²⁹

Judge Mukasey conducted the nine-month trial four days per week.¹³⁰ A brief experience with five days per week fatigued all participants without moving things along noticeably faster.¹³¹ Both Arabic and Spanish interpreters were required.¹³²

While the trial was in progress, on April 19, 1995, the federal building in Oklahoma City, including the courthouse there, was partially destroyed by a

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

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

Gross, *supra* note 31, at 22–23.

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

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

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

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

127. *Id.*

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

129. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *id.* (D.E. 880, judgment); see Benjamin Weiser, *Remorseful Terror Conspirator Gets an 11-Year Sentence*, N.Y. Times, Oct. 16, 1999, at B6.

130. 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”).

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

132. *Id.*

bomb.¹³³ Judge Mukasey permitted the jurors to consult news of the event, but admonished them not to let it influence them in the trial.¹³⁴

On October 1, 1995, the jury convicted el-Gabrowny, Hampton-El, both Abdelganis, Khallafalla, Elhassan, Saleh, Alvarez, Abdel Rahman, and Nosair of seditious conspiracy and other charges, including a guilty verdict for Nosair in Rabbi Kahane's murder.¹³⁵ On January 17, 1996, Judge Mukasey sentenced Abdel Rahman and Nosair to life in prison and sentenced the other eight defendants as follows: el-Gabrowny to fifty-seven years; Alvarez, Elhassan, Hampton-El, and Saleh to thirty-five years; Amir Abdelgani and Khallafalla to thirty years; and Fadil Abdelgani to twenty-five years.¹³⁶

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a reconsideration of el-Gabrowny's sentence.¹³⁷ On remand, Judge Mukasey sentenced el-Gabrowny to thirty-three years,¹³⁸ which the court of appeals affirmed.¹³⁹

Hampton-El died in prison on June 30, 2014.¹⁴⁰

133. 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.

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

135. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *id.* (D.E. 510, 512, 514–52, 522, judgments); 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).

136. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; see Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. Times, Jan. 18, 1996, at 1; Wren, *supra* note 3; see also www.bop.gov (noting life sentences for Abdel Rahman, reg. no. 34892-054, and Nosair, reg. no. 35074-054, and noting release dates of April 22, 2025, for Alvarez, reg. no. 34848-054; December 21, 2023, for Elhassan, reg. no. 34852-054; April 16, 2024, for Saleh, reg. no. 34853-054; October 11, 2019, for Amir Abdelgani, reg. no. 34850-054; October 10, 2019, for Khallafalla, reg. no. 34856-054; and April 5, 2015, for Fadil Abdelgani, reg. no. 34849-054).

Habeas petitions by Nosair and Saleh have been unsuccessful. Opinion, *Saleh v. United States*, No. 1:01-cv-169 (S.D.N.Y. July 31, 2014), D.E. 21, *available at* 2014 WL 3855022; *Nosair v. United States*, 839 F. Supp. 2d 646 (S.D.N.Y. 2012); *Nosair v. Wiley*, 308 F. App'x 285 (10th Cir. 2009); see Benjamin Weiser, *Man Convicted in Terrorism Conspiracy Is Denied New Trial*, N.Y. Times, Jan. 14, 2012, at A18.

137. *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.

138. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (D.E. 888, May 23, 2000); see www.bop.gov noting a release date of December 25, 2021, reg. no. 28054-054).

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

140. www.bop.gov (noting an age of 76, reg. no. 34854-054).

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.¹⁴¹ There, he launched a conspiracy to bomb U.S. airliners serving routes in southeast Asia.¹⁴² To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.¹⁴³ Also in December, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.¹⁴⁴ 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.¹⁴⁵

Yousef and his high school friend, Abdul Hakim Murad, were burning off excess chemicals in their Manila apartment on January 6, 1995, and they accidentally started a fire that resulted in a visit from Philippine police officers and discovery of the plot to bomb planes.¹⁴⁶

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

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

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

McDermott, *supra* note 9, at 148.

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

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

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

146. *Yousef*, 327 F.3d at 79, 81; see Lance, *supra* note 5, at 178–80; McDermott & Meyer, *supra* note 5, at 68 (describing Yousef as ever careless); McKinley, *supra* note 23; Philip Shenon, *Broad Terror Campaign Is Foiled by Fire in Kitchen, Officials Say*, N.Y. Times, Feb. 12, 1995, at 1; Temple-Raston, *supra* note 142, at 24; Wren, *supra* note 3; see also McDermott, *supra* note 9, at 146, 152–54 (reporting that the apartment was selected because it was on the route of a planned papal procession).

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.¹⁴⁷ 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.¹⁴⁸

Philippine authorities arrested Shah on January 11, but he escaped.¹⁴⁹ He was recaptured by Malaysian authorities in December and flown to New York on December 12.¹⁵⁰

Yousef fled the Philippines, but he was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.¹⁵¹ He was transported to the Southern District of New York on February 8.¹⁵² En route, he confessed to an intention to topple one of the World Trade Center towers into the other.¹⁵³

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.¹⁵⁴ 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.¹⁵⁵ Yousef and Judge Duffy agreed that

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

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

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

150. *Yousef*, 327 F.3d at 79, 82; see Lance, *supra* note 5, at 227; McKinley, *supra* note 149.

151. The 9/11 Commission Report 148 (2004); *Yousef*, 327 F.3d at 79, 81–82; *United States v. Yousef*, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); see Johnston, *supra* note 23; McDermott, *supra* note 9, at 153–54; McKinley, *supra* note 23; Temple-Raston, *supra* note 142, at 24; Wren, *supra* note 3.

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

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

154. *Yousef*, 327 F.3d at 85 (giving the start date as May 29, which was the day of opening arguments); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (also noting the filing on April 13, 1995, of an eighth superseding indictment against Yousef, Yasin, and Murad, D.E. 356; the filing on June 14, 1995, of a ninth superseding indictment against Yousef, Yasin, and Murad, D.E. 366; the filing on September 11, 1995, of a tenth superseding indictment against Yousef, Yasin, Murad, and Ismoil, D.E. 391; the filing on December 13, 1995, of eleventh superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah, D.E. 402; and the filing on February 21, 1996, of twelfth superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah, D.E. 412); see *Judge Dismisses 75 on Bomb Jury Panel*, N.Y. Times, May 14, 1996, at 2 [hereinafter *Judge Dismisses 75*]; Lance, *supra* note 5, at 227; McDermott & Meyer, *supra* note 5, at 108–10 (reporting that Yousef's trial for the airplane plot occurred before his trial for the World Trade Center bombing so that a delay in the airplane trial would not make it more difficult to get testimony from witnesses in the Philippines).

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

he would do this.¹⁵⁶ All three defendants were convicted on September 5, the fourth day of deliberation.¹⁵⁷

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.¹⁵⁸ This time, Yousef let a lawyer represent him.¹⁵⁹ Both were convicted on November 12.¹⁶⁰

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.¹⁶¹ At his sentencing, Yousef proclaimed, “I am a terrorist and I am proud of it.”¹⁶² 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 sixty years.¹⁶³ The court of appeals affirmed

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

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

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

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

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

161. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *id.* (D.E. 655, judgment); see Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. Times, Jan. 9, 1998, at A1; see also www.bop.gov (noting a life sentence for Yousef, reg. no. 03911-000).

In 2005, 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). Five years later, Judge Duffy appointed counsel to challenge Yousef’s conditions of confinement, Order, *United States v. Salameh*, No. 1:93-cr-180 (S.D.N.Y. Apr. 8, 2010), D.E. 827, and transferred the matter to the District of Colorado, Opinion, *id.* (July 22, 2011), D.E. 842, *available at* 2011 WL 3422834. On May 13, 2014, Judge Richard P. Matsch “conclude[d] that Yousef has not shown that his conditions of confinement are so atypical and impose such a hardship as to infringe upon the limited liberty left to him under his sentences.” Opinion at 11, *Yousef v. United States*, No. 1:12-cv-2585 (D. Colo. May 13, 2014), D.E. 83, *available at* 2014 WL 1908711. Judge Matsch observed, however, that the Bureau of Prisons’ procedures for imposing special administrative measures (SAMs) are “offensive to traditional values of fairness and transparency but this Court may neither address nor remedy [that] here.” *Id.* at 12. An appeal is pending. Docket Sheet, *Yousef v. United States*, No. 14-1255 (10th Cir. June 30, 2014).

162. See Lance, *supra* note 5, at 284; McDermott & Meyer, *supra* note 5, at 113; Weiser, *supra* note 161.

163. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *id.* (D.E. 666, 669, judgments); see *Pilot Is Given Life Term for Bombing Plot*, N.Y. Times, May 16, 1998, at B5; Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. Times, Apr. 5, 1998, at B2; see also www.bop.gov (noting a release date of August 29, 2204, for Ismoil, reg. no. 37802-054, and a life sentence for Murad, reg. no. 37437-054).

the convictions and sentences on April 4, 2003.¹⁶⁴ On October 8, 2004, Judge Duffy sentenced Shah to thirty years.¹⁶⁵

2001 Destruction of the World Trade Center

On June 5, 2008, during the presidency of George W. Bush, five men were arraigned in military tribunals at Guantánamo Bay for the September 11, 2001, attacks: KSM, Mustafa Ahmed al-Hawsawi, Ramzi Bin al-Shibh, Walid Bin Attash, and Ali Abdul Aziz Ali.¹⁶⁶ Eric H. Holder, President Obama's Attorney General, announced on November 13, 2009, that the men would be tried in the Southern District of New York instead.¹⁶⁷ Their sealed December 14 indictment was added to the indictment for the 1993 World Trade Center bombing.¹⁶⁸ Magistrate Judge James C. Francis IV granted the government's request to both seal the indictment and keep it off the case's docket.¹⁶⁹ According to the government,

knowledge of the specific date the Superseding Indictment was returned may lead the defendants to coordinate with each other in ways that undermine both their security and the security of others. In addition, notice that new charges have been filed against the defendants may lead them to destroy evidence they now possess.¹⁷⁰

The defense appropriation act for 2011, however, forbade the use of defense funds to transfer KSM or any other Guantánamo Bay detainee for prosecution in

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

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

165. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *id.* (D.E. 816, judgment); see www.bop.gov (noting a release date of March 2, 2022, reg. no. 42799-054).

Following Shah's conviction, he provided the government with some cooperation. See David Johnston & Benjamin Weiser, *Officials Follow Money to Link Suspect to Attack*, N.Y. Times, June 6, 2002, at 28.

166. 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.

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

168. Superseding Indictment, *United States v. Salameh*, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011), D.E. 834; see Benjamin Weiser, *In Federal Court, a Docket Number for Global Terror*, N.Y. Times, Apr. 11, 2011, at A18.

The unsealing of an indictment against KSM was earlier announced at the 1998 sentencing of his nephew Yousef. See Lance, *supra* note 5, at 283–85; McDermott & Meyer, *supra* note 5, at 136; Weiser, *supra* note 161. A sealed indictment against KSM was returned in January 1996. See McDermott, *supra* note 9, at 165.

169. Order, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011), D.E. 832.

170. Affirmation at 2, *id.* (Dec. 14, 2009, filed Apr. 4, 2011), D.E. 833.

a civilian court,¹⁷¹ so the government obtained a dismissal of the superseding indictment in favor of renewed military tribunal prosecutions.¹⁷² Pretrial proceedings continue at Guantánamo Bay.¹⁷³

Challenge: Interpreters

These prosecutions required both Arabic and Spanish interpreters.¹⁷⁴

Challenge: Court Security

Security was tight in these trials. One downside of tight security in a criminal prosecution is that it suggests to the jury that the defendants are dangerous. In the trial for conspiracy to bomb airplanes, Judge Duffy had to dismiss the first 75 prospective jurors because they indicated that they would be influenced by heavy court security.¹⁷⁵

Challenge: Pro Se Defendants

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

After their convictions, Salameh, Ayyad, Mahmoud Abouhalima, and Ajaj dismissed their attorneys, and they appeared pro se for sentencing.¹⁷⁶

In response to Judge Mukasey's determination that Kunstler's law firm could represent either el-Gabrownny and Siddig Ali or Abdel Rahman, but not all three, Abdel Rahman elected to represent himself for a time.¹⁷⁷

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

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

172. Nolle Prosequi, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Apr. 4, 2011), D.E. 840; see Peter Finn, *Charges Against 9/11 Suspects Are Re-Filed*, Wash. Post, June 1, 2011, at A6; Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, Wash. Post, Apr. 5, 2011, at A1; Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. Times, Apr. 5, 2011, at A1.

173. www.mc.mil/CASES.aspx (military commission case records); see Carol Rosenberg, *In Reversal, Judge Proceeds with Sole 9/11 Trial for Group*, Miami Herald, Aug. 14, 2014, at 3A.

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

175. See *Judge Dismisses 75*, *supra* note 154.

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

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

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

he would have little chance of prevailing if he continued through trial pro se and convinced him to accept counsel.¹⁷⁸

At Yousef's first trial, for the plot to bomb airplanes, he appeared pro se so that he could address the jury during opening arguments.¹⁷⁹ He was convicted, and he opted for counsel representation at his second trial, for participation in the first bombing of the World Trade Center.¹⁸⁰

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors' protection.¹⁸¹

This process becomes necessary in high profile cases to protect the security of jurors. The confidential information in that case, mercifully, is something that even the court, and in a sense, the judge, is unaware of. The clerk knows the names of the jurors; the judge and the parties do not. The court tries at all costs to keep that information secret.¹⁸²

To protect the jurors' safety and anonymity, they did not report directly to the courthouse but to secret locations from which deputy marshals transported them to court.¹⁸³

In Judge Mukasey's case, "the identities of at least two of the jurors became known to some reporters after the case was over. As a result, those reporters camped outside the jurors' doors to discuss the jury's deliberations."¹⁸⁴ When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.¹⁸⁵

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

179. *See id.* at 5.

180. *See Suspect to Use Lawyer, supra* note 159.

181. Michael B. Mukasey, United States v. Abdel Rahman: Preliminary Voir Dire (Jan. 9, 1995) [hereinafter Mukasey Preliminary Voir Dire]; *Behind Closed Doors: Secret Justice in America*, 9 J. L. & Pol'y 1, 10 (2000) [hereinafter *Behind Closed Doors*] (remarks by Judge Mukasey); *see* Bernstein, *supra* note 11; Blumenthal, *supra* note 43; Gross, *supra* note 31, at 21 ("In every major terrorism trial that has taken place in the Southern District [of New York], an anonymous jury has been used due to the heightened risk of harm to potential jurors because of the nature of the crime at issue."); McDermott & Meyer, *supra* note 5, at 110; Tabor, *supra* note 44; Wren, *supra* note 3 ("After the [first Yousef] trial ended, the jurors were whisked away in three vans before reporters could approach them.").

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

183. Mukasey Preliminary Voir Dire, *supra* note 181; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007.

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

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

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.¹⁸⁶ 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.¹⁸⁷

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.¹⁸⁸

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).¹⁸⁹ Judge Mukasey kept the exhibits in a safe while he considered whether they had to be produced.¹⁹⁰ He ruled which exhibit had to be disclosed to the defendants, ordered that it not be disclosed to anyone else by the defendants, and ordered that all of the exhibits be kept under seal with the classified information security officer.¹⁹¹

Challenge: Terrorist Communications

According to the *New York Times*,

After news reports in 2006 that three men imprisoned in the 1993 World Trade Center bombing had sent letters to a Spanish terrorist cell, the Bureau of Prisons created two special wards, called Communication Management Units, or C.M.U.'s. The units, which opened at federal prisons in Terre Haute, Ind., in 2006 and Marion, Ill, in 2008, have set off litigation and controversy, chiefly because critics say they impose especially restrictive rules on Muslim inmates, who are in the majority.¹⁹²

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

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

188. Mukasey Preliminary Voir Dire, *supra* note 181; see Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

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

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

191. *Rahman*, 870 F. Supp. 47; see Gross, *supra* note 31, at 37 (reporting that only one of the six documents had to be disclosed); Liptak, *supra* note 130 (“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.”); see also Reagan, *supra* note 189, at 21–22 (providing information about classified information security officers).

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

Kenya and Tanzania

*United States v. El-Hage (Leonard B. Sand,
Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)*¹⁹³

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, killing 224 people, including twelve Americans.¹⁹⁴

Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya.¹⁹⁵

193. 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. Judge Feinberg died on July 31, 2014. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; see William Yardley, *Wilfred Feinberg, 94, U.S. Appellate Judge in New York*, N.Y. Times, Aug. 8, 2014, at A16.

194. The 9/11 Commission Report 70 (2004); *United States v. Ghailani*, 733 F.3d 29, 36–38 (2d Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 104 (2d Cir. 2008); *United States v. Ghailani*, 751 F. Supp. 2d 515, 521 (S.D.N.Y. 2010); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001); *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 604, 606 (S.D.N.Y. 2000); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see Rick Lyman, *Texans Cell Terror Suspect Apolitical*, N.Y. Times, Sept. 20, 1998, at 126; James C. McKinley, Jr., *Bombs Rip Apart 2 U.S. Embassies in Africa*, N.Y. Times, Aug. 8, 1998, at A1; see also Russ Feingold, *While America Sleeps* 11–12, 104 (2012) (reporting that “Al Qaeda . . . apparently narrowly missed a third one in Uganda on the same day”); Terry McDermott, *Perfect Soldiers* 63 (2005) (“That most of the dead were African Muslims seemed not to matter to true believers.”); Ali H. Soufan, *The Black Banners* 14 (2011) (reporting that the bombings occurred two months after an ABC interview with Osama Bin Laden in which Bin Laden threatened, “We anticipate a black future for America. Instead of remaining United States, it shall end up separated states and shall have to carry the bodies of its sons back to America.”).

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

Soufan, *supra*, at 78.

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

195. See Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6; Soufan, *supra* note 194, at 80.

“Hundreds more would have been killed and hurt but for the extraordinary luck of there having been a filled water truck parked at just that moment in front of the Dar es Salaam embassy.” McDermott, *supra* note 194, at 177.

Nairobi

Pakistani authorities arrested Mohammed Saddiq Odeh on the day of the bombings for traveling with a fraudulent passport,¹⁹⁶ and he quickly became a suspect in the Nairobi bombing.¹⁹⁷ Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12 as another suspect in the bombing.¹⁹⁸ Al-'Owhali admitted driving the bomb to the embassy in Kenya.¹⁹⁹ Later that month, the suspects were moved to New York,²⁰⁰ and they were indicted on October 7.²⁰¹ The United States decided to seek the death penalty against al-'Owhali but not Odeh.²⁰²

The government identified Haroun Fazil as another suspect in the Nairobi bombing.²⁰³ He was believed to have driven a pickup truck leading the vehicle

196. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 185 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 104; *United States v. Bin Laden*, 132 F. Supp. 2d 198 (S.D.N.Y. 2001); see Raymond Bonner, *Pakistan Arrests Two New Suspects in Embassy Blasts*, N.Y. Times, Aug. 19, 1998, at A1; Bonner, *supra* note 195; Soufan, *supra* note 194, at 88 (“Pakistani authorities had noticed that the picture on his passport was fraudulent”).

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

198. *In re Terrorist Bombings*, 552 F.3d at 181; *In re Terrorist Bombings*, 552 F.3d at 105; *United States v. Bin Laden*, 132 F. Supp. 2d 168, 173–74 (S.D.N.Y. 2001); see David Johnston, *Blast Suspect Held in U.S. and Is Said to Admit Role*, N.Y. Times, Aug. 28, 1998, at A1; Soufan, *supra* note 194, at 85–87, 92.

199. See Johnston, *supra* note 198; see also *In re Terrorist Bombings*, 552 F.3d at 182 (noting that al-'Owhali's cooperation was contingent on his being tried in the United States, which he regarded as his enemy, instead of in Kenya, which he did not).

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

200. *In re Terrorist Bombings*, 552 F.3d at 105; *Bin Laden*, 132 F. Supp. 2d at 205; *Bin Laden*, 132 F. Supp. 2d at 178; see Dan Barry, *With Suspect in Town, Giuliani Steps Up Security*, N.Y. Times, Aug. 28, 1998, at A6; David Johnston, *Charges Against 2d Suspect Detail Trial of Terrorists*, N.Y. Times, Aug. 29, 1998, at A4; Soufan, *supra* note 194, at 90, 94.

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

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

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

carrying the bomb to the embassy.²⁰⁴ The government offered a multi-million dollar reward for information leading to his arrest.²⁰⁵ Indicted as Fazul Abdullah Mohammed, he came to be regarded as the bombings' mastermind, and he was killed in a firefight in 2011 when he mistakenly came upon a security checkpoint in Mogadishu, Somalia, and tried to flee.²⁰⁶ In 2009, Saleh Ali Saleh Nabhan, who is believed to be also responsible for the 2002 bombing of an Israeli hotel on the Kenyan coast, was killed in Somalia in a helicopter raid on Al-Shabab.²⁰⁷

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.²⁰⁸ El-Hage, who also testified before a grand jury about Bin Laden's activities a year earlier, was charged with making false statements to investigators and the grand jury.²⁰⁹ On October 7, charges against him were broadened to include conspiracy to kill American citizens.²¹⁰

Heffelfinger, *Radical Islam in America* 58–60 (2011) (providing additional information about Fazil, identifying him as Abdullah Muhammad Fazul Husseine Mullah Ati, alias Harun Fazul).

204. See Weiser, *2 New Suspects*, *supra* note 203; Weiser, *Angry Record*, *supra* note 203.

205. See Weiser, *2 New Suspects*, *supra* note 203; Weiser, *Angry Record*, *supra* note 203; 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*].

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

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

208. *In re Terrorist Bombings*, 552 F.3d at 104; *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); Docket Sheet, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998) [hereinafter S.D.N.Y. *El Hage* Docket Sheet]; see Lyman, *supra* note 194; Weiser, *2 New Suspects*, *supra* note 203; see also The 9/11 Commission Report 56 (2004) (“Hage was a U.S. citizen who had worked with Bin Ladin in Afghanistan in the 1980s, and in 1992 he went to Sudan to become one of al Qaeda's major financial operatives.”); Heffelfinger, *supra* note 203, at 60 (“Born into a Catholic family in Lebanon in 1960, Wadih converted to Islam as a teenager while living in Kuwait where his father worked for an oil company, and was largely shunned by his family thereafter.”).

209. *El-Hage*, 213 F.3d at 77; *Bin Laden*, 91 F. Supp. 2d at 605–07 (noting that el-Hage appeared before the grand jury on September 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 1, September 17, 1998, criminal complaint); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 12 (2008) [hereinafter *Trying Cases*] (remarks by Judge Leonard B. Sand); see Lyman, *supra* note 194; Weiser, *2 New Suspects*, *supra* note 203.

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).

210. *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.

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.²¹¹

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.²¹²

Dar es Salaam

On September 21, 1998, the government of Tanzania charged Mustafa Mahmoud Said Ahmed and Rashid Saleh Hemed with the bombing of the American embassy in Dar es Salaam.²¹³ Tanzania dropped charges against Ahmed in March 2000.²¹⁴ After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.²¹⁵

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.²¹⁶ His attorney admitted at trial that K.K. Mohamed helped assemble the bomb.²¹⁷ The United States decided to seek the death

211. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *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 208, 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*].

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

213. See Bonner, *supra* note 195; 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).

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

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

216. *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); *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1242–43 (D. Colo. 2014); 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.*

217. See Hirsch, *supra* note 194, 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.”).

penalty against him.²¹⁸ 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.²¹⁹ 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.²²⁰

A Larger Plot

Osama Bin Laden was included in a November 4, 1998, superseding indictment,²²¹ but he remained a fugitive until his killing by U.S. forces in 2011.²²²

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, 1998.²²³ German authorities handed him over to the U.S. government on December 20 on condition that he not face the death penalty.²²⁴

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

218. *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting the filing of a death penalty notice on June 27, 2000); *United States v. Bin Laden*, 126 F. Supp. 2d 256 (S.D.N.Y. 2000) (denying a claim that the death penalty certification was race-based); see Weiser, *Faking Illness*, *supra* note 202; Weiser, *2d Death Penalty*, *supra* note 202.

219. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; see Hirsch, *supra* note 194, 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").

220. *Bin Laden*, 156 F. Supp. 2d 359; see Hirsch, *supra* note 194, at 228–29.

221. The 9/11 Commission Report 128 (2004); see Soufan, *supra* note 194, at 72; Benjamin Weiser, *Saudi Is Indicted in Bomb Attacks on U.S. Embassies*, N.Y. Times, Nov. 5, 1998, at A1.

Bin Laden was indicted two months before the embassy bombings, on June 10, 1998, for a 1993 killing of eighteen American soldiers in Mogadishu, Somalia. Docket Sheet, *United States v. Bin Laden*, No. 1:98-cr-539 (S.D.N.Y. June 10, 1998); The 9/11 Commission Report 110 (2004); see Soufan, *supra* note 194, at 72; Benjamin Weiser, *Prosecutors Are Expected to Seek Dismissal of All Charges*, N.Y. Times, May 4, 2011, at A11.

222. Nolle Prosequi, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. June 17, 2011), D.E. 1103 (voluntarily dismissing indictments against Bin Laden); see Peter Baker & Helene Cooper, *Bin Laden Killed by U.S. Forces in Pakistan, Obama Says, Declaring Justice Has Been Done*, N.Y. Times, May 2, 2011, at A1; Dana Priest & William M. Arkin, *Top Secret America* 256–61 (2011); Nicholas Schmidle, *Getting Bin Laden*, New Yorker, Aug. 8, 2011, at 34; Soufan, *supra* note 194, at 532–36; Benjamin Weiser, *Federal Court Drops Charges Against Bin Laden*, N.Y. Times, June 18, 2011, at A9; Scott Wilson & Craig Whitlock, *U.S. Forces Kill Osama Bin Laden*, Wash. Post, May 2, 2011, at A1.

223. *United States v. Bin Laden*, 160 F. Supp. 2d 670, 674 (S.D.N.Y. 2001); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 1, 2, September 14, 1998, complaint and arrest warrant against Salim); see Benjamin Weiser, *Judge Orders Embassy Bomb Suspect Held Without Bail*, N.Y. Times, Dec. 22, 1998, at B6 [hereinafter *Held Without Bail*]; Benjamin Weiser, *U.S. Says Bin Laden Aide Tried to Get Nuclear Material*, N.Y. Times, Sept. 26, 1998, at A3 [hereinafter *Nuclear Material*].

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

224. *Bin Laden*, 156 F. Supp. 2d at 370; see Weiser, *Held Without Bail*, *supra* note 223.

He first appeared before the district court on December 21.²²⁵ The government charged him with four broad conspiracy counts.²²⁶

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 1998.²²⁷ On June 19, 1999, the U.S. government indicted him for having a hand in the 1998 bombings.²²⁸ At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdel Bary on July 11, 1999.²²⁹ Britain's House of Lords ruled on December 17, 2001, that these three suspects could be extradited to the United States.²³⁰ Eidarous died of leukemia on July 16, 2008, while under house arrest in London.²³¹ On April 10, 2012, the European Court of Human Rights approved the extradition of al-Fawwaz and Abdel Bary.²³² The men were flown to New York on October 5.²³³

Ali A. Mohamed—a former sergeant in the U.S. Army who previously was a major in Egypt's army and then a CIA asset—was secretly charged with Al-Qaeda conspiracies in September 1998.²³⁴ He was formally indicted on May 19, 1999,

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

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

227. 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 203; Weiser, *Deliver Aide*, *supra* note 211; Craig Whitlock, *Extradition of Terror Suspects Founders*, Wash. Post, Dec. 21, 2008, at A1.

228. See Jacobs, *supra* note 227.

229. See David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6; Whitlock, *supra* note 227; see also Soufan, *supra* note 194, at 98 (“Although we had urged the British to arrest Fawwaz, Bary, and Eidarous in 1996, they had refused.”); *United States v. Bary*, 978 F. Supp. 2d 356, 360–62 (S.D.N.Y. 2013) (describing a previous period of arrest from September 23 to 27, 1998).

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

231. Nolle Prosequi, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Dec. 3, 2008), D.E. 730; see Whitlock, *supra* note 227.

232. Judgment, *Ahmad v. United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (Eur. Ct. H.R. Apr. 10, 2012), available at www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/Lists+of+judgments/ (also approving extraditions of Mustafa Kamal Mustafa, Seyla Talha Ahsan, and Babar Ahmad; review by Grand Chamber denied on September 24, 2012); see Notice, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 25, 2012), D.E. 1114; see also John F. Burns & Alan Cowell, *European Court Says Britain Can Send Terror Suspects to U.S.*, N.Y. Times, Apr. 11, 2012, at A4.

233. See Transcript at 14, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 9, 2012, filed Nov. 14, 2012), D.E. 1130 (provisionally setting trial for October 7, 2013); see also James Ball, *Five Al-Qaeda Suspects Reach U.S.*, Wash. Post, Oct. 7, 2012, at A3; Sarah Lyall & Alan Cowell, *British Judges Approve Extradition of Muslim Cleric to U.S. on Terrorism Charges*, N.Y. Times, Oct. 6, 2012, at A6; Larry Neumeister & John Christoffersen, *Five Terror Suspects Appear in U.S. Courts*, Miami Herald, Oct. 7, 2012, at 3A.

234. See Peter Lance, *Triple Cross* 10–17, 33–45, 318 (2006); Soufan, *supra* note 194, at 94; Benjamin Weiser, *U.S. Ex-Sergeant Linked to Bin Laden Conspiracy*, N.Y. Times, Oct. 30, 1998, at A1; see also The 9/11 Commission Report 68 (2004) (describing Ali Mohamed as “a former Egyptian army officer who had moved to the United States in the mid-1980s, enlisted in the U.S. Army,

after he refused to cooperate in the tracking down of Osama Bin Laden, and he first appeared in court on May 27.²³⁵ On October 20, 2000, he agreed to plead guilty.²³⁶ He was moved to a secret location, and he was never sentenced.²³⁷

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.²³⁸ He was held in secret for more than four months before charges against him were made public.²³⁹ In early 2003, he pleaded guilty²⁴⁰ and was sentenced to ten years and one month in prison.²⁴¹ He was released on August 21, 2009.²⁴²

Among the twenty-five defendants indicted in the U.S. prosecution, many of whom remain fugitives, was Ahmed Khalfan Ghailani.²⁴³ He was captured in a raid on his home in Pakistan in the summer of 2004 and held in secret CIA prisons until September 2006, when he was transferred to Guantánamo Bay.²⁴⁴ The

and became an instructor at Fort Bragg”); Lance, *supra*, at 301 (reporting that “to shield itself from the embarrassment of arresting an al Qaeda spy who had been one of their own informants, he was charged on a ‘John Doe’ warrant”); Benjamin Weiser & James Risen, *A Soldier’s Shadowy Trail in U.S. and in the Mideast*, N.Y. Times, Dec. 1, 1998, at A1 (reporting that Mohamed applied to be a CIA agent in 1984).

235. United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see Lance, *supra* note 234, at 320–22; Benjamin Weiser, *Indicted Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. Times, June 5, 1999, at A3 (reporting that Mohamed was also known as Abu Omar); Weiser, *U.S. Charges Ex-Soldier*, *supra* note 205.

236. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; see Lance, *supra* note 234, at 3–7, 358–60; Benjamin Weiser, *Bin Laden Linked to Embassy Blast by an Ex-Soldier*, N.Y. Times, Oct. 21, 2000, at A1.

Mohamed was not called as a witness at the trial of the other defendants. See Lance, *supra* note 234, at 6, 364; Benjamin Weiser, *Lawyers Seeking to Expose Plea Deal in Bombings Case*, N.Y. Times, May 6, 2001, at 151.

237. See Lance, *supra* note 234, at 7, 23–24, 361–62 (reporting also his receiving occasional visits from his American wife); Soufan, *supra* note 194, at 94.

238. 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*].

239. See Weiser, *Qaeda Member*, *supra* note 238; Weiser, *Held Secretly*, *supra* note 238.

240. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (noting a guilty plea on January 31, 2003); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 138 (2d Cir. 2008) (noting conviction in February 2003); see Weiser, *Qaeda Member*, *supra* note 238.

241. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 681); see Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of ten years).

242. www.bop.gov (reg. no. 45047-054).

243. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; United States v. Ghailani, 751 F. Supp. 2d 515, 518 (S.D.N.Y. 2010); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 31, December 16, 1998, third superseding indictment); see William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. Times, Apr. 1, 2008, at A14.

244. *Ghailani*, 751 F. Supp. 2d at 518, 523–24; United States v. Ghailani, 751 F. Supp. 2d 508, 509–10 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); United States v. Ghailani, 686 F. Supp. 2d 279, 283–84 (S.D.N.Y. 2009); see Glaberson, *supra* note 243; Josh White & Joby Warrick, *Detainee Is Charged with Capital Murder in Embassy Bombing*, Wash. Post, Apr. 1, 2008, at A2.

U.S. government announced on March 31, 2008, that it would try Ghailani by military commission,²⁴⁵ but the following year the government decided to try him in the Southern District of New York instead.²⁴⁶ On January 25, 2011, he was sentenced to life in prison for conspiracy to destroy buildings.²⁴⁷

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.²⁴⁸

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

245. *Ghailani*, 751 F. Supp. 2d at 525; see Glaberson, *supra* note 243; White & Warrick, *supra* note 244.

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

247. Judgment, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Jan. 25, 2011), D.E. 1090 [hereinafter *Ghailani* Judgment]; see Peter Finn, *Embassy Bomber Receives Life Sentence*, Wash. Post, Jan. 26, 2011, at A2; Benjamin Weiser, *Life Sentence Without Parole for Former Detainee*, N.Y. Times, Jan. 26, 2011, at A18.

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

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

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

it into a knife and stabbed the corrections officer and inflicted a permanent brain injury to him.²⁴⁹

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.²⁵⁰ Both Salim and K.K. Mohamed were transferred to other jails,²⁵¹ but only Salim was charged with the stabbing.²⁵² The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.²⁵³

Salim pleaded guilty on April 3, 2002, to attempted murder.²⁵⁴ Judge Batts sentenced him to thirty-two years in prison,²⁵⁵ but the court of appeals concluded that a terrorism enhancement did not require transnational conduct,²⁵⁶ so Judge Batts resentenced Salim to life.²⁵⁷ The court of appeals affirmed the life sentence.²⁵⁸

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.²⁵⁹ With the help of a jury questionnaire, Judge Sand

249. *Trying Cases*, *supra* note 209, at 13–14 (remarks by Judge Sand).

250. *Bin Laden*, 160 F. Supp. 2d at 673; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); *see* Hirsch, *supra* note 194, at 213; Weiser, *Quandary*, *supra* note 248.

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

252. *Bin Laden*, 160 F. Supp. 2d at 673; *see* Weiser, *Escape Plan*, *supra* note 248.

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 248.

253. *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.

254. *Salim*, 549 F.3d at 70; *United States v. Salim*, 287 F. Supp. 2d 250, 259 (S.D.N.Y. 2003); S.D.N.Y. *Salim* Docket Sheet, *supra* note 253; *see* Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

255. *Salim*, 549 F.3d at 70; S.D.N.Y. *Salim* Docket Sheet, *supra* note 253 (D.E. 90, also noting a \$4,722,820 restitution order); *see Salim*, 287 F. Supp. 2d 250 (finding facts for the sentence calculation); *see also* Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004, at B3 (reporting that Judge Batts had to eject the victim from the court for disruptive behavior).

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

257. Amended Judgment, *Salim*, No. 1:01-cr-2 (S.D.N.Y. Sept. 9, 2010), D.E. 126; *see* Benjamin Weiser, *Reputed Bin Laden Adviser Gets Life Term in Stabbing*, N.Y. Times, Sept. 1, 2010, at A18.

258. *United States v. Salim*, 690 F.3d 115 (2d Cir. 2012), *cert. denied*, 568 U.S. ___, 133 S. Ct. 901 (2013).

259. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 102, 106 (2d Cir. 2008); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 363 (S.D.N.Y. 2001); *United States v. Bin Laden*, 132 F. Supp. 2d 168, 172 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); *see* Benjamin Weiser, *First Day of Jury*

screened a jury pool of 1,302 people.²⁶⁰ Opening arguments began a month later, on February 5.²⁶¹

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.²⁶² 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.²⁶³

Closing arguments began on May 1,²⁶⁴ and the jury began its deliberations on May 10.²⁶⁵ All four defendants were convicted of all charges on May 29.²⁶⁶

Judge Sand granted al-'Owhali and K.K. Mohamed separate death penalty hearings.²⁶⁷ 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, 2001.²⁶⁸ On June 12, the jury announced that it was

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”).

260. Leonard B. Sand, *United States v. El Hage: Jury Questionnaire* (Jan. 3, 2001); *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); 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.

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

262. See Hirsch, *supra* note 194, at 72.

263. See *id.* at 72–73.

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

265. See *Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; see also Hirsch, *supra* note 194, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

266. *In re Terrorist Bombings*, 552 F.3d at 101–02, 107; *United States v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); *United States v. Bin Laden*, 160 F. Supp. 2d 670, 673 n.5 (S.D.N.Y. 2001); *Bin Laden*, 156 F. Supp. 2d at 363; *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1243 (D. Colo. 2014); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); see Hirsch, *supra* note 194, at 179–80; Weiser, *4 Guilty*, *supra* note 202 (reporting also that none of the defendants testified).

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

267. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); see Benjamin Weiser, *McVeigh Execution Casts Shadow on Embassy Terror Trial*, N.Y. Times, Apr. 24, 2001, at B2 (reporting on Judge Sand's April 23, 2001, ruling).

268. See Hirsch, *supra* note 194, 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 Heat-

deadlocked, which meant that al-'Owhali would be imprisoned for life without the possibility of release.²⁶⁹ The jury began to deliberate on K.K. Mohamed's sentence on July 5²⁷⁰ and announced a deadlock on July 10.²⁷¹

On October 18, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.²⁷² Because of the intervening and nearby attacks on September 11, court security on the day of sentencing was substantially enhanced.²⁷³

ley in 1997, but they pleaded guilty and avoided capital sentencing trials. See *25-Year Sentence for Ex-Girlfriend's Death*, N.Y. Times, Jan. 30, 2000, at 133; Benjamin Weiser, *Former Officer Gets a Life Term for 10 Murders in a Drug Gang*, N.Y. Times, Mar. 23, 1999, at B1; Benjamin Weiser, *Gang Leader, in Plea Deal, Admits to Role in 13 Killings*, N.Y. Times, Feb. 6, 1999, at B2; Weiser, *Reno Allows, supra*; Benjamin Weiser, *Reno Authorizes a Second Death Penalty Case for Prosecutors in Manhattan*, N.Y. Times, Nov. 21, 1997, at B4. The first federal defendant sentenced to death in New York since Puff was Ronell Wilson, whom a jury voted to execute on January 30, 2007, in the Eastern District of New York. Judgment, *United States v. Wilson*, No. 1:04-cr-1016 (E.D.N.Y. Mar. 29, 2007), D.E. 407; see Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. Times, Jan. 31, 2007, at A1. The court of appeals, however, vacated the sentence on June 30, 2010. *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010); see Manny Fernandez & A.G. Sulzberger, *U.S. Court Strikes Down Death Penalty for Officers' Killer*, N.Y. Times, July 1, 2010, at A20. A second jury voted on July 24, 2013, to execute Wilson. Special Verdict Form, *Wilson*, No. 1:04-cr-1016 (E.D.N.Y. July 24, 2013), D.E. 1437; *United States v. Wilson*, 967 F. Supp. 2d 673, 677 (E.D.N.Y. 2013); see also Mosi Secret, *Killer of Two Undercover Detectives Is Sent Back to Death Row*, N.Y. Times, July 25, 2013, at A19. The court of appeals remanded the case for reconsideration of Wilson's intellectual ability in light of the Supreme Court's May 27, 2014, holding in *Hall v. Florida* that IQ may not be used in a bright-line test. Order, *United States v. Wilson*, No. 13-3566 (2d Cir. June 25, 2014), D.E. 43; see *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986 (2014).

269. *In re Terrorist Bombings*, 552 F.3d at 101, 107; *Bin Laden*, 156 F. Supp. 2d at 361 n.2; see Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. Times, June 13, 2001, at A1 (reporting that ten jurors concluded that execution would make the defendant a martyr and that five jurors decided that life in prison would be the greater punishment); Hirsch, *supra* note 194, 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 266.

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

271. *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).

272. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *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); *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1243 (D. Colo. 2014); see Soufan, *supra* note 194, at 94; Weiser, *4 Are Sentenced, supra* note 269.

273. See Hirsch, *supra* note 194, at 244; Weiser, *4 Are Sentenced, supra* note 269 (“The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.”).

The defendants, including Salim, ultimately were sent to serve their sentences at the Administrative Maximum Facility, or “Super Max,” in Florence, Colorado.²⁷⁴

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.²⁷⁵ 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.²⁷⁶ 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 Wadhwan El-Hage.”²⁷⁷

Al-Fadl was in the Witness Security Program, living in a secret location.²⁷⁸ Prosecutors had arranged for a videoconference connection to al-Fadl, and the Marshals Service had recorded videoconferences with al-Fadl without the prosecutors’ knowledge.²⁷⁹ Prosecutors received copies of the videotapes from the Marshals Service and provided defense counsel with transcripts, redacting “various portions to protect the identities of certain individuals and to protect operation information that they believed was not subject to discovery.”²⁸⁰ On October 24, 2003, el-Hage moved for a new trial.²⁸¹

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

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

275. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 165 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 101 n.2, 141 n.41; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); see *Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 194, at 258.

276. *In re Terrorist Bombings*, 552 F.3d at 140–43; *Bin Laden*, 397 F. Supp. 2d at 474–81, 518; *Trying Cases*, *supra* note 209, at 12 (remarks by Judge Sand); see Benjamin Weiser, *U.S. Videos of Qaeda Informer Offer Glimpse Into a Secret Life*, N.Y. Times, May 1, 2004, at A1 [hereinafter *Qaeda Informer*].

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

278. *In re Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 474; see Weiser, *Qaeda Informer*, *supra* note 276.

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

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

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

impeachment material generally does not warrant a new trial.”²⁸² The court of appeals agreed.²⁸³

All four defendants appealed their convictions,²⁸⁴ but K.K. Mohamed withdrew his appeal.²⁸⁵

After the trial, the *New York Times* published an article based on interviews with nine of the twelve jurors.²⁸⁶ 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.²⁸⁷ Judge Duffy determined that the article entitled el-Hage to neither a new trial nor an evidentiary hearing.²⁸⁸

On November 24, 2008, the court of appeals affirmed the convictions of Odeh, al-'Owhali, and el-Hage.²⁸⁹ Only el-Hage appealed his life sentence, and the court of appeals remanded his case for resentencing in light of the Supreme Court's 2005 decision in *United States v. Booker* that sentencing guidelines are advisory rather than mandatory.²⁹⁰ Judge Lewis A. Kaplan, to whom the case had been reassigned in 2009, resentenced el-Hage on April 23, 2013, to life in prison.²⁹¹ On January 21, 2015, the court of appeals affirmed the resentencing.²⁹²

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

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

284. Docket Sheet, *United States v. Mohamed*, No. 01-1571 (2d Cir. Nov. 1, 2001) [hereinafter 2d Cir. *Mohamed* Docket Sheet]; Docket Sheet, *United States v. Odeh*, No. 01-1553 (2d Cir. Oct. 24, 2001); Docket Sheet, *United States v. El Hage*, No. 01-1550 (2d Cir. Oct. 25, 2001); Docket Sheet, *United States v. Al-'Owhali*, No. 01-1535 (2d Cir. Oct. 19, 2001) [hereinafter 2d Cir. *Al-'Owhali* Docket Sheet] (lead case); see Weiser, *Jury Torn*, supra note 266.

285. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; 2d Cir. *Mohamed* Docket Sheet, supra note 284 (noting a January 21, 2004, order that the appeal was withdrawn with prejudice); see Benjamin Weiser, *3 Seek Retrial in Bombing of Embassies*, N.Y. Times, Jan. 23, 2004, at B4.

286. Weiser, *Jury Torn*, supra note 266 (reporting that one juror could not be found and two jurors declined interviews).

287. *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 285; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1.

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

289. *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 284 (noting a remand on April 30, 2009). On February 16, 2010, Judge Duffy denied al-'Owhali relief. Opinion, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Feb. 16, 2010), *aff'd*, *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 407 F. App'x 548 (2d Cir. 2011).

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

290. *In re Terrorist Bombings*, 552 F.3d at 155; see *United States v. Booker*, 543 U.S. 220 (2005).

291. Amended Judgment, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Apr. 24, 2013), D.E. 1197; Transcript, *id.* (Apr. 23, 2013, filed May 24, 2013), D.E. 1226; see Russ Buettner, *Resentenced to Life in Prison, a Terrorist Plans to Appeal*, N.Y. Times, Apr. 24, 2013, at A20.

292. *United States v. El-Hage*, 589 F. App'x 29 (2d Cir. 2015).

A Guantánamo Bay Defendant

Nearly eleven years after the embassy bombings, Ghailani, the ninth defendant in the third superseding indictment filed on December 16, 1998, was transferred from the detention camp at Guantánamo Bay, Cuba, to the Southern District of New York.²⁹³ Ghailani's alleged role was to obtain explosives and transport them to Dar es Salaam.²⁹⁴

Ghailani grew up in Zanzibar, and after the embassy bombings he reportedly became a cook for Osama Bin Laden.²⁹⁵ In the summer of 2004, he was captured in a shootout in Pakistan.²⁹⁶ He was held in CIA custody until his transfer to Guantánamo Bay in 2006.²⁹⁷

On June 15, 2009, the case was transferred to Judge Kaplan.²⁹⁸ He determined that the interval between Ghailani's indictment and his presentation to the court for prosecution did not violate a Sixth Amendment right to a speedy trial.²⁹⁹ Although the time since his transfer from CIA to military custody implicated his speedy trial right,³⁰⁰ he was not substantially prejudiced by the delay.³⁰¹ The court of appeals agreed.³⁰²

Judge Kaplan also rejected Ghailani's argument that the indictment should be dismissed because of his alleged torture by the CIA while in its custody, because if

293. United States v. Ghailani, 751 F. Supp. 2d 515, 518, 521, 529 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 508, 509–10 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); see United States v. Ghailani, 733 F.3d 29, 38, 40 (2d Cir. 2013); Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, Wash. Post, June 10, 2009, at A1; Carol Rosenberg, *First Guantanamo Detainee Moved to U.S., Pleads Not Guilty*, Miami Herald, June 10, 2009, at 3A; Benjamin Weiser, *In U.S. Court, Guantanamo Detainee Pleads Not Guilty to Embassy Bombing Charges*, N.Y. Times, June 10, 2009, at A24.

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

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

296. *Ghailani*, 733 F.3d at 38; see Jess Bravin, *The Terror Courts* 363 (2013); Weiser, *supra* note 295.

297. *Ghailani*, 733 F.3d at 39; see Bravin, *supra* note 296, at 363.

298. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208.

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

299. United States v. Ghailani, 751 F. Supp. 2d 515 (S.D.N.Y. 2010); *Ghailani*, 733 F.3d at 40; see Peter Finn, *Delay in Prosecution Didn't Violate Detainee's Rights, Judge Rules*, N.Y. Times, July 14, 2010, at A6; Benjamin Weiser, *Judge Refuses to Dismiss Terror Suspect's Case*, N.Y. Times, July 14, 2010, at A19.

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

301. *Id.* at 520, 531–34.

302. *Ghailani*, 733 F.3d at 46–52, 55–56; see Benjamin Weiser, *Former Detainee's Right to Speedy Trial Wasn't Violated, Appeals Panel Rules*, N.Y. Times, Oct. 25, 2013, at A21.

Ghailani's allegation is true then "the proper remedy is money damages or criminal prosecution of the offending officers."³⁰³

Jury selection began on September 22.³⁰⁴ Judge Kaplan used a jury questionnaire,³⁰⁵ but he did not want the questionnaire to deprive the court of the benefits of oral *voir dire*:

While the Court recognizes that eliciting pedigree information about prospective jurors by written questionnaire would be more efficient [than] doing so by oral *voir dire*, there is much to be said also for doing it orally. Affording an opportunity for prospective jurors to speak orally in the presence of the parties about familiar matters such as their backgrounds, education, employment and families may help make them sufficiently comfortable to be more responsive with respect to more sensitive matters. In any case, it gives the parties more of an impression of the individuals than would questionnaire answers alone.³⁰⁶

Voir dire began on September 29.³⁰⁷ Judge Kaplan appointed counsel to represent one of the jurors, whose employer apparently illegally refused to excuse the juror's absence from work.³⁰⁸

The trial began on October 12.³⁰⁹ Judge Kaplan reserved some seats in the courtroom for the news media.³¹⁰ On November 17, the jury found Ghailani guilty on one count of conspiracy to destroy buildings but not guilty of the remaining 281 counts, including separate counts of murder for each of the persons killed at the two embassies.³¹¹ Judge Kaplan sentenced Ghailani to life in prison.³¹² On October 24, 2013, the court of appeals affirmed the sentence.³¹³

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

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

305. Lewis A. Kaplan, United States v. Ghailani: Jury Questionnaire (Sept. 22, 2010); *Ghailani* Preliminary Remarks, *supra* note 304; see United States v. Ghailani, 743 F. Supp. 2d 242, 247 n.1 (S.D.N.Y. 2010); see also Benjamin Weiser & Colin Moynihan, *Glimpse at Jurors in Ex-Detainee's Trial*, N.Y. Times, Oct. 14, 2010, at A33 ("The 11-page questionnaire, filled out by more than 1,000 potential jurors, included more than 30 questions.").

306. Order, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Aug. 23, 2010), D.E. 996.

307. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208.

308. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 14, 2010), D.E. 1041.

309. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; United States v. Ghailani, 733 F.3d 29, 40 (2d Cir. 2013); see Benjamin Weiser, *Trial of Man Held at Guantánamo Opens, but Guantánamo Isn't Mentioned*, N.Y. Times, Oct. 13, 2010, at A19.

310. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 22, 2010), D.E. 1024.

311. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; *Ghailani*, 733 F.3d at 40–41; see Peter Finn, *Terror Detainee Largely Acquitted*, Wash. Post, Nov. 18, 2010, at A1; Carol Rosenberg, *Guantánamo Detainee's Verdict a Test for War Court vs. Civilian Trial*, Miami Herald, Nov. 18, 2010, at 1A; Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. Times, Nov. 18, 2010, at A1.

312. *Ghailani* Judgment, *supra* note 247; *Ghailani*, 733 F.3d at 36–37, 41; see Finn, *supra* note 247; Weiser, *supra* note 247.

A Challenge to Prison Security Measures

On December 17, 2007, K.K. Mohamed submitted to the U.S. District Court for the District of Colorado a pro se complaint alleging improper conditions of confinement.³¹⁴ Magistrate Judge Boyd N. Boland reviewed the complaint and, on December 27, ordered it filed.³¹⁵ On September 29, 2011, District Judge Marcia S. Krieger dismissed most claims, but she ruled that the complaint, as amended, alleged a potentially valid violation of the First Amendment.³¹⁶

At issue were special administrative measures (SAMs), which are restrictions on the prisoner's communications and contacts with others at the direction of a law enforcement or intelligence agency to prevent violence.³¹⁷

Judge Krieger agreed to appoint pro bono counsel, if a willing attorney could be found.³¹⁸ According to Mohamed, an attorney attempted to send him mail in October 2011, but the mail did not reach Mohamed because of security measures.³¹⁹ In time, an attorney agreed to represent Mohamed, and the court initially set a discovery deadline of January 11, 2013.³²⁰ A protective order forbade the attorney from using any discovery for any purpose other than litigating Mohamed's case.³²¹ Judge Krieger presided over a bench trial from May 5 to 12, 2014.³²² Mohamed appeared by video conference from the prison courtroom.³²³

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

313. *Ghailani*, 733 F.3d at 54–56, cert. denied, 572 U.S. ___, 134 S. Ct. 1523 (2014); see Weiser, *supra* note 302.

314. Complaint, *Mohammed v. Gonzales*, No. 1:07-cv-2697 (D. Colo. Dec. 27, 2007), D.E. 3; *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1239 n.1 (D. Colo. 2014); see John Schwartz & Benjamin Weiser, *Judge Allows Trial on Terrorist's Challenge to Prison Rules*, N.Y. Times, Oct. 4, 2011, at A23.

315. Order, *Mohammed v. Mukasey*, No. 1:07-cv-2697 (D. Colo. Dec. 27, 2007), D.E. 2.

316. Opinion at 15–22, 32, *Mohammed v. Holder*, *id.* (Sept. 29, 2011), D.E. 234 [hereinafter *Mohammed* Opinion], available at 2011 WL 4501959; see Schwartz & Weiser, *supra* note 314.

Tim Reagan interviewed Judge Krieger for this report at a district judges' workshop in Seattle, Washington, on August 25, 2014. Judge Krieger observed that protecting the civil rights of prisoners helps to ensure the protection of civil rights for the rest of us. Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

317. *Mohammed*, 47 F. Supp. 3d at 1239–44; see 28 C.F.R. § 501.3 (2013).

SAMs are not a prison policy; they are a Justice Department policy. Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

318. *Mohammed* Opinion, *supra* note 316, at 32.

319. Motion to Compel at 2, *Mohammed*, No. 1:07-cv-2697 (D. Colo. Nov. 15, 2011), D.E. 236.

320. Order, *id.* (July 27, 2012), D.E. 263.

321. Protective Order, *id.* (Aug. 30, 2012), D.E. 266.

322. Minutes, *id.* (May 5–12, 2014), D.E. 388 to 391, 393; see Transcript at 28, *id.* (Jan. 7, 2014) [hereinafter *Mohammed* Final Pretrial Conference Transcript] (setting the trial date), filed as Ex. E, Government Motion to Strike Sanctions Motion, *id.* (Feb. 7, 2014), D.E. 354.

On February 1, 2014, the pro bono attorney filed a motion for relief from the government's allegedly "making the litigation and trial as difficult and costly as possible for the Plaintiff and his *pro*

On June 17, Judge Krieger found some of the SAMs imposed against Mohamed to be “arbitrary and capricious and unsupported by substantial evidence in the record”: (1) a prohibition on oral contact with a brother while permitting such contact with Mohamed’s mother and sisters; (2) a prohibition on written contact with specific persons who are not immediate family members; and (3) refusal to deliver outgoing mail to Mohamed’s attorney, which Mohamed requested because of a belief that the prison was not delivering his outgoing mail to the postal service.³²⁴ Judge Krieger remanded the matter to the FBI for further consideration and resolution during Mohamed’s SAMs review cycle.³²⁵ Judge Krieger denied a discovery motion filed during the following SAMs review cycle, opining that a challenge to SAMs decisions subsequent to Judge Krieger’s 2014 remand would require the filing of a new case.³²⁶

Osama Bin Laden’s Son-in-Law

An indictment against Sulaiman Abu Ghayth, one of Osama Bin Laden’s sons-in-law, was filed in the case against embassy bombers on March 1, 2013, for conspiracy to kill Americans based on the defendant’s support of Bin Laden in 2001.³²⁷

In 2002, Abu Ghayth was smuggled from Afghanistan into Iran following the 2001 U.S. invasion of Afghanistan.³²⁸ He was kept under house arrest in Iran for eleven years.³²⁹ Turkey deported him to Kuwait in February 2013, but U.S. au-

bono counsel.” Sanctions Motion, *id.* (Feb. 1, 2014), D.E. 343. The government opposed the motion as procedurally defective. Government Motion to Strike Sanctions Motion, *supra* note 322.

323. Transcripts, *Mohammed*, No. 1:07-cv-2697 (D. Colo. May 5 through 8 and 12, 2014, filed Nov. 9, 2014), D.E. 411 to 415; *see Mohammed* Final Pretrial Conference Transcript, *supra* note 322, at 30–32 (notifying Mohamed’s attorney that Judge Krieger would be willing to entertain a motion for in-person appearance, but noting that she would be disinclined to grant such a motion).

324. *Mohammed v. Holder*, 47 F. Supp. 3d 1236 (D. Colo. 2014).

325. *Id.* at 1263–65.

The Government withdrew its appeal. Order, *Mohammed v. Holder*, No. 14-1325 (10th Cir. Nov. 19, 2014).

326. Opinion, *Mohammed v. Holder*, No. 1:07-cv-2697 (D. Colo. Feb. 3, 2015), D.E. 423.

327. Abu Ghayth Indictment, *United States v. Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 7, 2013), D.E. 1154; *United States v. Abu Ghayth*, 945 F. Supp. 2d 511, 512 (S.D.N.Y. 2013) (denying a motion to suppress custodial statements); *see* Mark Mazzetti & William K. Rashbaum, *Qaeda Figure Is Held to Face New York Trial*, N.Y. Times, Mar. 8, 2013, at A1; Greg Miller & Peter Finn, *Terror Suspect Brought to U.S.*, Wash. Post, Mar. 8, 2013, at A1; *see also* Superseding Indictment, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Dec. 20, 2013), D.E. 1409 (expanding allegations of overt acts to include acts in 2002); Complaint, *United States v. Abu Ghayth*, No. 1:12-mj-3351 (S.D.N.Y. Dec. 28, 2012), D.E. 1.

328. *See* Abu Ghayth Indictment, *supra* note 327, at 2; Greg Miller & Julie Tate, *Bin Laden Son-in-Law Pleads Not Guilty to Conspiracy Charge*, Wash. Post, Mar. 9, 2013, at A3.

329. *See* Abu Ghayth Affidavit at 1–2, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. July 19, 2013), D.E. 1268; *see also* Mazzetti & Rashbaum, *supra* note 327; Miller & Tate, *supra* note 328; Joby Warrick, *New Tensions Test Fragile Ties Between Iran, Al-Qaeda*, Wash. Post, Mar. 13, 2013, at A1.

thorities arrested him during a layover in Jordan on February 28, New York time.³³⁰

Abu Ghayth's trial began on March 3, 2014, with jury selection.³³¹ Judge Kaplan used a jury questionnaire in this case as well.³³² On March 8, the *New York Times* reported that one juror, an accountant, was fired when her employer found out the trial for which she was serving.³³³ It appears that the employer was trying to shift responsibility for the juror's wages during the trial to unemployment insurance, but the juror was reinstated after intervention by an attorney appointed by Judge Kaplan.³³⁴ Judge Kaplan explained in court, "It is a violation of federal law for an employer to discharge, threaten to discharge, intimidate or coerce any permanent employee by reason of jury service in the federal courts."³³⁵

Abu Ghayth testified in his own defense,³³⁶ and he was convicted on March 26, after six hours of jury deliberation over two days, of being Al-Qaeda's spokesperson following September 11, 2001.³³⁷ On September 23, 2014, Judge Kaplan sentenced Abu Ghayth to life in prison.³³⁸ An appeal is pending.³³⁹

330. Transcript at 3, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 8, 2013, filed Mar. 22, 2013), D.E. 1167; see Abu Ghaith Affidavit, *supra* note 329, at 2–10; see also Mazzetti & Rashbaum, *supra* note 327 ("Jordan's spy service, the General Intelligence Directorate, is one of the Central Intelligence Agency's closest partners in the Middle East."); Miller & Tate, *supra* note 328; Shane, *supra* note 207; Warrick, *supra* note 329.

331. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; see Benjamin Weiser, *Jury Selection Begins at Trial of Bin Laden's Son-in-Law*, N.Y. Times, Mar. 4, 2014, at A17.

332. Transcript at 5, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 13, 2014, filed Apr. 10, 2014), D.E. 1600; see Benjamin Weiser, *Prosecutors Argue Against Allowing 9/11 Mastermind's Testimony*, N.Y. Times, Mar. 18, 2014, at A17.

333. Benjamin Weiser, *Juror Loses Job for Serving in Terror Trial*, N.Y. Times, Mar. 8, 2014, at A15; see Weiser, *supra* note 332.

334. Transcript at 315, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 10, 2014, filed Apr. 1, 2014), D.E. 1575 [hereinafter Mar. 10, 2014, *Abu Ghayth* Transcript]; see Benjamin Weiser, *Shoe-Bomb Plot Revisited at Terrorism Trial*, N.Y. Times, Mar. 11, 2014, at A16.

335. Mar. 10, 2014, *Abu Ghayth* Transcript, *supra* note 334, at 315.

336. Transcript at 1138–262, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 19, 2014, filed Apr. 1, 2014), D.E. 1585; see Christopher M. Matthews, *Terror Suspect Takes Stand*, Wall St. J., Mar. 20, 2014, at A6; Benjamin Weiser, *At Trial, Relative Recalls a Cave Meeting with Bin Laden on 9/11*, N.Y. Times, Mar. 20, 2014, at A1.

337. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; Transcript at 1566, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 26, 2014, filed Apr. 1, 2014), D.E. 1593 [hereinafter Mar. 26, 2014, *Abu Ghayth* Transcript]; see Tom Hays & Larry Neumeister, *Bin Laden's In-Law Found Guilty for Role in Terror Propaganda*, Miami Herald, Mar. 27, 2014, at 1A; Charles Levinson & Christopher M. Matthews, *Bin Laden Son-in-Law Found Guilty*, Wall St. J., Mar. 27, 2014, at A3; Benjamin Weiser, *Jurors Convict Bin Laden Aide in Terror Case*, N.Y. Times, Mar. 27, 2014, at A1.

338. Judgment, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Sept. 23, 2014), D.E. 1726; Transcript, *id.* (Sept. 23, 2014, filed Oct. 7, 2014), D.E. 1747 (noting no applications for departure from sentencing guideline calculations in the presentence report); see www.bop.gov (reg. no. 91969-054); see also Benjamin Weiser, *Bin Laden Adviser Warns of Dire Consequences as He Gets Life Sentence*, N.Y. Times, Sept. 24, 2014, at A25.

339. Docket Sheet, *United States v. Abu Ghayth*, No. 14-3674 (2d Cir. Oct. 1, 2014).

A Defendant Captured in Tripoli

The ninth superseding indictment filed on December 20, 2000, included as the 21st defendant Abu Anas al-Liby.³⁴⁰ He was captured in Tripoli on October 5, 2013,³⁴¹ and transferred to a Navy ship for questioning.³⁴² He arrived in the Southern District of New York several days later³⁴³ and announced in court a preference for his birth name, Nazih Abdel-Hamaed al-Raghie.³⁴⁴

The trial of al-Fawwaz and al-Liby was scheduled to begin in January 2015.³⁴⁵ Judge Kaplan scripted preliminary remarks for prospective jurors and a jury questionnaire.³⁴⁶ On January 2, however, al-Liby died.³⁴⁷

Extradited Defendants

Judge Kaplan would preside over the trials of al-Fawwaz and Abdel Bary, the defendants extradited from Britain in 2012.³⁴⁸ Judge Kaplan denied al-Fawwaz's motion to be tried separately,³⁴⁹ but on September 19, 2014, Abdel Bary offered a plea of guilty to a superseding information.³⁵⁰ Judge Kaplan sentenced Abdel Bary to twenty-five years on February 6, 2015.³⁵¹

340. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 380).

341. United States v. Al-Liby, 23 F. Supp. 3d 194, 196 (S.D.N.Y. 2014) (denying a motion to dismiss for wrongful capture); see Julian E. Barnes & Devlin Barrett, *U.S. Raids in Africa Show Unilateral Strategy*, Wall St. J., Oct. 7, 2013, at A8; David D. Kirkpatrick, Nicholas Kulish & Eric Schmitt, *U.S. Commando Raids Hit Terror Targets in 2 Nations*, N.Y. Times, Oct. 6, 2013, at A1; Ernesto Londoño & Scott Wilson, *Twin Raids in Africa Target Terror Leaders*, Wash. Post, Oct. 6, 2013, at A1; see also Video Shows U.S. Abduction of Accused Al-Qaeda Terrorist on Trial for Embassy Bombings, Wash. Post, www.washingtonpost.com/world/national-security/video-shows-us-abduction-of-accused-al-qaeda-terrorist-on-trial-for-embassy-bombings/2014/02/10/7f84927a-8f6b-11e3-b46a-5a3d0d2130da_story.html (video of capture); Adam Goldman, *Video Shows U.S. Abduction of Alleged Al-Qaeda Terrorist in Libya Last Year*, Wash. Post, Feb. 11, 2014, at A4.

342. *Al-Liby*, 23 F. Supp. 3d at 196; see Benjamin Weiser & Eric Schmitt, *U.S. Said to Hold Qaeda Suspect on Navy Ship*, N.Y. Times, Oct. 7, 2013, at A1.

343. *Al-Liby*, 23 F. Supp. 3d at 196; see Devlin Barrett, *Terror Suspect Moved to New York for Trial*, Wall St. J., Oct. 15, 2013, at A6; Ernesto Londoño & Karen DeYoung, *Suspect in Bombings Brought to U.S.*, N.Y. Times, Oct. 15, 2013, at A4; Benjamin Weiser, Charlie Savage & Eric Schmitt, *Qaeda Suspect Is Brought to New York for a Hearing*, N.Y. Times, Oct. 15, 2013, at A19.

344. Transcript at 2, United States v. Al-Liby, No. 1:98-cr-1023-21 (S.D.N.Y. Oct. 15, 2013, filed Nov. 14, 2013), D.E. 1376.

345. Order, *id.* (Oct. 22, 2014), D.E. 1766.

346. Order, *id.* (Sept. 30, 2014), D.E. 1738.

347. Nolle Prosequi, *id.* (Apr. 9, 2015), D.E. 1977; Letter, *id.* (Jan. 3, 2015), D.E. 1821; see Adam Goldman, *Al-Qaeda Suspect Dies Before Trial*, Wash. Post, Jan. 3, 2015, at A3; Benjamin Weiser & Michael S. Schmidt, *Qaeda Suspect Facing Trial in New York Over Africa Embassy Bombings Dies*, N.Y. Times, Jan. 4, 2015, at 9.

348. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208.

349. Opinion, United States v. Al-Fawwaz, No. 1:98-cr-1023-15 (S.D.N.Y. June 20, 2013), D.E. 1243, available at 2013 WL 3111043; see United States v. Bary, 978 F. Supp. 2d 356, 359 (S.D.N.Y. 2013) (denying motions to dismiss the indictment).

350. Plea Transcript, United States v. Abdel Bary, No 1:98-cv-1023-17 (S.D.N.Y. Sept. 19, 2014, filed Oct. 7, 2014), D.E. 1745; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; Superseding Infor-

Voir dire in al-Fawwaz's trial began on January 20.³⁵² Trial commenced on January 22,³⁵³ and the jury convicted him on February 26.³⁵⁴

Challenge: Attorney–Client Contacts

In detention, the original defendants were cut off from virtually all communications.³⁵⁵ 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.³⁵⁶ 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.³⁵⁷

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.³⁵⁸ 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.³⁵⁹

mation, *Abdel Bary*, No 1:98-cv-1023-17 (S.D.N.Y. Sept. 19, 2014), D.E. 1719; see *Guilty Plea in '98 Embassy Bombings*, *Bos. Globe*, Sept. 20, 2014, at A2; Benjamin Weiser, *Judge Questions Plea Deal with Man Tied to Lethal Qaeda Bombings*, *N.Y. Times*, Sept. 20, 2014, at A17.

351. Judgment, *Bary*, No 1:98-cv-1023-17 (S.D.N.Y. Feb. 12, 2015), D.E. 1912; see *United States v. Bary*, 57 F. Supp. 3d 300 (S.D.N.Y. 2014) (accepting the plea); see also www.bop.gov (reg. no. 67496-054).

352. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208.

353. See Benjamin Weiser, *Third Trial in 1998 U.S. Embassy Bombings in Africa Begins*, *N.Y. Times*, Jan. 23, 2015, at A22.

354. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; see Nicole Hong, *Witnesses in Terror Trial Had a Guide*, *Wall St. J.*, Feb. 28, 2015, at A3; Jennifer Peltz, *Man Convicted for Role in 1998 Embassy Bombings*, *Miami Herald*, Feb. 27, 2015, at 3A; Benjamin Weiser, "Bin Laden's Man in London" Is Convicted of Conspiracy, *N.Y. Times*, Feb. 27, 2015, at A23.

355. *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*].

356. See Weiser, *Suspects Isolated*, *supra* note 355; Weiser, *Judge to Hear Complaints*, *supra* note 355; Weiser, *Rules Violate Rights*, *supra* note 355.

357. *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.

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

359. *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 289.

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.”³⁶⁰

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.³⁶¹ Although the Secretary was not a party to the case, Judge Kaplan agreed to consider the motion.³⁶² 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.³⁶³

Ghailani’s dissatisfaction with one of his appointed New York attorneys resulted in the court’s dismissing the attorney from the case.³⁶⁴

Upon his indictment, the court assigned the federal defender to represent Abu Ghayth, but Abu Ghayth retained, with funds provided by his brother in Kuwait, a lawyer who himself was under federal indictment in the Northern District of New York for tax improprieties.³⁶⁵ After a colloquy ensuring that Abu Ghayth knowingly accepted the risks of having an attorney who might seek favor for himself with the prosecution, Judge Kaplan approved the substitution.³⁶⁶ Judge Kaplan conducted additional conflict waiver colloquies after the attorney was indicted in the Southern District as well.³⁶⁷ Three weeks after Abu Ghayth’s conviction, the attorney agreed to plead guilty in the Northern District to imped-

360. *Trying Cases*, *supra* note 209, at 13 (remarks by Judge Sand).

361. Motion, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 7, 2009), D.E. 791.

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

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

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

365. See Benjamin Weiser, *Bin Laden’s Son-in-Law Seeks a New Lawyer, but There’s a Snag*, N.Y. Times, May 21, 2013, at A18 (also describing the attorney as “an outspoken former Legal Aid Society lawyer with a gray ponytail, who has also handled many terrorism cases over the years”); see also Notice, *United States v. Cohen*, No. 5:12-cr-316 (N.D.N.Y. Mar. 3, 2014), D.E. 51; Letter, *United States v. Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. May 24, 2013), D.E. 1228.

The attorney also represented Mousa Abu Marzook. See Weiser, *supra* note 354; see also *infra* “Prosecution of a Charity”; *infra* “Chicago Fundraising.”

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

367. Transcript, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. May 1, 2014, filed May 29, 2014), D.E. 1630; Transcript at 2–7, *id.* (Jan. 7, 2014, filed Jan. 16, 2014), D.E. 1448 [hereinafter Jan. 7, 2014, *Abu Ghayth* Transcript]; Transcript at 12–19, *id.* (Dec. 23, 2013, filed Jan. 8, 2014), D.E. 1437 [hereinafter Dec. 23, 2013, *Abu Ghayth* Transcript]; Indictment, *United States v. Cohen*, No. 1:13-cr-979 (S.D.N.Y. Dec. 18, 2013), D.E. 1.

ing the IRS, and to a December 18, 2013, indictment in the Southern District for failure to file tax returns.³⁶⁸ On November 21, 2014, the attorney was sentenced to one year and six months in prison.³⁶⁹

Judge Kaplan conducted conflict waiver colloquies with al-Liby upon learning that al-Liby's defense was funded by the Libyan government, which had been reported to be cooperative in al-Liby's capture.³⁷⁰

In 2014, K.K. Mohamed's pro bono attorney in the action challenging prison conditions represented to the court, in a motion to appear at pretrial proceedings by telephone, that since his representation of Mohamed he was selected for extraordinary screening at airports, often resulting in travel delays.³⁷¹ Judge Krieger granted the motion.³⁷² In the interim, the attorney appeared in person in Denver.³⁷³

At the final pretrial conference, Mohamed informed Judge Krieger that he wanted to fire his attorney.³⁷⁴ Judge Krieger told Mohamed that he would be represented by his attorney at the proceeding and Mohamed could file a motion after the proceeding.³⁷⁵ If Mohamed proceeded without his attorney, he would still have to abide by the time schedule set that day.³⁷⁶ To allow Mohamed and his attorney to confer privately, Judge Krieger recessed the proceeding and closed the courtroom.³⁷⁷ Mohamed was represented by his attorney at trial.³⁷⁸

368. Transcript, *Cohen*, No. 1:13-cr-979 (S.D.N.Y. May 1, 2014, filed May 15, 2014), D.E. 9; Plea Agreement, *Cohen*, No. 5:12-cr-316 (N.D.N.Y. Apr. 14, 2014), D.E. 77; Transcript, *id.* (Apr. 14, 2014, filed Apr. 17, 2014), D.E. 81 (plea colloquy, expressing an understanding that the sentence will be one year and six months).

369. Judgment, *Cohen*, No. 5:12-cr-316 (N.D.N.Y. Nov. 25, 2014), D.E. 96; Transcript, *id.* (Nov. 21, 2014, filed Dec. 9, 2014), D.E. 98; see Docket Sheet, *Cohen*, No. 1:13-cr-979 (S.D.N.Y. Dec. 18, 2013) (noting transfer to the Northern District for sentencing); www.bop.gov (noting release on April 24, 2016, reg. no. 19846-052); see also Colin Moynihan, *Lawyer Who Represented Bin Laden Kin Is Sentenced in Tax Case*, N.Y. Times, Nov. 23, 2014, at 33.

370. Transcript at 3–13, *United States v. Al-Liby*, No. 1:98-cr-1023-21 (S.D.N.Y. Sept. 3, 2014, filed Jan. 15, 2015), D.E. 1856; Transcript, *id.* (Aug. 14, 2014, filed Jan. 15, 2015), D.E. 1854; see Michael S. Schmidt & Eric Schmitt, *U.S. Officials Say Libya Approved Commando Raids*, N.Y. Times, Oct. 9, 2013, at 1.

371. Motion to Appear by Telephone, *Mohammed v. Holder*, No. 1:07-cv-2697 (D. Colo. Feb. 6, 2014), D.E. 353.

372. Minutes, *id.* (Feb. 19, 2014), D.E. 362 [hereinafter D. Colo. *Mohammed* Trial Minutes].

Judge Krieger is generally amenable to telephonic appearances. Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

373. *Mohammed* Final Pretrial Conference Transcript, *supra* note 322.

374. *Id.* at 7.

375. *Id.* at 7–8.

376. *Id.*; Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

377. *Mohammed* Final Pretrial Conference Transcript, *supra* note 322, at 6–7; Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

378. D. Colo. *Mohammed* Trial Minutes, *supra* note 372.

Challenge: Interpreters

For the trial before Judge Sand, both Arabic and Kiswahili interpreters were required.³⁷⁹

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.³⁸⁰ Deputy marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge toward the judge.³⁸¹ Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.³⁸² 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.³⁸³

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage's possessions and privileges.³⁸⁴ According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.³⁸⁵ However, two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness.³⁸⁶ Judge Sand decided that the expert opinions were well founded and that el-Hage was competent to stand trial.³⁸⁷

During Ghailani's pretrial phase, he unsuccessfully moved for proscriptions on the strip and visual body cavity searches performed every time he left the detention center for a court appearance.³⁸⁸ Judge Kaplan found that such searches

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

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

381. *In re Terrorist Bombings*, 552 F.3d at 149–50; *Trying Cases*, *supra* note 209, at 13 (remarks by Judge Sand); see Weiser, *Suspect Avows Innocence*, *supra* note 380; Weiser, *Suspect Charges*, *supra* note 380.

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

383. 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 382.

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

385. See *id.*

386. See Weiser, *Faking Illness*, *supra* note 202.

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

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

apply without exception to all inmates at the Metropolitan Correctional Center in Manhattan.³⁸⁹ Ghailani claimed that he could tolerate these invasions of his dignity until the ninth occasion of the search in which he was required to not only display his bare buttocks but “‘open himself’ to allow a visual rectal cavity inspection.”³⁹⁰ Between the time of search to which he objected and the time of Judge Kaplan’s ruling, Ghailani agreed to come to court to attend a proceeding only once.³⁹¹ A psychologist testified that the stress of the searches was exacerbated by post-traumatic stress disorder resulting from enhanced interrogation techniques during his CIA custody, the details of which are classified.³⁹²

Judge Kaplan ruled that the government had made a credible showing that there were no ready alternatives to the search that would provide the same level of security.³⁹³ If stress of the searches triggered a response that made him unable to assist in his defense, then his prosecution would be suspended until he recovered.³⁹⁴

A week later, by letter apparently prepared by his attorney, Ghailani waived the right to attend a pretrial conference held that day.³⁹⁵ A week after that, Judge Kaplan issued an order finding that Ghailani has never suffered from post-traumatic stress disorder and his refusal to attend proceedings was motivated in part by an effort to frustrate the prosecution.³⁹⁶ Ghailani was back in court on the eve of trial for a three-day hearing on his successful motion to suppress a key witness,³⁹⁷ and he was in court for his trial.³⁹⁸

Challenge: Jury Security

Judge Sand decided to close jury selection and use an anonymous jury, but not sequester the jury.³⁹⁹

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

389. *Id.* at 510.

390. *Id.* at 510–11.

391. *Id.* at 511.

392. *Id.* & n.11.

393. *Id.* at 514.

394. *Id.* at 514–15.

395. Letter, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. June 24, 2010), D.E. 966.

396. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 1, 2010), D.E. 971.

397. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208.

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

399. See Feuer, *supra* note 260; Gross, *supra* note 358, at 21–22; Weiser, *supra* note 259; Weiser, *Jury Torn*, *supra* note 266; 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”).

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.⁴⁰⁰

For the trial against Ghailani, Judge Kaplan granted the government's motion for an anonymous jury.⁴⁰¹ Deputy marshals shuttled the jurors to and from the courthouse and provided them with breakfast, lunch, and refreshments.⁴⁰² Judge Kaplan also used anonymous juries for the trials of Abu Ghayth⁴⁰³ and al-Fawwaz.⁴⁰⁴

Challenge: Court Security

In the first trial, persons entering the courtroom had to pass through a metal detector and sign a log book stating their purpose in attending the trial.⁴⁰⁵

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

400. Weiser, *Jury Torn*, *supra* note 266.

401. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. June 16, 2010), D.E. 961; *see Ghailani Preliminary Remarks*, *supra* note 304, at 2; *see also* Weiser & Moynihan, *supra* note 305 ("the defense lawyers, prosecutors and even the judge have not been told their names").

402. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 27, 2010), D.E. 1029; *Ghailani Preliminary Remarks*, *supra* note 304, at 2.

403. Mar. 26, 2014, *Abu Ghayth* Transcript, *supra* note 337, at 1567–68; Dec. 23, 2013, *Abu Ghayth* Transcript, *supra* note 367, at 8; *see* Larry Neumeister, *Bin Laden's Son-in-Law Faces Judge*, *Bos. Globe*, Mar. 4, 2014, at A10; Weiser, *supra* note 332.

404. United States v. Al Fawwaz, 57 F. Supp. 3d 307 (S.D.N.Y. 2014); *see* Order, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Dec. 10, 2014), D.E. 1796 (ordering the Marshal to provide the anonymous jurors with transportation to and from the courthouse); *see also* Tom Hays, *Bombings Defendant Was Top Aide to Bin Laden*, *US Prosecutor Says*, *Bos. Globe*, Jan. 23, 2015, at A8.

405. *See* Hirsch, *supra* note 194, at 71.

ducked. Of course, one of the security officers tackled El-Hage just as he was coming up to the bench.⁴⁰⁶

Because of el-Hage's actions, the defendants were shackled to the floor under the table.⁴⁰⁷ To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out.⁴⁰⁸ And, for this trial, there was no "all rise" when the judge entered.⁴⁰⁹ Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.⁴¹⁰

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."⁴¹¹ 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.⁴¹² In 1996, al-Fadl presented himself at the American embassy in Eritrea as an asset in the fight against Al-Qaeda after he was caught embezzling nearly \$110,000 from Bin Laden's organization.⁴¹³

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

406. *Trying Cases*, *supra* note 209, at 13 (remarks by Judge Sand).

407. *Id.* at 14 (remarks by Judge Sand); Interview with Hon. Leonard B. Sand, June 25, 2007; *see Gross*, *supra* note 358, at 15 & n.54; Hirsch, *supra* note 194, at 78.

408. *Trying Cases*, *supra* note 209, at 14 (remarks by Judge Sand); Interview with Hon. Leonard B. Sand, June 25, 2007; *see Hirsch*, *supra* note 194, at 78.

409. *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 209, at 14 (remarks by Judge Sand); *see Hirsch*, *supra* note 194, at 78.

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

411. *See Hirsch*, *supra* note 194, 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 276.

Al-Fadl is related by marriage to al-Nalfi. *See Weiser, Qaeda Member*, *supra* note 238; Weiser, *Held Secretly*, *supra* note 238; Weiser, *Qaeda Informer*, *supra* note 276.

412. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 142 (2d Cir. 2008); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *see* Docket Sheet, *United States v. Al-Fadl*, No. 1:97-cr-673 (S.D.N.Y. July 10, 1997) (unsealed Apr. 2, 2001); *see also Weiser, Ex-Aide*, *supra* note 411; Weiser, *Qaeda Informer*, *supra* note 276.

413. The 9/11 Commission Report 109 (2004); *Bin Laden*, 397 F. Supp. 2d at 474; *see* Mark Bowden, *The Finish* 90 (2012); Bravin, *supra* note 296, at 202 (describing al-Fadl as "an al Qaeda turncoat who had become the US government's star informer"); Lance, *supra* note 234, at 260-65 (describing al-Fadl as a Zelig of terror and reporting that the embezzlement resulted in part from jealousy over el-Hage's higher compensation from Al-Qaeda); Soufan, *supra* note 194, at 66-69, 71; Weiser, *Qaeda Informer*, *supra* note 276.

his identity to their clients until the day before al-Fadl appeared in court.⁴¹⁴ Judge Sand forbade courtroom artists from sketching al-Fadl's face.⁴¹⁵

Judge Kaplan also forbade courtroom artists from sketching a witness's face.⁴¹⁶ Ghailani moved to suppress evidence from a witness whom Tanzanian authorities arrested in 2006, the FBI questioned, and who was released after the witness agreed to testify against Ghailani.⁴¹⁷ Ghailani argued that finding the witness resulted from coercion during extremely harsh interrogation while Ghailani was in the CIA's Rendition, Detention, and Interrogation Program.⁴¹⁸ Judge Kaplan ordered an evidentiary hearing on the matter,⁴¹⁹ at which the witness testified.⁴²⁰ The witness's identity was initially redacted from Judge Kaplan's opinion ordering the hearing,⁴²¹ but his identity was revealed at the hearing⁴²² and the opinion was reposted three weeks later without the witness's name redacted.⁴²³ Judge Kaplan suppressed the witness,⁴²⁴ and the government elected not to delay the trial by appealing the suppression order.⁴²⁵

For the prosecution of Abu Ghayth, Judge Kaplan denied a government request to let a witness testify under a pseudonym.⁴²⁶

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client's religious beliefs.⁴²⁷ As Judge Sand reported,

414. See Hirsch, *supra* note 194, at 109.

415. See *id.*

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

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

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

419. *Id.* at 261; see Weiser, *supra* note 417.

420. United States v. Ghailani, 743 F. Supp. 2d 261, 274 (S.D.N.Y. 2010); see Weiser, *supra* note 416.

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

422. See Weiser, *supra* note 416.

423. Opinion, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 7, 2010), D.E. 1039.

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

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

426. Order, United States v. Abu Ghayth, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 13, 2014), D.E. 1482.

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

An attorney who was very diligently representing his client was talking to his client. His client explained that if he died as a martyr he would go immediately to paradise and have thirteen virgin brides. The lawyer said, “Can you imagine having thirteen fathers-in-law?” The next morning there is on my desk a motion to replace the attorney. The defendant said, “How can I be represented by a lawyer who mocks my religion?” I granted the application.⁴²⁸

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.⁴²⁹

Challenge: Classified Evidence

The handling of classified evidence in criminal trials is governed by the Classified Information Procedures Act (CIPA).⁴³⁰

In order to have access to classified evidence, defense counsel had to have security clearances.⁴³¹ Protective orders specified defense attorneys’ responsibilities for protecting government secrets.⁴³²

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.⁴³³ The court ruled that a security clearance requirement did not violate the defendants’ Sixth Amendment right to counsel, and the court of appeals affirmed.⁴³⁴

For the prosecution of Abu Ghayth, the defendant’s retained counsel was under federal indictment for tax improprieties, and the ability of two other defense attorneys to obtain security clearances was also in question, so Judge Kaplan conducted a colloquy with the defendant to determine whether the defendant understood the risks of not having an attorney with a security clearance.⁴³⁵ The defend-

428. *Trying Cases*, *supra* note 209, at 13 (remarks by Judge Sand).

429. *See Hirsch*, *supra* note 194, at 78.

430. 18 U.S.C. app. 3 (2013); *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

431. First *El Hage* Protective Order, *supra* note 358, ¶ 5; Interview with Hon. Lewis Kaplan, Nov. 5, 2009; *see* Gross, *supra* note 358, at 13; Benjamin Weiser, *Bomb Suspects’ Lawyers to Need Security Checks*, N.Y. Times, July 1, 1999, at B5.

432. Abu Ghayth Protective Order, *United States v. El-Hage*, No. 1:98-cr-1023 (S.D.N.Y. Apr. 11, 2013), D.E. 1184; Al-Fawwaz and Abdel Bary Protective Order, *id.* (Jan. 11, 2013), D.E. 1137; Ghailani Classified Protective Order, *id.* (July 21, 2009), D.E. 765; Ghailani Unclassified Protective Order, *id.* (July 14, 2009), D.E. 763; First *El Hage* Protective Order, *supra* note 358.

433. *See Weiser*, *supra* note 431.

434. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 119–28 (2d Cir. 2008); *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); *see* Gross, *supra* note 358, at 13.

435. Transcript, *United States v. Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. May 21, 2013, filed May 30, 2013), D.E. 1232.

ant agreed to proceed with that risk,⁴³⁶ but on the following day another retained attorney entered an appearance on behalf of Abu Ghayth,⁴³⁷ and she was eligible for a clearance.⁴³⁸ Abu Ghayth waived conflict arising from the new attorney's having earlier represented Abdel Bary.⁴³⁹

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.⁴⁴⁰ 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.⁴⁴¹

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

After giving El-Hage's counsel the opportunity to set forth their theory on the relevance of this information, the District Court explained that—based upon its review of an *ex parte* submission made by the government—it could represent with confidence that the classified information did not have the significance claimed by counsel.⁴⁴²

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 ap-

436. *Id.* at 7–10, 17.

437. Appearance, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. May 22, 2013), D.E. 1224.

438. Endorsed Letter, *id.* (May 28, 2013), D.E. 1230; see Benjamin Weiser, *Terror Case Has Lawyer with Several Distinctions*, N.Y. Times, Feb. 22, 2014, at A15.

439. Transcript, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. July 15, 2013, filed Aug. 15, 2013), D.E. 1279.

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

441. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 118–19 (2d Cir. 2008).

442. *Id.* at 119.

ply to extraterritorial searches of U.S. citizens.⁴⁴³ 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.⁴⁴⁴ 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.⁴⁴⁵ The court of appeals determined that Judge Sand's method was appropriate.⁴⁴⁶

Judge Kaplan reviewed classified information on Ghailani to determine what had to be produced in discovery to cleared defense counsel.⁴⁴⁷ 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."⁴⁴⁸ 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."⁴⁴⁹ 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.⁴⁵⁰

Also in al-Liby's case, Judge Kaplan reviewed classified evidence to determine what had to be disclosed to cleared defense counsel.⁴⁵¹ Both al-Liby's attorneys⁴⁵² and al-Fawwaz's attorneys⁴⁵³ filed notices in August 2014 that they intended to

443. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 159, 161–64, 167–72, 176–77 (2d Cir. 2008); *United States v. Bin Laden*, 264 F. Supp. 2d 264, 270–77 (S.D.N.Y. 2000); see Weiser, *supra* note 289.

444. *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.

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

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

447. Order, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Nov. 24, 2009, filed Dec. 7, 2009), D.E. 843 [hereinafter *Ghailani* Discovery Order].

448. *Id.* at 1.

449. *Id.* at 2.

450. *Id.*

451. Orders, *United States v. Al-Liby*, No. 1:98-cr-1023-21 (S.D.N.Y. July 16, 2014), D.E. 1651 to 1653.

452. Notice, *id.* (Aug. 21, 2014), D.E. 1693.

453. Notice, *United States v. Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Aug. 25, 2014), D.E. 1700.

use classified evidence at the trial. Pursuant to CIPA, Judge Kaplan held an in camera hearing on the matter.⁴⁵⁴

Judge Sand's and Judge Kaplan's law clerks had security clearances.⁴⁵⁵ It is Circuit Judge Cabranes's practice to ask his law clerks to seek security clearances,⁴⁵⁶ but Circuit Judge Newman has never had a cleared clerk, unless the clerk came with a security clearance as a result of previous employment.⁴⁵⁷ 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.⁴⁵⁸

In K.K. Mohamed's challenge to prison conditions, some discovery withheld as subject to the state secrets privilege was presented to Judge Krieger for her ex parte, in camera examination.⁴⁵⁹ A career law clerk for Judge Krieger received a security clearance to assist her in the review of classified materials.⁴⁶⁰ Some of the material submitted to Judge Krieger was redacted.⁴⁶¹

The government argued that Judge Krieger could disregard classified evidence, unless she was inclined to rule against the government, in which case she should consider it.⁴⁶² "The Court expressed some doubt about the proposition that 'you get a second bite at the apple,' but invited defense counsel to address the issue more fully in closing arguments."⁴⁶³ Judge Krieger concluded that classified information did not alter her judgment in favor of the prisoner.⁴⁶⁴

Challenge: Classified Arguments

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

454. Order, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 22, 2014), D.E. 1767; see 18 U.S.C. app. 3 § 6 (2013).

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

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

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

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

459. *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1246 (D. Colo. 2014); Opinion at 7–8, *Mohammed v. Holder*, No. 1:07-cv-2697 (D. Colo. Apr. 15, 2014), D.E. 378, available at 2014 WL 1493476.

460. Interview with Hon. Marcia S. Krieger, Aug. 25, 2014.

461. *Id.* (noting that redactions included names on email chains).

Judge Krieger noted that some of the classified information was duplicative of non-classified information. *Id.*

462. *Mohammed*, 47 F. Supp. 3d at 1246.

463. *Id.*

464. *Id.* at 1254–55, 1259, 1263.

and only a caption page would be filed electronically until a redacted copy could be filed electronically after a security review.⁴⁶⁵

In K.K. Mohamed's action challenging prison conditions, Mohamed's attorney sought access to national security information justifying special administrative measures (SAMs).⁴⁶⁶ The government filed a classified ex parte declaration in opposition to the motion.⁴⁶⁷

Challenge: Classified Orders and Opinions

A discovery order by Judge Kaplan early in the Ghailani prosecution contained details about two classified documents, about which Judge Kaplan determined cleared counsel were entitled to more information.⁴⁶⁸ The order was filed with the classified information security officer on November 24, 2009.⁴⁶⁹ 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 7.⁴⁷⁰

A second discovery order was filed with the classified information security officer on December 8, and a redacted version was filed publicly on February 4, 2010.⁴⁷¹ Judge Kaplan's opinion denying relief from strip and visual body cavity searches was filed with the classified information security officer on June 14, determined to contain no classified information, and then filed publicly three days later.⁴⁷²

On July 12, Judge Kaplan filed with the classified information security officer an opinion rejecting Ghailani's speedy trial motion, and the opinion was publicly filed the next day with three slight redactions.⁴⁷³ Also on July 12, Judge Kaplan filed with the security officer a classified supplement to his opinion discussing Ghailani's treatment while in CIA custody.⁴⁷⁴ The supplement was docketed the next day, and a heavily redacted public version of it was filed two days after that.⁴⁷⁵

465. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 27, 2009), D.E. 806; see Reagan, *supra* note 430, at 21–22 (providing information about classified information security officers).

466. Motion to Compel Discovery, *Mohammed v. Holder*, No. 1:07-cv-2697 (D. Colo. Jan. 14, 2014), D.E. 331.

467. Notice, *id.* (Feb. 5, 2014), D.E. 351; Government Brief, *id.* (Feb. 5, 2014), D.E. 350.

468. *Ghailani* Discovery Order, *supra* note 447.

469. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 843).

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

471. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 878).

472. *Id.* (D.E. 962); *United States v. Ghailani*, 751 F. Supp. 2d 508 (S.D.N.Y. 2010).

473. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 976); see *United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

474. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 980); see Opinion, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010), D.E. 978.

475. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208; Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010, filed July 15, 2010), D.E. 980 (redacted).

On August 17, Judge Kaplan ordered an evidentiary hearing on whether testimony from a government witness should be suppressed because the government learned of the witness through extraordinary interrogation methods.⁴⁷⁶ Judge Kaplan's memorandum opinion ordering the hearing was filed with the classified information security officer on August 18.⁴⁷⁷ On September 1, a heavily redacted version of the opinion was filed publicly.⁴⁷⁸ Redactions include the name of the witness and appear to include details of Ghailani's capture, detention, and interrogation.⁴⁷⁹ The witness's identity was revealed at the hearing on the admissibility of his testimony, and a substitute redacted opinion not redacting his name was filed three weeks after the hearing.⁴⁸⁰

On October 6, Judge Kaplan agreed to suppress the witness.⁴⁸¹ A redacted opinion on the matter was filed publicly approximately one week later.⁴⁸²

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided that testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of al-'Owhali's trial.⁴⁸³ It was reported, "The lawyers . . . said they want[ed] to question Dr. Albright about 'her knowledge of the number of Iraqi children dying as a direct consequence of the United States enforcement of United Nations sanctions following the gulf war.'"⁴⁸⁴ Judge Sand agreed to sign the subpoena,⁴⁸⁵ but on the government's motion he quashed it.⁴⁸⁶ Al-'Owhali presented at trial as a substitute for her live testimony a *60 Minutes* interview with Secretary Albright.⁴⁸⁷ Al-'Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.⁴⁸⁸

476. *United States v. Ghailani*, 743 F. Supp. 2d 242, 261 (S.D.N.Y. 2010); see Weiser, *supra* note 417.

477. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 1000).

478. *Id.*

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

480. Opinion, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Aug. 17, 2010, filed Oct. 7, 2010), D.E. 1039.

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

482. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 1040); see Benjamin Weiser, *Judge Says Witness Barred from Ex-Detainee's Trial Had Lied*, N.Y. Times, Oct. 15, 2010, at A21.

483. See Hirsch, *supra* note 194, 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*].

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

485. See *Subpoena for Albright*, *supra* note 483.

486. See Weiser, *supra* note 484.

487. See Hirsch, *supra* note 194, at 196.

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

Challenge: Interviewing Detainees

On March 18, 2014, while the trial was underway, Judge Kaplan denied Abu Ghayth's request to call Guantánamo detainee Khalid Sheikh Mohammed (KSM) as a witness.⁴⁸⁹ The government permitted Abu Ghayth's attorney to submit written questions to KSM, who was a defendant in military commission proceedings for the September 11, 2001, attack.⁴⁹⁰ The questions could not address certain issues, such as conditions of KSM's detention, and they were reviewed by government personnel walled off from the prosecution; KSM's answers were to be subjected to a classification review.⁴⁹¹ The government, however, refused a request by KSM's military commission attorney that KSM's responses be reviewed by persons walled off from KSM's prosecution.⁴⁹² Judge Kaplan scolded Abu Ghayth's attorney for not bringing the impasse to the court's attention promptly for possible remedy.⁴⁹³

That impasse apparently resolved, KSM's fourteen-page response was submitted for review three days after Abu Ghayth's trial began⁴⁹⁴ and presented to the court ten days after that.⁴⁹⁵

Judge Kaplan explained his reasons for denying KSM's testimony four weeks after the trial.⁴⁹⁶ He denied the request to call KSM as a witness because "Abu Ghayth had failed to show that the proposed testimony would be material, admissible, non-cumulative, and competent."⁴⁹⁷ KSM's narrative "ignored almost all of the questions that asked specifically about Abu Ghayth, Abu Ghayth's associates, and Abu Ghayth's role in making videos and with al Qaeda's media center."⁴⁹⁸ In

489. United States v. Abu Ghayth, 17 F. Supp. 3d 289 (S.D.N.Y. 2014); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (D.E. 1556, 1557); see Charles Levinson, *Judge Blocks Testimony by Alleged 9/11 Planner*, Wall St. J., Mar. 19, 2014, at A8; Benjamin Weiser, *Judge Bars 9/11 Architect's Testimony at the Trial of Bin Laden's Son-in-Law*, N.Y. Times, Mar. 19, 2014, at A19.

490. *Abu Ghayth*, 17 F. Supp. 3d at 295–96; Order, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 19, 2014), D.E. 1494 [hereinafter Feb. 19, 2014, *Abu Ghayth* Order]; see Exhibit, *id.* (Apr. 16, 2014), D.E. 1608-1 (draft questions); see also Transcript, *id.* (Feb. 19, 2014, filed Feb. 27, 2014), D.E. 1505; Transcript at 3–7, *id.* (Feb. 11, 2014, filed Mar. 13, 2014), D.E. 1538 (concerning earlier plans for cleared counsel to interview KSM in person).

491. Feb. 19, 2014, *Abu Ghayth* Order, *supra* note 490; see Benjamin Weiser, *Suspect Facing Terror Trial Gets Access to 9/11 Detainee*, N.Y. Times, Feb. 20, 2014, at A1 (also reporting that the questions were transmitted to Guantánamo Bay on February 18, 2014).

492. *Abu Ghayth*, 17 F. Supp. 3d at 296; see Letter, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 28, 2014), D.E. 1510.

493. Transcript at 7–8, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 28, 2014, filed Mar. 5, 2014), D.E. 1524.

494. See Letter, *id.* (Mar. 11, 2014), D.E. 1534.

495. Ex. B, *Abu Ghayth* Brief, *id.* (Mar. 16, 2014, filed Apr. 2, 2014), D.E. 1597; see Adam Goldman, *9/11 Mastermind Makes Statement in Terror Trial*, Wash. Post, Mar. 18, 2014, at A2; Benjamin Weiser, *9/11 Architect Says Bin Laden Aide Had No Role in Qaeda Military*, N.Y. Times, Mar. 17, 2014, at A16.

496. *Abu Ghayth*, 17 F. Supp. 3d 289.

497. *Id.* at 300.

498. *Id.* at 297.

addition, the request was untimely.⁴⁹⁹ “Abu Ghayth did not seek any assistance from the Court in securing access to [KSM] until February 2014”⁵⁰⁰

For the prosecutions of al-Fawwaz, Abdel Bary, and Abu Ghayth, Judge Kaplan prepared for the discovery of and use at trial of classified evidence and evidence derived from classified information by having transcribed ex parte proceedings with the government and optional ex parte proceedings with defense counsel to learn the bases of both sides’ cases and how trial presentations would relate to classified information.⁵⁰¹

Challenge: Foreign Evidence

On August 19, 2013, Judge Kaplan granted al-Fawwaz’s motion for letters rogatory to the courts of the United Kingdom for exculpatory evidence from MI5.⁵⁰² In 2014, the parties stipulated to an order permitting the government to depose foreign witnesses in the prosecutions of al-Fawwaz, Abdel Bary, and al-Liby.⁵⁰³ Judge Kaplan agreed to issue letters rogatory⁵⁰⁴ for two MI5 agents whom the defense had been unable to locate or contact⁵⁰⁵ and for two other witnesses likely to yield material evidence but unwilling to travel to the United States.⁵⁰⁶ Later, Judge Kaplan granted permission for the deposition of another witness in London.⁵⁰⁷ For that witness, it turned out that proceeding without United Kingdom court assistance, made possible by the witness’s consent to the deposition, allowed video recording of the deposition.⁵⁰⁸

499. *Id.* at 303–04.

500. *Id.* at 294.

501. Orders, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Aug. 19, 2013), D.E. 1284, 1285; see Order, *id.* (Sept. 24, 2013), D.E. 1318 (in al-Fawwaz’s and Abdel Bary’s case, denying the discoverability of some classified information as not relevant and helpful to the defense and approving the discoverability of a summary of other classified information); Order, *id.* (Sept. 24, 2013), D.E. 1517 (approving in al-Fawwaz’s and Abdel Bary’s case the discoverability of summaries of classified information, as supplemented according to Judge Kaplan’s instructions); Order, *id.* (Sept. 24, 2013), D.E. 1315 (denying the discovery of classified information in Abu Ghayth’s case).

502. Order, United States v. Al-Fawwaz, No. 1:98-cr-1023-15 (S.D.N.Y. Aug. 19, 2013), D.E. 1283; Letters Rogatory, *id.* (Apr. 22, 2014), D.E. 1616; Letters Rogatory, *id.* (Oct. 2, 2013), D.E. 1337. See generally T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory (Federal Judicial Center 2014).

503. Order, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Feb. 20, 2014), D.E. 1498.

504. Opinion, *id.* (Feb. 18, 2014), D.E. 1490, available at 2014 WL 627083 (also denying letters rogatory for seven other witnesses for a failure to show either materiality or inability to appear).

505. Letters Rogatory, *id.* (Feb. 18, 2014), D.E. 1491.

506. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 208 (entry dated Apr. 30, 2014); see also Order, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Apr. 15, 2014, filed Dec. 8, 2014), D.E. 1793 (granting in part an additional request for letters rogatory to the United Kingdom; limiting the grant to evidence of uncontested materiality and denying the request as to matters that Judge Kaplan determined to be a fishing expedition).

507. Opinion, *Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Sept. 4, 2014), D.E. 1706.

508. See Order, *id.* (Sept. 22, 2014), D.E. 1722.

The United Kingdom responded that some of the MI5 information was “sensitive material” and would be provided pursuant to the “US Classified Information Procedure.”⁵⁰⁹ One unwilling witness was seriously ill, and the other would be compelled to provide evidence.⁵¹⁰

After meeting in New York with prosecutors and cleared defense counsel, the United Kingdom decided to refuse the request for MI5 evidence on national security grounds.⁵¹¹

On January 15, 2014, in the case against Abu Ghayth, Judge Kaplan granted the government’s motion for closed-circuit trial testimony from a cooperating witness convicted in the United Kingdom of complicity in the plot for Richard Reid to detonate a shoe bomb on a transatlantic flight in 2001.⁵¹² Examining attorneys for both sides were in the United Kingdom, including Abu Ghayth’s lead counsel; the video feed depicted the faces of the witness and the defendant.⁵¹³

Judge Kaplan also granted Abu Ghayth permission to take deposition testimony from Salim Hamdan, a former detainee at Guantánamo Bay released to Yemen who is known as Osama Bin Laden’s former driver.⁵¹⁴

509. United Kingdom Response, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Aug. 14, 2014, filed Sept. 2, 2014), D.E. 1704.

510. United Kingdom Response, *supra* note 509 (including a doctor’s report that the ill witness would be troubled by recalling events of 1998, a time when her husband was terminally ill).

511. United Kingdom Letter, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 29, 2014, filed Sept. 29, 2014), D.E. 1731; *see* United Kingdom Letter, *id.* (Oct. 6, 2014, filed Oct. 9, 2014), D.E. 1753 (providing additional explanations for the refusal in response to an inquiry from Judge Kaplan).

512. Opinion at 5–7, *United States v. Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Jan. 15, 2014), D.E. 1447 [hereinafter Jan. 15, 2014, *Abu Ghayth* S.D.N.Y. Opinion], *available at* 2014 WL 144653; *see id.* at 2 (“The [confidential witness] has been indicted also in the District of Massachusetts on charges relating to the shoe-bomb plot . . .”).

513. Transcript at 493–686, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 11, 2014, filed Apr. 1, 2014), D.E. 1577; Mar. 10, 2014, *Abu Ghayth* Transcript, *supra* note 334, at 416–86; Approved Procedures, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 19, 2014), D.E. 1494; *see* Benjamin Weiser, *At Trial of Bin Laden Relative, Witness Describes Meeting 9/11 Mastermind*, N.Y. Times, Mar. 12, 2014, at A23.

514. Jan. 15, 2014, *Abu Ghayth* S.D.N.Y. Opinion, *supra* note 512, at 7–10; *see* Jan. 7, 2014, *Abu Ghayth* Transcript, *supra* note 367, at 8–35; *see also infra* “Guantánamo Bay.”

Millennium Bomber

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

On December 14, 1999, Ahmed Ressam was detained by customs officials suspicious of his nervousness as he tried to enter the United States by ferry from Canada into Washington with over 100 pounds of explosives in his car.⁵¹⁵

Ressam was born in Algeria in 1967, and in February 1994 he moved to Canada, where he unsuccessfully applied for political asylum.⁵¹⁶ In Canada, he lived on welfare and petty theft.⁵¹⁷ In 1998 and 1999, he attended terrorist training camps in Afghanistan.⁵¹⁸

Traveling under the name Benni Noris with fraudulent documentation, Ressam rented a car in Vancouver and drove it onto a ferry from Victoria to Port Angeles, Washington.⁵¹⁹ Ressam's car was the last off the ferry.⁵²⁰ Noting that Res-

515. *United States v. Ressam*, 679 F.3d 1069, 1073 (9th Cir. 2012); *United States v. Ressam*, 474 F.3d 597, 600 (9th Cir. 2007); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 673 (S.D.N.Y. 2006); The 9/11 Commission Report 82 (2004); see *Complaint, United States v. Ressam*, No. 2:99-mj-547 (W.D. Wash. Dec. 17, 1999), D.E. 1 [hereinafter *Ressam Complaint*]; Paula Bock, *An Otherwise Ordinary Day in Quiet Port Angeles, Local Folks Tackle a Terrorist—And Nothing Has Been Quite the Same Since*, *Seattle Times*, Nov. 25, 2001, at 16; *Frontline: Trail of a Terrorist* (PBS television broadcast Oct. 25, 2001) [hereinafter *Trail of a Terrorist*], available at www.pbs.org/wgbh/pages/frontline/shows/trail/; 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.

516. *Ressam*, 679 F.3d at 1072; *Ressam*, 474 F.3d at 599; see *Ressam Complaint*, *supra* note 515; Bock, *supra* note 515; 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 515; Meyer, *supra* note 515; Steven Pearlstein, *Canadians Examine Lapses in Security*, *Wash. Post*, Dec. 22, 1999, at A8; Ali H. Soufan, *The Black Banners* 141 (2011) ("A wily Algerian, he falsely claimed political asylum in Canada in 1994, using a fake passport and a story about persecution.").

517. See *Trail of a Terrorist*, *supra* note 515; Soufan, *supra* note 516, at 141–42.

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

519. *Ressam*, 679 F.3d at 1073; *Ressam*, 474 F.3d at 599–600; *Ressam*, 221 F. Supp. 2d at 1254; see *Ressam Complaint*, *supra* note 515; Bock, *supra* note 515; *Trail of a Terrorist*, *supra* note 515; Soufan, *supra* note 516, at 142; Sunde & Porterfield, *supra* note 515; Verhovek & Weiner, *supra* note 515.

sam's hands were shaking and, despite the cold weather, he was sweating, the customs inspector asked him to step out of the car, and Ressam initially refused.⁵²¹ Then he got out of the car and, as agents began searching the trunk, he fled.⁵²² He was caught a few blocks away.⁵²³

It was later determined that Ressam's sweating may have been caused by malaria, which he did not know at the time he had.⁵²⁴

A search of the car showed that its spare tire had been replaced by ten garbage bags containing 118 pounds of urea and fourteen 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.⁵²⁵

A Tylenol bottle contained a powerful military-grade explosive, cyclotri-methylene-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.⁵²⁶

Also in the car were maps of Washington, Oregon, and California.⁵²⁷ Further investigation led to suspicion that he was an agent of Osama Bin Laden.⁵²⁸

520. See *Ressam*, 474 F.3d at 600; *Ressam Complaint*, *supra* note 515; Bock, *supra* note 515; *Trail of a Terrorist*, *supra* note 515; Meyer, *supra* note 515; Soufan, *supra* note 516, at 142 ("Apparently he thought that the last car off would receive less attention."); Sunde & Porterfield, *supra* note 515.

521. See *Ressam Complaint*, *supra* note 515; Gilmore & Carter, *supra* note 515; Meyer, *supra* note 515; Sunde & Porterfield, *supra* note 515; Verhovek & Weiner, *supra* note 515.

522. *Ressam*, 679 F.3d at 1073; *Haouari v. United States*, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); see *Ressam Complaint*, *supra* note 515; Bock, *supra* note 515; Gilmore & Carter, *supra* note 515; *Trail of a Terrorist*, *supra* note 515; Meyer, *supra* note 515; Sunde & Porterfield, *supra* note 515; Verhovek & Weiner, *supra* note 515.

523. *Ressam*, 679 F.3d at 1073; see *Ressam Complaint*, *supra* note 515; Gilmore & Carter, *supra* note 515; Meyer, *supra* note 515; Miletich et al., *supra* note 515; Verhovek & Weiner, *supra* note 515.

524. 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).

525. *Ressam*, 679 F.3d at 1073 n.2; *Ressam*, 474 F.3d at 600; *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see *Ressam Complaint*, *supra* note 515; 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 515; Verhovek & Weiner, *supra* note 515.

526. Bock, *supra* note 515.

527. See Meyer, *supra* note 515; Miletich et al., *supra* note 515; Sunde & Porterfield, *supra* note 515; Verhovek & Weiner, *supra* note 515.

Ressam was indicted on December 22, 1999, in the Western District of Washington, for false statements and improper transportation of explosives.⁵²⁹ The court assigned the case to Judge John C. Coughenour.⁵³⁰

Ressam shared a motel room with another man for three weeks just before his ferry trip.⁵³¹ Canadian authorities determined that the other man was Abdelmajed Dahoumane.⁵³² On January 20, 2000, Ressam's indictment was superseded to add a terrorism charge and to add Dahoumane as a defendant.⁵³³ On April 6, the U.S. embassy in Montreal offered a reward of \$5 million for information leading to Dahoumane's arrest and conviction.⁵³⁴ Dahoumane was arrested in Algeria late in 2000.⁵³⁵ On April 1, 2001, the Algerian government announced that it would try Dahoumane there.⁵³⁶ Dahoumane pleaded guilty in Algeria.⁵³⁷

528. See Michael Janofsky, *Terrorism Trial May Keep to Narrower Focus*, N.Y. Times, Mar. 14, 2001, at A12; Meyer, *supra* note 515; Steven Mufson, *Arrest Stirs Terrorism Concerns*, Wash. Post, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 515.

529. Indictment, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999), D.E. 8; see William Booth, *Algerian Indicted on Explosives Counts*, Wash. Post, Dec. 23, 1999, at A1; Steve Miletich, *Algerian Indicted by Grand Jury*, Seattle Times, Dec. 22, 1999, at A1; Kim Murphy, *Algerian Suspect Pleads Not Guilty to 5 Bomb Charges*, L.A. Times, Dec. 23, 1999, at 17; Elaine Porterfield, *Bomb Suspect Is Indicted*, Seattle Post-Intelligencer, Dec. 23, 1999, at A1; Sam Howe Verhovek, *Grand Jury Charges Man Found with Bomb Materials*, N.Y. Times, Dec. 23, 1999, at A20.

530. Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 23, 1999), D.E. 11 ("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 529.

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

531. See *Trail of a Terrorist*, *supra* note 515; Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. Times, Dec. 19, 1999, at 142.

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

533. Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Jan. 20, 2000); see Mike Carter, *Algerian Bomb-Plot Web Grows with New Charges*, Seattle Times, Jan. 21, 2000, at A1; Elaine Porterfield, *Indictment Details Bomb Conspiracy*, Seattle Post-Intelligencer, Jan. 21, 2000, at A1; David A. Vise & Dan Eggen, *Bomb Plot Suspect Sought by United States, Canada Is Detained in Algeria*, Wash. Post, Dec. 8, 2000, at A44; see also Second Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Feb. 14, 2001), D.E. 178; Sam Skolnik, *Terrorism Charge Expanded in Bomb-Smuggling Case*, Seattle Post-Intelligencer, Feb. 15, 2001, at B3 (reporting on the second superseding indictment).

534. See Meyer, *supra* note 515 (reporting that this was the same bounty offered for Osama Bin Laden); Steve Miletich & Mike Carter, *Prints Found on Bomb Parts*, Seattle Times, Apr. 12, 2000, at B1; *Reward Offered on Suspected Terrorist*, L.A. Times, Apr. 7, 2000, at 6; Sam Skolnik, *U.S. Puts \$5 Million Bounty for Algerian*, Seattle Post-Intelligencer, Apr. 7, 2000, at A1; Vise & Eggen, *supra* note 533.

535. See Lorraine Adams, *The Other Man*, Wash. Post Mag., May 20, 2001, at 10; Judith Miller, *Suspect in New Year's Terror Plot Is Arrested in Algeria*, N.Y. Times, Dec. 7, 2000, at A3; Vise & Eggen, *supra* note 533.

536. See Adams, *supra* note 535; *Algiers to Try Terror Suspect Sought by U.S.*, N.Y. Times, Apr. 2, 2001, at A5.

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 on the following day.⁵³⁸ Seattle canceled its millennium New Year's Eve party scheduled for the base of the Space Needle.⁵³⁹ 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.⁵⁴⁰

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.⁵⁴¹ In addition, transportation of Ressam between the detention center in Seattle and the courthouse required road closures, but this was not necessary in Los Angeles because of the detention center's proximity to the courthouse.⁵⁴²

A minor international incident erupted in March 2000 as Ressam's attorneys prepared for trial.⁵⁴³ 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.⁵⁴⁴ Two attorneys and an investigator

537. 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.

538. See *Ressam Complaint*, *supra* note 515; Miletich et al., *supra* note 525; Verhovek & Weiner, *supra* note 515.

539. 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 515; 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.

540. Order, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 3, 2000), D.E. 56; *United States v. Ressam*, 679 F.3d 1069, 1074 (9th Cir. 2012); *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); see Meyer, *supra* note 515; 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.

541. 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 540; Porterfield, *supra* note 540.

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

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

543. 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.

544. See Oliver Affidavit, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000), D.E. 75.

traveled to Montreal to investigate the seizures, and they obtained from the court there copies of documents in the related files.⁵⁴⁵ Apparently, the documents were disclosed to Ressam's attorneys in error, and they were taken back from the attorneys at the airport.⁵⁴⁶ 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.⁵⁴⁷ Both parties submitted affidavits, and Ressam's attorneys submitted a sealed ex parte affidavit "concerning purpose of review of Montreal court files."⁵⁴⁸

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.⁵⁴⁹ After a hearing, Judge Coughenour ruled that the matter was moot because Ressam's attorneys no longer had copies of the documents.⁵⁵⁰ The judge told the attorneys that they could use the information from the Canadian files, but only as a last resort and without disclosing to Ressam its origin.⁵⁵¹

A couple of weeks before trial, on February 28, 2001, a 6.8-magnitude earthquake hit the Seattle area,⁵⁵² so a status conference held the next day was held at the SeaTac detention facility where Ressam was housed.⁵⁵³

Jury selection began in Los Angeles on March 12, 2001.⁵⁵⁴ After a little more than seven hours of voir dire, a jury was selected from 44 prospective jurors.⁵⁵⁵ Opening arguments and the first witnesses were presented the next day.⁵⁵⁶

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

545. See Document Return Motion Response, *id.* (Mar. 23, 2000), D.E. 74; Steve Miletich, *Man in Alleged Bomb Plot to Enter Lesser Plea*, Seattle Times, Mar. 16, 2000, at B2; Sunde, *supra* note 543.

546. See Document Return Motion, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000), D.E. 66; Miletich, *supra* note 543; Sunde, *supra* note 543.

547. Document Return Motion, *supra* note 546; see Miletich, *supra* note 543.

548. Document Return Motion Response, *supra* note 545; Document Return Motion, *supra* note 546.

549. Document Return Motion Response, *supra* note 545; see Mike Carter, *Ressam Lawyers May Use Secret Files*, Seattle Times, Mar. 24, 2000, at B3.

550. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000), D.E. 80; see Carter, *supra* note 549.

551. See Carter, *supra* note 549; Sunde, *supra* note 543.

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

553. Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 1, 2001, filed Mar. 8, 2001), D.E. 208 [hereinafter *Ressam* Mar. 1, 2001, Transcript].

554. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 12, 2001), D.E. 226; see Carter, *supra* note 541; *Jury Selection Begins in Terrorism Trial*, N.Y. Times, Mar. 13, 2001, at A17.

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

Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 13, 2001), D.E. 232; see Booth, *supra* note 516; Janofsky, *supra* note 528.

other local airports circled.⁵⁵⁷ Discovery of this map had been reported by news media nearly two months previously.⁵⁵⁸

On April 6, 2001, the jury convicted Ressam on all counts.⁵⁵⁹ On the same day, he and twenty-three others were sentenced by a French judge, before whom Ressam was tried in absentia, to five years in prison for conspiracy to support Islamic militants.⁵⁶⁰

Abdelghani Meskini's Brooklyn telephone number was found when Ressam was arrested.⁵⁶¹ Meskini, who reportedly lived as a con man and thief, was once an Algerian Army officer, and he came to the United States as a stowaway in 1994.⁵⁶²

Apparently Meskini flew to Seattle on December 11, 1999, to meet Ressam.⁵⁶³ Because Ressam was a no-show, Meskini flew back to New York on December 16.⁵⁶⁴ On the basis of his number's being in Ressam's car, the Foreign Intelligence Surveillance Court authorized surveillance of Meskini's telephone.⁵⁶⁵ Meskini was arrested early in the morning on December 30 at his home as a suspected accomplice of Ressam.⁵⁶⁶

557. 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.

558. 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.

559. United States v. Ressam, 679 F.3d 1069, 1071 & n.1, 1074 (9th Cir. 2012); United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); Haouari v. United States, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); Docket Sheet, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); see Adams, *supra* note 535; William Booth, *Algerian Convicted on Terror Charges*, Wash. Post, Apr. 7, 2001, at A1; Mike Carter, *Ressam Guilty on All Counts*, Seattle Times, Apr. 7, 2001, at A1; Thomas J. Lueck, *Algerian Is Found Guilty in Plot to Bomb Sites in the U.S.*, N.Y. Times, Apr. 7, 2001, at A9; Josh Meyer, *Man Convicted of Taking Part in Bomb Plot*, L.A. Times, Apr. 7, 2001, at 1; Sam Skolnik & Scott Sunde, *Ressam Guilty of Terrorism*, Seattle Post-Intelligencer, Apr. 7, 2001, at A1; see also Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Apr. 4, 2001, filed Oct. 11, 2005), D.E. 396 (jury instructions).

560. See Booth, *supra* note 559; Carter, *supra* note 559; Meyer, *supra* note 559; Skolnik & Sunde, *supra* note 559.

561. See Booth, *supra* note 559; Mike Carter, *Feds Link Ressam to Terror Camps*, Seattle Times, Mar. 9, 2001, at A1; *Trail of a Terrorist*, *supra* note 515; Meyer, *supra* note 515; Steve Miletich & Mike Carter, *Ressam Linked to Terrorist Group*, Seattle Times, Dec. 31, 1999, at A1; Benjamin Weiser, *New Trouble for Terrorist Who Helped Prosecutors*, N.Y. Times, July 31, 2010, at A12.

562. See Weiser, *supra* note 561.

563. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 535; Meyer, *supra* note 515; Miletich & Carter, *supra* note 561; David A. Vise, *Algerian Arrested Dec. 24*, Wash. Post, Jan. 4, 2000, at A2.

564. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 535; Meyer, *supra* note 515; Miletich & Carter, *supra* note 561; Vise, *supra* note 563.

565. See Walter Pincus, *Judge Discusses Details of Work on Secret Court*, Wash. Post, June 26, 2007, at A4; see also *Ressam* Mar. 1, 2001, Transcript, *supra* note 553.

566. *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 535; *Trail of a Terrorist*, *supra* note

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.⁵⁶⁷ He was arrested four days later in Montreal; another three days later, the indictment was superseded to add Meskini as a defendant.⁵⁶⁸ The court assigned the case to Judge John F. Keenan.⁵⁶⁹

Based in part on surveillance of Meskini's telephone conversations, Haouari was charged with coordinating Ressam's bomb plot.⁵⁷⁰ Haouari waived extradition proceedings and agreed to be tried in the United States, where he was arraigned on August 14.⁵⁷¹

On March 7, 2001, Meskini pleaded guilty and agreed to cooperate with the prosecution.⁵⁷² On January 23, 2004, he was sentenced to six years, with credit for time served.⁵⁷³ He was released in 2005; his application for the witness protection program was rejected.⁵⁷⁴ With the government's approval, he got a job in Atlanta as a building manager for an apartment complex known to be "a hotbed of criminal activity, where narcotics sales and prostitution occurred openly and persistently."⁵⁷⁵ In October 2010, he was sentenced to two years and seven months for an attempt to acquire an AK-47 assault rifle.⁵⁷⁶

515; Kifner & Rashbaum, *supra* note 525; Meyer, *supra* note 515; Miletich & Carter, *supra* note 561; Vise, *supra* note 563.

567. Docket Sheet, *United States v. Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 10, 2000) [hereinafter *Haouari* Docket Sheet] (D.E. 1); *see Adams, supra* note 535; Craig Pyes, *Canada Adds Details on Algerians' Suspected Bomb Plot*, N.Y. Times, Jan. 21, 2000, at A3.

568. *Haouari* Docket Sheet, *supra* note 567 (D.E. 3); *see Adams, supra* note 535; Benjamin Weiser & Craig Pyes, *U.S., in Pursuit of Bomb Plot, Indicts Man Held in Canada*, N.Y. Times, Jan. 19, 2000, at A1.

569. *Haouari* Docket Sheet, *supra* note 567.

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

570. *See Meyer, supra* note 515; Pyes, *supra* note 567.

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

572. *United States v. Ressam*, 679 F.3d 1069, 1074–75 (9th Cir. 2012); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); *United States v. Haouari*, No. 1:00-cr-15, 2001 WL 1154714, at *1 (S.D.N.Y. Sept. 28, 2001); *see Adams, supra* note 535; Carter, *supra* note 561; 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 525; Meyer, *supra* note 515; Sam Skolnik, *A Guilty Plea to Aiding Ressam*, Seattle Post-Intelligencer, Mar. 9, 2001, at B1; Weiser, *supra* note 561.

573. *Haouari* Docket Sheet, *supra* note 567 (D.E. 96); *see Weiser, supra* note 561.

574. *See Weiser, supra* note 561.

575. Opinion at 3, *United States v. Haouari*, No. 1:00-cr-15 (S.D.N.Y. Oct. 27, 2010), D.E. 130, available at 2010 WL 4345748.

576. *Haouari* Docket Sheet, *supra* note 567; *see Benjamin Weiser, "Millennium Plot" Terrorist Reimprisoned in Gun Case*, N.Y. Times, Oct. 30, 2010, at A16; *see also* www.bop.gov (noting release on June 22, 2012, reg. no. 44712-054).

As Ressam's sentencing date approached, Meskini agreed to cooperate with the prosecution of Haouari, and Ressam's sentencing was postponed.⁵⁷⁷ 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.⁵⁷⁸ He said he planned to explode a suitcase filled with fertilizer and nitric acid.⁵⁷⁹

In order to keep the witness Ressam separate from the defendant Haouari, each was brought to Judge Keenan's courtroom by a different elevator.⁵⁸⁰ There is one other courtroom on the same floor as Judge Keenan's, and separate prisoner elevators serve the two courtrooms.⁵⁸¹ Ressam was brought up in the other courtroom's elevator.⁵⁸²

Haouari found Ressam's testimony so upsetting that he repeatedly banged his head against the counsel table.⁵⁸³ In time, he knocked himself out.⁵⁸⁴ Judge Keenan had to excuse the jury and seek medical attention for the defendant.⁵⁸⁵

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.⁵⁸⁶

On July 13, the jury acquitted Haouari of aiding and abetting what became known as the millennium bombing plot, but convicted him of conspiracy and fraud.⁵⁸⁷ On January 16, 2002, Judge Keenan sentenced Haouari to twenty-four

577. See *Trail of a Terrorist*, *supra* note 515; Laura Mansnerus & Judith Miller, *Bomb Plot Insider Details Training*, N.Y. Times, July 4, 2001, at A1; Sam Skolnik & Paul Shukovsky, *Ressam: Seattle No Target*, Seattle Post-Intelligencer, May, 21, 2001, at A1; see also Transcript, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. July 27, 2005, filed Aug. 4, 2005), D.E. 384 [hereinafter *Ressam* July 27, 2005, Transcript] (discussing Ressam's cooperation); Transcript, *id.* (Apr. 27, 2005, filed Sept. 9, 2005), D.E. 394 [hereinafter *Ressam* Apr. 27, 2005, Transcript] (same).

578. United States v. Ressam, 679 F.3d 1069, 1074 (9th Cir. 2012); United States v. Ressam, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see *Trail of a Terrorist*, *supra* note 515; Josh Meyer, *Terrorist Says Plans Didn't End with LAX*, L.A. Times, July 4, 2001, at 1; Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target*, Wash. Post, July 4, 2001, at A2; see also Mike Carter & Steve Miletich, *Ressam: L.A. Airport Was Target*, Seattle Times, May 30, 2001, at A1 (reporting that Ressam had told Haouari's prosecutors that the Los Angeles airport was his target); Josh Meyer, *Millennium Terrorist Now Detailing Plot*, *Sources Say*, L.A. Times, May 30, 2001, at 1 (same).

579. See *Trail of a Terrorist*, *supra* note 515; Powell & Haughney, *supra* note 578.

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

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. *Id.*

586. *Id.*

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

years in prison.⁵⁸⁸ A year later, the court of appeals affirmed the conviction and the sentence.⁵⁸⁹

On July 27, 2005, at the conclusion of Ressam's cooperation with investigations and prosecutions,⁵⁹⁰ Judge Coughenour sentenced Ressam to twenty-two years in prison.⁵⁹¹

A year and a half later, the court of appeals reversed Ressam's conviction on one count, for carrying explosives while committing a felony, reasoning that carrying explosives did not relate to the felony of signing a false name on a customs declaration.⁵⁹² The court remanded the case for resentencing.⁵⁹³

On December 7, 2007, the Supreme Court agreed to review the court of appeals' decision.⁵⁹⁴ On March 25, 2008, Attorney General Michael B. Mukasey, who, as a judge, had presided over the prosecution of blind Sheik Omar Abdel

588. *Haouari*, 429 F. Supp. 2d at 673; *United States v. Ressam*, 679 F.3d 1069, 1075 (9th Cir. 2012); see Fritsch, *supra* note 587; John J. Goldman, *Algerian Gets Prison in LAX Bomb Plot*, L.A. Times, Jan. 17, 2002, at 13; see also www.bop.gov (noting a release date of December 30, 2020, reg. no. 44949-054).

589. *Meskini*, 319 F.3d 88; *Haouari*, 429 F. Supp. 2d at 673; see Benjamin Weiser, *Conviction Upheld in Bomb Plot*, N.Y. Times, Jan. 28, 2003, at B7.

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

591. *Ressam*, 679 F.3d at 1076–78; *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); *Ressam* July 27, 2005, Transcript, *supra* note 577; see Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, Seattle Times, July 28, 2005, at A1; Jonathan Hafetz, *Habeas Corpus After 9/11* 209 (2011); Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced to 22 Years*, N.Y. Times, July 28, 2005, at A20; Paul Shukovsky, *22 Years*, Seattle Post-Intelligencer, July 28, 2005, at A1; Tomas Alex Tizon & Lynn Marshall, *Would-Be Millennium Bomber Ressam Gets 22-Year Sentence*, L.A. Times, July 28, 2005, at 10.

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

593. *Ressam*, 474 F.3d at 604; see *Ressam*, 679 F.3d at 1078; see Shukovsky, *supra* note 592.

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

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

Rahman, argued the government's case to reinstate the conviction.⁵⁹⁵ The Supreme Court agreed with the argument and reinstated the conviction on May 19.⁵⁹⁶

On December 3, Judge Coughenour resentenced Ressay to twenty-two years.⁵⁹⁷ On February 2, 2010, a three-judge panel of the court of appeals determined that the sentence was too lenient and remanded the case for resentencing by a different judge.⁵⁹⁸ Over the dissent of four judges, on March 12, 2012, an eleven-judge en banc panel agreed that the sentence was unreasonably lenient, but the en banc panel remanded the case to Judge Coughenour for resentencing.⁵⁹⁹ Judge Coughenour resentenced Ressay on October 24 to thirty-seven years.⁶⁰⁰

595. 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 Word 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.

596. *United States v. Ressay*, 553 U.S. 272 (2008); see *Ressay*, 679 F.3d at 1078; William Branigin, *High Court Affirms Terrorism Conviction*, Wash. Post, May 20, 2008, at A6; Linda Greenhouse, *Court Upholds Child Pornography Law, Despite Free Speech Concerns*, N.Y. Times, May 20, 2008, at A17; *Justices Rule Against 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.

597. Amended Judgment, *United States v. Ressay*, No. 2:99-cr-666 (W.D. Wash. Dec. 3, 2008), D.E. 424; *Ressay*, 679 F.3d at 1071, 1078–84; 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.

598. *United States v. Ressay*, 629 F.3d 793 (9th Cir.) (opinion by Circuit Judge Arthur L. Alarcón, joined by Circuit Judge Richard R. Clifton; Circuit Judge Ferdinand F. Fernandez dissented from both the reversal of the sentence and the reassignment to a different judge), *amending* 593 F.3d 1095 (9th Cir. 2010); *Ressay*, 679 F.3d at 1085; see Hafetz, *supra* note 591, at 209; John Schwartz, *Appeals Court Throws Out Sentence in Bombing Plot, Calling It Too Light*, N.Y. Times, Feb. 3, 2010, at A15; Jennifer Sullivan, *Court: Ressay Sentence "Failed to Protect Public"*, Seattle Times, Feb. 3, 2010, at A1; Carol J. Williams, *22-Year Term in LAX Bomb Plot Overturned*, L.A. Times, Feb. 3, 2010, at 9.

599. *Ressay*, 679 F.3d at 1071–72, 1088–97 & n.11; see Ian Lovett, *Appeals Court Overturns Millennium Bomb-Plot Sentence as Too Lenient*, N.Y. Times, Mar. 13, 2012, at A13; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 524–25 (2014); Jennifer Sullivan, *Terrorist Ressay's Sentence Too Short, Appeals Court Says*, Seattle Times, Mar. 13, 2012, at B1; Carol J. Williams, *Sentence Overturned in LAX Plot*, L.A. Times, Mar. 13, 2012.

600. Sentencing Order, *Ressay*, No. 2:99-cr-666 (W.D. Wash. Oct. 24, 2012), D.E. 458; Transcript, *id.* (Oct. 24, 2012, filed Oct. 30, 2012), D.E. 462; see Mike Carter, *Ressay Gets 37 Years at Resentencing in Millennial Bomb Plot*, Seattle Times, Oct. 25, 2012, at B1; Kirk Johnson, *New Sentence Is Imposed in Bomb Plot from 1999*, N.Y. Times, Oct. 25, 2012, at A18; Kim Murphy, *LAX Bomb Plotter Gets 37 Years*, L.A. Times, Oct. 25, 2012, at 7; www.bop.gov (noting a release date of December 27, 2032, reg. no. 29638-086); see also Mike Carter, *U.S. Won't Appeal Ressay's Sentence*,

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.⁶⁰¹ Judge Coughenour reviewed the documents without the assistance of a law clerk, because there was not enough time to obtain top secret clearance for a clerk.⁶⁰² The documents were delivered to the judge by a classified information security officer and reviewed by the judge under the security officer's watch.⁶⁰³ They were stored in a safe to which the officer, and not the judge, had access.⁶⁰⁴ Judge Coughenour decided that the documents were not discoverable.⁶⁰⁵

Challenge: Foreign Evidence

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.⁶⁰⁶ 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.⁶⁰⁷ A Canadian court official attended to rule on potential issues of Canadian law.⁶⁰⁸ Ressay participated by video conference from his jail cell with the assistance of an Arabic interpreter.⁶⁰⁹

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.⁶¹⁰

Seattle Times, Nov. 29, 2012, at B3 (reporting that the government decided not to appeal the sentence).

601. 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; see also 18 U.S.C. app. 3 (2013) (text of CIPA); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

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

603. *Id.*; see Reagan, *supra* note 601, at 21–22 (providing information about classified information security officers).

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

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

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

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

607. See *Ressay* Mar. 1, 2001, Transcript, *supra* note 553; Skolnik, *supra* note 606.

608. See *Ressay* Mar. 1, 2001, Transcript, *supra* note 553.

609. 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.

610. *Ressay* Apr. 27, 2005, Transcript, *supra* note 577; Interview with Hon. John C. Coughenour, Oct. 3, 2008.

Some of the witnesses subsequently indicated that they might be willing to testify live at Ressam's trial, but the parties agreed that either side could substitute deposition video tapes.⁶¹¹

Challenge: Court Security

At Ressam's first appearance in court in Seattle, on December 17, 1999, "Security was so tight at the courthouse that anyone entering—even employees—had to produce a photo identification. A phalanx of U.S. marshals also blocked the door to [U.S. Magistrate Judge David] Wilson's courtroom and armed officers patrolled the streets as Ressam was brought to the courthouse."⁶¹²

For Ressam's trial also, security at the Roybal courthouse in Los Angeles was enhanced, including added patrols, bomb-sniffing dogs, and inspections of cars entering the underground garage.⁶¹³

Challenge: Jury Security

Judge Coughenour was not asked to use an anonymous jury; he has never used one.⁶¹⁴ 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.⁶¹⁵

Challenge: Witness Security

On March 29, 2001, Meskini testified at Ressam's trial.⁶¹⁶ It was reported that his testifying would require his entering the witness protection program.⁶¹⁷ He was brought to the courtroom through a side door.⁶¹⁸

Judge Coughenour overruled the government's attempts to protect the identity of another witness, such as by taking testimony remotely or behind a screen and withholding background information, and the government decided not to use the witness.⁶¹⁹

611. Interview with Hon. John C. Coughenour, Oct. 3, 2008; see *Ressam* Mar. 1, 2001, Transcript, *supra* note 553.

612. Sunde & Porterfield, *supra* note 515.

613. See Carter, *supra* note 555.

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

615. *Id.*

616. See Adams, *supra* note 535; Booth, *supra* note 559; 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.

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

618. See Miletich, *supra* note 616.

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

Mujahedeen Khalq

United States v. Afshari
(Robert M. Takasugi and David O. Carter, C.D. Cal.)

After a three-year investigation, on three criminal complaints filed in the Central District of California on February 26, 2001, the FBI arrested on February 27 five Iranians and two Iranian Americans at various Los Angeles locations.⁶²⁰ They were charged with providing material support to Mujahedeen Khalq, also known as MEK, which the State Department classified as a terrorist organization on October 8, 1997.⁶²¹ MEK arose in the 1960s and 1970s in opposition to the shah of Iran.⁶²² It came to be a regular solicitor of donations at airports, including the Los Angeles International Airport, ostensibly for charitable purposes.⁶²³ The defendants were charged with participating in those solicitation efforts.⁶²⁴

U.S. citizens Mohammad Omidvar and Navid Taj, also known as Najaf Eshkoftegi, were granted \$25,000 bail.⁶²⁵ Iranian Hossein Afshari's bail was set at \$100,000.⁶²⁶ The other Iranians—Roya Rahmani, also known as Tahmineh Tahamtan, the only woman, Hassan Rezaie, Moustafa Ahmady, and Alireza Mohammad Moradi—were denied pretrial release.⁶²⁷ The grand jury returned an indictment on March 13.⁶²⁸ Two days later, Rahmani's bail was set at \$500,000.⁶²⁹ In April, bail was set for Rezaie, Ahmady, and Moradi at \$60,000 each.⁶³⁰

620. Docket Sheet, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001) [hereinafter *Afshari* Docket Sheet] (D.E. 1); Docket Sheet, *United States v. Rahmani*, No. 2:01-mj-393 (C.D. Cal. Feb. 26, 2001); see Soraya Sarhaddi Nelson, *7 Accused of Raising Funds for Terrorists*, L.A. Times, Mar. 1, 2001, at 3.

621. *United States v. Afshari*, 426 F.3d 1150, 1152–53 (9th Cir. 2005); *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152 (D.C. Cir. 2004) (declining to overturn the redesignation); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) (declining to overturn the redesignation); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (remanding redesignation for due process cure); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) (declining to overturn the designation); *United States v. Afshari*, 635 F. Supp. 2d 1110, 1113 (C.D. Cal. 2009); see Nelson, *supra* note 620.

622. *Afshari*, 426 F.3d at 1152; see Nelson, *supra* note 620.

623. See Nelson, *supra* note 620.

624. *Afshari*, 635 F. Supp. 2d at 1112–13.

625. *Afshari* Docket Sheet, *supra* note 620 (D.E. 31, 60).

626. *Id.* (D.E. 54).

627. *Id.* (D.E. 9, 18, 19, 42, 43, 52, 53).

628. Indictment, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001), D.E. 65.

629. *Afshari* Docket Sheet, *supra* note 620 (D.E. 77).

630. *Id.* (D.E. 132).

On June 21, 2002, Judge Robert M. Takasugi dismissed the indictment.⁶³¹ Judge Takasugi determined that the statute authorizing the designation of MEK as a terrorist organization was unconstitutional:

[The statute admits] of no other interpretation but that the organization to be designated is precluded from challenging the facts contained in the administrative record or presenting evidence to rebut the proposition that it is a terrorist organization. Such provisions are unconstitutional as violative of due process and render [the statute] facially invalid.⁶³²

The court of appeals reversed in a series of opinions from December 2004 through October 2005.⁶³³

On June 14, 2005, and November 29, 2007, the government filed superseding indictments, the latter adding Mohammad Bigdeli and Elham Kiamanesh as fugitive defendants.⁶³⁴

The court transferred the case from Judge Takasugi in Los Angeles to Judge David O. Carter in Santa Ana on February 23, 2009.⁶³⁵ Judge Takasugi died on August 4.⁶³⁶

On March 10 from 5:00 to 9:00 p.m. and on March 11 from 6:00 p.m. until past midnight, Judge Carter held a status conference with all counsel and defendants in preparation for an April trial.⁶³⁷ Among the matters covered were the judge's learning how to pronounce the participants' names, a review of witnesses to be called, and preparation of a jury questionnaire.⁶³⁸ On March 17 and 18, Judge Carter heard motions.⁶³⁹ On April 9, the government filed a third superseding indictment.⁶⁴⁰

631. *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002), *rev'd*, 426 F.3d 1150 (9th Cir. 2005); *United States v. Afshari*, 635 F. Supp. 2d 1110, 1113–14 (C.D. Cal. 2009); see Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22, 2002, at 1.

632. *Rahmani*, 209 F. Supp. 2d at 1058.

633. *Afshari*, 426 F.3d 1150 (on rehearing); *United States v. Afshari*, 412 F.3d 1071 (9th Cir. 2005) (amended opinion); *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004) (opinion withdrawn); *Afshari*, 635 F. Supp. 2d at 1114.

634. Second Superseding Indictment, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Nov. 29, 2007), D.E. 677; First Superseding Indictment, *id.* (June 14, 2005), D.E. 339.

The fugitive defendants were dismissed on June 25, 2013. Order, *id.* (June 25, 2013), D.E. 1370. 635. Notice, *id.* (Feb. 23, 2009), D.E. 916; *Afshari*, 635 F. Supp. 2d at 1114.

For this report, Tim Reagan interviewed Judge Carter and his law clerks Daniel Galindo and Robert Hodgson at the Santa Ana courthouse on October 16, 2012.

636. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

637. Transcripts, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 10 and 11, 2009, filed Mar. 11 and 13 and May 6, 2009), D.E. 945, 946, 950, 1130.

638. *Id.*

639. Transcripts, *id.* (Mar. 17 and 18, 2009, filed Mar. 18, 19, and 20, July 21, and Sept. 30, 2009), D.E. 962, 963, 966 to 968, 971, 975, 1168, 1169, 1204.

640. Third Superseding Indictment, *id.* (Apr. 9, 2009), D.E. 1034.

Jury selection began on Friday, April 17.⁶⁴¹ Jury questionnaire review continued on Monday and Tuesday, with jury selection to resume on April 29.⁶⁴² On the morning of April 29, the parties announced that they were close to a settlement of the case.⁶⁴³ By 11:31 a.m., the parties were able to put plea agreements on the record.⁶⁴⁴ As a precaution, Judge Carter kept the jury at the courthouse during the plea colloquies.⁶⁴⁵

Judge Carter delayed sentencing, because of political efforts to have MEK removed from the list of terrorist organizations.⁶⁴⁶ In September 2012, the Secretary of State removed MEK from the terrorist organization list.⁶⁴⁷

On February 19, 2013, Judge Carter sentenced each defendant to three years of supervised release.⁶⁴⁸ On March 18, 2014, Judge Carter allowed the defendants to meet together on March 22 to celebrate the Iranian New Year.⁶⁴⁹

Challenge: Classified Evidence

In preparation for trial, the defendants filed a notice that they might introduce classified evidence,⁶⁵⁰ and Judge Carter reviewed classified evidence for discoverability.⁶⁵¹

The court's contacts with classified information became much more sensitive when Judge Carter determined that for sentencing purposes he needed to know how likely it was that MEK would be removed from the terrorist list.⁶⁵² Judge

641. Minutes, *id.* (Apr. 17, 2009), D.E. 1086; Transcripts, *id.* (Apr. 17, 2009, filed Apr. 20, June 15, and July 8, 2009), D.E. 1082, 1153, 1159.

642. Minutes, *id.* (Apr. 20 and 21, 2009), D.E. 1092, 1093.

643. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009), D.E. 1132 (status conference).

644. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009), D.E. 1134 (change of plea); Minutes, *id.* (Apr. 29, 2009), D.E. 1120 to 1126; see Julie Cart, *7 Admit Raising Funds for Terrorists*, L.A. Times, Apr. 30, 2009, at 5; Kimberly Edds, *7 Plead Guilty to Raising Money for Terrorists*, Orange Cnty. Reg., May 1, 2009, at B.

645. Interview with Hon. David O. Carter, Oct. 16, 2012.

646. *Id.*; see People's Mojahedin Org. of Iran v. U.S. Dep't of State, 613 F.3d 220 (D.C. Cir. 2010) (remanding redesignation for a due process remedy); Dena Bunis, *Iranian Exiles Get Local Support*, Orange Cnty. Reg., Sept. 9, 2008, at B. See generally Ali Gharib & Eli Clifton, *Long March of the Yellow Jackets: How a One-Time Terrorist Group Prevailed on Capitol Hill*, The Intercept, Feb. 26, 2015, <https://firstlook.org/theintercept/2015/02/26/long-march-yellow/>.

647. See Shashank Bengali, *U.S. to Adjust Terror List*, L.A. Times, Sept. 22, 2012, at 3; Scott Shane, *Star Lobbyists Help Iran Group Escape Shadow*, N.Y. Times, Sept. 22, 2012, at A1; Joby Warrick, *U.S. to Remove Iranian Exiles from Terrorist List*, Wash. Post, Sept. 22, 2012, at A14.

648. Judgments, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Feb. 19, 2013), D.E. 1337, 1339, 1341, 1343, 1345, 1347, 1349; see Orders and Minutes, *id.* (Apr. 3, 2015), D.E. 1420 to 1431 (terminating supervised release for all but Omidvar); Minutes, *id.* (Dec. 1, 2014), D.E. (release revocation hearing for Omidvar; revocation in abeyance until January 25, 2016).

649. Order, *id.* (Mar. 18, 2014), D.E. 1392.

650. Notice, *id.* (Mar. 20, 2009), D.E. 973.

651. Transcript at 6–9, *id.* (Apr. 14, 2009, filed Apr. 15, 2009), D.E. 1060.

652. Interview with Hon. David O. Carter, Oct. 16, 2012.

Carter, therefore, determined that he and his law clerks needed access to very sensitive and timely diplomatic and counterterrorism records.⁶⁵³

Judge Carter's law clerks and a court reporter received security clearances allowing them to view top secret sensitive compartmented information (SCI).⁶⁵⁴ SCI must be stored in a sensitive compartmented information facility (SCIF).⁶⁵⁵ The Santa Ana courthouse does not have one, but the courthouse in Los Angeles has one.⁶⁵⁶ Classified information designated secret and not SCI could be stored in an approved safe in the Santa Ana courthouse.⁶⁵⁷

653. *Id.*

654. *Id.*

655. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

656. Interview with Dep't of Justice Litig. Sec. Group Staff, Dec. 19, 2012.

657. *Id.*

Detroit

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

Six days after the September 11, 2001, attacks on the United States, federal agents visited a suspected Detroit apartment residence of Nabil al-Marabh, a suspect in the attacks.⁶⁵⁸ Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.⁶⁵⁹ Agents found fraudulent identification documents in the name of Youssef Hmimssa, a former roommate, who had asked the current residents to hold the documents for him.⁶⁶⁰ Koubriti and Hannan admitted that they knew that the documents were fraudulent.⁶⁶¹ They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.⁶⁶² Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.⁶⁶³ Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.⁶⁶⁴ Abdel Ilah Elmardoudi, a suspected

658. *Koubriti v. Convertino*, 593 F.3d 459, 462 (6th Cir. 2010) (finding prosecutorial immunity in one defendant’s civil action); *United States v. Koubriti*, 305 F. Supp. 2d 723, 724–25, 727 (E.D. Mich. 2003) (sanctioning Attorney General John Ashcroft for false and public statements about the case in violation of the court’s gag order); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003) (agreeing to partially close the jury voir dire); *United States v. Koubriti*, 199 F. Supp. 2d 656, 658–59 (E.D. Mich. 2002) (denying motions to suppress evidence acquired during the search of the apartment); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001) (denying bond release pending trial); *Trying Cases Related to Allegations of Terrorism: Judges’ Roundtable*, 77 Fordham L. Rev. 1, 21 (2008) [hereinafter *Trying Cases*] (remarks by Judge Gerald E. Rosen); see David Johnston, *3 Held in Detroit After Aircraft Diagrams Are Found*, N.Y. Times, Sept. 20, 2001, at B2; Philip Shenon & Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. Times, Nov. 1, 2001, at A1; Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001, at B1.

659. *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), available at www.thisamericanlife.org/radio-archives/episode/356/the-prosecutor.

Two days later, al-Marabh was arrested in Burbank, Illinois. See Shenon & Van Natta, *supra* note 658; 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.

660. *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 658; Shenon & Van Natta, *supra* note 658; *The Prosecutor*, *supra* note 659; Van Natta, *supra* note 658.

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

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

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

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

ringleader in Chicago, also was indicted on March 27.⁶⁶⁵ On August 28, 2002, the government added charges against the defendants for material support of terrorism.⁶⁶⁶ The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Gerald E. Rosen.⁶⁶⁷

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.⁶⁶⁸ In September 2005, he was sentenced to six years and six months in prison for document fraud.⁶⁶⁹ He was deported to Morocco in 2007.⁶⁷⁰

This case was a high-profile case that received some national press coverage and a lot of local press coverage.⁶⁷¹ The court selected 280 prospective jurors for the case, and Judge Rosen greeted them on March 18, 2003, with a speech disclosing the case on which they might serve and welcoming them to their opportunity to provide civic service.⁶⁷²

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.⁶⁷³ Based on answers to this questionnaire, the court and the attorneys were able to sort the potential jurors into three groups: (1) apparently suita-

665. *Koubriti*, 199 F. Supp. 2d at 658 n.1; see *United States v. Elwardoudi*, 501 F.3d 935, 937–38 (8th Cir. 2007); see also Hakim, *supra* note 659; *The Prosecutor*, *supra* note 659.

Elwardoudi was arrested in North Carolina near Greensboro on November 4, 2002. *Elwardoudi*, 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.

666. *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.

667. Docket Sheet, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001) [hereinafter E.D. Mich. *Koubriti* Docket Sheet]; Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 Cardozo Pub. L. Pol'y & Ethics J. 101, 102 (2006) ("I presided over the nation's first post-September 11 terrorism trial"); see Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. Times, Sept. 3, 2004, at A12.

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

668. *Koubriti*, 305 F. Supp. 2d at 734; see *Koubriti v. Convertino*, 593 F.3d 459, 462 n.3 (6th Cir. 2010); *Koubriti*, 199 F. Supp. 2d at 658 n.1.

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

669. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 1, 2005), D.E. 633; see Cecil Angel, *Ex-Terrorism Trial Witness Gets Maximum Sentence*, Detroit Free Press, Sept. 2, 2005, at 6. Hmimssa was released from prison on May 25, 2007. www.bop.gov (reg. no. 20451-424).

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

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

672. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 667 (noting voir dire from March 18 to March 26, 2003); Gerald E. Rosen, *United States v. Koubriti: Preliminary Voir Dire* (Mar. 18, 2003) (text of speech); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

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

ble, (2) possibly suitable, and (3) not suitable.⁶⁷⁴ Jurors were questioned individually, beginning with those “apparently suitable,” in random order, and a jury was selected from the approximately sixty-five to eighty potential jurors in that group.⁶⁷⁵

On June 3, the jury convicted Koubriti and Elmardoudi of both terrorism and document-fraud charges, convicted Hannan of document-fraud charges only, and acquitted Ali-Haimoud.⁶⁷⁶

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.⁶⁷⁷ The defendant moved for a mistrial, but the government maintained that the document was not material.⁶⁷⁸ Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.⁶⁷⁹

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.⁶⁸⁰

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

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

675. *Id.*

676. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *United States v. Koubriti*, 305 F. Supp. 2d 723, 736 (E.D. Mich. 2003); see *Koubriti v. Convertino*, 593 F.3d 459, 463 & n.7 (6th Cir. 2010); *United States v. Elmardoudi*, 501 F.3d 935, 938 (8th Cir. 2007); see also Hakim, *supra* note 668; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10; *The Prosecutor*, *supra* note 659.

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), D.E. 1. 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. 26, 2005), D.E. 11.

677. *United States v. Koubriti*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004); *United States v. Koubriti*, 297 F. Supp. 2d 955, 958–61 (E.D. Mich. 2004); *Trying Cases*, *supra* note 658, at 22 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463; *The Prosecutor*, *supra* note 659.

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

679. *Trying Cases*, *supra* note 658, at 23 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463; *The Prosecutor*, *supra* note 659.

680. *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.”).

to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view.”⁶⁸¹

In a criminal trial over which Judge Arthur J. Tarnow presided, the prosecutor and a government witness were acquitted of wrongdoing.⁶⁸²

As a result of the withheld evidence, 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.⁶⁸³ The government elected not to pursue further the charges tried.⁶⁸⁴

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.⁶⁸⁵ Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of time served and deportation to Morocco.⁶⁸⁶ The court released Koubriti on bond on October 12, 2004.⁶⁸⁷ Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.⁶⁸⁸ On February 9, 2010, Judge

681. *Id.* at 681; see Hakim, *supra* note 667 (quoting text).

682. Jury Verdict, *United States v. Convertino*, No. 2:06-cr-20173 (E.D. Mich. Oct. 31, 2007), D.E. 195; *Koubriti*, 593 F.3d at 464; *Trying Cases*, *supra* note 658, at 23 (remarks by Judge Rosen); see Spencer S. Hsu, *Ex-Prosecutor, Security Officer Cleared in Terrorism Case*, Wash. Post, Nov. 1, 2007, at A3; Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, N.Y. Times, Nov. 1, 2007, at A17; *The Prosecutor*, *supra* note 659.

Tim Reagan interviewed Judge Tarnow for this report by telephone on October 3, 2012.

683. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *Koubriti*, 336 F. Supp. 2d at 682; *Trying Cases*, *supra* note 658, at 23 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463–64; *United States v. Elmardoudi*, 501 F.3d 935, 938 & n.4 (8th Cir. 2007); see also Hakim, *supra* note 667; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15; *The Prosecutor*, *supra* note 659.

684. *United States v. Koubriti*, 435 F. Supp. 2d 666, 670 & n.5 (E.D. Mich. 2006); Order to Dismiss Third Superseding Indictment, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Jan. 18, 2005), D.E. 591; *The Prosecutor*, *supra* note 659.

685. *Koubriti*, 509 F.3d at 748; Fourth Superseding Indictment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Dec. 15, 2004), D.E. 580; see *Koubriti*, 593 F.3d at 464; *Koubriti*, 435 F. Supp. 2d at 668, 670; see also *Terror Case Is Switched to Fraud Charges*, Wash. Post, Dec. 16, 2004, at A10.

When federal agents first searched Koubriti and Hannan’s apartment, they noticed airport-employee badges, which the agents regarded as alarming evidence. *United States v. Koubriti*, 199 F. Supp. 2d 656, 660 (E.D. Mich. 2002); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001); see Johnston, *supra* note 658; *The Prosecutor*, *supra* note 659. 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 658.

686. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Mar. 22, 2005), D.E. 612; Plea Agreement, *id.* (Mar. 22, 2005), D.E. 611; see also *Koubriti*, 435 F. Supp. 2d at 668 n.1 (noting Hannan’s deportation).

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

688. *Koubriti*, 509 F.3d 746 (holding that a retrial after a mistrial is not double jeopardy), *cert. denied*, 552 U.S. 1328 (2008); *Koubriti*, 435 F. Supp. 2d 666.

Rosen granted the government's motion to dismiss Koubriti's indictment for successful completion of pretrial diversion.⁶⁸⁹

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.⁶⁹⁰ The district court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,⁶⁹¹ and the case settled.⁶⁹² Koubriti then sued his prosecutors for malicious prosecution,⁶⁹³ but the Sixth Circuit's court of appeals determined that the prosecutors had prosecutorial immunity.⁶⁹⁴ The district court granted summary judgment to an FBI agent defendant, bringing the case to a close.⁶⁹⁵

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,⁶⁹⁶ and he was sentenced by the U.S.

689. Order, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Feb. 9, 2010), D.E. 679; see David Ashenfelter, *Deal May Lead to Probation for Koubriti*, Detroit Free Press, Apr. 15, 2009, at 4A (reporting on an agreement to save Koubriti from a criminal record and provide him with a path to citizenship); Paul Egan, *Ex-Terror Suspect in Talks to Clear Record*, Detroit News, Apr. 15, 2009, at 4A (same).

690. Complaint, *Koubriti v. Rojo*, No. 2:05-cv-74343 (E.D. Mich. Nov. 14, 2005), D.E. 1.

In their first motion for summary judgment, the defendants noted that “[w]hile incarcerated in the Wayne County Jail Plaintiff was deemed a level 4 security risk by the U.S. Marshals, and as such, was placed in a ‘super max’ security cell block.” Defendants’ Summary Judgment Motion at 1, *id.* (July 25, 2006), D.E. 15.

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.

691. Opinion, *id.* (July 27, 2007), D.E. 48, available at 2007 WL 2178331 (granting summary judgment on the exercise claim); Opinion, *id.* (Jan. 3, 2007), D.E. 24, available at 2007 WL 45923 (granting summary judgment on the pork claim).

692. Stipulated Dismissals, *id.* (Aug. 9 and 24, 2007), D.E. 52, 53.

693. Complaint, *Koubriti v. Convertino*, No. 2:07-cv-13678 (E.D. Mich. Aug. 30, 2007), D.E. 1; Docket Sheet, *id.*; see Paul Egan, *Ex-Terror Suspect Sues Convertino*, Detroit News, Aug. 31, 2007, at 5B; *The Prosecutor*, *supra* note 659.

694. *Koubriti v. Convertino*, 593 F.3d 459 (6th Cir.), *cert. denied*, 562 U.S. 829 (2010); see Ben Schmitt & Robin Erb, *Man Can't Sue U.S. Prosecutor in Terror Case*, Detroit Free Press, Feb. 4, 2010, at A8.

695. Order, *Koubriti*, No. 2:07-cv-13678 (E.D. Mich. May 23, 2011), D.E. 69, available at 2011 WL 1982239; see David Ashenfelter, Mike Brookbank, Tammy Stables Battaglia, Elisha Anderson & Megha Satyanarayana, *Dismissal Ends Terror Trial Lawsuit*, Detroit Free Press, May 24, 2011, at A4.

696. *United States v. Elmardoudi*, 501 F.3d 935, 937, 940 (8th Cir. 2007) (describing the crime as “‘shoulder surfing,’ that is, surreptitiously memorizing other people’s calling card and credit card numbers at the Minneapolis–St. Paul airport and then passing the numbers on to other people who used them to pay for telephone calls”), *cert. denied*, 552 U.S. 1120 (2008); Amended Sentencing Judgment, *United States v. Elmardoudi*, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006), D.E. 40.

District Court for the Northern District of Iowa to five years in prison for fraudulent use of Social Security numbers.⁶⁹⁷

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."⁶⁹⁸ Jurors did not come directly to the courthouse in the morning.⁶⁹⁹ Instead, they assembled at a secret location and were driven to the courthouse in a van.⁷⁰⁰ Someone found out about the secret location and called the jury room with a death threat.⁷⁰¹ On the following day, someone called the Detroit News with a death threat concerning the judge.⁷⁰² The Marshal changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.⁷⁰³

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.⁷⁰⁴ Jury selection was conducted behind closed doors.⁷⁰⁵ Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.⁷⁰⁶ Judge Rosen noted that it was very important to make sure that the jury clerk knew that the names and addresses of the jurors were confidential.⁷⁰⁷

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued "a public and formal judicial admonishment of the Attorney General."⁷⁰⁸ As Judge Rosen recalled,

697. Judgment, *United States v. Elwardoudi*, No. 1:06-cr-112 (N.D. Iowa Mar. 14, 2008), D.E. 110; Indictment, *id.* (Aug. 16, 2006), D.E. 1; see *Elwardoudi*, 501 F.3d at 937. The court of appeals affirmed. *United States v. Elwardoudi*, 313 F. App'x 923 (8th Cir.), *cert. denied*, 558 U.S. 958 (2009).

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

699. *Id.*

700. *Id.*

701. *Trying Cases*, *supra* note 658, at 21 (remarks by Judge Rosen); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

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

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

704. *United States v. Koubriti*, 305 F. Supp. 2d 723, 728 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 418 (E.D. Mich. 2002) (denying a motion opposing the empaneling of an anonymous jury); *Trying Cases*, *supra* note 658, at 21 (remarks by Judge Rosen); see David Eggen & Allan Lengel, *In Detroit, First Post-9/11 Terrorism Trial*, Wash. Post, Mar. 19, 2003, at A3; David Runk, *Judge Says Elwardoudi Terror Trial to Proceed*, St. Paul Pioneer Press, Mar. 25, 2003, at B9.

705. *Trying Cases*, *supra* note 658, at 21 (remarks by Judge Rosen); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Eggen & Lengel, *supra* note 704.

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

707. *Id.*

708. *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.

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.⁷⁰⁹

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.⁷¹⁰ 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.”⁷¹¹ In addition, during the trial, the Attorney General commented favorably at a press conference on the credibility of the cooperating codefendant’s testimony.⁷¹²

On the day before the grand jury handed down the second superseding indictment adding terrorism charges for the first time, Fox News announced the forthcoming indictment in detail sufficient to suggest the indictment had been improperly leaked.⁷¹³ On the following day, MSNBC News presented improperly leaked evidence against the defendants.⁷¹⁴ The Attorney General’s responsibility for these leaks remained unclear.⁷¹⁵

The defendants moved for sanctions against the Attorney General on August 28, 2003.⁷¹⁶ 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.”⁷¹⁷ In response, the Attorney General stated that he regretted making the statements and acknowledged that they were mistakes, but said that the errors were entirely inadvertent.⁷¹⁸

709. *Trying Cases*, *supra* note 658, at 21 (remarks by Judge Rosen).

710. *Koubriti*, 305 F. Supp. 2d at 728–29; *see id.* at 733 (“I didn’t initiate the gag order, but I intend to keep it in place until further order of the Court, and I intend to enforce it.”); *see also The Prosecutor*, *supra* note 659.

711. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; *see Shenon & Van Natta*, *supra* note 658 (reporting on the Attorney General’s news conference); *The Prosecutor*, *supra* note 659.

Two days after the news conference, the Justice Department acknowledged that “it did not know whether three Arab men now in custody in Michigan had advance knowledge of the terror attacks of Sept. 11.” Don Van Natta, Jr., *Justice Dept. Alters Stand on 3 Detained*, N.Y. Times, Nov. 3, 2001, at B5; *see The Prosecutor*, *supra* note 659. More than five years after that, however, government counsel told an appellate panel at oral argument that Elmardoudi was accused of supporting terrorists connected with the September 11, 2001, attacks. *United States v. Elmardoudi*, 504 F.3d 935, 938 n.3 (8th Cir. 2007).

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

713. *Id.* at 731; *Trying Cases*, *supra* note 658, at 22 (remarks by Judge Rosen); *see The Prosecutor*, *supra* note 659 (noting that Judge Rosen learned from the broadcast that he would preside over the case).

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

715. *Id.* at 725 n.1.

716. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 667.

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

718. *Id.* at 737–38; *see Schmitt*, *supra* note 708.

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.⁷¹⁹ Criminal contempt proceedings against a sitting Cabinet officer would require extraordinary procedures and implicate serious constitutional issues.⁷²⁰ Because the record did not suggest willful violation of the court's order, Judge Rosen decided that confronting these difficulties would not be necessary.⁷²¹ Because the Attorney General did violate the court's order on two occasions, however, Judge Rosen decided to formally admonish him.⁷²²

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.⁷²³ Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and use of the CIA's evidence.⁷²⁴ Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.⁷²⁵

Review of classified evidence in Detroit required the court to (1) establish a sensitive compartmented information facility (SCIF)⁷²⁶ and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.⁷²⁷

A SCIF is a secure room in which documents are stored in independently locked file drawers.⁷²⁸ The room was created by classified information security officers provided by the Justice Department's Litigation Security Group,⁷²⁹ and

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

720. *Id.* at 726, 742, 752–57.

721. *Id.* at 726, 748–57.

722. *Id.* at 725–26, 757–65; see Schmitt, *supra* note 708; *The Prosecutor*, *supra* note 659.

723. *Trying Cases*, *supra* note 658, at 22 (remarks by Judge Rosen); Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

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

725. *Trying Cases*, *supra* note 658, at 5–6 (remarks by Professor Daniel J. Capra); Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

726. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

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

Judge Rosen employs career law clerks, and all of his originally cleared staff remained on staff. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

728. Rosen, *supra* note 667, at 105; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see also *Trying Cases*, *supra* note 658, at 4–5 (remarks by Professor Daniel J. Capra).

729. See Reagan, *supra* note 726, at 21–22 (providing information about classified information security officers).

then the court programmed the codes for access.⁷³⁰ Only chambers staff with security clearances may enter this SCIF.⁷³¹

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.⁷³²

For the prosecution of the prosecutor and a government witness, Judge Tarnow's law clerk and a court reporter obtained security clearances.⁷³³ Classified information was stored in a chambers safe, but the classified information was not a significant factor in the case.⁷³⁴

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

731. *Id.*

732. *Trying Cases, supra* note 658, at 3 (remarks by Professor Daniel J. Capra).

733. Interview with Hon. Arthur J. Tarnow, Oct. 3, 2012.

734. *Id.*

Twentieth Hijacker

United States v. Moussaoui (*Leonie M. Brinkema, E.D. Va.*)⁷³⁵

On September 11, 2001, four hijacked commercial jumbo jets were crashed in New York, Virginia, and Pennsylvania, killing nearly 3,000 people, including nineteen suspected hijackers.⁷³⁶ 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.⁷³⁷ The fourth plane crashed near Shanksville, Pennsylvania, after passengers thwarted the hijackers' plan to strike a strategic target—probably the Capitol.⁷³⁸ This plane apparently had only four hijackers aboard.⁷³⁹ Just a few days later, it was reported that Zacarias Moussaoui may have been intended to be the twentieth hijacker.⁷⁴⁰

735. Preconviction 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.

736. 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 Airlines, 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).

737. See Grunwald, *supra* note 736; 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 736.

738. The 9/11 Commission Report 244 (2004); *Moussaoui*, 591 F.3d at 266; see Jess Bravin, *The Terror Courts* 329 (2013); Grunwald, *supra* note 736; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; Terry McDermott, *Perfect Soldiers* 229, 241 (2005); *New Theory*, *supra* note 737; Schmemmann, *supra* note 736; see also Terry McDermott, *The Mastermind*, New Yorker, Sept. 13, 2010, at 38, 49 (“[Khalid Sheikh Mohammed] allowed Atta to overrule Bin Laden’s choice of the White House as one of the targets—Atta thought it was too difficult—and substituted the Capitol.”); Terry McDermott & Josh Meyer, *The Hunt for KSM 142* (2012) (reporting same); Ali H. Soufan, *The Black Banners* 282 (2011) (reporting that Osama Bin Laden identified the Capitol as the fourth target).

739. 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 737; Longman, *supra* note 738; *New Theory*, *supra* note 737.

740. Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. Times, Sept. 21, 2001, at B1; David Peterson, *Mother Says Extremists Brainwashed Her Son*, Minneapolis–St. Paul Star Trib., Sept. 20, 2001, at 9A (reporting that the French newsmagazine *L'Express* speculated online on September 19, 2001, that Moussaoui might be the twentieth hijacker).

Khalid Sheikh Mohammed wanted even more men, as many as seven or eight per plane. At least half a dozen men selected for the mission never made it into the United States—several

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.⁷⁴¹ Three days earlier, he had begun instruction at the Pan Am International Flight Academy.⁷⁴² It was initially reported that he aroused suspicion when he expressed an interest in steering a jumbo jet but not in taking off or landing.⁷⁴³ The *Washington Post* reported in November, however, that the director of the FBI told federal prosecutors at a closed-door meeting that initial reports of Moussaoui's not wanting to learn how to take off or land were inaccurate, and Moussaoui no longer was thought to be intended as the twentieth hijacker; he was thought to have been intended for a later attack.⁷⁴⁴

Moussaoui was born on May 30, 1968, in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.⁷⁴⁵ He moved to London in 1990, and then moved back to France in 1997.⁷⁴⁶ By the time he entered the United States on a student visa, French authorities already suspected him of terrorist

had visas denied, others agreed to participate, then withdrew before ever leaving for the United States. At least one man was turned away by an immigration officer at arrival.

McDermott, *Perfect Soldiers*, *supra* note 738, at 204 (footnotes omitted).

741. 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 737; McDermott, *Perfect Soldiers*, *supra* note 738, at 226; Peterson, *supra* note 740; H.L. Pohlman, *Terrorism and the Constitution* 192 (2008); Soufan, *supra* note 738, at 277.

742. The 9/11 Commission Report 246–47, 273 (2004); *Moussaoui*, 591 F.3d at 266, 274; see Johnston & Shenon, *supra* note 739.

One of the three instructors who alerted authorities to suspicion concerning Moussaoui received a \$5 million reward in 2008. See *Reward in Moussaoui Case*, *N.Y. Times*, Jan. 25, 2008, at A18; *Two Others Seek Reward in Moussaoui Case*, *N.Y. Times*, Jan. 26, 2008, at A10.

743. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, *Wash. Post*, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 739; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, *Wash. Post*, Sept. 22, 2001, at A20.

744. Dan Eggen, *Yemeni Fugitive Linked to Hijackers*, *Wash. Post*, Nov. 15, 2001, at A20; see Bin al-Shibh Deposition Opinion at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 10, 2003), available at 2003 WL 21263699 (“he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda”); Philip Shenon, *F.B.I. Chief Says Failed Sept. 11 Hijackers May Remain at Large*, *N.Y. Times*, Nov. 17, 2001, at B5; see also McDermott, *Perfect Soldiers*, *supra* note 738, at 204 (reporting that attack planners decided that they would use Moussaoui only as a last resort).

In 2004, the 9/11 Commission reported that 9/11 conspirator “Khallad believes [Khalid Sheikh Mohammed] wanted between four and six operators per plane. KSM states that al Qaeda had originally planned to use 25 or 26 hijackers but ended up with only the 19.” The 9/11 Commission Report 235 (2004).

745. See Daley, *supra* note 740; Donahue, *supra* note 741, at 42, 104; Schmidt & Romano, *supra* note 743.

746. See Daley, *supra* note 740.

ties.⁷⁴⁷ In February 2001, he moved to Norman, Oklahoma, for training at the Airman Flight School, where his performance was judged poor.⁷⁴⁸

During this time, he apparently had contact with Ramzi Muhammad Abdullah Bin al-Shibh, a roommate of Mohamed Atta⁷⁴⁹ in Hamburg, Germany.⁷⁵⁰ Atta is believed to have been the leader of the September 11 attacks and the pilot of the first plane to hit the World Trade Center.⁷⁵¹ Bin al-Shibh apparently wired Moussaoui \$14,000,⁷⁵² \$8,600 of which Moussaoui used for flight school.⁷⁵³ Ramzi Bin al-Shibh was also known as Ramzi Omar,⁷⁵⁴ and he too came to be suspected as the intended twentieth hijacker,⁷⁵⁵ but he was repeatedly denied a visa to enter the

747. See Donahue, *supra* note 741, at 16–17, 116–17; Grimaldi, *supra* note 743 (reporting that French officials warned the FBI of their suspicions at least ten days before the September 11 attacks); Diana Jean Schemo & Robert Pear, *Suspects in Hijackings Exploited Loopholes in Immigration Policy*, N.Y. Times, Sept. 27, 2001, at A1.

In April 1998, Moussaoui was at the same terrorist training camp in Afghanistan as Ahmed Ressay, who is sometimes referred to as the Millennium Bomber. *United States v. Ressay*, 679 F.3d 1069, 1075 (9th Cir. 2012); see Donahue, *supra* note 741, at 121, 165; see also *supra* “Millennium Bomber” (concerning the prosecution of Ressay).

748. 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 740; Donahue, *supra* note 741, 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 739; Schmidt & Romano, *supra* note 743; Soufan, *supra* note 738, at 276–77.

749. “Atta was a finicky, dour man whose chief attributes were obedience and a capacity for detail.” McDermott, *The Mastermind*, *supra* note 738, at 49. “Where Atta was the dutiful striver, bin al-Shibh was an affable layabout who rarely held a job for more than a few weeks and found university study not worth his effort. A friend in Hamburg said Atta was impossible to like, but bin al-Shibh had charm to spare.” McDermott & Meyer, *supra* note 738, at 140.

750. The 9/11 Commission Report 162 (2004) (Atta and Bin al-Shibh moved in with hijacker Marwan al-Shehhi in April 1998); *Moussaoui*, 591 F.3d at 274; see James Risen, *U.S. Says Suspect Tied to 9/11 and Qaeda Is Captured in Raid*, N.Y. Times, Sept. 14, 2002, at A1; Soufan, *supra* note 738, at 271–73; John Tagliabue & Raymond Bonner, *German Data Led U.S. to Search for More Suicide Hijacker Teams*, N.Y. Times, Sept. 29, 2001, at A1; see also The 9/11 Commission Report 161 (2004) (profiling Bin al-Shibh).

751. The 9/11 Commission Report 5 (2004) (Atta was “the only terrorist on board trained to fly a jet”); see Johnston & Shenon, *supra* note 739; Risen, *supra* note 750; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

752. The 9/11 Commission Report 246, 273 (2004); see Donahue, *supra* note 741, at 1, 28–29, 76; Johnston & Shenon, *supra* note 737.

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

754. See McDermott, *The Mastermind*, *supra* note 738, at 49; Soufan, *supra* note 738, at 272.

“His real name, he said, had no religious meaning, so he adopted the name of the prophet Mohammed’s successor, the second caliph of Islam. Many acquaintances in Hamburg didn’t even know Omar had another name.” McDermott, *Perfect Soldiers*, *supra* note 738, at 37.

755. See *New Theory*, *supra* note 737; Risen, *supra* note 750; Shenon, *supra* note 744; Tagliabue, *supra* note 751; see also Bravin, *supra* note 738, at 346 (reporting on an apparent military commission confession “that, as the government alleged, he, too, had aspired to be a Twentieth Hijacker”).

Another person designated a twentieth hijacker—Mohammed al-Qahtani—is detained at Guantánamo Bay. See Peter L. Bergen, *Man Hunt* 95 (2012) (“the man al-Qaeda was grooming to

United States.⁷⁵⁶ He was captured in Karachi, Pakistan, on the eve of the first anniversary of September 11, held in Morocco in secret by the CIA, and eventually transferred to Guantánamo Bay.⁷⁵⁷ He is on trial there by military commission.⁷⁵⁸

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.⁷⁵⁹

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.⁷⁶⁰ Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court

be the twentieth hijacker in the months before the 9/11 attacks”); Bravin, *supra* note 738, at 252–55 (reporting that al-Qahtani was denied entry on August 4, 2011, at the Orlando airport); Jonathan Hafetz, *Habeas Corpus After 9/11* 38 (2011); Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1; Soufan, *supra* note 738, at 458–59; Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 154 (2008). He has been declared “incompetent and unable to assist effectively in [his] case.” Docket Sheet, *Al-Qahtani v. Bush*, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) (April 20, 2012, minute order).

756. The 9/11 Commission Report 161, 168, 225 (2004) (reporting that Bin al-Shibh could not persuade immigration officials that he would return home); see McDermott, *The Mastermind*, *supra* note 738, at 49 (“the American immigration system viewed him as a likely economic migrant”); Michael Moss, *A Traveler with Strong Views on the Right Kind of Islam and No Fear of Sharing Them*, N.Y. Times, Dec. 12, 2001, at B6; Soufan, *supra* note 738, at 272 (“The United States at the time was suspicious of Yemeni visa seekers, believing they’d attempt to become illegal immigrants.”); *id.* at 275.

757. See Donahue, *supra* note 741, at 29; Peter Finn, *9/11 Detainee’s Interrogation in Morocco Was Recorded*, Wash. Post, Aug. 18, 2010, at A4; Kamran Khan & Peter Finn, *Pakistanis Detail Capture of Key 9/11 Suspect*, Wash. Post, Sept. 15, 2002, at A1; Mark Mazzetti, *9/11 Suspect Was Detained and Taped in Morocco*, N.Y. Times, Aug. 18, 2010, at A4; Walter Pincus, *Binalshibh Said to Provide “Useful Information,”* Wash. Post, Oct. 4, 2002, at A17; Risen, *supra* note 750; Soufan, *supra* note 738, at 428, 484–88.

758. See Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, Wash. Post, Apr. 5, 2011, at A1; see also www.mc.mil/CASES.aspx (military commission case records).

759. See Johnston & Shenon, *supra* note 739.

760. Indictment, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001), D.E. 1; *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 741, 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 737; Pohlman, *supra* note 741, at 192.

Moussaoui was originally flown to New York, on September 14, 2001, for possible prosecution there. See Donahue, *supra* note 741, at 18–19 (“But the Department of Justice was going to ask for the death penalty, and the New York court had deadlocked on the death penalty for two of the East African embassy bombing suspects. A court near the Pentagon would more likely decide for the death penalty.”). Moussaoui was transported to Alexandria, Virginia, on December 13. See *id.* at 19.

immediately appointed three attorneys to represent him.⁷⁶¹ The court assigned the case to Judge Leonie M. Brinkema.⁷⁶²

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.”⁷⁶³ Judge Brinkema, with the consent of Moussaoui’s lawyer, entered a plea of not guilty.⁷⁶⁴ Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.⁷⁶⁵

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.⁷⁶⁶

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 fifty-minute diatribe on Islam and the U.S. government’s conspiracy to kill him.⁷⁶⁷ He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.⁷⁶⁸ 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.⁷⁶⁹

761. Complex Case Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 27, 2001), D.E. 18, available at 2001 WL 1887910 (recognizing four capital counts); see Donahue, *supra* note 741, at 1, 19; Johnston & Shenon, *supra* note 737; David Johnston & Benjamin Weiser, *Government’s Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

762. Docket Sheet, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) [hereinafter E.D. Va. Docket Sheet]; see Philip Shenon & Neil A. Lewis, *Unpredictable Judge for Terrorism Suspect*, N.Y. Times, Dec. 26, 2001, at B6.

Tim Reagan interviewed Judge Brinkema for this report in the judge’s chambers on January 5, 2007, and by telephone on March 26, 2008.

763. 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 741, at 8, 20.

764. E.D. Va. Docket Sheet, *supra* note 762; *Moussaoui*, 591 F.3d at 267; see Copeland, *supra* note 763; Donahue, *supra* note 741, at 20; Johnston, *supra* note 763.

765. Complex Case Order, *supra* note 761, at 3 (setting a deadline of March 29, 2002); Death Penalty Notice, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 28, 2002), D.E. 89; *Moussaoui*, 483 F.3d at 223–24 n.1; see Donahue, *supra* note 741, 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.

766. See Donahue, *supra* note 741, at 9, 64.

767. See Pohlman, *supra* note 741, 193–94 (presenting excerpts from the speech); Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

768. *Moussaoui*, 591 F.3d at 269–70; *United States v. Moussaoui*, 333 F.3d 509, 512–13 (4th Cir. 2003); see Motion to Proceed Pro Se, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 25, 2002), D.E. 112 (handwritten motion dated April 22, 2002); Donahue, *supra* note 741, at 23–24, 36, 39–40, 166; Pohlman, *supra* note 741, at 192; Shenon, *supra* note 767.

769. Mental Health Evaluation Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2002), D.E. 104, available at 2002 WL 1311722; see *Moussaoui*, 591 F.3d at 270; Donahue, *supra* note 741, at 24, 36, 54; Shenon, *supra* note 767.

The government filed a superseding indictment on June 19,⁷⁷⁰ and at the arraignment six days later Moussaoui tried to plead no contest.⁷⁷¹ 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.⁷⁷²

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.⁷⁷³ So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.⁷⁷⁴ 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.”⁷⁷⁵ Judge Brinkema decided to give him a week to reconsider his guilty plea.⁷⁷⁶ 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.⁷⁷⁷

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.⁷⁷⁸ Judge Brinkema postponed the trial in-

770. Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 19, 2002), D.E. 199.

771. Order Denying No-Contest Plea, *id.* (July 9, 2002), D.E. 299, 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.

772. Order Denying No-Contest Plea, *supra* note 771; E.D. Va. Docket Sheet, *supra* note 762; see Lewis, *supra* note 771.

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

774. Second Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 16, 2002), D.E. 340; *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); see Donahue, *supra* note 741, at 26; Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

775. *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 741, at 26; Pohlman, *supra* note 741, at 194.

776. *Moussaoui*, 591 F.3d at 270; see Donahue, *supra* note 741, at 26; Shenon, *supra* note 775.

777. E.D. Va. Docket Sheet, *supra* note 762; *Moussaoui*, 591 F.3d at 270–71; see Donahue, *supra* note 741, at 27; Pohlman, *supra* note 741, at 194; Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

778. Bin al-Shibh Deposition Opinion, *supra* note 744, at 16–17 (“The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant’s behalf—both as to guilt and potential punishment.”); Bin al-Shibh Deposition Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 31, 2003), D.E. 732; *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 762; see Donahue, *supra* note 741, at 28–29; Pohlman, *supra* note 741, 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”).

definitely to permit the government to appeal.⁷⁷⁹ The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.⁷⁸⁰ 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.”⁷⁸¹ After oral argument on June 3 before Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,⁷⁸² 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.⁷⁸³

On August 29, Judge Brinkema ordered the government to provide Moussaoui deposition access to Khalid Sheikh Mohammed (KSM)—regarded as the mastermind of the September 11 attacks—and Mustafa Ahmed al-Hawsawi—regarded as the paymaster for the September 11 attacks—as well.⁷⁸⁴ Bin al-Shibh

779. Order Vacating Trial Date, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 12, 2003), D.E. 752, available at 2003 WL 402249; see Donahue, *supra* note 741, 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.

780. 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 741, at 29; Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Pohlman, *supra* note 741, at 194; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

781. Bin al-Shibh Substitution Opinion at 6, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 15, 2003), D.E. 925, available at 2003 WL 21277161; *Moussaoui*, 382 F.3d at 458–59; see Donahue, *supra* note 741, 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.

782. *Moussaoui*, 333 F.3d at 513; *Moussaoui*, 382 F.3d at 459; see Philip Shenon, *Justice Dept. Warns of Risk to Prosecution and Security*, N.Y. Times, June 4, 2003, at A21.

783. *Moussaoui*, 333 F.3d at 512, 514, 517; *Moussaoui*, 382 F.3d at 459; see Donahue, *supra* note 741, 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 741, at 198.

Over the dissent of five judges, the court decided not to rehear the appeal en banc. United States v. Moussaoui, 336 F.3d 279 (4th Cir. 2003); see Jerry Markon, *Moussaoui Prosecutors Defy Judge*, Wash. Post, July 15, 2003, at A1; Philip Shenon, *U.S. Will Defy Court’s Order in Terror Case*, N.Y. Times, July 15, 2003, at A1.

784. Mohammed and al-Hawsawi Deposition Opinion, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2003), D.E. 1033, available at 2003 WL 22258213; *Moussaoui*, 382 F.3d at 459; see Donahue, *supra* note 741, at 29; Eric Lichtblau, *New Ruling Favors Suspect in Terror Case*, N.Y. Times, Aug. 31, 2003, at 123; Jerry Markon, *Moussaoui Granted Access to Witnesses*, Wash. Post, Aug. 30, 2003, at A12; Susan Schmidt, *2nd Key Al Qaeda Suspect Identified*, Wash. Post, Mar. 5, 2003, at A1.

Ramzi Yousef, a principal in the first World Trade Center bombing, is KSM’s nephew. The 9/11 Commission Report 73, 145 (2004). “According to KSM, he started to think about attacking the United States after Yousef returned to Pakistan following the 1993 World Trade Center bombing.” *Id.* at 153; see Soufan, *supra* note 738, at 54 (“KSM had been yearning to get more actively involved in jihad ever since his nephew had earned notoriety for the World Trade Center bomb-

and al-Hawsawi were identified as supporting conspirators in Moussaoui's indictment and otherwise frequently mentioned there.⁷⁸⁵ KSM and al-Hawsawi were captured in Pakistan on February 27.⁷⁸⁶ 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.⁷⁸⁷

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.⁷⁸⁸ 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.⁷⁸⁹ Judge Gregory dissented in part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.⁷⁹⁰

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.⁷⁹¹ The government prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.⁷⁹² The court of appeals did not share Judge Brinkema's skepticism about the reliability of the detainee reports: the interrogators "have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives."⁷⁹³ 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 crea-

ing"); see also McDermott, *Perfect Soldiers*, *supra* note 738, at 128 (reporting that the uncle is three years older than the nephew).

785. Second Superseding Indictment, *supra* note 774.

786. See Donahue, *supra* note 741, at 29; Schmidt, *supra* note 784.

787. *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 741, at 29–30; Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Pohlman, *supra* note 741, at 191, 198; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

788. *Moussaoui*, 382 F.3d at 462–63.

789. *Id.* at 456–57, 479–82; see Donahue, *supra* note 741, at 122; Hafetz, *supra* note 755, at 227; Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5; Pohlman, *supra* note 741, 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 741, at 31; Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005, at A20; Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3; Pohlman, *supra* note 741, at 191.

790. *Moussaoui*, 382 F.3d at 483–89 (Judge Gregory, concurring in part and dissenting in part); see Markon, *supra* note 789; Pohlman, *supra* note 741, at 226–27.

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

792. *Id.*

793. *Id.* at 478.

tion of written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony."⁷⁹⁴

Meanwhile, on November 14, 2003, Judge Brinkema decided that because of his frequent inappropriate filings Moussaoui could no longer proceed pro se.⁷⁹⁵ 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 he denied involvement in the September 11 attacks.⁷⁹⁶

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.⁷⁹⁷ Jury selection began on February 6, 2006.⁷⁹⁸ The court sent summonses to more than 1,000 residents within the district's Alexandria division.⁷⁹⁹ Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than 500 potential jurors filled out.⁸⁰⁰

Opening statements began on March 6.⁸⁰¹ 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 2001.⁸⁰² Proceedings were not publicly televised, but they were broadcast

794. *Id.* at 479.

795. Order Vacating Pro Se Status at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 14, 2003), D.E. 1120; *United States v. Moussaoui*, 591 F.3d 263, 271 (4th Cir. 2010); *Moussaoui*, 382 F.3d at 460 n.6; see Donahue, *supra* note 741, at 30–31, 36, 40; Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Pohlman, *supra* note 741, at 194; Philip Shenon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

796. Plea Statement, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2005), D.E. 1264; *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 741, 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 741, 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.

797. *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 741, at 33–34, 65.

798. E.D. Va. Docket Sheet, *supra* note 762; see Donahue, *supra* note 741, at 34, 59; Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

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

800. Trial Conduct Order 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006), D.E. 1500; Leonie M. Brinkema, *United States v. Moussaoui*: Jury Questionnaire (Feb. 6, 2006); Interview with Hon. Leonie M. Brinkema, Mar. 26, 2008; see Donahue, *supra* note 741, 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.

801. E.D. Va. Docket Sheet, *supra* note 762; see Donahue, *supra* note 741, at 59, 65; Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14.

802. See Lewis, *supra* note 801; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

to viewing sites in Manhattan, Central Islip, Boston, Philadelphia, Newark, and Alexandria for family members of September 11 victims.⁸⁰³

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.⁸⁰⁴ Judge Brinkema ruled that the coached witnesses could not testify.⁸⁰⁵

The trial continued and jurors began to deliberate on Wednesday, March 29.⁸⁰⁶ After a weekend break,⁸⁰⁷ on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.⁸⁰⁸ On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,⁸⁰⁹ returning a verdict of life in prison on Wednesday, May 3.⁸¹⁰ After inter-

803. See Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006), D.E. 1638; Donahue, *supra* note 741, 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), D.E. 1646.

“During the trial, Judge Brinkema remarked that fewer people were watching from the off-site courtrooms than anticipated.” Donahue, *supra* note 741, at 174.

804. See Donahue, *supra* note 741, 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.

805. Second Aviation Witness Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006), D.E. 1686; First Aviation Witness Order, *id.* (Mar. 14, 2006), D.E. 1681; see Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct That Nearly Derailed the Moussaoui Trial*, 20 Geo. J. Legal Ethics 463 (2007); Donahue, *supra* note 741, 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.

806. E.D. Va. Docket Sheet, *supra* note 762; see Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

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

808. *United States v. Moussaoui*, 591 F.3d 263, 277 (4th Cir. 2010); Phase 1 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 3, 2006), D.E. 1739; see Donahue, *supra* note 741, 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.

809. E.D. Va. Docket Sheet, *supra* note 762; see Donahue, *supra* note 741, at 99; Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

810. Phase 2 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 3, 2006), D.E. 1852; *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 741, 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,

views with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.⁸¹¹

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.⁸¹² Judge Brinkema denied his motion.⁸¹³ The court of appeals affirmed on January 4, 2010: "the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands."⁸¹⁴

Colorado. He now spends 23 hours a day alone in a cell, with another hour alone in exercise space.

Donahue, *supra* note 741, at 3.

811. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1; see Donahue, *supra* note 741, at 2–3, 102–03.

812. Motion to Withdraw Plea, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006), D.E. 1857; *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 741, 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 Affidavit at 3, Motion to Withdraw Plea, *supra*; see Donahue, *supra* note 741, at 167.

813. Order Denying Plea Withdrawal, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006), D.E. 1858; *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 741, at 102, 167; Lewis, *supra* note 812; Markon, *supra* note 812; Pohlman, *supra* note 741, at 247.

814. *Moussaoui*, 591 F.3d at 307; see Docket Sheet, United States v. *Moussaoui*, No. 06-4494 (4th Cir. May 15, 2006) [hereinafter 4th Cir. May 15, 2006, Docket Sheet].

The appeal was first heard on January 26, 2009. 4th Cir. May 15, 2006, Docket Sheet, *supra*; see Jerry Markon, *Moussaoui's Attorneys Call Guilty Plea Invalid*, Wash. Post, Jan. 27, 2009, at A8. Judge Williams was on the panel that heard the appeal, but she retired for health reasons before the panel issued an opinion, so the appeal was reheard on September 25, 2009. 4th Cir. May 15, 2006, Docket Sheet, *supra*; see *New Arguments in 9/11 Case*, N.Y. Times, July 15, 2009, at A11; Josh White & Jerry Markon, *Diagnosis of Early Alzheimer's Forces Chief Judge to Retire*, Wash. Post, July 10, 2009, at B3.

Tim Reagan attended the September 25, 2009, rehearing, interviewed Judge Gregory for this report in the judge's chambers that same day, and interviewed Judge Shedd by telephone on September 3, 2009.

Challenge: Attorney Appointment

Judge Brinkema initially appointed the Federal Public Defender and a private attorney to represent Moussaoui.⁸¹⁵ “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.”⁸¹⁶ Moussaoui identified a Muslim attorney in Texas with whom he wanted to consult, but this attorney never made an appearance, never sought admission to the court’s bar, and never consented to the screening required for the security clearance that would be needed to represent Moussaoui in court.⁸¹⁷

Moussaoui’s relations with his appointed private attorney were more problematic than his relations with the Federal Defender’s office, so Judge Brinkema appointed another private attorney.⁸¹⁸ “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 [that attorney] was polite to him.”⁸¹⁹

Challenge: Pro Se Defendant

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.⁸²⁰ On June 13, 2002, Judge Brinkema granted Moussaoui’s motion to represent himself, keeping appointed attorneys as standbys.⁸²¹

Because of his pro se status, Moussaoui was eventually given three cells to accommodate his access to documents in this case.⁸²²

As a result of his disruptive filing behavior, however, Judge Brinkema withdrew the privilege of self-representation in November 2003.⁸²³

Challenge: Court Security

Security was enhanced at Moussaoui’s arraignment.⁸²⁴ He arrived before 6:00 a.m., while it was still dark.⁸²⁵ Deputy marshals surrounded the courthouse, and

815. *Moussaoui*, 591 F.3d at 267.

816. *Id.*

817. *Id.* at 269.

818. *Id.*

819. *Id.* at 271 n.6.

820. See Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11; see also Donahue, *supra* note 741, at 54.

821. Pro Se Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 14, 2002), D.E. 183, available at 2002 WL 1311738; *Moussaoui*, 591 F.3d at 274–75, 292–93; *United States v. Moussaoui*, 333 F.3d 509, 513 (4th Cir. 2003); see Donahue, *supra* note 741, at 24, 36, 54; Pohlman, *supra* note 741, at 192; Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

822. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

823. Order Vacating Pro Se Status, *supra* note 795; *Moussaoui*, 591 F.3d at 271; *United States v. Moussaoui*, 382 F.3d 453, 460 n.6 (4th Cir. 2004).

extra metal detectors were stationed at the courtroom.⁸²⁶ 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.⁸²⁷

At subsequent appearances also, extra deputy marshals guarded the courthouse.⁸²⁸ It was reported that the courthouse had never seen such a level of security.⁸²⁹

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.⁸³⁰

Challenge: Jury Security

Judge Brinkema used an anonymous jury.⁸³¹ Jurors assembled in a secret location and were driven to the courthouse.⁸³² The court set up a special room for the jurors to eat lunch away from the public.⁸³³ They were never permitted to be in the building unsupervised.⁸³⁴

Judge Brinkema observed that it is important to work cooperatively with the Marshal while maintaining ultimate responsibility.⁸³⁵

824. See Copeland, *supra* note 763; Johnston, *supra* note 763.

825. See Copeland, *supra* note 763; see also Brooke A. Masters, *Alexandria's Logistical Juggling Act*, Wash. Post, Mar. 14, 2002, at T10 (“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.”).

826. See Johnston, *supra* note 763.

827. See Copeland, *supra* note 763.

828. See Masters, *supra* note 825.

829. See Libby Copeland & Richard Leiby, *The Moussaoui Circus Extends Its Run*, Wash. Post, July 26, 2002, at C1 (“‘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.”).

830. Donahue, *supra* note 741, at 32.

831. Trial Conduct Order 1, *supra* note 800; see Markon, *supra* note 800.

832. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

833. *Id.*

834. *Id.*

835. *Id.*

Challenge: Classified Evidence

Classified materials require extraordinary procedures, but Judge Brinkema tries to keep procedures as normal as possible.⁸³⁶ She requires all of her law clerks and other staff members to qualify for top-secret security clearances.⁸³⁷

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.⁸³⁸

Moussaoui himself was not supposed to have access to classified information.⁸³⁹ In June and July of 2002, however, the government inadvertently included classified materials among documents produced to Moussaoui.⁸⁴⁰ On August 22, the government wrote to Judge Brinkema 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.⁸⁴¹

Judge Brinkema denied the FBI search.

[G]iven the massive amounts of material produced in this case, there is a significant danger that any agents sent to Mr. Moussaoui's cell would have to

836. *Id.*

837. *Id.*

838. *United States v. Moussaoui*, 591 F.3d 263, 267 (4th Cir. 2010); Protective Order and Memorandum of Understanding, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002), D.E. 54; *see Donahue, supra* note 741, at 23; Pohlman, *supra* note 741, at 194.

839. Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 23, 2002), D.E. 450, *available at* 2002 WL 1987964.

As the Government strenuously argues, the defendant's repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and pledged allegiance to Osama Bin Laden are strong evidence that the national security could be threatened if the defendant had access to classified information.

Id. at 2; *see Liptak, supra* note 796; 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 (2014); Tom Jackman, *Moussaoui's Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

840. Aug. 22, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 26, 2002), D.E. 575, *available at* 2002 WL 32001771; Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see Shenon, supra* note 839.

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.

841. Aug. 22, 2002, Letter, *supra* note 840; *see Shenon, supra* note 839.

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.⁸⁴²

But Judge Brinkema did permit the Marshal Service, in consultation with the classified information security officer, to search Moussaoui’s cells for the two documents plus an additional five that the government identified in the interim as improperly produced.⁸⁴³ Of the seven searched for, five were found.⁸⁴⁴ By the following week, the government presented to Judge Brinkema a list of forty-three improperly produced documents.⁸⁴⁵ Many of the documents were prepared by FBI agents who were brought into September 11 investigations without sufficient training in handling and labeling classified information.⁸⁴⁶ Eventually, the documents were retrieved and properly classified.⁸⁴⁷

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.⁸⁴⁸

Challenge: Classified Arguments

Eastern District of Virginia

Moussaoui’s appointed standby attorneys had security clearances; to ensure that they did not inadvertently put classified information into the public record, Judge Brinkema established a procedure in which they submitted filings to the classified information security officer, who was given forty-eight hours to identify any classified information that had to be redacted from the public record.⁸⁴⁹ These filings could not be shared with Moussaoui, because he did not have a security clearance, until they had been reviewed by the security officer.⁸⁵⁰ Unredacted filings containing classified information were filed with the security officer rather than

842. Letter (Aug. 23, 2002), *attached to* Classified Document Retrieval Unsealing Order, *supra* note 840.

843. Interview with Dep’t of Justice Litig. Sec. Group Staff, Feb. 3, 2010; *see* Aug. 29, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *supra* note 840; *see also* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

844. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see* Aug. 29, 2002, Letter, *supra* note 843; Shenon, *supra* note 839.

845. *See* Letter (Sept. 5, 2002), *attached to* Classified Document Retrieval Unsealing Order, *supra* note 840; Shenon, *supra* note 839.

846. *See* Dan Eggen, *FBI Failed to Classify Reports Before Moussaoui Had Them*, Wash. Post, Sept. 28, 2002, at A8.

847. Classified Document Retrieval Unsealing Order, *supra* note 840, at 1.

848. Order Rescheduling Trial, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 30, 2002), D.E. 585, *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.

849. Classified Filing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Oct. 3, 2002), D.E. 594; *see Moussaoui Motions to Be Cleared*, Wash. Post, Oct. 4, 2002, at A15 [hereinafter *Moussaoui Motions*].

850. Classified Filing Order, *supra* note 849, at 2; *see Moussaoui Motions*, *supra* note 849.

the clerk.⁸⁵¹ The government was responsible for classification reviews of its filings.⁸⁵²

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.⁸⁵³ So the clerk's office worked with the classified information security officers to (1) create a sensitive compartmented information facility (SCIF)—an especially secure storage facility suitable for storing sensitive compartmented information and other classified information—and (2) begin the process of obtaining security clearances for several staff members.⁸⁵⁴

The court's judges meet in regular session in Richmond six times a year. There were safes in the court's SCIF for the Moussaoui case, with separate drawers allocated to each judge.⁸⁵⁵ Cleared court staff members could bring classified documents from the SCIF to judges' Richmond chambers for review while the judges were in Richmond.⁸⁵⁶ Judge Gregory's home chambers are in Richmond, so cleared court staff members can bring him classified documents from the Richmond SCIF even when the court is not in session. Judge Gregory frequently visited the SCIF himself to retrieve documents.⁸⁵⁷ 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.⁸⁵⁸

Judge Wilkins had chambers in Greenville, South Carolina, and the courthouse there has a SCIF.⁸⁵⁹ Judge Williams had chambers in Orangeburg, South Carolina, which is approximately fifty miles south of Columbia. Either classified information security officers brought classified documents to her chambers in Orangeburg for her review while they were there, or she traveled to Columbia, where the FBI has a SCIF.⁸⁶⁰ 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.⁸⁶¹

851. Classified Filing Order, *supra* note 849, at 2–3.

852. *Id.* at 2; see *Moussaoui Motions*, *supra* note 849.

One seventy-one-page government brief had fifty blank (redacted) pages, fifteen partially redacted pages, three full pages of text, and three head and end pages. Government Response Brief, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 13, 2003), D.E. 715; see Pohlman, *supra* note 741, at 194.

853. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

854. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010; see Reagan, *supra* note 843, at 22–23 (describing SCIFs).

855. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

856. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

857. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

858. *Id.*

859. 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, www.fjc.gov/public/home.nsf/hisj.

860. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

861. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, the briefs were filed with the classified information security officer under seal.⁸⁶² Some information about their contents, however, was reported in the *Washington Post*.⁸⁶³ In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs were filed with the classified information security officer under seal and redacted briefs were filed in the public record.⁸⁶⁴

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.⁸⁶⁵ Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.⁸⁶⁶ Moussaoui would give a document for the court of appeals to the jail where he was detained, and the jail would pass it on to a classified information security officer who notified the court.⁸⁶⁷ The court docketed it as filed with the classified information security officer, who had it reviewed for classified information and then sent a redacted copy to the court for public filing.⁸⁶⁸ Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.⁸⁶⁹

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.⁸⁷⁰ Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.⁸⁷¹ The court denied the petition.⁸⁷²

The appeal of Moussaoui's guilty plea also included classified briefing.⁸⁷³ 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.⁸⁷⁴ Judge Gregory does not have a career law clerk, and

862. Docket Sheet, *United States v. Moussaoui*, No. 03-4162 (4th Cir. Feb. 12, 2003) [hereinafter 4th Cir. Feb. 12, 2003, Docket Sheet]; see Jerry Markon, *U.S. Filed Terror Briefs in Secrecy*, *Wash. Post*, Mar. 15, 2003, at A6 ("legal specialists said they could recall virtually no other examples of the government's filing an entire set of legal briefs under seal").

863. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, *Wash. Post*, Apr. 2, 2003, at A7.

864. Docket Sheet, *United States v. Moussaoui*, No. 03-4792 (4th Cir. Oct. 7, 2003) [hereinafter 4th Cir. Oct. 7, 2003, Docket Sheet].

865. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

866. *Id.*

867. *Id.*

868. *Id.*

869. *Id.*

870. *Id.*

871. *Id.*

872. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 864 (noting the denial of rehearing on October 13, 2004).

873. 4th Cir. May 15, 2006, Docket Sheet, *supra* note 814; Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

874. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

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.⁸⁷⁵

In August 2009, the court worked with the classified information security officer to establish a larger SCIF in Richmond, suitable for working and meeting in addition to storage.⁸⁷⁶

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.⁸⁷⁷ At the public session, a classified information security officer and a CIA officer attended to monitor the proceeding in case it needed to be interrupted to prevent disclosure of classified information.⁸⁷⁸ At these public sessions, no interruption was necessary.⁸⁷⁹

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.⁸⁸⁰ 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.⁸⁸¹ The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.⁸⁸² 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

875. *Id.*

876. *Id.*; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008, and Sept. 1, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

877. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 864; Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 28, 2009; *see* Pohlman, *supra* note 741, at 196, 217; *id.* at 197–98 (presenting a redacted transcript from the June 3, 2002, closed session).

878. Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 28, 2009.

879. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

880. 4th Cir. Feb. 12, 2003, Docket Sheet, *supra* note 862 (noting the grant, on March 24, 2003, of a motion to seal the argument); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Jerry Markon, *Moussaoui Hearing Closed to Public*, Wash. Post, Mar. 25, 2003, at A2.

881. United States v. Moussaoui, 65 F. App'x 881 (4th Cir. 2002) (order by Judges William W. Wilkins, H. Emory Widener, Jr., and Paul V. Niemeyer); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Philip Shenon, *In Shift, Appeals Court Opens Hearing on a 9/11 Suspect*, N.Y. Times, May 14, 2003, at A15.

882. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

within twenty-four hours of the argument.⁸⁸³ A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.⁸⁸⁴

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.⁸⁸⁵ 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.⁸⁸⁶ The court initially filed these documents under seal.⁸⁸⁷ 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.⁸⁸⁸ 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.⁸⁸⁹

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.⁸⁹⁰ 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 rec-

883. *Moussaoui*, 65 F. App'x 881.

884. See Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, Wash. Post, June 13, 2003, at A9.

885. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; see *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

886. E.D. Va. Docket Sheet, *supra* note 762.

887. Pro Se Order, *supra* note 821, at 1.

888. *Id.* at 2.

889. Pro Se Filings Unsealing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 17, 2002), D.E. 188, *available at* 2002 WL 1311764.

890. Letter, *id.* (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).

ord 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.⁸⁹¹

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."⁸⁹² She sealed several, but not all, recent filings.⁸⁹³ 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."⁸⁹⁴

On motion from news media, and after observing that "the defendant has filed fewer pleadings and has significantly toned down his inappropriate rhetoric," Judge Brinkema modified her order so that all *pro se* filings would be sealed for ten days to give the government an opportunity "to advise the Court in writing whether the pleading should remain under seal or be unsealed with or without redactions."⁸⁹⁵

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.⁸⁹⁶

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.⁸⁹⁷ 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."⁸⁹⁸

891. Pro Se Filings Sealing Order at 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), D.E. 465, available at 2002 WL 1990900.

892. *Id.* at 4.

893. *Id.* at 3-4.

894. *Id.* at 4 n.3.

895. Sept. 27, 2002, Pro Se Filings Sealing Order, *id.* (Sept. 27, 2002), D.E. 579, available at 2002 WL 32001783; see *News Media Win Ruling in Terror Trial*, N.Y. Times, Sept. 28, 2002, at A11.

896. Sept. 27, 2002, Pro Se Filings Sealing Order, *supra* note 895, at 4 n.1.

897. Videotape Production Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 5, 2002), D.E. 660, 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.

898. Videotape Production Order, *supra* note 897.

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.⁸⁹⁹ Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.⁹⁰⁰ Lindh⁹⁰¹ was shot in the upper thigh during the uprising, and he denied involvement in Spann’s death.⁹⁰² Lindh and several dozen other surviving Taliban troops were recaptured on December 1 when the Northern Alliance flooded them out of a basement.⁹⁰³

899. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002); see Dan Eggen & Brooke A. Masters, *U.S. Won’t Seek Death for Walker*, Wash. Post, Jan. 16, 2002, at A1; Chris Heffelfinger, *Radical Islam in America* xix (2011); David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y. Times, Jan. 16, 2002, at A1; Fredrick Kunkle, *Lindh Never Betrayed Homeland, Parents Say*, Wash. Post, July 16, 2002, at A10; Brooke A. Masters & Patricia Davis, *Walker’s Long Trip Ends at Alexandria Jail*, Wash. Post, Jan. 24, 2002, at A13; Jane Mayer, *Lost in the Jihad*, New Yorker, Mar. 10, 2003, at 50; Jesselyn Radack, *Traitor: The Whistleblower and the “American Taliban”* 28–29 (2012).

900. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; see Eggen & Masters, *supra* note 899; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 899; Kunkle, *supra* note 899; Vernon Loeb, *U.S. Soldiers Recount Smart Bomb’s Blunder*, Wash. Post, Feb. 2, 2002, at A15; Radack, *supra* note 899, at 29; Anthony D. Romero & Dina Temple-Raston, *In Defense of Our America* 91–92 (2007); Rene Sanchez, *John Walker’s Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

Spann’s wife, also a CIA employee, was able to witness the engraving of a black star on the CIA’s memorial wall to commemorate Spann’s death in the line of duty. See Ian Shapira, *Shaping the Memorial to the CIA’s Fallen*, Wash. Post, May 23, 2014, at A1.

901. 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.

902. *Lindh*, 227 F. Supp. 2d at 569; see Eggen & Masters, *supra* note 899; Johnston, *supra* note 899; see also Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Mayer, *supra* note 899; Radack, *supra* note 899, at 29; Romero & Temple-Raston, *supra* note 900, at 92–93.

903. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; see Johnston, *supra* note 899; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 900; Mayer, *supra* note 899; Radack, *supra* note 899, at 29–30; Romero & Temple-Raston, *supra* note 900, at 94.

Lindh played dead for a day before Taliban soldiers helped him and other wounded survivors into the basement of a building in a fortress, where they would spend the next six harrowing days. The Northern Alliance tried to flush out the unarmed, wounded, starving prisoners with gunfire, hand grenades, and ignited diesel fuel. Finally, the Northern Alliance flooded the basement with freezing water, which quickly became polluted with blood, human waste, and floating body parts.

Radack, *supra* note 899, at 29.

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.⁹⁰⁴ He arrived in the Eastern District of Virginia for trial eight days later.⁹⁰⁵ An indictment filed on February 5 added related charges as well as a firearms charge.⁹⁰⁶ The court assigned the case to Judge T.S. Ellis III.⁹⁰⁷ Lindh pleaded not guilty on February 13.⁹⁰⁸ 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.⁹⁰⁹

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.⁹¹⁰ John Walker Lindh was raised a Catholic, but he decided to convert to Islam at sixteen, taking the name Suleyman.⁹¹¹ At eighteen, he moved to Yemen to study Arabic, and then he moved to Bannu, Pakistan, to attend a madrasah.⁹¹²

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 900, 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 900, at 144, 191 (reporting on *Hamdi*).

904. Docket Sheet, United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002) (D.E. 1) [hereinafter E.D. Va. Docket Sheet]; see Eggen & Masters, *supra* note 899; Johnston, *supra* note 899; Masters & Davis, *supra* note 899; Romero & Temple-Raston, *supra* note 900, at 140 & fig. 7.

905. See Masters & Davis, *supra* note 899; see also Jess Bravin, *The Terror Courts 118–19* (2013) (reporting that Lindh's prosecution was steered to the Eastern District of Virginia by repatriating him there).

906. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 904 (D.E. 13); see Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 900, at 139.

907. E.D. Va. Docket Sheet, *supra* note 904; T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1611 (2013); see Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 900, at 142.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

908. E.D. Va. Docket Sheet, *supra* note 904; see Masters, *supra* note 907.

909. 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.

910. See Heffelfinger, *supra* note 899, at xiii–xiv; Kunkle, *supra* note 899; Loeb, *supra* note 903; 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 900, at 13, 15; Sanchez, *supra* note 900.

911. See Eggen & Masters, *supra* note 899 (reporting that Lindh took the name Suleyman al-Faris); Heffelfinger, *supra* note 899, at xiv–xv (“He asked that the name on his [high-school] diploma be changed to Suleyman al-Lindh, though he never picked it up.”); Kunkle, *supra* note 899; Loeb, *supra* note 903; Nieves, *supra* note 910 (reporting that Lindh took the name Suleyman al-Lindh); Radack, *supra* note 899, at 26; Romero & Temple-Raston, *supra* note 900, at 16 (reporting that “Suleyman” is equivalent to “Solomon”); Sanchez, *supra* note 900.

912. See Eggen & Masters, *supra* note 899; Heffelfinger, *supra* note 899, at xvi–xviii; Loeb, *supra* note 903; Mayer, *supra* note 899; Romero & Temple-Raston, *supra* note 900, at 17–19 (reporting

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.⁹¹³ He arrived on the Taliban's front line on September 6, 2001.⁹¹⁴

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.⁹¹⁵ Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.⁹¹⁶ Other photos apparently were destroyed.⁹¹⁷

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.⁹¹⁸ To protect Brosnahan's law firm's employees from harm, Brosnahan kept the firm's name off of the case.⁹¹⁹

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.⁹²⁰ 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.⁹²¹

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.⁹²² All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.⁹²³ On October 4, Judge Ellis imposed the statutory maximum of consecutive ten-year terms on each charge, a

that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 900.

913. See Eggen & Masters, *supra* note 899; Loeb, *supra* note 903; Mayer, *supra* note 899; Nieves, *supra* note 910; Radack, *supra* note 899, at 26–27; Romero & Temple-Raston, *supra* note 900, 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 900.

914. See Heffelfinger, *supra* note 899, at xiii; Romero & Temple-Raston, *supra* note 900, at 24.

915. See *Silenced* (Morninglight Films 2014); Romero & Temple-Raston, *supra* note 900, at 111 & fig. 5; Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9.

916. See Masters, *supra* note 915; Romero & Temple-Raston, *supra* note 900, at 114 (reporting that the obscenity was “shithead”).

917. See Masters, *supra* note 915; Romero & Temple-Raston, *supra* note 900, at 114.

918. See Eggen & Masters, *supra* note 899; Mayer, *supra* note 899; Romero & Temple-Raston, *supra* note 900, at 94, 111–14, 136–37; see also Radack, *supra* note 899, at 31, 38–39 (reporting that the government refused to recognize Brosnahan as Lindh's attorney until after Lindh was brought to the Eastern District of Virginia and that the government refused to inform Lindh that his parents had provided him with an attorney).

919. See *Nation in Brief*, Wash. Post, Feb. 2, 2002, at A26.

920. See Masters, *supra* note 907; Radack, *supra* note 899, at 29; Romero & Temple-Raston, *supra* note 900, at 140–41 (reporting that the government brought Spann's family to the courthouse).

921. See Brooke A. Masters, *Prosecutors Concede Limits of Their Case Against Lindh*, Wash. Post, Apr. 2, 2002, at A11.

922. *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 904; Ellis, *supra* note 907, at 1611, 1613; see Jackman, *supra* note 900; Kunkle, *supra* note 899; Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. Times, July 16, 2002; Mayer, *supra* note 899; Romero & Temple-Raston, *supra* note 900, at 188.

923. *Lindh*, 227 F. Supp. 2d at 566; see Jackman, *supra* note 900; Lewis, *supra* note 922; Romero & Temple-Raston, *supra* note 900, at 188–89.

sentence to which the parties had agreed.⁹²⁴ Lindh tearfully admitted making a mistake by joining the Taliban.⁹²⁵ Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.⁹²⁶

Challenge: Sensitive Unclassified 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.”⁹²⁷ The reports were regarded as “unclassified information vital to national security.”⁹²⁸ 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.⁹²⁹

Judge Ellis granted the government’s motion for a protective order.⁹³⁰

[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.⁹³¹

Judge Ellis rejected the government’s proposal that defense investigators and expert witnesses be pre-screened before information contained in the redacted

924. *Lindh*, 227 F. Supp. 2d at 571–72; E.D. Va. Docket Sheet, *supra* note 904; Ellis, *supra* note 907, at 1611; *see Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 900; Romero & Temple-Raston, *supra* note 900, at 12, 189–90.

925. Ellis, *supra* note 907, at 1611; *see Apologetic Lindh*, *supra* note 924; Romero & Temple-Raston, *supra* note 900, at 189.

926. *Lindh*, 227 F. Supp. 2d at 572; *see* www.bop.gov (noting a release date of May 23, 2019, reg. no. 45426-083).

927. *United States v. Lindh*, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002).

928. *Id.* at 742.

929. *Id.* at n.2.

Later in the case, Judge Ellis agreed with the government that a set of additional detainee reports did not need to be disclosed to the defense. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974284 (E.D. Va. June 17, 2002).

930. *Lindh*, 198 F. Supp. 2d at 744.

931. *Id.* at 742.

reports could be disclosed to them.⁹³² Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.⁹³³

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.⁹³⁴

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.”⁹³⁵

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.”⁹³⁶

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.⁹³⁷ It was stored in the court’s sensitive compartmented information facility (SCIF).⁹³⁸

Judge Ellis’s career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.⁹³⁹ The chambers has a rule requiring classified documents to be within eyesight at all times.⁹⁴⁰ Even a law clerk’s brief trip outside chambers requires taking the classified documents securely along.⁹⁴¹ But classified materials are *never* taken home.⁹⁴²

932. *Id.*

933. *Id.* at 742–43; *see id.* at 743 (noting that the “defendant will be at liberty to disclose information from the redacted interview reports to investigators and expert witnesses who are not pre-screened by, or known to, the government”).

934. *Id.* at 742–43.

935. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974184 (E.D. Va. May 6, 2002).

This type of court security officer is now known as a classified information security officer. *See* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013).

936. *Lindh*, 198 F. Supp. 2d at 743.

937. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

938. *Id.*; *see* Reagan, *supra* note 935, at 22–23 (describing SCIFs).

939. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

940. *Id.*

941. *Id.*

942. *Id.*

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.⁹⁴³ 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.⁹⁴⁴

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.⁹⁴⁵

Defense counsel submitted questions for each detainee to the firewall attorneys.⁹⁴⁶ The firewall attorneys could object to any questions, and the court would resolve any objections on sealed noticed filings.⁹⁴⁷ Approved questions were submitted to interrogators who interwove the questions into the interrogations.⁹⁴⁸ Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.⁹⁴⁹ Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.⁹⁵⁰

Judge Ellis monitored the procedure to ensure that it protected Lindh’s rights to a defense.⁹⁵¹

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.⁹⁵² To pro-

943. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1298601, at *1 (E.D. Va. May 30, 2002); Ellis, *supra* note 907, at 1611; *see* Masters, *supra* note 902; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

“Justice Department prosecutors . . . felt the Pentagon nearly had sabotaged the cases of Lindh and Zacarias Moussaoui . . . by blocking access to Guantanamo detainees who were potential witnesses. The Defense Department would not acknowledge any summons from a federal court directed to Guantanamo.” Bravin, *supra* note 905, at 121.

944. *Lindh*, 2002 WL 1298601, at *1–2; Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 907, at 1611–12; *see* Masters, *supra* note 902.

945. *Lindh*, 2002 WL 1298601, at *1 & n.1.

946. *Id.* at *1.

947. *Id.*

948. *Id.*

949. *Id.*

950. *Id.*

951. *Id.*; *see* Masters, *supra* note 902.

952. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 907, at 1613; *see* Jackman, *supra* note 900; Lewis, *supra* note 922; Mayer, *supra* note 899 (“The case was settled in a weekend-long flurry of negotiations that ended at 2 a.m. on the day that key evidence against Lindh was to be challenged in open court.”); Romero & Temple-Raston, *supra* note 900, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing).

The bombshell plea agreement, which startled even the judge, was announced before a packed courtroom awaiting the start of what was to be a crucial evidentiary hearing on whether statements Lindh made while in custody in Afghanistan—the ones I had advised the US

tect the witness by shielding the witness's identity, Judge Ellis worked with the classified information security officers and the U.S. Marshals Service to make adjustments to the courtroom.⁹⁵³ The courtroom was outfitted with special draperies and screens.⁹⁵⁴ 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.⁹⁵⁵

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.⁹⁵⁶ 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.⁹⁵⁷

Challenge: Religious Accommodation

On January 11, 2013, Judge Jane Magnus-Stinson in the Southern District of Indiana granted summary judgment to Lindh in a civil action challenging his warden's refusal to permit group prayer.⁹⁵⁸

His scant, nonviolent disciplinary history during his incarceration has merited him a classification of low security. He is allowed to engage in contact sports, play cards, and watch movies and television, including Muslim videos in the Arabic language. In this matter, he seeks permission to engage in one more activity: congregate prayer in accordance with his sincerely held religious beliefs.⁹⁵⁹

against soliciting without counsel—could be used against him at his trial—which I had also advised against.

Radack, *supra* note 899, at 61 (report by a government ethics attorney who claimed that she suffered retaliation for leaking to the news media an alleged coverup of the government's failure to follow ethical advice with respect to Lindh's interrogation).

953. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007; *see* Reagan, *supra* note 935, at 21–22 (providing information about classified information security officers).

954. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007; *see* Jackman, *supra* note 900; Lewis, *supra* note 922.

955. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 907, at 1612–13.

956. *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; Ellis, *supra* note 907, at 1613.

957. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 907, at 1613.

958. *Opinion, Lindh v. Warden*, No. 2:09-cv-215 (S.D. Ind. Jan. 11, 2013), D.E. 200 [hereinafter Jan. 11, 2013, S.D. Ind. Opinion], *available at* 2013 WL 139699; *see* *Opinion at 10, id.* (Feb. 3, 2012), D.E. 121 [hereinafter Feb. 3, 2012, S.D. Ind. Opinion], *available at* 2012 WL 379737 (finding “as a matter of law that daily group prayer is a religious exercise motivated by Mr. Lindh's sincerely held religious beliefs”).

959. Jan. 11, 2013, S.D. Ind. Opinion, *supra* note 958, at 1.

Judge Magnus-Stinson found that the warden's policy violated the Religious Freedom Restoration Act of 1993.⁹⁶⁰ She approved a stipulated award of \$160,607.52 in attorney fees and costs.⁹⁶¹

Lindh was not an original plaintiff in the case.⁹⁶² Of the two original plaintiffs in the June 18, 2009, complaint,⁹⁶³ one was released⁹⁶⁴ and the other was transferred from the prison in Terre Haute, Indiana, to another prison.⁹⁶⁵ Lindh was added by amendment on June 29, 2010.⁹⁶⁶

On April 10, 2013, Lindh filed a contempt motion challenging the warden's implementation of Judge Magnus-Stinson's decision.⁹⁶⁷ With Lindh appearing by videoconference, Judge Magnus-Stinson heard the matter on June 27.⁹⁶⁸ Rather than issue a sanction for contempt, Judge Magnus-Stinson issued an order on July 19 clarifying the warden's obligations to provide reasonable opportunities for group prayer.⁹⁶⁹ On August 7, Judge Magnus-Stinson approved a stipulated award of \$8,200 for attorney fees and costs.⁹⁷⁰

960. *Id.* at 30; see 42 U.S.C. § 2000bb to 2000bb-4 (2013).

961. Order, *Lindh*, No. 2:09-cv-215 (S.D. Ind. Apr. 9, 2013), D.E. 208; see Stipulation, *id.* (Apr. 8, 2013), D.E. 207.

962. Feb. 3, 2012, S.D. Ind. Opinion, *supra* note 958, at 6.

963. Complaint, *Arnaout v. Warden*, No. 2:09-cv-215 (S.D. Ind. June 18, 2009), D.E. 1 (complaint by Enaam Arnaout and Randall T. Royer, see *infra* "Paintball").

964. www.bop.gov (noting Arnaout's release on February 8, 2011, reg. no. 14504-424).

965. Order, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. May 26, 2010), D.E. 36 (dismissing Royer as a plaintiff because of his transfer to another prison); www.bop.gov (previously noting Royer's incarceration in Marion, Illinois; now noting Royer's incarceration in Hopewell, Virginia, and a release date of February 6, 2021; reg. no. 46812-083).

966. Amended Complaint, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. June 29, 2010), D.E. 40; Order, *id.* June 28, 2010), D.E. 39 (permitting amendment).

967. Motion, *Lindh v. Warden*, No. 2:09-cv-215 (S.D. Ind. Apr. 10, 2013), D.E. 209.

968. Minutes, *id.* (June 27, 2013), D.E. 226.

969. Order, *id.* (July 19, 2013), D.E. 227.

970. Order, *id.* (Aug. 7, 2013), D.E. 233.

Dirty Bomber

Padilla v. Rumsfeld (Michael B. Mukasey, S.D.N.Y.),
Padilla v. Hanft and Padilla v. Rumsfeld
(Henry F. Floyd, D.S.C.), and *United States*
v. Hassoun (Marcia G. Cooke, S.D. Fla.)

José Padilla was born in Brooklyn to Puerto Rican parents.⁹⁷¹ 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.⁹⁷²

Padilla was flown to Manhattan for detention and possible grand jury testimony.⁹⁷³ On June 10, at a press conference in Russia, Attorney General John Ash-

971. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002); see *United States v. Jayyousi*, 657 F.3d 1085, 1096 (11th Cir. 2011) (“they referred to Padilla as ‘the Puerto Rican’ because of his Puerto Rican descent”); Dan Eggen & Susan Schmidt, “*Dirty Bomb*” Plot Uncovered, *U.S. Says*, Wash. Post, June 11, 2002, at A1; James Risen & Philip Shenon, *U.S. Says It Halt-ed 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.

972. *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004); *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir. 2012); *Padilla v. Hanft*, 423 F.3d 386, 388–90 (4th Cir. 2005); *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003); *Padilla*, 233 F. Supp. 2d at 568–69, 571, 573; Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program, at 235–37 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], available at www.intelligence.senate.gov/study2014/sscistudy1.pdf; Michael B. Mukasey, *Commencement Address—May 10, 2009*, 88 N.C. L. Rev. 1, 4 (2009) (“Padilla was arrested when he landed on a warrant I had issued in New York, based on information contained in an affidavit. That information came in part from the harsh interrogation of Abu Zabaydah . . .”); see *Jayyousi*, 657 F.3d at 1094, 1101; see also Eggen & Schmidt, *supra* note 971; John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 Rev. Litig. 297, 304 (2008); Jonathan Hafetz, *Habeas Corpus After 9/11* 47, 73 (2011); Robert C. Herguth, *Former Chicagoan “Trained with the Enemy,” U.S. Says*, Chi. Sun Times, June 10, 2002, at 3; Donna Newman, *The Jose Padilla Habeas Case: A Modern Day Struggle to Preserve the Great Writ*, 10 N.Y. City L. Rev. 333, 333 (2007) [hereinafter *Modern Day Struggle*]; Donna R. Newman, *What the F— Is an “Enemy Combatant”?*, in *The Guantánamo Lawyers* 361, 361 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) [hereinafter *What the F—*]; H.L. Pohlman, *Terrorism and the Constitution* 76 (2008); Risen & Shenon, *supra* note 971; Larry Siems, *The Torture Report* 1–6 (2011) (“Five minutes before his flight from Zurich landed, then-U.S. District Court Judge Michael Mukasey signed a material witness warrant authorizing Padilla’s arrest.”); Ali H. Soufan, *The Black Banners* 407–08, 428 (2011); Wilgoren & Thomas, *supra* note 971.

973. *Padilla*, 542 U.S. at 431; *Padilla*, 678 F.3d at 751; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700 (“On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent Padilla.”); see Eggen & Schmidt, *supra* note 971; Gibbons, *supra* note 972, at 304.

croft 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.⁹⁷⁴ The detainee was Padilla, and the government had transferred him the previous day to the high-security Consolidated Naval Brig in Charleston, South Carolina.⁹⁷⁵ As a result of this transfer, Padilla was denied access to counsel.⁹⁷⁶

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.⁹⁷⁷ "[A material witness warrant] may not be used simply as a substitute for indefinite detention. When it was clear Padilla would not testify against his cohorts, he was transferred on order of the President to military custody as an unlawful combatant"⁹⁷⁸

As a result of Padilla's change in status from material witness to enemy combatant, the government vacated the warrant.⁹⁷⁹ Padilla's attorney filed a habeas

974. *Padilla*, 233 F. Supp. 2d at 572–73; see *Padilla*, 678 F.3d at 751; Eggen & Schmidt, *supra* note 971; Hafetz, *supra* note 972, at 47; Herguth, *supra* note 972; Newman, *What the F—*, *supra* note 972, at 362; Risen & Shenon, *supra* note 971; *US Announces Arrest of Alleged Al-Qaeda Terrorist*, Morning Edition (NPR radio broadcast June 10, 2002), available at www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=1144759&m=144759; see also Soufan, *supra* note 972, at 408 (reporting that the Attorney General was misinformed: "While Padilla was a committed terrorist set on trying to harm America, he was a brain transplant away from making a bomb, and there was no unfolding plot."); Clive Stafford Smith, *Eight O'Clock Ferry to the Windward Side* 49–80 (2007) (arguing that the alleged dirty bomb plot was "almost certainly a fantasy"). *But see* Terry McDermott & Josh Meyer, *The Hunt for KSM* 144 (2012) (reporting that Khalid Sheikh Mohammed "sent José Padilla, the hapless American son of Puerto Rican immigrants, back to the United States to research the possibility of building a dirty bomb and blowing up apartment buildings after filling them with gas."); *id.* at 187.

975. *Padilla*, 542 U.S. at 431–32; *Padilla*, 678 F.3d at 751; *Lebron*, 670 F.3d at 545; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 569; see Eggen & Schmidt, *supra* note 971; Gibbons, *supra* note 972, at 304–05; Pohlman, *supra* note 972, at 76–77; Risen & Shenon, *supra* note 971.

976. *Padilla*, 678 F.3d at 751; *Padilla*, 233 F. Supp. 2d at 574; see Newman, *Modern Day Struggle*, *supra* note 972, at 336.

977. *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; see Eggen & Schmidt, *supra* note 971; Gibbons, *supra* note 972, at 304–05; Risen & Shenon, *supra* note 971; see also Soufan, *supra* note 972, at 408 (noting that Judge Mukasey had signed the warrant).

Judge Mukasey had appointed counsel to represent Padilla in his material witness case:

In May 2002, when it seemed that the smell of the debris and smoke from the demise of the Twin Towers had just cleared, I received a call from the courtroom deputy to the Honorable Michael B. Mukasey, then chief judge of the U.S. District Court for the Southern District of New York. He asked me to appear in court the following week for an assignment representing a grand-jury material witness who was being held in connection with the grand jury sitting to investigate 9/11.

Newman, *What the F—*, *supra* note 972, at 361.

978. Mukasey, *supra* note 972, at 4 (footnote and paragraph break omitted).

979. *Padilla*, 542 U.S. at 432 n.3; *Padilla*, 233 F. Supp. 2d at 571; see Newman, *What the F—*, *supra* note 972, at 362.

corpus petition on his behalf.⁹⁸⁰ Judge Mukasey ruled that she had standing to do that as Padilla's next friend⁹⁸¹ and denied the government's motion to transfer the habeas case to the District of South Carolina.⁹⁸²

Judge Mukasey ruled that the President had the power to detain Padilla as an enemy combatant,⁹⁸³ but he also ruled that Padilla had a right to consult counsel and pursue a habeas corpus petition challenging the grounds for the detention.⁹⁸⁴ The government would have to show only "some evidence" to support its determination that Padilla was an enemy combatant.⁹⁸⁵ On reconsideration, Judge Mukasey upheld his original ruling on access to counsel.⁹⁸⁶ At the government's request, a month later, Judge Mukasey certified the issue for interlocutory appeal.⁹⁸⁷

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."⁹⁸⁸ The court ordered Padilla released from military custody,

980. *Padilla*, 542 U.S. at 432; *Lebron*, 670 F.3d at 545; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; Docket Sheet, *Padilla v. Rumsfeld*, No. 1:02-cv-4445 (S.D.N.Y. June 12, 2002) (D.E. 1); see Newman, *Modern Day Struggle*, *supra* note 972, at 333; Newman, *What the F—*, *supra* note 972, at 364–65; see also Gibbons, *supra* note 972, at 305; Hafetz, *supra* note 972, at 47; Pohlman, *supra* note 972, at 77; Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect*, Wash. Post, June 13, 2002, at A11.

981. *Padilla*, 233 F. Supp. 2d at 569, 575–78, 610; see Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, N.Y. Times, Dec. 5, 2002, at A24. The court of appeals affirmed. *Padilla*, 352 F.3d at 702–04, 724.

982. *Padilla*, 233 F. Supp. 2d at 569, 578–87, 610. The court of appeals affirmed. *Padilla*, 352 F.3d at 704–10, 724.

983. *Padilla*, 233 F. Supp. 2d at 569, 587–99, 610; see Pohlman, *supra* note 972, at 84–85; Weiser, *supra* note 981.

984. *Padilla*, 233 F. Supp. 2d at 569, 588, 599–605, 610; see Andrew G. Patel, *Accessing Padilla, in The Guantánamo Lawyers*, *supra* note 972, at 364, 364–65; Pohlman, *supra* note 972, at 84–85; Weiser, *supra* note 981.

985. *Padilla*, 233 F. Supp. 2d at 570, 605–10; see Pohlman, *supra* note 972, at 85; Weiser, *supra* note 981.

Later, in another case, the Supreme Court determined that the "some evidence" standard is too lenient. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (four-justice plurality opinion); *id.* at 540–41 (Justice Souter, joined by Justice Ginsburg, concurring in part, dissenting in part, and concurring in the judgment, rejecting the government's proposed "some evidence" standard).

986. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); see Pohlman, *supra* note 972, at 85–86.

987. *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.

988. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003); see Neil A. Lewis & William Glaberson, *U.S. Courts Reject Detention Policy in 2 Terror Cases*, N.Y. Times, Dec. 19, 2003, at A1 (reporting also that the U.S. Court of Appeals for the Ninth Circuit found judicial rights for Guantánamo Bay detainees); Patel, *supra* note 984, at 365; Pohlman, *supra* note 972, at 87–88.

and the court acknowledged that he could be held as a material witness or for criminal prosecution.⁹⁸⁹

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.⁹⁹⁰ 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.⁹⁹¹

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.⁹⁹² But Hamdi was apprehended in Afghanistan.⁹⁹³ No opinion was endorsed by a majority of the Court,⁹⁹⁴ 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 decision maker.⁹⁹⁵

Approximately four weeks before the Supreme Court issued its opinion in Padilla's case, the government released newly declassified information on Padilla.⁹⁹⁶ 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.⁹⁹⁷

989. *Padilla*, 352 F.3d at 699, 724.

990. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.); see Gibbons, *supra* note 972, at 305; Linda Greenhouse, *Access to Courts*, N.Y. Times, June 29, 2004, at A1; Pohlman, *supra* note 972, at 120.

991. *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 990.

992. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see Gibbons, *supra* note 972, at 303; Greenhouse, *supra* note 990; Pohlman, *supra* note 972, at 76, 120.

993. *Hamdi*, 542 U.S. at 510; see Gibbons, *supra* note 972, at 303; Greenhouse, *supra* note 990; Pohlman, *supra* note 972, at 86.

994. *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 972, at 120–21, 130.

995. *Hamdi*, 542 U.S. at 579–99 (Justice Thomas, dissenting); see Gibbons, *supra* note 972, at 303; Greenhouse, *supra* note 990; Pohlman, *supra* note 972, at 121.

Hamdi was released to his home in Saudi Arabia in October 2004 without charge. See Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 156 (2006).

996. See Eric Lichtblau, *U.S. Spells Out Dangers Posed by Plot Suspect*, N.Y. Times, June 2, 2004, at A1; Pohlman, *supra* note 972, at 119–20.

997. SSCI Executive Summary, *supra* note 972, at 237; Lichtblau, *supra* note 996.

“The plots associated with Jose Padilla were assessed by the Intelligence Community to be infeasible.” SSCI Executive Summary, *supra* note 972, at 225; see *Two Case Studies*, N.Y. Times, Dec.

On July 2, 2004, Padilla's New York attorney filed a habeas corpus petition on his behalf in the District of South Carolina.⁹⁹⁸ The court assigned the case to Judge Henry F. Floyd.⁹⁹⁹ On February 28, 2005, Judge Floyd declared Padilla's military detention improper.¹⁰⁰⁰ 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.¹⁰⁰¹

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.¹⁰⁰² The case had been assigned to Judge Marcia G. Cooke.¹⁰⁰³

10, 2014, at A1 ("Despite many administration statements to the contrary, C.I.A. officials never took Mr. Padilla's dirty bomb plot seriously.").

998. Petition, *Padilla v. Hanft*, No. 2:04-cv-2221 (D.S.C. July 2, 2004), D.E. 1; see *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir. 2012); *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005); see *Gibbons*, *supra* note 972, at 305; *Hafetz*, *supra* note 972, at 144; *Pohlman*, *supra* note 972, at 131.

999. 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); see *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006) (dismissing the petition), *rev'd sub. nom.* *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc, holding that the president can detain a legal resident subject to judicial review of his status as an enemy combatant), *vacated sub. nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (ordering the appeal dismissed as moot in light of a February 26, 2009, indictment against the petitioner in the Central District of Illinois); see also Docket Sheet, *United States v. Al-Marri*, No. 1:09-cr-10030 (N.D. Ill. Feb. 26, 2009) (noting a plea agreement on April 30, 2009, and a sentence of eight years and four months); www.bop.gov (noting a release date of January 16, 2015, reg. no. 12194-026); *Al-Marri v. Davis*, 714 F.3d 1183 (10th Cir.) (affirming the denial of al-Marri's habeas petition for confinement credits), *cert. denied*, 571 U.S. ___, 134 S. Ct. 295 (2013).

Judge Floyd was elevated to the court of appeals on October 5, 2011. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

1000. *Padilla*, 389 F. Supp. 2d 678; see *Hafetz*, *supra* note 972, at 144; Neil A. Lewis, *Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant*, N.Y. Times, Mar. 1, 2005, at A14; *Pohlman*, *supra* note 972, at 131.

1001. *Padilla*, 423 F.3d 386; see Pub. L. No. 107-40, 115 Stat. 224 (2001); see *Gibbons*, *supra* note 972, at 306; *Hafetz*, *supra* note 972, at 144-45; Neil A. Lewis, *Court Gives Bush Right to Detain U.S. Combatant*, N.Y. Times, Sept. 10, 2005, at A1; *Pohlman*, *supra* note 972, at 132.

1002. Superseding Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 17, 2005), D.E. 141 [hereinafter Nov. 17, 2005, Indictment]; Docket Sheet, *id.* (Jan. 8, 2004) [hereinafter S.D. Fla. *Hassoun* Docket Sheet]; *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 8 (2008) [hereinafter *Trying Cases*] (remarks by Judge Marcia G. Cooke); see *Gibbons*, *supra* note 972, at 306; *Hafetz*, *supra* note 972, at 145; Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y.

The court of appeals denied the government's motion to transfer Padilla to civilian authority in Florida.¹⁰⁰⁴

[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.¹⁰⁰⁵

The Supreme Court, however, granted the government's request to transfer Padilla.¹⁰⁰⁶ In light of Padilla's removal from military detention, the court later denied his petition for a writ of certiorari.¹⁰⁰⁷

First indicted on January 8, 2004, Adham Amin Hassoun was a Lebanese-born Palestinian charged with raising money and recruiting persons for jihad training.¹⁰⁰⁸ He and Padilla became friends when they both attended a Fort Lauderdale mosque in the 1990s.¹⁰⁰⁹ Added by superseding indictment on September 16, 2004, Mohamed Hesham Youssef was charged as one of Hassoun's

Times, Nov. 23, 2005, at A1; Pohlman, *supra* note 972, at 131; Jay Weaver, *Padilla to Face Terror Charges Here*, Miami Herald, Nov. 23, 2005, at 1A; *see also* Mukasey, *supra* note 972, at 6 ("the dirty bomb plot . . . couldn't be proved in a conventional trial where a defendant has access under conventional discovery rules not only to what evidence the government has but also how it is gathered").

The *Miami Herald* reported over a year earlier that Padilla might be indicted in Florida. Jay Weaver, *Padilla Could Be Charged in Miami*, Miami Herald, June 30, 2004, at 1A.

1003. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1002; *Trying Cases*, *supra* note 1002, at 8 (remarks by Judge Cooke); *see* Hafetz, *supra* note 972, at 146.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on October 8, 2009.

1004. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005); *see* Hafetz, *supra* note 972, at 145–46; Neil A. Lewis, *Court Refuses U.S. Bid to Shift Terror Suspect*, N.Y. Times, Dec. 22, 2005, at A1; Pohlman, *supra* note 972, at 132.

1005. *Padilla*, 432 F.3d at 584.

1006. *Hanft v. Padilla*, 546 U.S. 1084 (2006); *see* Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. Times, Jan. 5, 2006; Hafetz, *supra* note 972, at 146; Pohlman, *supra* note 972, at 133; Jay Weaver, *Dirty-Bomb Suspect Charged as Civilian*, Miami Herald, Jan. 6, 2006, at 5B ("Padilla was flown in a military jet to Homestead Air Base, then by helicopter to Watson Island, before a convoy of U.S. marshals escorted him to the Miami Federal Detention Center for his initial court hearing.").

1007. *Padilla v. Hanft*, 547 U.S. 1062 (2006); *see* Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. Times, Apr. 4, 2006, at A1; Hafetz, *supra* note 972, at 146; Pohlman, *supra* note 972, at 133.

1008. Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 8, 2004), D.E. 3; *Trying Cases*, *supra* note 1002, at 8 (remarks by Judge Cooke); *see* Abby Goodnough, *After 5 Years, Padilla Goes on Trial in Terror Case*, N.Y. Times, May 15, 2007, at A14; Jay Weaver, *2 Men Facing Terror Charges*, Miami Herald, Sept. 17, 2004, at 1B.

1009. *See* Weaver, *supra* note 1002.

recruits; he was in custody in Egypt on other charges.¹⁰¹⁰ Kifah Wael Jayyousi and Kassem Daher were named in a sealed material support complaint filed on December 1, 2004.¹⁰¹¹ The complaint was unsealed on March 30, 2005, when Jayyousi was apprehended in Detroit on his return from Qatar.¹⁰¹² Jayyousi was born in Jordan;¹⁰¹³ Daher was a Canadian citizen in overseas custody.¹⁰¹⁴ Jayyousi and Daher were added to the pending indictment on April 7, 2005.¹⁰¹⁵ Youssef and Daher remain fugitives.¹⁰¹⁶

Even after Padilla was added to the indictment, there was no charge pertaining to a dirty bomb.¹⁰¹⁷ The dirty bomb issue never arose at all in the case.¹⁰¹⁸ But there was the following allegation: “On or about July 24, 2000, Padilla filled out a ‘Mujahideen Data Form’ in preparation for violent jihad training in Afghanistan.”¹⁰¹⁹ The government claimed that it was found in Afghanistan among dozens of other applications late in 2001.¹⁰²⁰

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.¹⁰²¹ Judge Cooke denied the

1010. Second Superseding Indictment, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 16, 2004), D.E. 66; see Weaver, *supra* note 1008.

1011. Sealed Criminal Complaint, *United States v. Jayyousi*, No. 1:04-mj-3565 (S.D. Fla. Dec. 1, 2004), D.E. 3; Docket Sheet, *id.* (Apr. 4, 2005); see *Trying Cases*, *supra* note 1002, at 8 (remarks by Judge Cooke).

1012. See Hannah Sampson, *2 Men Held on Terror Charges*, *Miami Herald*, Mar. 30, 2005, at 9B.

1013. See Goodnough, *supra* note 1008.

1014. See Sampson, *supra* note 1012; Weaver, *supra* note 1006.

1015. Nov. 17, 2005, Indictment, *supra* note 1002; see Jack Dolan, *Third Suspect Faces Terror Charges*, *Miami Herald*, Apr. 9, 2005, at 4B.

1016. *United States v. Jayyousi*, 657 F.3d 1085, 1091 n.1 (11th Cir. 2011); Order, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 23, 2006), D.E. 224 (transferring Youssef and Daher to the court’s fugitive case list).

1017. See *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); see also Pohlman, *supra* note 972, at 133; Weaver, *supra* note 1002.

1018. *Trying Cases*, *supra* note 1002, at 7 (remarks by Judge Cooke); Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1019. Nov. 17, 2005, Indictment, *supra* note 1002; see *Jayyousi*, 657 F.3d at 1093; Weaver, *supra* note 1006.

1020. See Jay Weaver, *We Found al Qaeda Inquiry, U.S. Says*, *Miami Herald*, Jan. 13, 2006, at 2B; see also *Jayyousi*, 657 F.3d at 1093.

1021. June 15, 2005, Joint Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. June 15, 2005), D.E. 120; see Jay Weaver, *Two Men Claim Prison Abuse*, *Miami Herald*, June 18, 2005, at 1B.

defendants' motion to be relieved of solitary confinement, but she said she would "hold the government's feet to the fire."¹⁰²²

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.¹⁰²³

On August 18, 2006, Judge Cooke dismissed the first count of the eleven-count indictment—a charge that the defendants conspired to murder, kidnap, and maim persons in a foreign country—as impermissibly multiplicitous of other counts.¹⁰²⁴ The court of appeals reversed.¹⁰²⁵

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.¹⁰²⁶

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.¹⁰²⁷

Jury selection began on April 16, 2007.¹⁰²⁸ Judge Cooke had decided that the court should send out 3,000 jury duty letters for the trial.¹⁰²⁹ Jurors were selected from a pool of approximately 300.¹⁰³⁰ Voir dire lasted four weeks.¹⁰³¹ Judge Cooke

1022. Sept. 21, 2005, Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 21, 2005), D.E. 135; see Jay Weaver, *Judge Backs Confinement of Two Terror Suspects*, Miami Herald, Sept. 17, 2005, at 3B.

1023. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006), D.E. 185; see Weaver, *supra* note 1006.

1024. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Aug. 18, 2006), D.E. 535, available at 2006 WL 2415946; see Jay Weaver, *Padilla Terror Count Tossed*, Miami Herald, Aug. 22, 2006, at 1B.

1025. *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007); see *Jayyousi*, 657 F.3d at 1091; Jay Weaver, *Key Charge Against Padilla Restored*, Miami Herald, Jan. 31, 2007, at 1B.

1026. Deborah Sontag, *In Padilla Wiretaps, Murky View of "Jihad" Case*, N.Y. Times, Jan. 4, 2007, at A1; see Jay Weaver, *Padilla Lawyers Blasted for Wiretap Leak*, Miami Herald, Jan. 23, 2007, at 5B.

1027. See Jay Weaver, *Judge Scolds Padilla's Lawyers for Leak*, Miami Herald, Jan. 25, 2007, at 6B.

1028. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1002; *Jayyousi*, 657 F.3d at 1091; see Jay Weaver, *Padilla Jury Picking Could Last 3 Weeks*, Miami Herald, Apr. 17, 2007, at 7B.

1029. *Trying Cases*, *supra* note 1002, at 10 (remarks by Judge Cooke); see *3,000 in Jury Pool for Terror Trial*, Miami Herald, Oct. 27, 2006.

1030. *Trying Cases*, *supra* note 1002, at 10 (remarks by Judge Cooke); see Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. Times, May 9, 2007, at A18; Weaver, *supra* note 1028.

1031. See Goodnough, *supra* note 1030.

decided to use a jury questionnaire.¹⁰³² On May 8, 2007, the jury was selected from a culled pool of eighty-eight potential jurors.¹⁰³³

After about three weeks of testimony, it was discovered that one of the jurors was not a U.S. citizen.¹⁰³⁴ The jury summons was meant for his son, who had the same name.¹⁰³⁵ Another juror was excused because of injuries suffered when he tried to prevent a break-in of his daughter's car.¹⁰³⁶ 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.¹⁰³⁷

The jury convicted all three defendants on August 16, 2007, one day after beginning deliberations.¹⁰³⁸ Three months later, Hassoun attempted suicide.¹⁰³⁹ On January 22, 2008, Judge Cooke sentenced Padilla to seventeen years and four months, Hassoun to fifteen years and eight months, and Jayyousi to twelve years and eight months.¹⁰⁴⁰ The court of appeals, over a dissent, affirmed the convictions but remanded Padilla's case for a harsher sentence.¹⁰⁴¹ On September 9, 2014, Judge Cooke resentenced Padilla to twenty-one years.¹⁰⁴²

1032. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009; see Jay Weaver, *Padilla Terror Trial Is Ready to Unfold*, Miami Herald, Apr. 15, 2007, at 1A.

1033. See Jay Weaver, *Angry Lawyers Finally Pick Jury*, Miami Herald, May 9, 2007, at 1B.

1034. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1035. *Id.*

1036. *Id.*

1037. *Id.*

1038. *United States v. Jayyousi*, 657 F.3d 1085, 1091–92 (11th Cir. 2011); see *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); see also Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. Times, Aug. 17, 2007, at A1; Hafetz, *supra* note 972, at 146; Pohlman, *supra* note 972, at 133; Jay Weaver & Larry Lebowitz, *Miami Jury Convicts Padilla*, Miami Herald, Aug. 17, 2007, at 1A; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, Wash. Post, Aug. 17, 2007, at A1.

1039. See Jay Weaver, *Padilla Codefendant Tries to Kill Himself*, Miami Herald, Dec. 4, 2007, at 5B.

1040. *Jayyousi*, 657 F.3d at 1092; S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1002; see Hafetz, *supra* note 972, at 146; Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. Times, Jan. 23, 2008, at A14; Jay Weaver, *Padilla Gets 17 Years in "Jihad" Conspiracy*, Miami Herald, Jan. 23, 2008, at 1A; Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years*, Wash. Post, Jan. 23, 2008, at A3.

1041. *Jayyousi*, 657 F.3d at 1119 (opinion by Circuit Judge Joel F. Dubina, joined by Circuit Judge William H. Pryor, Jr.), *cert. denied*, 567 U.S. ___, 133 S. Ct. 29 (petition by Padilla), 567 U.S. ___, 133 S. Ct. 29 (petition by Hassoun), and 567 U.S. ___, 133 S. Ct. 29 (2012) (petition by Jayyousi); see *id.* at 1119–35 (dissenting opinion by Circuit Judge Rosemary Barkett, who would have suppressed Padilla's statements before he was read his *Miranda* rights, who would have suppressed lay opinion testimony, and who determined that Padilla's sentence was reasonable); see also www.bop.gov (noting release dates of September 15, 2017, for Jayyousi, reg. no. 39551-039, and October 10, 2017, for Hassoun, reg. no. 72433-004); *Padilla*, 678 F.3d at 751; Lizette Alvarez, *Sentence for Terrorist Is Too Short, Court Rules*, N.Y. Times, Sept. 20, 2011, at A12; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 521–24 (2014).

1042. Amended Judgment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 9, 2014), D.E. 1458; Transcript at 54–55, *id.* (Sept. 9, 2014, filed Dec. 24, 2014), D.E. 1459 ("credit for time served in civilian custody only"); see www.bop.gov (noting a release date of August 6, 2025,

During his criminal prosecution in Florida, Padilla filed civil suits challenging his conditions of confinement while designated an enemy combatant. On February 17, 2011, Judge Richard Mark Gergel dismissed a 2007 action for nominal damages that Padilla and his mother filed in the District of South Carolina against the government.¹⁰⁴³ The court originally assigned the action to Judge Floyd, but the action was transferred to Judge Gergel when he joined the bench.¹⁰⁴⁴ The court of appeals affirmed on January 23, 2012: “The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages.”¹⁰⁴⁵

On January 4, 2008, Padilla and his mother filed an action against Boalt Hall law professor John Yoo, claiming that mistreatment of Padilla while in custody resulted from improperly crafted legal opinions that Yoo wrote when he worked for the Justice Department’s Office of Legal Counsel.¹⁰⁴⁶ The court assigned the case to Judge Jeffrey S. White,¹⁰⁴⁷ who denied Yoo’s motion to dismiss.¹⁰⁴⁸ The court of appeals, however, determined that Professor Yoo was entitled to qualified immunity, because the rights of suspected terrorists held in military detention as enemy combatants were not beyond debate, and it was not clearly established at the time that Padilla’s treatment qualified as torture.¹⁰⁴⁹

Challenge: Attorney–Client Contacts

Padilla was transferred from New York to South Carolina without notice to his attorney.¹⁰⁵⁰ Once Padilla was designated an enemy combatant, the government denied him access to counsel, arguing that access to counsel would interfere with

reg. no. 20796-424); see also Jay Weaver, *Terrorist Recruit Gets Tougher Sentence*, Miami Herald, Sept. 10, 2014, at 1B.

1043. *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011); see *Padilla*, 678 F.3d at 755–56; see also *Judge Tosses Out Padilla Torture Suit*, Wash. Post, Feb. 18, 2011, at A2; Siems, *supra* note 972, at 1–6 (also describing Judge Gergel’s hearing).

1044. Docket Sheet, *Padilla v. Rumsfeld*, No. 2:07-cv-410 (D.S.C. Feb. 9, 2007) (noting a transfer on Aug. 18, 2010); Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting the judge’s commission on August 9, 2010).

1045. *Lebron v. Rumsfeld*, 670 F.3d 540, 547 (4th Cir.), *cert. denied*, 567 U.S. ____, 132 S. Ct. 2751 (2012); see *Padilla*, 678 F.3d at 756–57.

1046. Complaint, *Padilla v. Yoo*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008), D.E. 1; see Amended Complaint, *id.* (June 2, 2008), D.E. 22; see also *Padilla*, 678 F.3d at 751–54.

1047. Docket Sheet, *Padilla*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008).

1048. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); *Padilla*, 678 F.3d at 754–55; see Adam Liptak, *Padilla Sues U.S. Lawyer Over Detention*, N.Y. Times, Jan. 5, 2008, at A9.

1049. *Padilla*, 678 F.3d at 750; see *California: Court Throws Out Suit Against Bush Lawyer*, N.Y. Times, May 3, 2012, at A20; Erwin Chemerinsky, *The Case Against the Supreme Court* 215–17 (2014); Howard Mintz, *Court Rules for UC Professor in Torture Lawsuit*, San Jose Mercury News, May 3, 2012, at 6B.

1050. See Chris Hedges, *Speaking for Terror Suspect, and for the Constitution*, N.Y. Times, Feb. 11, 2003, at B2.

Padilla's interrogation and that Padilla might use contacts with counsel to communicate with other terrorists.¹⁰⁵¹ Judge Mukasey ruled this restriction improper.¹⁰⁵²

[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.¹⁰⁵³

Judge Mukasey characterized concerns about using the attorney as a communication conduit to terrorists "gossamer speculation."¹⁰⁵⁴ "[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."¹⁰⁵⁵

Unwilling to allow Padilla access to counsel, the government filed a motion to reconsider, violating local rules by filing the motion late and submitting a supporting affidavit without leave of court.¹⁰⁵⁶ 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.¹⁰⁵⁷ Judge Mukasey was not persuaded.¹⁰⁵⁸

Because the court of appeals ordered Padilla released, it did not reach the issue of his right to counsel, and the government continued to deny him counsel access until his case was pending before the Supreme Court, at which time the government argued that that legal issue was moot.¹⁰⁵⁹

In Florida, Hassoun and Jayyousi complained of insufficient access to counsel; Judge Cooke ordered that they be permitted two fifteen-minute telephone calls with their attorneys each week.¹⁰⁶⁰ "During these legal telephone calls the [Federal Detention Center] officials shall stay a reasonable distance away from the Defendant to allow for sufficient privacy."¹⁰⁶¹ As trial approached, Judge Cooke

1051. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

1052. *Id.* at 569, 599–605, 610; see Weiser, *supra* note 981.

1053. Padilla, 233 F. Supp. 2d at 603.

1054. *Id.* at 604.

1055. *Id.*

1056. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 43–49 (S.D.N.Y. 2003).

1057. *Id.* at 43.

1058. *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.

1059. See Patel, *supra* note 984, at 365–65.

1060. June 15, 2005, Joint Motion, *supra* note 1021.

1061. Sept. 21, 2005, Order, *supra* note 1022.

ordered the detention center to provide a bigger conference table for meetings between the defendants and their attorneys.¹⁰⁶²

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."¹⁰⁶³

Special administrative measures for Padilla's detention (SAMs) made his psychiatric evaluation difficult,¹⁰⁶⁴ so Judge Cooke had the evaluation conducted in her courtroom.¹⁰⁶⁵ Judge Cooke was not present for the evaluation.¹⁰⁶⁶

Judge Cooke found Padilla competent to stand trial.¹⁰⁶⁷

For Padilla's scheduled December 3, 2012, resentencing, Padilla was transferred from the Supermax facility in Florence, Colorado, to Florida.¹⁰⁶⁸ Padilla's attorney requested a delay in sentencing for the benefit of Padilla's mental health.¹⁰⁶⁹ "While in Florence, Jose's family, who are of limited means, only have been able to visit him on one occasion. . . . The undersigned is clearly concerned about Jose's mental health and believes that multiple family visits, prior to the resentencing, will be beneficial to his mental health"¹⁰⁷⁰ Judge Cooke delayed sentencing until April 8, 2013,¹⁰⁷¹ on which day two sealed docket entries were entered in the case.¹⁰⁷² Padilla was resentenced on September 9, 2014.¹⁰⁷³

1062. See Jay Weaver, *Padilla Judge: I Don't Want to Run a Prison*, Miami Herald, Feb. 4, 2006, at 1B.

1063. Motion for Mental Competency Hearing, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Dec. 13, 2006), D.E. 716; see Deborah Sontag, *Federal Judge Is Asked to Decide if Padilla Is Competent for Trial*, N.Y. Times, Dec. 14, 2006, at A24; Jay Weaver, *Terror Suspect to Undergo Mental Testing*, Miami Herald, Dec. 19, 2006, at 4B.

1064. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1065. *Id.*; see Jay Weaver, *Padilla Mental Evaluation to Be Done in Court*, Miami Herald, Dec. 22, 2006, at 5B.

1066. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1067. Competency Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 1, 2007), D.E. 889, available at 2007 WL 610175; see Deborah Sontag, *U.S. Judge Finds Padilla Competent to Face Trial*, N.Y. Times, Mar. 1, 2007, at A11; Jay Weaver, *Judge Rules Padilla Fit for Trial*, Miami Herald, Mar. 1, 2007, at 1B; Peter Whoriskey, *Judge Rules Padilla Is Competent to Stand Trial*, Wash. Post, Mar. 1, 2007, at A3.

1068. See Resentencing Motion at 2, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 6, 2012), D.E. 1415.

1069. *Id.* at 1–4; Transcript, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 28, 2012, filed Dec. 20, 2012), D.E. 1429; see Transcript at 2–3, *id.* (Feb. 12, 2014, filed Feb. 24, 2014), D.E. 1441.

1070. Resentencing Motion, *supra* note 1068, at 2–3.

1071. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 28, 2013), D.E. 1431.

1072. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1002.

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.¹⁰⁷⁴ Judge Mukasey reviewed the classified declaration to assess the validity of the government's denial of Padilla's access to counsel.¹⁰⁷⁵ 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.¹⁰⁷⁶ The classified declaration did not refer to conduct by Padilla not described in the redacted declaration.¹⁰⁷⁷

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.¹⁰⁷⁸

The government also presented in camera an ex parte unredacted declaration to support its motion to reconsider Judge Mukasey's granting Padilla access to counsel.¹⁰⁷⁹ The court of appeals reviewed both unredacted declarations, but it did not rely on them.¹⁰⁸⁰

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.¹⁰⁸¹ None was.¹⁰⁸² Much of the information that was classified during the district court case, such as statements made while Padilla was designated an enemy combatant, had been declassified by the time of the appeal.¹⁰⁸³ Hassoun's appellate brief included some still-classified information.¹⁰⁸⁴

1073. Amended Judgment, *supra* note 1042; see Transcript, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Apr. 28, 2014, filed May 8, 2014), D.E. 1448 (discussing the review of classified discovery in advance of sentencing).

1074. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 569–70, 572–73, 604–10 (S.D.N.Y. 2002); see Benjamin Weiser, *Lawyers for Detainee Ask Judge Not to Review Classified Papers*, N.Y. Times, Oct. 24, 2002, at A15.

1075. *Padilla*, 233 F. Supp. 2d at 604.

1076. *Id.* at 609.

1077. *Id.*

1078. *Id.* at 608–10.

1079. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

1080. *Padilla v. Rumsfeld*, 352 F.3d 695, 701 n.4 (2d Cir. 2003).

1081. Docket Sheet, *United States v. Jayyousi*, No. 08-10494 (11th Cir. Feb. 4, 2008).

1082. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 19, 2010.

1083. *Id.*

1084. *Id.*

Challenge: Witness Security

To show a chain of custody for Padilla's alleged Mujahideen Data Form, the government offered testimony from the CIA agent who found it.¹⁰⁸⁵ The government asked that the witness's identity be protected by use of (1) a pseudonym; (2) light disguise (which "may involve the witness wearing a wig, eyeglasses or minor facial hair"); (3) a separate entrance; (4) a prohibition on sketch artists "recording the witness' likeness"; and (5) a prohibition on "questioning the witness in a manner that would expose either his classified identity, the classified identities of other covert CIA personnel, or the specific location of the covert CIA site in Quandahar, Afghanistan where the witness worked."¹⁰⁸⁶

At trial, the witness wore black-rimmed glasses and a closely cropped beard.¹⁰⁸⁷ He came to the courtroom from the basement by way of the prisoner elevator.¹⁰⁸⁸

Challenge: Court Security

For Padilla's Miami trial, federal deputy marshals were brought in from around the country.¹⁰⁸⁹ An extra metal detector was set up outside Judge Cooke's courtroom.¹⁰⁹⁰

Challenge: Jury Security

To shield potential jurors from the public during jury selection, the court erected a screen in the courthouse lobby.¹⁰⁹¹ The jury was semi-sequestered.¹⁰⁹² Their identities were known to the court and the parties, but identifying information was not presented in open court or otherwise made public.¹⁰⁹³ 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.¹⁰⁹⁴ Instead of going their own way for lunch, they always ate together.¹⁰⁹⁵ Once a week or so, the deputy marshals took them out for lunch.¹⁰⁹⁶

1085. Motion in Limine, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 22, 2007), D.E. 928.

1086. *Id.*; see Jay Weaver, *Padilla Trial CIA Witness May Testify in Disguise*, Miami Herald, Mar. 22, 2007.

1087. See Jay Weaver, "Secret Agent" Testifies about Padilla Document, Miami Herald, May 16, 2007, at 3A.

1088. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1089. See Goodnough, *supra* note 1008.

1090. See Weaver, *supra* note 1028.

1091. See *id.*

1092. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1093. *Id.*

1094. *Id.*

1095. *Id.*

1096. *Id.*

Restrooms on the courtroom's floor were reserved for use by jurors and court staff only.¹⁰⁹⁷ 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.¹⁰⁹⁸

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.¹⁰⁹⁹ 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.¹¹⁰⁰ Judge Floyd sits in Spartanburg, but he anticipated a possible evidentiary hearing at the larger courthouse in Charleston, about 200 miles away.¹¹⁰¹ For this reason, a courtroom deputy and a court reporter there obtained security clearances.¹¹⁰² As it happened, oral arguments were held in Spartanburg, and they did not refer to classified information.¹¹⁰³

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.¹¹⁰⁴

Southern District of Florida

All defense attorneys in the criminal case received security clearances.¹¹⁰⁵ There was already a SCIF in the basement of the courthouse, and defense attorneys could review classified information in this room.¹¹⁰⁶

More than two years after Padilla's indictment, Judge Cooke granted him access to classified evidence created during his military confinement.¹¹⁰⁷ Although it is common to grant defense attorneys access to classified evidence relevant to a prosecution, it is very unusual for courts to grant such access to terrorism defendants. Both Judge Cooke and defense attorneys viewed classified videos of Padilla's interrogation in the basement SCIF.¹¹⁰⁸

1097. *Id.*

1098. *Id.*

1099. Interview with Hon. Henry F. Floyd, Nov. 19, 2009.

1100. *Id.*

1101. *Id.*

1102. *Id.*

1103. *Id.*

1104. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1105. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1106. *Id.*

1107. Order, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. July 5, 2006), D.E. 464; see *Judge Allows Padilla to See Secrets*, Wash. Post, July 14, 2006, at A12.

1108. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

For Padilla's 2014 resentencing, defense counsel planned to use classified evidence, and the government agreed to "accommodate defense counsel's requests by coordinating with the government agencies who own the classified information the defense seeks to use."¹¹⁰⁹

All of Judge Cooke's staff received security clearances for this case.¹¹¹⁰ The last of her cleared law clerks left in 2009, but her permanent staff—her assistant, courtroom deputy, and court reporter—all retained top secret clearances.¹¹¹¹ During this case, Judge Cooke did not use interns, because they would not have security clearances.¹¹¹²

Challenge: FISA Evidence

FISA warrants resulted in evidence against each of the defendants.¹¹¹³ On February 14, 2006, Hassoun moved the court

to undertake a careful review of all applications for electronic surveillance of defendant Hassoun conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as well as applications for such surveillance of any third-party target which intercepted defendant, and based upon that review, disclose the applications [and] orders to the defense, hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and, as [a] result, suppress all intercepts of defendant Hassoun derived from illegally authorized FISA surveillance.¹¹¹⁴

Judge Cooke referred the matter to Magistrate Judge Stephen T. Brown,¹¹¹⁵ 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."¹¹¹⁶ 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."¹¹¹⁷ When she was not looking at

1109. Joint Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. July 7, 2014), D.E. 1450.

1110. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1111. *Id.*

1112. *Id.*

1113. *Trying Cases*, *supra* note 1002, at 8 (remarks by Judge Cooke); Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1114. Hassoun FISA Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 13, 2006), D.E. 200.

1115. FISA Order, *id.* (Apr. 4, 2007), D.E. 954, *available at* 2007 WL 1068127.

1116. Report and Recommendation at 3, *id.* (Dec. 15, 2006), D.E. 727, *available at* 2007 WL 1068127.

1117. FISA Order, *supra* note 1115.

them, Judge Cooke stored the warrant applications in an approved safe in her chambers.¹¹¹⁸

Judge Cooke was also called upon to review an evidentiary substitute for classified evidence, as provided by the Classified Information Procedures Act (CIPA).¹¹¹⁹ An agent of the intelligence agency with authority over the evidence brought the original evidence to the classified information security officer, who delivered it to Judge Cooke in chambers for her private review in her office while the agent and the security officer waited outside her door.¹¹²⁰

1118. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1119. *Id.*; see 18 U.S.C. app. 3 (2013) (text of CIPA); Reagan, *supra* note 1104 (discussing CIPA).

1120. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011; see Reagan, *supra* note 1104, at 21–22 (providing information about classified information security officers).

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.¹¹²¹ The men—all American citizens—were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.¹¹²² The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.¹¹²³ 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.¹¹²⁴

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.¹¹²⁵ Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.¹¹²⁶ In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yasein Taher, Mukhtar al-Bakri, Shafal Mosed, and Faysal Galab.¹¹²⁷

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.¹¹²⁸ The

1121. See *Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) [hereinafter *Sleeper Cell*], available at www.pbs.org/wgbh/pages/frontline/shows/sleeper/; Michael Powell, *No Choice but Guilty*, Wash. Post, July 29, 2003, at A1; Matthew Purdy & Lowell Bergman, *Where the Trail Led*, N.Y. Times, Oct. 12, 2003, at 11; Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror* 153 (2007).

1122. See *United States v. Goba*, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Sleeper Cell*, *supra* note 1121; Powell, *supra* note 1121; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, N.Y. Times, May 20, 2003, at A17; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 4.

1123. See *Sleeper Cell*, *supra* note 1121; Powell, *supra* note 1121; Purdy & Bergman, *supra* note 1121.

1124. See Powell, *supra* note 1121; Purdy, *supra* note 1122; Purdy & Bergman, *supra* note 1121; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. Times, Oct. 22, 2002, at A19.

1125. See *Sleeper Cell*, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Ali H. Soufan, *The Black Banners* 507 (2011); Temple-Raston, *supra* note 1121, at 31–32, 44–46.

1126. See Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 37.

1127. See Temple-Raston, *supra* note 1121, at 44–45.

1128. See Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 81–87.

“Dossari had a certain touch with the youth, able to make radical ideology approachable. He could give an incendiary sermon calling for jihad to avenge the repression of Muslims, then have lunch at Fuddrucker's and go sightseeing at Niagara Falls.” Jess Bravin, *The Terror Courts* 260 (2013).

sermon, and Derwish's encouragement, persuaded the "Lackawanna Six" to travel to Afghanistan to train for jihad.¹¹²⁹ They told their families and friends, however, that they were going to Pakistan for religious study.¹¹³⁰

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28.¹¹³¹ Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.¹¹³² 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.¹¹³³

Shortly after arriving, the men began to look for opportunities to leave.¹¹³⁴ "The six made excuses about needing to go home to make arrangements for their wives."¹¹³⁵ Alwan had an exit interview with Osama Bin Laden, who asked about the willingness of other Muslims with U.S. passports to do martyrdom missions.¹¹³⁶ Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June; Goba returned in August.¹¹³⁷

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.¹¹³⁸ Bahraini authorities arrested him from his wedding bed on September 9.¹¹³⁹ The other five men were arrested back home on September 13 and 14, on a criminal complaint for material support of terrorism.¹¹⁴⁰

1129. See *Sleeper Cell*, *supra* note 1121; Chris Heffelfinger, *Radical Islam in America* 115 (2011); Temple-Raston, *supra* note 1121, at 88–89.

1130. See *Sleeper Cell*, *supra* note 1121; Powell, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 89.

1131. *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 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 94.

1132. *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 1121; Powell, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 94.

1133. See Powell, *supra* note 1121; Temple-Raston, *supra* note 1121, at 88–89, 99–109; see also Gordon Cucullu, *Inside Gitmo* 214 (2009) (reporting that at the camp the men became friends with Australian David Hicks, who would become a Guantánamo Bay detainee).

1134. See *Sleeper Cell*, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 110–25.

1135. Bravin, *supra* note 1128, at 260.

1136. See *id.*

1137. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; see *id.* at 211; *Sleeper Cell*, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 129.

1138. See Temple-Raston, *supra* note 1121, at 7.

1139. See *Sleeper Cell*, *supra* note 1121; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Lou Michel, "I Did My Share of Suffering," Buffalo News, Nov. 25, 2012, at A1; Purdy & Bergman, *supra* note 1121; Santora, *supra* note 1124; Temple-Raston, *supra* note 1121, at 1, 3, 154, 205.

1140. *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 1121; Powell, *supra* note 1121; Santora, *supra* note 1124; Temple-Raston, *supra* note 1121, at 160–61.

The defendants appeared before the U.S. District Court for the Western District of New York's Magistrate Judge H. Kenneth Schroeder, Jr., on September 14 and 16.¹¹⁴¹ 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.¹¹⁴²

All pretrial matters in criminal cases are referred to magistrate judges in this district.¹¹⁴³ On September 18 through 20, Judge Schroeder held a detention hearing in the court's large ceremonial courtroom.¹¹⁴⁴ 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.¹¹⁴⁵ Public picketers also occupied space in the plaza and around the courthouse; a popular picket read "Jail, No Bail."¹¹⁴⁶ Judge Schroeder strove to provide the government and the defendants with a fair and peaceful hearing, mindful that the world was watching the treatment of the criminal defendants.¹¹⁴⁷ Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.¹¹⁴⁸

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.¹¹⁴⁹ Told that supporters were willing to post \$600,000 bond per defendant, Judge Schroeder set Alwan's bail at \$600,000.¹¹⁵⁰ But Alwan was unable to post such an amount after all, so he remained detained.¹¹⁵¹

1141. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 1140.

Tim Reagan interviewed Judge Schroeder for this report in the judge's chambers on October 31, 2007.

1142. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 1140; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1143. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1144. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 1140; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1145. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1146. *Id.*

1147. *Id.*

1148. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 1140; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1149. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 1140; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

1150. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 1140; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1151. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

The six men were indicted on October 21.¹¹⁵² The court assigned the case to District Judge William M. Skretny for trial.¹¹⁵³

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002,¹¹⁵⁴ and an indictment against him on December 15, 2003.¹¹⁵⁵ He traveled to Yemen instead of returning from Afghanistan and became one of the FBI's most-wanted terrorism suspects.¹¹⁵⁶ He was arrested in Yemen by Yemeni authorities in 2004, but he escaped two years later.¹¹⁵⁷ He surrendered to Yemeni authorities in May 2007, who agreed not to extradite him to the U.S.¹¹⁵⁸ He was observed in public in Yemen in February 2008.¹¹⁵⁹ Yemeni authorities arrested him again following American press reports of his boasting that his freedom was protected by Yemen's president.¹¹⁶⁰ On January 15, 2010, Judge Skretny appointed an attorney to represent him in U.S. court, should he ever appear.¹¹⁶¹

A significant obstacle to the other men's defense was the government's refusal, for national-security reasons, to allow them to seek interviews with Derwish and al-Dosari.¹¹⁶² This matter, however, was not presented to the court.¹¹⁶³

1152. *Goba*, 240 F. Supp. 2d at 244; see Heffelfinger, *supra* note 1129, at 129; Purdy & Bergman, *supra* note 1121; Santora, *supra* note 1124; Temple-Raston, *supra* note 1121, at 193.

1153. *Goba* Docket Sheet, *supra* note 1140.

Tim Reagan interviewed Judge Skretny for this report in Judge Schroeder's chambers on October 31, 2007, following a private interview with Judge Schroeder.

1154. Docket Sheet, United States v. Elbaneh, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002).

1155. Docket Sheet, United States v. Elbaneh, No. 1:03-cr-255 (W.D.N.Y. Dec. 15, 2003).

1156. www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing; see *Sleeper Cell*, *supra* note 1121; Temple-Raston, *supra* note 1121, at 200, 206-10; *U.S. Fugitive Born in Yemen Surrenders in Terror Case*, N.Y. Times, May 25, 2007, at A11 [hereinafter *U.S. Fugitive*]; Craig Whitlock, *Al-Qaeda Operative Loses Freedom in Yemen*, Wash. Post, May 19, 2008, at A10; Jerry Zremski, *Officials Confident Money Will Yield Granville's Killers*, Buffalo News, Feb. 28, 2013, at 1 ("Elbaneh . . . remains at large despite a \$5 million bounty on his head."); see also Soufan, *supra* note 1125, at 512 (noting that only indicted terrorists appear on the FBI's most wanted terrorists site).

1157. See Dan Herbeck, *Yemen Holds Lackawanna 6 Figure*, Buffalo News, Jan. 21, 2010, at A1 ("he and 22 other men, including many with alleged ties to terrorism, escaped [in February 2006] after digging a tunnel below a high-security prison in Sana, Yemen's capital"); Whitlock, *supra* note 1156; Craig Whitlock, *Bounties a Bust in Hunt for Al-Qaeda*, Wash. Post, May 17, 2008, at A1 [hereinafter *Bounties*].

1158. See Herbeck, *supra* note 1157 (reporting that "Yemen has no extradition agreement with the United States" and that "Yemen's government has refused requests from the U.S. government to extradite him"); Temple-Raston, *supra* note 1121, at 254; *U.S. Fugitive*, *supra* note 1156; Whitlock, *supra* note 1156; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

1159. See Whitlock, *Bounties*, *supra* note 1157; Worth, *supra* note 1158.

1160. See Whitlock, *supra* note 1156; Whitlock, *Bounties*, *supra* note 1157; see also Herbeck, *supra* note 1157 (reporting that Elbaneh was sentenced to ten years in Yemen's prison system for crimes in Yemen).

1161. Order, United States v. Elbaneh, No. 1:03-cr-255 (W.D.N.Y. Jan. 15, 2010), D.E. 16; see Herbeck, *supra* note 1157.

1162. See Temple-Raston, *supra* note 1121, at 189, 193.

1163. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

Each of the men agreed to plead guilty in early 2003 and was sentenced in December 2003 to from seven to ten years in prison followed by three years of supervised release.¹¹⁶⁴ It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.¹¹⁶⁵

Galab, the first to plead, was sentenced to the shortest term—seven years.¹¹⁶⁶ Mosed and Taher each were sentenced to eight years; Alwan was sentenced to nine and one-half years.¹¹⁶⁷ Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.¹¹⁶⁸ As a reward for subsequent assistance in other prosecutions, Goba and Alwan's sentences were reduced to nine years.¹¹⁶⁹

As one example of Goba's cooperation, on May 18, 2007, Goba testified at the trial of José Padilla about the terrorist training camp Padilla allegedly applied to

1164. *Goba* Docket Sheet, *supra* note 1140; *see* Temple-Raston, *supra* note 1121, at 198–205.

1165. Powell, *supra* note 1121 (“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 1121, at 200 (“The threat was unspoken . . .”).

1166. *Goba* Docket Sheet, *supra* note 1140; *see* David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 1121, at 198–99.

Galab was released from prison on October 17, 2008. www.bop.gov (reg. no. 11871-055); *see* Lou Michel, *U.S. Gives Half of the Lackawanna Six a Fresh Start*, Buffalo News, June 13, 2009, at A1.

1167. *Goba* Docket Sheet, *supra* note 1140; *see* David Staba, *Last in Group Gets Sentence for Aiding Al Qaeda*, N.Y. Times, Dec. 18, 2003, at A41; David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. Times, Dec. 10, 2003, at A28; David Staba, *Qaeda Trainee Is Sentenced to 8-Year Term*, N.Y. Times, Dec. 5, 2003, at A32 [hereinafter *Qaeda Trainee*]; Temple-Raston, *supra* note 1121, at 199.

Mosed was released from prison on September 1, 2009. www.bop.gov (reg. no. 11875-055).

1168. Sentence Reduction Order at 1, *United States v. Goba*, No. 1:02-cr-214 (W.D.N.Y. Dec. 14, 2007), D.E. 288; *Goba* Docket Sheet, *supra* note 1140; *see* *United States v. Goba*, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); Purdy & Bergman, *supra* note 1121; David Staba, *Judge Questions Sentence in al Qaeda Case*, N.Y. Times, Dec. 11, 2003, at A37; Staba, *Qaeda Trainee*, *supra* note 1167; Temple-Raston, *supra* note 1121, at 199.

“The Lackawanna Six . . . proved faint-hearted jihadists. They quickly made plea bargains, promising cooperation in exchange for prison terms capped at ten years.” Bravin, *supra* note 1128, at 259.

Al-Bakri was the last to plead. *See* Purdy, *Sixth Man Pleads*, *supra* note 1122. He was released from prison on July 1, 2011. www.bop.gov (reg. no. 11879-055); *see* Michel, *supra* note 1139 (reporting on al-Bakri's difficulties in obtaining a visa for his wife and his inability to visit her because of the terms of his supervised release); *see also* Satisfaction, *Goba*, No. 1:02-cr-214 (W.D.N.Y. June 25, 2014), D.E. 313 (noting al-Bakri's payment of his fine and assessment).

1169. Amended Judgment, *Goba*, No. 1:02-cr-214 (W.D.N.Y. June 29, 2010), D.E. 306 (Alwan); Amended Judgment, *id.* (Jan. 3, 2008), D.E. 289 (Goba); Sentence Reduction Order, *supra* note 1168; *see* Sentence Reduction Motion, *Goba*, No. 1:02-cr-214 (W.D.N.Y. May 20, 2010), D.E. 299; Order, *id.* (Jan. 7, 2008), D.E. 292 (denying Goba's motion for a further reduction of his sentence).

join.¹¹⁷⁰ In 2014, Alwan testified against Sulaiman Abu Ghayth, Osama Bin Laden's son-in-law.¹¹⁷¹

It was reported that Goba, Alwan, and Taher were offered entry into the witness protection program.¹¹⁷²

Derwish, also known as Ahmed Hijazi, was killed in Yemen in a November 2002 U.S. drone strike on a jeep carrying Abu Ali al-Harithi, who was believed to be one of the 2000 USS *Cole* bombing planners.¹¹⁷³ Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.¹¹⁷⁴ He attempted suicide several times while there.¹¹⁷⁵ The government released him to Saudi Arabia on July 16, 2007.¹¹⁷⁶

Challenge: Classified Evidence

As a precaution in case Judge Schroeder was called upon to review classified evidence, classified information security officers discreetly facilitated a background check on him.¹¹⁷⁷ Article III judges are automatically cleared to see classified evidence, but magistrate judges are not.¹¹⁷⁸

1170. *United States v. Jayyousi*, 657 F.3d 1085, 1094 (11th Cir. 2011); see Abby Goodnough, *Witness Describes Training Padilla Reportedly Received*, N.Y. Times, May 19, 2007, at A9; Jay Weaver, *Jihadist Testifies in Padilla Trial*, Miami Herald, May 19, 2007, at 3A; Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A6; see also *supra* “Dirty Bomber.”

1171. See Benjamin Weiser, *Witness Says Defendant Spoke to Qaeda Trainees*, N.Y. Times, Mar. 7, 2014, at 22; see also *supra* “Kenya and Tanzania.”

1172. Michel, *supra* note 1166.

In May 2012, there were 700 active participants in the witness protection program. See Greg Miller, *Terrorist Witnesses Flew on U.S. Airlines*, Wash. Post, May 17, 2013, at A8; see also Charlie Savage, *Justice Dept. Lost Track of Terrorists, Report Says*, N.Y. Times, May 17, 2013, at A12 (“just two former known or suspected terrorists have been admitted into the program in the past six years”).

1173. See Bravin, *supra* note 1128, at 261; *Sleeper Cell*, *supra* note 1121; Herbeck, *supra* note 1157; Powell, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Jeremy Scahill, *Dirty Wars* 75–78 (2013) (reporting that DNA tests confirmed Derwish's identity); Soufan, *supra* note 1125, at 506–07; Temple-Raston, *supra* note 1121, at 195–98, 249–50, 252.

1174. See Bravin, *supra* note 1128, at 68; *Sleeper Cell*, *supra* note 1121; Powell, *supra* note 1121; Purdy & Bergman, *supra* note 1121; Temple-Raston, *supra* note 1121, at 139–40, 148.

1175. See Mahvish Rukhsana Khan, *My Guantánamo Diary* 210, 298 (2008); Temple-Raston, *supra* note 1121, at 247–49.

1176. Transfer Notice, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 16, 2007), D.E. 179; see Khan, *supra* note 1175, at 252; see also *infra* “Guantánamo Bay.”

1177. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22* (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

1178. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007; see Reagan, *supra* note 1177, at 2.

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.¹¹⁷⁹ Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.¹¹⁸⁰

Challenge: Court Security

For this high-profile terrorism prosecution, the U.S. marshal established extra security at the courthouse doors.¹¹⁸¹ The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.¹¹⁸² During the days of pleas and sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.¹¹⁸³

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.¹¹⁸⁴ But the defendants' pleas before Judge Skretny were taken by affirmation.¹¹⁸⁵

1179. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1180. *Id.*

1181. Interview with Hon. William M. Skretny, Oct. 31, 2007.

1182. *Id.*; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1183. Interview with Hon. William M. Skretny, Oct. 31, 2007.

1184. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1185. 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.)*¹¹⁸⁶

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding Al-Qaeda.¹¹⁸⁷ Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.¹¹⁸⁸

Abu Ali, whose parents are Jordanian, was born in Houston, Texas, and raised in Falls Church, Virginia.¹¹⁸⁹ 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.¹¹⁹⁰ In 2002, he went to Saudi Arabia to attend the University of Medina.¹¹⁹¹ He apparently had significant contacts with Al-Qaeda.¹¹⁹² He was arrested in Saudi Arabia, by officers of Saudi Arabia's counterterrorism Mabathith, on June 8, 2003, as part of an investigation of bombings on May 12, 2003, in Riyadh.¹¹⁹³

1186. An appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

1187. Sentencing Order at 1 & n.1, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006), D.E. 396, available at 2006 WL 1102835; see Caryle Murphy, *Man Given 30 Years in Plot Against Bush*, Wash. Post, Mar. 30, 2006, at A3; David Stout, *American Is Sentenced to 30 Years in Terror Case*, N.Y. Times, Mar. 30, 2006, at A18. See generally Human Rights Watch, *Illusion of Justice* 5, 79–81, 109, 190–91, 198–200 (2014); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after Abu Ali*, 88 Tex. L. Rev. 1501 (2010).

1188. 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 1187; Lloyd Smith, *An Interview with Judge Gerald Bruce Lee*, *Landslide*, Nov./Dec. 2013, at 7; Stout, *supra* note 1187; 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.

1189. *United States v. Abu Ali*, 528 F.3d 210, 221 (4th Cir. 2008); Sentencing Order, *supra* note 1187; see Paul Bradley, *Prosecutors Say Terror Suspect Lied*, *Richmond Times-Dispatch*, Feb. 24, 2005, at A5; Michael Isikoff, *A Tangled Web*, *Newsweek*, Mar. 7, 2005, at 32; Murphy, *supra* note 1187; Stout, *supra* note 1187.

Abu Ali's father was a computer analyst for Saudi Arabia's embassy. *Abu Ali*, 528 F.3d at 221; see Isikoff, *supra*.

1190. *Abu Ali*, 528 F.3d at 221; Sentencing Order, *supra* note 1187, 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.

1191. *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 1187, at 12; see Meyer, *supra* note 1190; Stout, *supra* note 1187.

1192. *Abu Ali*, 528 F.3d at 221–24; see Isikoff, *supra* note 1189; Mowbray, *supra* note 1190.

1193. *Abu Ali*, 528 F.3d at 223–24, 238; *Abu Ali*, 395 F. Supp. 2d at 341, 344, 367, 384; see *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 30 (D.D.C. 2004); Bradley, *supra* note 1189; Isikoff, *supra* note 1189; Murphy, *supra* note 1187; Stout, *supra* note 1187.

On July 28, 2004, Abu Ali's parents sought release of their son, filing a habeas corpus petition in the U.S. District Court for the District of Columbia.¹¹⁹⁴ On December 16, Judge John D. Bates denied the government's motion to dismiss the petition for lack of jurisdiction,¹¹⁹⁵ but on September 19, 2005, Judge Bates dismissed the petition as moot, because Abu Ali had been indicted and transferred to Virginia.¹¹⁹⁶

Abu Ali was held in Saudi Arabia until February 21, 2005, following a February 3 indictment for conspiracy to establish terrorist operations.¹¹⁹⁷ The indictment later was expanded to include conspiracy to kill the President.¹¹⁹⁸ Abu Ali argued unsuccessfully that his confession was inadmissible because he was tortured while held in Saudi Arabia.¹¹⁹⁹

Although sentencing guidelines would dictate a life sentence, Judge Lee sentenced Abu Ali on March 29, 2006, to thirty years in prison followed by thirty years of supervised release.¹²⁰⁰ The court of appeals vacated the sentence,¹²⁰¹ although Judge Diana Gribbon Motz determined that the sentence was within Judge Lee's discretion,¹²⁰² Judges J. Harvie Wilkinson III and William B. Traxler, Jr., determined that the sentence insufficiently reflected the gravity of the crime.¹²⁰³ On July 27, 2009, Judge Lee resentenced Abu Ali to life in prison.¹²⁰⁴ The court of appeals affirmed the life sentence.¹²⁰⁵

1194. Docket Sheet, *Abu Ali v. Ashcroft*, No. 1:04-cv-1258 (D.D.C. July 28, 2004); see Jonathan Hafetz, *Habeas Corpus After 9/11 196* (2011).

1195. *Abu Ali*, 350 F. Supp. 2d 28; see Hafetz, *supra* note 1194, at 196–97.

1196. *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005); see Hafetz, *supra* note 1194, at 197.

1197. *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 1189; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 1187.

1198. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 396 F. Supp. 2d at 704.

1199. *Abu Ali*, 528 F.3d at 231–34; *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; see Bradley, *supra* note 1189; Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647, 649 (2008); Hafetz, *supra* note 1194, at 197; Isikoff, *supra* note 1189; Jerry Markon, *Conviction Upheld in Terror Plot*, Wash. Post, June 7, 2008, at B3; Markon & Priest, *supra* note 1197; Meyer, *supra* note 1190; Murphy, *supra* note 1187.

Portions of the confession are included in an NBC News report: www.msnbc.msn.com/id/10266654/.

1200. Sentencing Order, *supra* note 1187; see Stout, *supra* note 1187.

1201. *Abu Ali*, 528 F.3d at 269, *cert. denied*, 555 U.S. 1170 (2009); see Markon, *supra* note 1199; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 518–19 (2014).

1202. *Abu Ali*, 528 F.3d at 269–82 (Judge Motz, dissenting).

1203. *Id.* at 258–69 (opinion for the court).

Tim Reagan interviewed Judge Traxler for this report at the Federal Judicial Center on November 12, 2008.

1204. E.D. Va. Docket Sheet, *supra* note 1188; see Hafetz, *supra* note 1194, at 197; Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, Wash. Post, July 28, 2009, at A3.

Challenge: Foreign Evidence and Witness Security

To decide whether Abu Ali's confession should be suppressed, Judge Lee arranged for seven days of video depositions of Mabahith officers in Saudi Arabia.¹²⁰⁶ Because the identities of Mabahith officers are secret,¹²⁰⁷ the Saudi government would not permit them to come to the United States to testify.¹²⁰⁸ There also was the risk that dangerous groups in Saudi Arabia would object to the officers' cooperation with an American prosecution.¹²⁰⁹

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.¹²¹⁰ A live video feed was established between Saudi Arabia and the United States; the judge, additional counsel for both sides, and the court reporter were in Alexandria.¹²¹¹ 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.¹²¹²

Portions of the deposition were put into evidence at a suppression hearing, in addition to live testimony from FBI agents (who had interviewed the Mabahith

Abu Ali was sent to the "Super Max" prison in Florence, Colorado. www.bop.gov (reg. no. 70250-083); see Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to "Superjail,"* London Times, June 20, 2006, at 8.

1205. United States v. Abu Ali, 410 F. App'x 673 (4th Cir. 2011).

On October 28, 2013, Judge Lee denied Abu Ali's petition to vacate his sentence because of ineffective trial and appellate counsel. Opinion, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Oct. 28, 2013), D.E. 461, available at 2013 WL 5797855, appeal dismissed, 584 F. App'x 135 (4th Cir. 2014).

1206. United States v. Abu Ali, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005); Order at 2, *Abu Ali*, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005), D.E. 195 [hereinafter E.D. Va. Sept. 16, 2005, Order]; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; see David H. Laufman, Op-Ed, *Terror Trials Work*, Legal Times, Nov. 5, 2007, at 58 (observation by the prosecuting attorney in the case that "for the first time, the Saudi government permitted Saudi security officers (including a general) to testify in an American criminal proceeding and to face rigorous cross-examination by defense attorneys—even though the officers would have to answer questions about Saudi interrogation methods said to violate international human rights standards"); Vladeck, *supra* note 1187, at 1510 ("Over Abu Ali's objection, such depositions were taken in July 2005 using procedures that, whatever their merits, were certainly novel.").

1207. E.D. Va. Sept. 16, 2005, Order, *supra* note 1206; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

The Mabahith is the Saudi domestic security service. E.D. Va. Sept. 16, 2005, Order, *supra* note 1206.

1208. *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 1206, at 2.

1209. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; see E.D. Va. Sept. 16, 2005, Order, *supra* note 1206, at 5.

1210. *Abu Ali*, 528 F.3d at 239; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1211. *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.

1212. *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.

officers when Abu Ali was transported from Saudi Arabia to the United States), expert witnesses, and other percipient witnesses.¹²¹³ The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.¹²¹⁴ So the split-screen video deposition evidence was played to the jury as well.¹²¹⁵

The Mabahith officers testified pseudonymously.¹²¹⁶ 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.¹²¹⁷

Taking the video depositions of foreign witnesses was challenging for several reasons.¹²¹⁸ First, there was a substantial difference in time zones.¹²¹⁹ Second, a secure communication line was necessary, and the availability of a secure line was not reliable.¹²²⁰ Third, the heat in Saudi Arabia sometimes caused technical difficulties.¹²²¹

Judge Lee acknowledges something he would do differently if he had it to do over: He would send at least one more interpreter.¹²²² One interpreter was not enough, because, at the very least, interpreters need breaks.¹²²³

Challenge: Attorney–Client Contacts

During the video depositions of the Mabahith officers, “Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings. In addition, the court was willing to stop the depositions if Abu Ali’s counsel in Saudi Arabia wanted to consult with their client.”¹²²⁴

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali’s trial was classified.¹²²⁵ Classified evidence was stored in the court’s sensitive compartmented information facility

1213. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1214. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1215. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see Abu Ali*, 528 F.3d at 238–39.

1216. *Abu Ali*, 395 F. Supp. 2d at 344; E.D. Va. Sept. 16, 2005, Order, *supra* note 1206, at 4–5; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1217. E.D. Va. Sept. 16, 2005, Order, *supra* note 1206, at 4, 7, 9–10; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1218. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1219. *Id.*

1220. *Id.*

1221. *Id.*

1222. *Id.*

1223. *Id.*

1224. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008).

1225. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

(SCIF).¹²²⁶ 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.¹²²⁷ Only the cleared attorney, and not Abu Ali or either uncleared attorney, was allowed to see classified evidence.¹²²⁸

The court of appeals held that it was improper, but harmless error in this case, for the district court to permit the jury to see classified evidence that the defendant could not see.¹²²⁹ At issue were two messages that the government claimed were coded communications between the defendant and fellow jihadists.¹²³⁰

The government produced unredacted copies of the messages to cleared counsel.¹²³¹ 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."¹²³² Uncleared counsel were concerned that the redacted information might be relevant to when the government acquired the messages, which would be material to the defendant's ultimately unsuccessful argument that the government's cooperation with Saudi Arabia triggered a requirement of *Miranda* warnings upon Abu Ali's arrest.¹²³³ 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.¹²³⁴

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."¹²³⁵

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

1226. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1227. *Abu Ali*, 528 F.3d at 248–49; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1228. *Abu Ali*, 528 F.3d at 248–55; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1229. *Abu Ali*, 528 F.3d at 248–57.

1230. *Id.* at 236–37, 248.

1231. *Id.* at 249.

1232. *Id.*

1233. *Id.* at 250; see *id.* at 227–31 (holding that *Miranda* warnings were not required).

1234. *Id.* at 250; see 18 U.S.C. app. 3 (2013) (text of CIPA); Reagan, *supra* note 1226 (describing CIPA procedures).

1235. *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.").

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.¹²³⁶

The court held, however, that the error was harmless beyond a reasonable doubt.¹²³⁷

Challenge: Classified Arguments

In the appeal, part of the record and part of the briefing concerning classified evidence were classified.¹²³⁸ Classified materials were filed through the classified information security officer.¹²³⁹ Part of oral argument was conducted in closed session.¹²⁴⁰

All of Judge Traxler's law clerks are career clerks, and two of them had top secret security clearances.¹²⁴¹ One of the two clerks with security clearances was assigned to help with the case.¹²⁴² Judge Traxler reviewed most of the classified materials for the case in his Greenville, South Carolina, chambers;¹²⁴³ there is a SCIF in the Greenville courthouse.¹²⁴⁴ Occasionally, classified material would be submitted at a time when Judge Traxler was in Richmond, Virginia, to hear other

1236. *Id.* at 255.

1237. *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.”).

1238. *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, No. 06-4521 (4th Cir. Nov. 27, 2006), D.E. 48 [hereinafter 4th Cir. Classified Briefing Order] (appeal by the government, accepting for filing classified portions of the appellant’s brief and joint appendix); Order, United States v. Abu Ali, No. 06-4334 (4th Cir. Nov. 27, 2006), D.E. 70 (appeal by the defendant, same); Docket Sheet, *Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) [hereinafter 4th Cir. Government Appeal Docket Sheet] (noting Abu Ali’s filing of a classified supplemental brief on March 5, 2007, and a classified supplemental appendix on March 6, 2007, and noting the government’s filing of a classified supplemental brief and a classified supplemental appendix on April 27, 2007); Docket Sheet, *Abu Ali*, No. 06-4334 (4th Cir. Apr. 10, 2006) (same).

1239. 4th Cir. Classified Briefing Order, *supra* note 1238; *see* Reagan, *supra* note 1226, at 21–22 (providing information about classified information security officers).

An “under seal, in camera, ex parte notice” was filed in the district court on April 27, 2007. 4th Cir. Government Appeal Docket Sheet, *supra* note 1238 (noting that an original document was filed with the classified information security officer).

1240. *Abu Ali*, 528 F.3d at 244 n.13; Interview with 4th Cir. Clerk’s Office Staff, Feb. 26, 2008; *see* Larry O’Dell, *Torture Alleged in Bush-Plot Case*, Richmond Times–Dispatch, June 24, 2007, at B3.

1241. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1242. *Id.*

1243. *Id.*

1244. *Id.*; Interview with 4th Cir. Clerk’s Office Staff, Feb. 26, 2008.

matters, and he reviewed the materials in his Richmond chambers.¹²⁴⁵ 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.¹²⁴⁶

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.¹²⁴⁷ Or a judge or law clerk taking a break to get coffee must take classified documents along.¹²⁴⁸ 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.¹²⁴⁹

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."¹²⁵⁰ The court also ordered that the security officer and all who participate in the classification review be "walled off from government counsel" and "otherwise protect the confidentiality of . . . internal court documents during the pendency of this appeal and thereafter."¹²⁵¹

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.¹²⁵²

1245. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1246. *Id.*

1247. *Id.*

1248. *Id.*

1249. *Id.*

1250. Order at 2, *United States v. Abu Ali*, No. 06-4521 (4th Cir. Aug. 29, 2007), D.E. 139 [hereinafter 4th Cir. Classification Review Order]; Order at 2, *United States v. Abu Ali*, No. 06-4334 (4th Cir. Aug. 29, 2007), D.E. 164.

Classified information security officers, who help courts handle classified information, were formerly known by the ambiguous term "court security officers." *See supra* "Introduction."

1251. 4th Cir. Classification Review Order, *supra* note 1250, at 1–2.

1252. E.D. Va. Docket Sheet, *supra* note 1188.

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 sixty miles south of Washington, D.C.¹²⁵³ The indictment listed thirty-two terrorism counts.¹²⁵⁴ 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.¹²⁵⁵ One related case was prosecuted before Judge Brinkema,¹²⁵⁶ and another related case was prosecuted before Judge Claude M. Hilton.¹²⁵⁷

Nine defendants are American citizens, and three served in the U.S. military.¹²⁵⁸ At core, they were charged with conspiracy, in violation of the Neutrality

1253. *United States v. Chandia*, 675 F.3d 329, 332 (4th Cir. 2012); *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008); *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); Docket Sheet, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. June 25, 2003) [hereinafter *Royer* Docket Sheet]; see *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 32 (D.D.C. 2004); *Khan Habeas Relief Opinion* at 2, *Royer*, No. 1:03-cr-296 (E.D. Va. May 12, 2011), D.E. 742; Chris Heffelfinger, *Radical Islam in America* 84, 91–92, 101, 129–31 (2011); Eric Lichtblau, *Group of Muslims Charged With Plotting Against India*, N.Y. Times, June 28, 2003, at A7; Jerry Markon, “*Virginia Jihad*” *Defendant Sentenced*, San Jose Mercury News, Aug. 26, 2006, at A7; Milton Viorst, *The Education of Ali al-Timimi*, Atlantic Monthly, June 2006, at 69, 77.

1254. *United States v. Khan*, 461 F.3d 477, 485 n.3 (4th Cir. 2006); *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); *Khan Habeas Relief Opinion*, *supra* note 1253, at 3.

1255. *Chandia*, 675 F.3d at 332; *Benkahla*, 530 F.3d at 303–04; *Chandia*, 514 F.3d at 370; *Khan*, 461 F.3d at 485–86; *Khan*, 309 F. Supp. 2d 789; *Khan Habeas Relief Opinion*, *supra* note 1253, at 3; see Paul Bradley, *Lengthy Sentences for Two in “VA Jihad,”* Richmond Times–Dispatch, June 16, 2004, at B1; Jerry Markon, “*Va. Jihad*” *Case Hailed as Key in War on Terror*, Wash. Post, June 8, 2006, at A3 [hereinafter *Case Hailed*]; Markon, *supra* note 1253; Larry O’Dell, *Court Hears Appeal of Jihad Cases*, Richmond Times–Dispatch, May 26, 2006, at B10.

Tim Reagan interviewed Judge Brinkema for this report in the judge’s chambers on January 5, 2007, and September 4, 2014.

1256. Docket Sheet, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter *Al-Timimi* Docket Sheet].

1257. Docket Sheet, *United States v. Chandia*, No. 1:05-cr-401 (E.D. Va. Sept. 14, 2005) [hereinafter *Chandia* Docket Sheet].

Ahmed Omar Abu Ali apparently was at one time a suspect in the paintball case. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005); see Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32. Subsequently he was tried for other crimes. See *supra* “A Plot to Kill President Bush.”

1258. See Lichtblau, *supra* note 1253.

Act,¹²⁵⁹ to support Lashkar-e-Taiba (LET), a terrorist group that opposes Indian rule over Kashmir.¹²⁶⁰ The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.¹²⁶¹

Judge Brinkema tried four defendants in one bench trial,¹²⁶² acquitting one on February 20, 2004,¹²⁶³ and convicting three on March 4.¹²⁶⁴ The convicted defendants were sentenced on June 15,¹²⁶⁵ and they were resentenced on July 29, 2005,¹²⁶⁶ in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.¹²⁶⁷

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.¹²⁶⁸ Khan spent time at an LET training camp in Pakistan.¹²⁶⁹ 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.¹²⁷⁰ Beginning in 1999, LET's primary focus was combating India's control in Kashmir.¹²⁷¹ But the court found that the defendants' participation in the LET training camps was to pre-

1259. 18 U.S.C. § 960 (2013).

1260. *Chandia*, 675 F.3d at 332; *Khan*, 461 F.3d at 484; Khan Habeas Relief Opinion, *supra* note 1253, at 2–3; see Heffelfinger, *supra* note 1253, at 91–93; Lichtblau, *supra* note 1253; Markon, *supra* note 1253; Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1; Mary Beth Sheridan, *Hardball Tactics in an Era of Threats*, Wash. Post, Sept. 3, 2006, at A1.

The name of the group means “army of the pure.” See Brendan Smith, *Chandia Challenges Law on Terror Group*, Legal Times, Oct. 29, 2007, at 10. It was designated a terrorist organization in 2001 after a deadly attack on India's parliament building in New Delhi. See *id.*

1261. *United States v. Khan*, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); see Lichtblau, *supra* note 1253.

“[T]he vast majority of the group's firearms training in the United States was conducted legally and no specific plans were uncovered to carry out an attack inside the United States or to specifically target Americans.” Heffelfinger, *supra* note 1253, at 93.

1262. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 1253, at 3.

1263. *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*].

1264. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827; Khan Habeas Relief Opinion, *supra* note 1253, at 3–4.

1265. *Royer Docket Sheet*, *supra* note 1253; Khan Habeas Relief Opinion, *supra* note 1253, at 4; see Bradley, *supra* note 1255.

1266. *Khan*, 461 F.3d at 486; *Royer Docket Sheet*, *supra* note 1253; Khan Habeas Relief Opinion, *supra* note 1253, at 4.

1267. 543 U.S. 220 (2005) (decided on January 12, 2005).

1268. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 1253, at 4; see Bradley, *supra* note 1255; Sheridan, *supra* note 1260.

1269. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807; Khan Habeas Relief Opinion, *supra* note 1253, at 25 (“During the several weeks he stayed in [LET] camps, [Khan] engaged in paramilitary training and after returning to the United States he stayed in touch with an LET operative and purchased military equipment for him.”).

1270. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

1271. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; see Sheridan, *supra* note 1260.

pare to fight against the United States in Afghanistan on behalf of the Taliban.¹²⁷² At the training camp, Khan fired an AK-47 rifle, an antiaircraft gun, and a rocket-propelled grenade.¹²⁷³ By December 2001, the United States had substantially defeated the Taliban¹²⁷⁴ and declared LET a terrorist organization.¹²⁷⁵ Khan returned to the United States that month.¹²⁷⁶ 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.¹²⁷⁷ Judge Brinkema found Khan guilty of conspiracy, conspiracy to levy war against the United States, conspiracy to contribute services to the Taliban, conspiracy to provide material support to LET, conspiracy to possess and use firearms in connection with a crime of violence, and three counts of using and discharging a weapon in relation to a crime of violence.¹²⁷⁸ In 2011, on habeas corpus review, Judge Brinkema and the government agreed that one of the conspiracy convictions and sentences should be vacated, but Khan remained sentenced to life in prison.¹²⁷⁹

Judge Brinkema convicted Seifullah Chapman, a former Marine and police officer residing in Alexandria, Virginia, of five counts and sentenced him to sixty-five years in prison.¹²⁸⁰ Chapman also spent time at the LET training camp in Pakistan.¹²⁸¹ In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LET member.¹²⁸² 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.¹²⁸³

1272. *Khan*, 309 F. Supp. 2d at 810; see Heffelfinger, *supra* note 1253, at 93.

1273. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811; Khan Habeas Relief Opinion, *supra* note 1253, at 27.

1274. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1275. *Khan*, 309 F. Supp. 2d at 812; Khan Habeas Relief Opinion, *supra* note 1253, at 2.

1276. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1277. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14; Khan Habeas Relief Opinion, *supra* note 1253, at 17; see *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008).

1278. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820–21, 823, 826–27; Khan Habeas Relief Opinion, *supra* note 1253, at 4; *Royer Docket Sheet*, *supra* note 1253 (D.E. 469, March 4, 2004, court verdict against Masoud Ahmad Khan).

1279. Khan Habeas Relief Opinion, *supra* note 1253, at 2, 31 & n.2, *certificate of appealability denied*, 451 F. App'x 262 (4th Cir. 2011); see www.bop.gov (reg. no. 46810-083).

1280. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 803, 816; see www.bop.gov (noting a release date of May 22, 2060, reg. no. 46868-083); see also Bradley, *supra* note 1255; Heffelfinger, *supra* note 1253, at 96–97; Markon, *supra* note 1255; Sheridan, *supra* note 1260. The original sentence of eighty-five years was reduced to sixty-five years on July 29, 2005. *Royer Docket Sheet*, *supra* note 1253 (July 29, 2005, minute entry).

1281. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811.

1282. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13.

1283. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823–24, 826–27; *Royer Docket Sheet*, *supra* note 1253 (D.E. 470, March 4, 2004, court verdict against Seifullah Chapman).

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.¹²⁸⁴ 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.¹²⁸⁵ Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded for resentencing,¹²⁸⁶ Judge Brinkema reimposed the same fifty-two-month sentence, determining that she had not clearly articulated her reasons for the downward departure the first time.¹²⁸⁷ The government appealed again,¹²⁸⁸ but withdrew the appeal¹²⁸⁹ 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.¹²⁹⁰ Abdur-Raheem was released on November 30, 2007.¹²⁹¹

The court of appeals affirmed the convictions of Khan, Chapman, and Abdur-Raheem.¹²⁹²

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem, of Arlington, Virginia.¹²⁹³

Randall Todd Royer pleaded guilty and was sentenced on April 9, 2004, to twenty years in prison for using firearms and explosives in relation to a crime of

Chapman's petition for habeas corpus relief was unsuccessful. Opinion, *United States v. Chapman*, 396 F. App'x 971 (4th Cir. 2010); *Royer* Docket Sheet, *supra* note 1253 (D.E. 725, December 23, 2009, dismissal of the petition).

1284. *Khan*, 309 F. Supp. 2d at 796, 803, 814; *see* Bradley, *supra* note 1255. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1253 (July 29, 2005, minute entry); *see* Heffelfinger, *supra* note 1253, at 96.

1285. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 1253 (D.E. 471, March 4, 2004, court verdict against Hammad Abdur-Raheem).

1286. *Khan*, 461 F.3d at 483, 498–501; *see* Jerry Markon, *Resentencing Is Ordered for "Jihad" Defendant*, Wash. Post, Sept. 2, 2006, at B5.

1287. Transcript, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. Aug. 16, 2007, filed Sept. 14, 2006), D.E. 665 [hereinafter *Royer* Aug. 16, 2007, Transcript]; *Royer* Docket Sheet, *supra* note 1253 (noting resentencing on August 16, 2007). Resentencing was delayed by a petition to the Supreme Court for certiorari, which the Court denied on May 21, 2007. *Chapman v. United States*, 550 U.S. 956 (2007).

1288. Docket Sheet, *United States v. Abdur-Raheem*, No. 07-4941 (4th Cir. Oct. 2, 2007).

1289. Government Motion to Dismiss, *id.* (Dec. 18, 2007), D.E. 23.

1290. *Gall v. United States*, 552 U.S. 38 (2007).

1291. www.bop.gov (noting an expected release date of November 30, 2007, reg. no. 46814-083); *see Royer* Aug. 16, 2007, Transcript, *supra* note 1287.

1292. *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006); *see* Markon, *supra* note 1286; Sheridan, *supra* note 1260. The Supreme Court denied petitions for certiorari on May 21, 2007. *Chapman*, 550 U.S. 956; *Khan v. United States*, 550 U.S. 956 (2007).

1293. *Khan*, 461 F.3d at 486; *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); *see Judge Acquits*, *supra* note 1263.

violence.¹²⁹⁴ Royer was born in St. Louis, converted to Islam at age nineteen, and eventually became president of the Muslim Student Association at American University in Washington, D.C.¹²⁹⁵ 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.¹²⁹⁶

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to fifteen years in prison.¹²⁹⁷ Al-Hamdi attended an LET training camp in Pakistan.¹²⁹⁸

Yong Ki Kwon, who resided in Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to eleven and one-half years in prison.¹²⁹⁹ After Kwon cooperated with the government, his sentence was reduced to three years and two months.¹³⁰⁰ He is now out of prison.¹³⁰¹ Kwon attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹³⁰²

Khwaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to eleven and one-quarter years in prison.¹³⁰³ After Hasan cooperated with the government, his sentence was reduced to three years and one month.¹³⁰⁴ He is now out of prison.¹³⁰⁵ Hasan attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹³⁰⁶

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to ten and one-half years in prison.¹³⁰⁷ After he

1294. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 1253; see www.bop.gov (noting a release date of March 1, 2021, reg. no. 46812-083); see also Shane, *supra* note 1260; Sheridan, *supra* note 1260.

1295. See Heffelfinger, *supra* note 1253, at 97.

1296. *Khan*, 309 F. Supp. 2d at 796, 808.

1297. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer* Docket Sheet, *supra* note 1253; see www.bop.gov (noting a release date of September 6, 2017, reg. no. 46583-083); see also Sheridan, *supra* note 1260.

1298. *Khan*, 309 F. Supp. 2d at 807, 811.

1299. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

1300. *Royer* Aug. 16, 2007, Transcript, *supra* note 1287; *Royer* Docket Sheet, *supra* note 1253 (D.E. 639, February 24, 2006, reduction-of-sentence order); see Sheridan, *supra* note 1260; see also Witness Statement, filed as Ex., Government Discovery Response, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Aug. 14, 2013), D.E. 308 (some of Kwon's cooperating evidence).

1301. See Viorst, *supra* note 1253, at 77.

1302. *Khan*, 309 F. Supp. 2d at 811.

1303. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer* Docket Sheet, *supra* note 1253.

1304. *Royer* Aug. 16, 2007, Transcript, *supra* note 1287; *Royer* Docket Sheet, *supra* note 1253 (D.E. 638, February 24, 2006, reduction-of-sentence order).

1305. See www.bop.gov (noting a release date of March 24, 2006, reg. no. 46866-083); see also Sheridan, *supra* note 1260 (reporting that Hasan spent less than three years in jail); Viorst, *supra* note 1253, at 77.

1306. *Khan*, 309 F. Supp. 2d at 811.

1307. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer* Docket Sheet, *supra* note 1253.

cooperated with the government, his sentence was reduced to three years and two months.¹³⁰⁸ He was released from prison on March 31, 2006.¹³⁰⁹

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.¹³¹⁰ After he cooperated with the government, his sentence was reduced to one year and eleven months.¹³¹¹ He was released from prison on February 14, 2006.¹³¹²

Judge Brinkema also acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.¹³¹³ Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.¹³¹⁴ Judge Brinkema found that Benkahla attended an LET training camp, but the government did not prove that he did so at a time when LET was designated a terrorist organization or at a place in Afghanistan under Taliban control, as alleged in the indictment.¹³¹⁵ 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 2004.¹³¹⁶ 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.¹³¹⁷ He denied attending any training camp, and he denied using any firearms.¹³¹⁸ On February 9, 2006, he

1308. *Royer* Aug. 16, 2007, Transcript, *supra* note 1287; *Royer* Docket Sheet, *supra* note 1253 (D.E. 612, August 26, 2005, reduction of sentence for Muhammed Aatique); *see Sheridan*, *supra* note 1260.

1309. www.bop.gov (reg. no. 57593-066).

1310. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer* Docket Sheet, *supra* note 1253; *see Heffelfinger*, *supra* note 1253, at 97; *Sheridan*, *supra* note 1260.

1311. *Royer* Aug. 16, 2007, Transcript, *supra* note 1287; *Royer* Docket Sheet, *supra* note 1253 (D.E. 630).

1312. www.bop.gov (reg. no. 46809-083).

1313. *United States v. Benkahla*, 530 F.3d 300, 303–04 (4th Cir. 2008); *Khan*, 461 F.3d at 485; *United States v. Benkahla*, 437 F. Supp. 2d 541, 544–46 (E.D. Va. 2006); *Khan*, 309 F. Supp. 2d at 796 n.2; *Khan Habeas Relief Opinion*, *supra* note 1253, at 3 n.2; *Royer* Docket Sheet, *supra* note 1253; *see Matthew Barakat, Va. Man Convicted of Lying in Terror Probe*, *Richmond Times–Dispatch*, Feb. 6, 2007, at B2; *Heffelfinger*, *supra* note 1253, at 93.

1314. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544–45.

1315. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 545–46; *see Matthew Barakat, Jihadist Suspect on Trial*, *Richmond Times–Dispatch*, Jan. 30, 2007, at B2 [hereinafter *Jihadist Suspect*]; *Barakat*, *supra* note 1313.

1316. *Benkahla*, 530 F.3d at 303; *United States v. Benkahla*, 501 F. Supp. 2d 748, 750–51 (E.D. Va. 2007); *Opinion* at 1–3, *United States v. Benkahla*, No. 1:06-cr-9 (E.D. Va. Oct. 2, 2006), D.E. 57 [hereinafter *Benkahla Dismissal Denial*], *available at* 2006 WL 2871234; *see Barakat, Jihadist Suspect*, *supra* note 1315.

1317. *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 1313.

1318. *Benkahla*, 530 F.3d at 304–05; *Habeas Denial Opinion* at 2–3, *Benkahla*, No. 1:06-cr-9 (E.D. Va. July 8, 2010), D.E. 182 [hereinafter *Benkahla Habeas Denial Opinion*], *available at* 2010 WL 2721384, *appeal dismissed*, 420 F. App'x 275 (4th Cir. 2011); *Benkahla*, 437 F. Supp. 2d at 544–45; *see Barakat*, *supra* note 1313.

was indicted for perjury during his grand jury testimony and for obstruction of justice.¹³¹⁹ On July 13, the indictment was expanded to charge him for false statements to the FBI.¹³²⁰ The court assigned Benkahla's perjury case to Judge James C. Cacheris,¹³²¹ who told the jury at various times during the trial that it was a perjury case, not a terrorism case, that they were deciding.¹³²² The jury found Benkahla guilty on February 5, 2007; Judge Cacheris sentenced him on July 24 to ten years and one month in prison.¹³²³ The court of appeals affirmed.¹³²⁴

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.¹³²⁵

Ali al-Timimi was regarded as the paintballers' spiritual leader.¹³²⁶ Reportedly a person of international fame,¹³²⁷ he was a cofounder of a Muslim center in Falls Church called the Dar Al-Arqam Center, where many of the paintballers met each other.¹³²⁸

On September 16, 2001, five days after terrorists attacked the Pentagon and World Trade Center, [al-Timimi] attended a group dinner meeting with several of [the paintballers] to speak about the events. Upon arriving, [al-Timimi] first

1319. *Benkahla*, 530 F.3d at 305; *Benkahla*, 437 F. Supp. 2d at 544; Docket Sheet, *Benkahla*, No. 1:06-cr-9 (E.D. Va. Feb. 9, 2006) [hereinafter *Benkahla* Docket Sheet] (D.E. 1); see Jerry Markon, Va. "Jihad" Probe Sees New Charge, Wash. Post, Feb. 23, 2006, at B4.

1320. *Benkahla*, 530 F.3d at 305; *Benkahla* Habeas Denial Opinion, *supra* note 1318, at 3; *Benkahla* Dismissal Denial, *supra* note 1316, at 1, 3–4; *Benkahla* Docket Sheet, *supra* note 1319 (D.E. 49).

1321. Tim Reagan interviewed Judge Cacheris for this report in the judge's chambers on November 6, 2008.

1322. Interview with Hon. James C. Cacheris, Nov. 6, 2008; see James C. Cacheris, *United States v. Benkahla: Voir Dire Questions* (Jan. 25, 2007).

1323. *Benkahla*, 530 F.3d at 305–06; *Benkahla* Habeas Denial Opinion, *supra* note 1318, at 6; *United States v. Benkahla*, 501 F. Supp. 2d 748, 751, 762 (E.D. Va. 2007); *Benkahla* Docket Sheet, *supra* note 1319; see www.bop.gov (noting a release date of May 5, 2016, reg. no. 46867-083); see also Barakat, *supra* note 1313; Human Rights Watch, *Illusion of Justice* 128–29, 153–54, 190–91, 199 (2014); Jerry Markon, *10-Year Sentence for Perjury*, Wash. Post, July 25, 2007, at B5.

1324. *Benkahla*, 530 F.3d 300, *cert. denied*, 555 U.S. 1120 (2009).

1325. *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").

1326. See Markon, *Case Hailed*, *supra* note 1255; Markon, *supra* note 1253; Jeremy Scahill, *Dirty Wars* 71–72 (2013); Viorst, *supra* note 1253, at 69, 79.

1327. Heffelfinger, *supra* note 1253, at 88, 91.

1328. *United States v. Chandia*, 514 F.3d 365, 369 (4th Cir. 2008); Opinion at 1, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Apr. 28, 2014), D.E. 350 [hereinafter *Al-Timimi* Discovery Opinion]; *Benkahla* Habeas Denial Opinion, *supra* note 1318, at 1; *United States v. Khan*, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004); see Heffelfinger, *supra* note 1253, at 92, 94.

instructed those present to disconnect the phones and draw the blinds. He then proceeded to advise the men that it would become necessary to defend Islam by engaging in violent jihad against enemies of their faith, including the United States military in Afghanistan.¹³²⁹

Al-Timimi 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.¹³³⁰ His appeal to the U.S. Court of Appeals for the Fourth Circuit was interrupted by a remand to the district court on April 25, 2006, for a determination of whether the prosecution of al-Timimi relied on undisclosed surveillance.¹³³¹ After reviewing classified ex parte briefing, Judge Brinkema ruled on April 28, 2014, that the government had not improperly denied al-Timimi any discovery.¹³³²

Al-Timimi was born in the United States to Iraqi immigrants.¹³³³ His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.¹³³⁴ When al-Timimi was a teenager, his family spent some time in Saudi Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Islam.¹³³⁵ A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.¹³³⁶

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

1329. *Al-Timimi* Discovery Opinion, *supra* note 1328, at 1–2.

1330. *Chandia*, 514 F.3d at 369 n.1; *Al-Timimi* Discovery Opinion, *supra* note 1328, at 3; see www.bop.gov (reg. no. 48054-083); Markon, *Case Hailed*, *supra* note 1255; Markon, *supra* note 1253; Viorst, *supra* note 1253, at 78; see also *Khan*, 309 F. Supp. 2d at 821 (“As we have found, the government’s evidence established beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon’s house to heed the call of Mullah Omar for all Muslims to help defend the Taliban.”); Katherine C. Donahue, *Slave of Allah* 168 (2007) (“Dr. Ali al-Timimi was sentenced to life in prison for urging young men at a dinner party to go on jihad.”); Heffelfinger, *supra* note 1253, at 93.

To select jurors for al-Timimi’s trial, Judge Brinkema used a jury questionnaire. Leonie M. Brinkema, *United States v. Al-Timimi: Jury Questionnaire* (Mar. 28, 2005); see Transcript, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Apr. 1, 2005, filed Aug. 5, 2014), D.E. 380 (post-questionnaire voir dire); Transcript, *id.* (Mar. 31, 2005, filed Aug. 5, 2014), D.E. 379 (same); Transcript, *id.* (Mar. 23, 2005, filed July 16, 2014), D.E. 377 (working with the attorneys to draft the questionnaire).

1331. Order, *United States v. Al-Timimi*, No. 05-4761 (4th Cir. Apr. 25, 2006), D.E. 74 [hereinafter *Al-Timimi* Remand Order]; *Al-Timimi* Discovery Opinion, *supra* note 1328, at 3–4; Transcript, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Jan. 16, 2007, filed May 17, 2007), D.E. 220 [hereinafter *Al-Timimi* Jan. 16, 2007, Transcript]; see *Al-Timimi* Docket Sheet, *supra* note 1256 (noting reopening of the district court case on May 19, 2006); see also Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

1332. *Al-Timimi* Discovery Opinion, *supra* note 1328.

An appeal is pending. Docket Sheet, *United States v. Al-Timimi*, No. 14-4451 (4th Cir. June 6, 2014) (noting that the response brief is due on July 6, 2015).

1333. See Heffelfinger, *supra* note 1253, at 94; Viorst, *supra* note 1253, at 69.

1334. See Sheridan, *supra* note 1260; Viorst, *supra* note 1253, at 69.

1335. See Sheridan, *supra* note 1260; Viorst, *supra* note 1253, at 72.

1336. See Viorst, *supra* note 1253, at 73.

equipment.¹³³⁷ Chandia was indicted separately, because although he was associated with the paintballers he did not actually play the game.¹³³⁸ Judge Hilton sentenced him to fifteen years in prison on August 25, 2006, applying a terrorism sentencing enhancement.¹³³⁹ The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in this case.¹³⁴⁰ On January 23, 2008, the court of appeals remanded the case for resentencing, because Judge Hilton had not supported the enhancement with a finding of specific intent.¹³⁴¹ On May 2, 2008, Judge Hilton again sentenced Chandia to fifteen years in prison, and the court of appeals again remanded for more factfinding.¹³⁴² On April 6, 2012, the court of appeals affirmed a third sentencing to fifteen years.¹³⁴³ Chandia is a Pakistani citizen who taught third grade at an Islamic school called the Al-Huda School in College Park, Maryland.¹³⁴⁴

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.¹³⁴⁵ 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.¹³⁴⁶

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

1337. *United States v. Chandia*, 675 F.3d 329, 333 (4th Cir. 2012); *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); see Matthew Barakat, *Teacher Convicted of Aiding Terror Group*, Cincinnati Post, June 7, 2006, at A9; Jerry Markon, *Final Defendant Guilty in "Va. Jihad,"* Wash. Post, June 7, 2006, at A12 [hereinafter *Final Defendant*]; Markon, *Case Hailed*, *supra* note 1255; Markon, *supra* note 1253; Sheridan, *supra* note 1260; Smith, *supra* note 1260 ("Chandia provided material support to LET by paying \$622 to ship 50,000 paintballs to Pakistan.").

1338. *Chandia*, 675 F.3d at 332; *Chandia*, 514 F.3d at 373; see Barakat, *supra* note 1337.

1339. *Chandia*, 675 F.3d at 331; *Chandia*, 514 F.3d at 370–71; *Chandia* Docket Sheet, *supra* note 1257; see Markon, *supra* note 1253.

1340. *Chandia* Docket Sheet, *supra* note 1257 (D.E. 222, 223).

1341. *Chandia*, 514 F.3d at 369, 375–77; *Chandia*, 675 F.3d at 331.

1342. *Chandia*, 675 F.3d at 331; *Chandia* Docket Sheet, *supra* note 1257 (D.E. 249); *United States v. Chandia*, 395 F. App'x 53 (4th Cir. 2010).

1343. *Chandia*, 675 F.3d 329, *cert. denied*, 568 U.S. ___, 133 S. Ct. 609 (2012); see www.bop.gov (noting a release date of August 2, 2019, reg. no. 46811-083).

1344. See Barakat, *supra* note 1337; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 1337; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing Profiles of Accused Jihad Network Member*, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 1260.

1345. *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 32, December 23, 2004, sealed motion; D.E. 36, December 29, 2004, CIPA notice); see 18 U.S.C. app. 3 (2013) (text of CIPA); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2–22* (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

1346. *Al-Timimi* Docket Sheet, *supra* note 1256.

government may have undisclosed intercepts of either the appellant or various individuals material to his trial.¹³⁴⁷

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.¹³⁴⁸

Another difficulty arose from the government's refusal to allow Judge Brinkema's law clerk, who had a security clearance, to see classified information that the government showed the judge.¹³⁴⁹

I have still not gotten my law clerk who is assigned to this case cleared to have access to all of the documents to which the Court has had access. I will not and do not function that way. That means I cannot have the assistance of my clerk in drafting any opinions, in having my own in-house person to discuss any legal or other issues. I have been asking the government for several probably months at this point. She has a full clearance but is not cleared for the particular issues involved in this case. Until that is done, this Court is not going to rule definitively on any of those issues that require that information be addressed.¹³⁵⁰

Judge Brinkema relies on staff for the typing of opinions, so the denial of the law clerk's access to materials that Judge Brinkema needed to review in order to rule interfered with Judge Brinkema's judicial work.¹³⁵¹ At an October 4, 2013, hearing, Judge Brinkema announced that she had figured out a way to opine on the matters that only she could see.¹³⁵² She was unable, however, to prepare for the court of appeals as detailed a record of her review as she otherwise would have.¹³⁵³

Challenge: Closed Proceedings

On July 21, 2006, Judge Brinkema conducted a closed hearing on administrative motions in al-Timimi's remand, but the transcript of the hearing was unsealed the following month after a classification review.¹³⁵⁴ Another sealed proceeding

1347. *Al-Timimi* Remand Order, *supra* note 1331, at 1; see *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 182, referring to a warrant under the Foreign Intelligence Surveillance Act).

1348. Transcript, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. July 21, 2006, filed July 24, 2006), D.E. 183 [hereinafter *Al-Timimi* July 21, 2006, Transcript].

1349. *Al-Timimi* Discovery Opinion, *supra* note 1328, at p.4 n.1.

1350. Transcript at 4–5, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Feb. 19, 2009, filed Sept. 19, 2012), D.E. 297 [hereinafter *Al-Timimi* Feb. 19, 2009, Transcript].

1351. Interview with Hon. Leonie M. Brinkema, Sept. 4, 2014 (noting that the government said that it would allow the clerk to view the material if the clerk were a permanent law clerk rather than a term law clerk).

1352. Transcript at 27, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 4, 2013, filed Nov. 13, 2013), D.E. 340.

1353. Interview with Hon. Leonie M. Brinkema, Sept. 4, 2014.

1354. *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 183, August 14, 2006, unsealing of the transcript); see Matthew Barakat, *Eavesdropping Did Not Taint Case*, *Richmond Times-Dispatch*, July 22, 2006, at B8.

was held on January 16, 2007, and its transcript was unsealed seven months later.¹³⁵⁵ The transcript of a closed proceeding held on October 23, 2008, was unsealed only seven days after the event.¹³⁵⁶ A partial transcript of a closed February 19, 2009, proceeding¹³⁵⁷ was unsealed in 2012.¹³⁵⁸

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?”¹³⁵⁹

Challenge: Classified Arguments

On November 6, 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.”¹³⁶⁰ A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.¹³⁶¹ 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.¹³⁶²

Classified filings in al-Timimi’s case were filed with the classified information security officer, and redacted versions were sometimes subsequently filed in the public record.¹³⁶³ On June 13, 2014, Judge Brinkema ordered the government to have another look at all classified filings “to allow the placement of those documents on the public docket in whole or in redacted form.”¹³⁶⁴ The government

Appearing at the hearing were four attorneys and a special agent for the government and one attorney for al-Timimi. *Al-Timimi* July 21, 2006, Transcript, *supra* note 1348. 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.*

1355. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 1331; *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 228, August 16, 2007, unsealing of the transcript).

By the time of this hearing, both defense attorneys had obtained secret clearances. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 1331.

1356. *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 272).

1357. *Id.*

1358. *Al-Timimi* Feb. 19, 2009, Transcript, *supra* note 1350.

1359. Transcript, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 23, 2008, filed Oct. 30, 2008), D.E. 272.

1360. *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 243).

1361. 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.

1362. See Lichtblau, *supra* note 1361; Markon, *supra* note 1361.

1363. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1256; see Reagan, *supra* note 1345, at 21–22 (providing information about classified information security officers).

1364. Order, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. June 13, 2014), D.E. 363; see Motion, *id.* (June 12, 2014), D.E. 361 (“This motion is being made in anticipation of the trans-

filed seven redacted documents on September 19¹³⁶⁵ and another eleven on the following March 27.¹³⁶⁶

Challenge: FISA Evidence

After the court of appeals' 2006 remand of al-Timimi's case, the government presented to Judge Brinkema ex parte and in camera surveillance orders and applications for surveillance orders pursuant to the Foreign Intelligence Surveillance Act (FISA) and related to al-Timimi's case.¹³⁶⁷

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.”¹³⁶⁸

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.¹³⁶⁹ Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.¹³⁷⁰

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.¹³⁷¹ Therefore, Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.¹³⁷²

mission of the record to the United States Court of Appeals for the Fourth Circuit and to facilitate appellate review.”).

1365. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1256; (D.E. 381 to 387).

1366. *Id.* (D.E. 394 to 404).

1367. Government Brief, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 2, 2006, filed Sept. 19, 2014), D.E. 381 (redacted).

1368. *Al-Timimi* Remand Order, *supra* note 1331, at 1.

It was reported that “authorities” obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 1253, at 78.

1369. *Al-Timimi* July 21, 2006, Transcript, *supra* note 1348.

1370. *Al-Timimi* Docket Sheet, *supra* note 1256 (D.E. 182); *Al-Timimi* July 21, 2006, Transcript, *supra* note 1348.

1371. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

1372. *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.¹³⁷³ He lived in Minneapolis with his wife, a naturalized U.S. citizen, and their daughter.¹³⁷⁴ The interview was prompted by information obtained by secretly monitoring Warsame's telecommunications and searching his home.¹³⁷⁵ On the following day, Warsame was arrested as a material witness in a Southern District of New York grand jury investigation.¹³⁷⁶

FBI agents approached Warsame's home on December 8 at a time they knew he would be alone.¹³⁷⁷ Warsame invited the agents in.¹³⁷⁸ 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.¹³⁷⁹ 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.¹³⁸⁰

In early 2000, Warsame illegally entered Afghanistan from Pakistan to attend an Al-Qaeda training camp near Kabul.¹³⁸¹ That summer, Warsame trained at another Al-Qaeda training camp, in Kandahar, which was led by Osama Bin Lad-

1373. *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 United States); Susan Schmidt, *Canadian Held for Alleged Al Qaeda Ties*, Wash. Post, Jan. 22, 2004, at A3.

1374. *Warsame*, 488 F. Supp. 2d at 849; see Todd Nelson, *Suspect Faces N.Y. Extradition*, St. Paul Pioneer Press, Dec. 13, 2003, at A1.

1375. *Warsame*, 488 F. Supp. 2d at 850; see Pam Louwagie, *Terror Suspect's Case Debated in U.S. District Court*, Minneapolis–St. Paul Star Trib., Nov. 16, 2005, at 1B.

1376. *Warsame*, 488 F. Supp. 2d at 854; see Greg Gordon & Howie Padilla, *Al-Qaida Associate Held in Hennepin County Jail*, Minneapolis–St. Paul Star Trib., Dec. 10, 2003, at 1A; Pam Louwagie & Howie Padilla, *Student Accused of Link to Al-Qaida*, Minneapolis–St. Paul Star Trib., Jan. 22, 2004, at 1A; Schmidt, *supra* note 1373.

1377. *Warsame*, 488 F. Supp. 2d at 850.

1378. *Id.*

1379. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1380. *Warsame*, 488 F. Supp. 2d at 851; see Bob von Sternberg, *Warsame's Statements Suppressed*, Minneapolis–St. Paul Star Trib., June 1, 2007, at 4B.

1381. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009) (quoting the plea agreement).

en.¹³⁸² In 2001, Warsame returned to the United States, maintaining communication and financial contacts with Al-Qaeda.¹³⁸³

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.¹³⁸⁴ Warsame consented.¹³⁸⁵ 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.¹³⁸⁶ After a night's sleep on the base, Warsame said that he wanted to go home.¹³⁸⁷ For that reason, and because the several hours of questioning that day were immediately followed by an arrest, Judge John R. Tunheim, on May 31, 2007, suppressed fruits of that day's interview.¹³⁸⁸

On the day of his arrest, Warsame appeared before Magistrate Judge Earl Cudd at a closed proceeding, and Warsame's name was not reported publicly until a couple of days later.¹³⁸⁹ It was subsequently reported that Warsame's public identification thwarted the government's intentions to use him as an informant.¹³⁹⁰ At another closed proceeding, on December 16, 2003, the government received permission to transfer Warsame to Manhattan for grand jury testimony.¹³⁹¹

A Minnesota grand jury indicted Warsame on January 20, 2004, for providing material support to Al-Qaeda by attending training camps in Afghanistan.¹³⁹² Warsame returned to Minnesota on the following day.¹³⁹³ The court assigned the case to Judge Tunheim.¹³⁹⁴ A superseding indictment was filed about a year and a

1382. *Id.* at 980.

1383. *Id.*

1384. *Warsame*, 488 F. Supp. 2d at 851.

1385. *United States v. Warsame*, 547 F. Supp. 2d 982, 984 (D. Minn. 2008); *Warsame*, 488 F. Supp. 2d at 851.

1386. *Warsame*, 488 F. Supp. 2d at 850–51; see Von Sternberg, *supra* note 1380.

1387. *Warsame*, 488 F. Supp. 2d at 853.

1388. *Id.* at 861; see Von Sternberg, *supra* note 1380.

Tim Reagan interviewed Judge Tunheim for this report at the Federal Judicial Center on August 18, 2009.

1389. See Gordon & Padilla, *supra* note 1376; Padilla et al., *supra* note 1373.

1390. Greg Gordon, *FBI Hoped Warsame Would Act as Spy*, Minneapolis–St. Paul Star Trib., Feb. 14, 2004, at 1B; Schmidt, *supra* note 1373.

1391. 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.

1392. *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 1373; Louwagie & Padilla, *supra* note 1376; Schmidt, *supra* note 1373.

1393. See Schmidt, *supra* note 1373.

1394. D. Minn. Docket Sheet, *supra* note 1392.

half later.¹³⁹⁵ Warsame's attorneys claimed that he went to Afghanistan in search of Muslim utopia, but he left after becoming disillusioned.¹³⁹⁶

The government appealed Judge Tunheim's suppression order, and the court of appeals heard arguments on March 13, 2008.¹³⁹⁷ The case could not be brought to trial while the appeal was pending.¹³⁹⁸

Midway through his sixth year of detention, Warsame and the government agreed to a plea bargain.¹³⁹⁹ On July 9, 2009, Judge Tunheim sentenced Warsame to seven years and eight months and signed a stipulated deportation order.¹⁴⁰⁰

Warsame was released from prison on October 8, 2010, and deported to Canada.¹⁴⁰¹

Challenge: Mental Health During Detention

Detention of terrorism suspects frequently amounts to solitary confinement.¹⁴⁰² 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.¹⁴⁰³ Judge Tunheim observed that visits by the Canadian consulate were also helpful.¹⁴⁰⁴

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

1395. *Warsame*, 651 F. Supp. 2d at 979; D. Minn. Docket Sheet, *supra* note 1392; *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.

1396. See Pam Louwagie, *Terror Suspect's Case Questioned*, Minneapolis–St. Paul Star Trib., Aug. 29, 2005, at 1B.

1397. Docket Sheet, *United States v. Warsame*, No. 07-2560 (8th Cir. June 29, 2007).

1398. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1399. *Warsame*, 651 F. Supp. 2d at 979; see Pam Louwagie, *Terror Suspect Pleads Guilty*, Minneapolis–St. Paul Star Trib., May 21, 2009, at 1B.

1400. *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), D.E. 176; Transcript, *id.* (July 9, 2009, filed Aug. 10, 2009), D.E. 179.

In light of the plea bargain, the court of appeals dismissed the government's pending suppression appeal. Judgment, *Warsame*, No. 07-2560 (8th Cir. Aug. 12, 2009).

1401. www.bop.gov (reg. no. 11355-041); see Sandro Contenta, *Terrorist Supporter Might Make Toronto His Home*, Toronto Star, Oct. 10, 2010, at A6.

1402. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Contenta, *supra* note 1401 (“Warsame spent 5½ years in solitary confinement during pre-trial custody. He was let out of his cell only one hour a day.”).

1403. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Human Rights Watch, *Illusion of Justice* 109, 115, 198–200 (2014); see also Atul Gawande, *Hellhole*, New Yorker, Mar. 30, 2009, at 36 (describing mental health deterioration resulting from solitary confinement).

1404. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

would not agree.¹⁴⁰⁵ Warsame was represented by the federal public defender's office, and the problematic restrictions would have curtailed who in the office could communicate with Warsame.¹⁴⁰⁶ In time, attorneys for both sides were able to strike an agreement.¹⁴⁰⁷

Challenge: Classified Evidence

The case against Warsame relied on classified evidence, and a substantial amount of classified information was discoverable.¹⁴⁰⁸ Warsame's attorneys and Judge Tunheim's staff all obtained security clearances.¹⁴⁰⁹ A protective order governed defense handling of classified materials.¹⁴¹⁰ 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.¹⁴¹¹

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 Warsame.¹⁴¹² Because the professor could not identify local counsel likely to obtain a security clearance, however, Judge Tunheim continued the appointment of the federal defender's office as second counsel.¹⁴¹³

Early in the case, the government produced to defense counsel discoverable classified evidence, and Warsame's attorneys had to review the classified material in a secure room at the courthouse, which included a safe suitable for storing classified materials.¹⁴¹⁴ The attorneys had to prepare any documents based on or referring to classified material in the secure room.¹⁴¹⁵ 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

1405. 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.

1406. See Pam Louwagie, *Feds Want Restrictions in Terror Case*, Minneapolis–St. Paul Star Trib., Feb. 3, 2004, at 1B.

1407. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Donovan, *Civil Rights*, *supra* note 1405; 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.

1408. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1409. *Id.*

1410. Protective Order, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005), D.E. 27.

1411. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1412. *Id.*

1413. *Id.*

1414. *Id.*; see Louwagie, *supra* note 1396.

1415. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Louwagie, *supra* note 1396.

in the safe.¹⁴¹⁶ Judge Tunheim could keep classified materials in a safe in his chambers office.¹⁴¹⁷

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.¹⁴¹⁸ Some information the government was willing to declassify, and for other information the government proposed unclassified substitutions—modifications to the evidence intended to redact classified information while retaining evidentiary value.¹⁴¹⁹ Judge Tunheim compared all proposed substitutions with their corresponding originals and frequently asked for modifications.¹⁴²⁰ 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.¹⁴²¹ As a result of this process, Warsame's attorneys saw only declassified evidence or unclassified substitutions.¹⁴²²

Challenge: FISA Evidence

Some evidence against Warsame was obtained as a result of warrants granted pursuant to the Foreign Intelligence Surveillance Act (FISA).¹⁴²³ 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.¹⁴²⁴ The government notified Warsame that it intended to use some of this evidence against him at trial.¹⁴²⁵

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.¹⁴²⁶

1416. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1417. *Id.*

1418. *Id.*

1419. *Id.*; Substitution Protective Order 3, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. July 9, 2009), D.E. 173 (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), D.E. 144 (same); Substitution Protective Order 1, *id.* (Mar. 8, 2005), D.E. 27 (same).

1420. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1421. *Id.*

1422. *Id.*

1423. *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.

1424. *Warsame*, 547 F. Supp. 2d at 984; Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1425. *Warsame*, 547 F. Supp. 2d at 985–86.

1426. *Id.*, 547 F. Supp. 2d 982.

Ashland and Moscow¹⁴²⁷

United States v. Al-Haramain Islamic Foundation, Inc.
(Michael R. Hogan and Thomas M. Coffin, D. Or.),
Al-Haramain Islamic Foundation, Inc. v. United States
(Garr M. King, D. Or.), *United States v. Al-Hussayen and*
Al-Kidd v. Gonzales (Edward J. Lodge
and Mikel H. Williams, D. Idaho)

On February 19, 2004, the government froze the assets of Al-Haramain Islamic Foundation, a charity headquartered in Ashland, Oregon.¹⁴²⁸ The charity and two of its founders—Pete Seda and Soliman al-Buthe—had been on an FBI terrorism watch list for a couple of years.¹⁴²⁹ The Department of Treasury designated Al-Haramain and al-Buthe, whose name was sometimes spelled al-Buthi, global agents of terrorism on September 9.¹⁴³⁰

An Iranian who was born Perouz Sedaghaty, Seda immigrated to the United States in the early 1970s to study at the Southern Oregon University.¹⁴³¹ He remained in the United States following the 1979 Iranian revolution and became a tree trimmer in Ashland, where he was known as a skilled arborist who saved heritage trees.¹⁴³² He also became a U.S. citizen.¹⁴³³ In 1989, Seda established a foun-

1427. Christopher Krewson provided research assistance for this case study.

1428. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 970–71, 973 (9th Cir. 2012); *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233, 1245 (D. Or. 2008); see Les Zaitz, *U.S. Freezes Assets of Charity in Ashland*, *Oregonian*, Feb. 20, 2004, at A1.

1429. *Al Haramain Islamic Found.*, 686 F.3d at 971; see Beth Quinn, *Ashland Friends Defend Muslim*, *Oregonian*, June 4, 2004, at A1; Les Zaitz, *Saudi Charity in Ashland on Terrorism "Watch List"*, *Oregonian*, Nov. 9, 2003, at A1 [hereinafter "Watch List"]; Zaitz, *supra* note 1428.

Although he was living in Iran at the time, Seda's home was searched on February 18 pursuant to a February 13 warrant. Order at 1–2, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 13, 2010), D.E. 324 [hereinafter *Sedaghaty* Suppression Denial Order], available at 2010 WL 1490306.

1430. *Al Haramain Islamic Found.*, 686 F.3d at 970, 973–74, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243, 1245–46; see Les Zaitz, *U.S. Closing Oregon Islamic Charity It Calls Terror Link*, *Oregonian*, Sept. 10, 2004, at A1; see also *infra* "Foreign Intelligence Surveillance Act Litigation."

1431. *United States v. Sedaghaty*, 728 F.3d 885, 893 (9th Cir. 2013); see Quinn, *supra* note 1429 (reporting that his birth name was Pervouz Sada Gaty); Les Zaitz, *Charity Boss Is Back to Face Charges*, *Oregonian*, Aug. 16, 2007, at A4 [hereinafter *Charity Boss*]; Zaitz, "Watch List," *supra* note 1429.

1432. *Sedaghaty*, 728 F.3d at 893; see Quinn, *supra* note 1429; Zaitz, "Watch List," *supra* note 1429.

1433. See Bill Bishop, *Charity's Fugitive Leader Arraigned*, *Eugene Reg.-Guard*, Aug. 16, 2007, at A1.

dation to distribute Islamic books to American prisoners.¹⁴³⁴ This caught the attention of Al-Haramain Islamic Foundation in Saudi Arabia.¹⁴³⁵ Al-Haramain Saudi Arabia was the charitable arm of the Muslim World League, which was founded in 1962.¹⁴³⁶

Al-Haramain Saudi Arabia helped Seda found Al-Haramain Oregon on October 22, 1997.¹⁴³⁷ In addition to operating a prayer house in Ashland and distributing Islamic literature, Al-Haramain established a mosque in Springfield, Missouri, in 2000.¹⁴³⁸ In 2003, Seda traveled to Saudi Arabia, after which he settled first in Dubai and then in Iran.¹⁴³⁹

At one time, Al-Haramain Saudi Arabia had affiliates in approximately fifty countries.¹⁴⁴⁰ From 2002 through 2004, the U.S. Treasury Department identified as specially designated global terrorists Al-Haramain organizations in Afghanistan, Albania, Bangladesh, Bosnia-Herzegovina, the Comoros Islands, Ethiopia, Indonesia, Kenya, the Netherlands, Pakistan, Somalia, and Tanzania.¹⁴⁴¹ The Saudi government shut down Al-Haramain Saudi Arabia in 2004,¹⁴⁴² but the U.S. Treasury Department did not identify it as a specially designated global terrorist until June 19, 2008.¹⁴⁴³

Aqeel Abdul Aziz al-Aqeel, director of Al-Haramain Saudi Arabia, co-founded Al-Haramain Oregon.¹⁴⁴⁴ He was president of Al-Haramain Oregon until his resignation in March 2003.¹⁴⁴⁵ His procedural challenge to the U.S. Treasury's

1434. *Sedaghaty*, 728 F.3d at 893, 897; see Zaitz, *Charity Boss*, *supra* note 1431; Zaitz, "Watch List," *supra* note 1429.

1435. *Sedaghaty*, 728 F.3d at 893; see Zaitz, *Charity Boss*, *supra* note 1431.

1436. See Chris Heffelfinger, *Radical Islam in America* 57–59 (2011).

1437. *Sedaghaty*, 728 F.3d at 891 n.1, 893; *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233, 1243 (D. Or. 2008); see Zaitz, *Charity Boss*, *supra* note 1431; Zaitz, "Watch List," *supra* note 1429; Les Zaitz, *Tax Case Ends Against Charity*, *Oregonian*, Aug. 5, 2005, at D1 [hereinafter *Tax Case Ends*]; Zaitz, *supra* note 1430; Zaitz, *supra* note 1428.

1438. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 971 (9th Cir. 2012); *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243; see Zaitz, "Watch List," *supra* note 1429.

1439. See Bill Bishop, *Charity's Fugitive Leader Arraigned*, *Eugene Reg.-Guard*, Aug. 16, 2007, at A1; Quinn, *supra* note 1429; Zaitz, "Watch List," *supra* note 1429; Zaitz, *Tax Case Ends*, *supra* note 1437.

1440. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241.

1441. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241.

1442. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 686 F.3d at 971, 973; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241; see Zaitz, *supra* note 1430.

1443. *Al Haramain Islamic Found.*, 686 F.3d at 975; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1444. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 686 F.3d at 971, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242; see *Sedaghaty* Suppression Denial Order, *supra* note 1429, at 3; see also Zaitz, "Watch List," *supra* note 1429; Zaitz, *supra* note 1430.

1445. *Al Haramain Islamic Found.*, 686 F.3d at 971, 973, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242, 1245; see *Sedaghaty* Suppression Denial Order, *supra* note 1429, at 3; see also Zaitz, "Watch List," *supra* note 1429; Zaitz, *supra* note 1430.

June 2004 identification of him as a specially designated global terrorist was unsuccessful.¹⁴⁴⁶

Al-Buthe was also an Al-Haramain Saudi Arabia official and was the only one other than Seda who had access to Al-Haramain Oregon's bank account.¹⁴⁴⁷

Idaho Prosecution

An associate of al-Buthe's, Sarni Omar al-Hussayen, was acquitted on June 10, 2004, of terrorism material support charges in Idaho.¹⁴⁴⁸

Al-Hussayen was indicted on February 13, 2003, for failure to disclose as part of his student visa applications Internet development assistance that he provided to the Islamic Assembly of North America.¹⁴⁴⁹ The U.S. District Court for the District of Idaho assigned the case to Judge Edward J. Lodge.¹⁴⁵⁰

The indictment was filed in the district's central division, which holds court in Moscow, but the case was transferred to Boise for trial because of the great publicity the case received locally.¹⁴⁵¹ In Boise, the court reduced its burdens arising from news media interest by designating one member of the media as a liaison.¹⁴⁵² This helped ensure that all members of the media had prompt and complete information at the same time.¹⁴⁵³ This effort proved successful, and the liaison acted as media liaison in one of Judge Lodge's subsequent cases.¹⁴⁵⁴

Additional precautions by Judge Lodge to avoid improper prejudice included a proscription on references to terrorism in general, September 11, the Islamic faith, and similar matters unless they were directly related to the case.¹⁴⁵⁵ Judge Lodge did not find it necessary to sequester the Boise jury; he might have had to sequester a Moscow jury.¹⁴⁵⁶

1446. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008); see *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1447. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242–43.

1448. *Id.* at 1243; Verdict, *United States v. Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 10, 2004), D.E. 671 [hereinafter *Al-Hussayen Verdict*]; see *No Conviction for Student in Terror Case*, N.Y. Times, June 11, 2004, at A14 [hereinafter *No Conviction*].

1449. Indictment, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003), D.E. 1 [hereinafter *Al-Hussayen Indictment*]; see Susan Schmidt, *5 Tied to Islamic Charity Indicted in N.Y.*, *Idaho*, Wash. Post, Feb. 27, 2003, at A2 (reporting on the unsealing of the indictment).

1450. Docket Sheet, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003); see Timothy Egan, *Computer Student on Trial Over Muslim Web Site Work*, N.Y. Times, Apr. 27, 2004, at A16.

For this report, Tim Reagan interviewed Judge Lodge and his law clerk Lauri Thompson in the judge's chambers on October 17, 2012.

1451. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1452. *Id.*

1453. *Id.*

1454. *Id.*

1455. *Id.*

1456. *Id.* (noting that jurors perform better if they can return home every day).

Al-Hussayen was a Saudi citizen and the son of a retired education minister; the Saudi government paid for his defense.¹⁴⁵⁷ In 1999, al-Hussayen entered a Ph.D. program in computer science at the University of Idaho in Moscow, Idaho.¹⁴⁵⁸ On January 9, 2004, a superseding indictment added a charge of material support to terrorism and an allegation of association with Al-Haramain.¹⁴⁵⁹ A March 4 second superseding indictment expanded the material support allegations to three counts.¹⁴⁶⁰ On June 10, the jury found him not guilty of the material support charges and some of the visa fraud charges and was unable to reach a verdict on the other visa fraud charges.¹⁴⁶¹ The government dismissed the counts on which the jury was hung upon al-Hussayen's agreeing to deportation.¹⁴⁶² Judge Lodge transferred al-Hussayen to the custody of immigration authorities on July 2,¹⁴⁶³ and al-Hussayen was immediately deported.¹⁴⁶⁴

Material Witness Detention

Abdulla al-Kidd was held as a material witness in al-Hussayen's prosecution, but he was never called to testify.¹⁴⁶⁵

According to al-Kidd's arrest warrant application, from March 2000 to November 2001 he and his wife received over \$20,000 from al-Hussayen and his associates.¹⁴⁶⁶ The application also claimed that he had a one-way first-class ticket to

1457. See Egan, *supra* note 1450 (also reporting, "Not long after the terrorist attacks of Sept. 11, 2001, a group of Muslim students led by a Saudi Arabian doctoral candidate held a candlelight vigil in the small college town of Moscow, Idaho, and condemned the attacks as an affront to Islam.").

1458. *Al-Hussayen* Indictment, *supra* note 1449; see Egan, *supra* note 1450.

1459. Superseding Indictment, *United States v. Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Jan. 9, 2004), D.E. 378.

1460. Second Superseding Indictment, *id.* (Mar. 4, 2004), D.E. 486; see Egan, *supra* note 1450.

1461. *Al-Hussayen* Verdict, *supra* note 1448; see Timothy Egan, *Sensing the Eyes of Big Brother, and Pushing Back*, N.Y. Times, Aug. 8, 2004, at 120 ("One juror, John Steger, said in an interview that the jury believed Mr. Hussayen's activities were matters of free speech, protected by the First Amendment."); *No Conviction*, *supra* note 1448 (also reporting that al-Hussayen "has been jailed since his February 2003 arrest, but continued to work toward his doctorate from his cell. His wife and their children returned to Saudi Arabia this year rather than fight deportation.").

1462. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 1, 2004), D.E. 684; see *U.S. Drops Charges for Saudi Student*, N.Y. Times, July 1, 2004, at A12; see also *Judge Allows Deportation for Saudi Grad Student*, Wash. Post, Apr. 26, 2003, at A10 (reporting on al-Hussayen's 2003 deportation order).

1463. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 2, 2004), D.E. 685.

1464. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1465. Opinion at 3, *Al-Kidd v. Gonzales*, No. 1:05-cv-93 (D. Idaho Sept. 18, 2006), D.E. 78, available at 2006 WL 2682346 [hereinafter *Al-Kidd* Opinion Denying Motion to Dismiss]; Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 16, 2004), D.E. 680.

1466. Application Affidavit at 2, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Mar. 17, 2003), D.E. 34.

Saudi Arabia departing from Dulles International Airport in Virginia on March 16, 2003.¹⁴⁶⁷ He was arrested at the airport on that date.¹⁴⁶⁸

Al-Kidd was held in the Alexandria Detention Center for eight days.¹⁴⁶⁹ On March 24, he was transferred to Oklahoma, and he was transferred to Boise, Idaho, on March 25.¹⁴⁷⁰ Following a March 31 hearing in Boise, he was released to the custody of his wife in Nevada.¹⁴⁷¹ Conditions of release were removed on June 16, 2004, following the conclusion of al-Hussayen's trial.¹⁴⁷²

On March 15, 2005, al-Kidd filed a civil action against various government officials, alleging that he was unlawfully detained as a terrorism suspect rather than as a material witness.¹⁴⁷³ He also claimed that his arrest warrant was based on false information.¹⁴⁷⁴

[The warrant application falsely stated that the plane ticket] was a first class, one-way ticket to Saudi Arabia, costing \$5,000 when in reality it was a round trip ticket with no scheduled return date, coach class, costing approximately \$2,000. In addition, [there were] several omissions from the warrant application: 1) Plaintiff's prior cooperation with the FBI, 2) Plaintiff was a native-born United States citizen with a wife, son, and other family living in the United States, 3) Plaintiff was not informed that his testimony may be needed or that he should not travel, 4) Plaintiff was not told to inform the FBI prior to any overseas travel,

1467. *Id.* at 3; *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1465, at 2.

1468. Dunning Transfer Opinion at 1–2, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 19, 2006), D.E. 74, available at 2006 WL 2038592; see Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at A1 (“Abdullah al Kidd was on his way to Saudi Arabia to work on his doctorate in Islamic studies in March 2003 when he was arrested as a material witness in a terrorism investigation.”); Susan Schmidt, *Fourth Man Arrested in Probe of Idaho Group*, Wash. Post, Mar. 18, 2003, at A21.

1469. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1465, at 3; see Susan Schmidt, *Fourth Man Arrested in Probe of Idaho Group*, Wash. Post, Mar. 18, 2003, at A21 (reporting, “The FBI has been seeking to interview [al-Kidd] about payments of about \$20,000 he allegedly received from al-Hussayen and his associates.”)

1470. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1465, at 3.

1471. *Id.*; see Liptak, *supra* note 1468 (“a federal judge ordered [al-Kidd] to move in with his in-laws in Las Vegas, where his wife was planning to stay until she joined him in Saudi Arabia”); Adam Liptak, *Justices Will Decide Whether Ashcroft May Be Sued in 2003 Detention Case*, N.Y. Times, Oct. 19, 2010, at A19 (“Abdullah al-Kidd, born in Kansas and once a star running back at the University of Idaho, spent 16 days in federal detention in three states in 2003, sometimes naked and sometimes shackled hand and foot.”).

1472. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1465, at 3; Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Aug. 6, 2004), D.E. 687; Order, *id.* (June 16, 2004), D.E. 680.

“By the time al-Kidd's confinement and supervision ended, fifteen months after his arrest, he had been fired from his job as an employee of a government contractor and had separated from his wife.” Erwin Chemerinsky, *The Case Against the Supreme Court* 212 (2014).

1473. Complaint, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Mar. 15, 2005), D.E. 1; see Ethan Bronner, *Citizen Held After 9/11 Wins Right to Be Tried*, N.Y. Times, Sept. 29, 2012, at A16.

1474. Amended Complaint at 15, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Nov. 18, 2005), D.E. 40 (denying the government's motion to dismiss); *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1465, at 8.

and 5) Plaintiff [had a history of cooperating with the FBI, but he] had not been contacted by the FBI in over eight months.¹⁴⁷⁵

Judge Lodge determined that the Idaho court did not have personal jurisdiction over the warden of the Alexandria Detention Center, so he transferred the claims against him to the Eastern District of Virginia,¹⁴⁷⁶ where Judge Claude M. Hilton granted the warden summary judgment.¹⁴⁷⁷ Judge Lodge also adopted¹⁴⁷⁸ Magistrate Judge Mikel H. Williams's grant of summary judgment¹⁴⁷⁹ to the Ada County sheriff respecting al-Kidd's conditions of confinement in Idaho. These matters settled on appeal.¹⁴⁸⁰

On September 27, 2006, Judge Lodge denied Attorney General John Ashcroft's motion to dismiss on the grounds of absolute immunity and qualified immunity.¹⁴⁸¹ The court of appeals affirmed on September 4, 2009.¹⁴⁸² On May 31, 2011, however, the Supreme Court determined that Attorney General Ashcroft was protected from al-Kidd's suit by qualified immunity.¹⁴⁸³

Agreeing with Judge Williams's report and recommendation, Judge Lodge awarded al-Kidd summary judgment on September 27, 2012, against the agent who prepared justifications for the arrest warrant application.¹⁴⁸⁴ Judge Lodge, however, awarded the agent who presented the warrant application summary judgment against al-Kidd, because the warrant application was not facially defi-

1475. Opinion at 3–4, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2012), D.E. 350, available at 2012 WL 4470776 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Opinion].

Agents ceased seeking al-Kidd's voluntary cooperation so as to preserve the confidentiality of their investigations. Report and Recommendation at 6, *id.* (June 18, 2012), D.E. 336, available at 2012 WL 4470852 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Report and Recommendation].

1476. Dunning Transfer Opinion, *supra* note 1468.

1477. Docket Sheet, *Al-Kidd v. Dunning*, No. 1:06-cv-871 (E.D. Va. July 27, 2006) (D.E. 156, summary judgment May 11, 2007).

1478. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 17, 2008), D.E. 248, available at 2008 WL 2795137.

1479. Opinion, *id.* (Feb. 13, 2008), D.E. 230, available at 2008 WL 553777.

1480. Order, *Al-Kidd v. Gonzales*, No. 08-35692 (9th Cir. Aug. 24, 2009), D.E. 23; Order, *Al-Kidd v. Dunning*, No. 07-1564 (4th Cir. Aug. 20, 2008), D.E. 30; see Robert Barnes, *Ashcroft Not Liable in Man's Detention*, Wash. Post, June 1, 2011, at A2.

1481. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2006), D.E. 79, available at 2006 WL 5429570; see Dan Eggen, *Ashcroft Is Denied Immunity in Case*, Wash. Post, Sept. 29, 2006, at A12.

1482. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009); see Carrie Johnson, *Court Allows Lawsuit Against Ashcroft*, Wash. Post, Sept. 5, 2009, at A3; John Schwartz, *Federal Court Rules Against Ashcroft in 9/11 Case*, N.Y. Times, Sept. 5, 2009, at A10.

1483. *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S. Ct. 2074 (2011); see *Al-Kidd v. Ashcroft*, 653 F.3d 982 (9th Cir. 2011) (remanding the case to the district court); Barnes, *supra* note 1477; Adam Liptak, *Justices Block Suit Over Use of Material Witness Law Against Detainee*, N.Y. Times, June 1, 2011, at A17; Stephen I. Vladeck, *The New National Security Canon*, 61 Am. U. L. Rev. 1295, 1326 (2012).

1484. *Al-Kidd* Summary Judgment Against FBI Agents Opinion, *supra* note 1475 at 3–14, 23.

cient.¹⁴⁸⁵ Judge Lodge also adopted Judge Williams’s grant of summary judgment against the government on al-Kidd’s Federal Tort Claims Act claim of false imprisonment.¹⁴⁸⁶ While the case was on appeal,¹⁴⁸⁷ it settled on January 5, 2015, for \$385,000 and an apology.¹⁴⁸⁸

A \$150,000 Donation

In February 2000, Mahmoud Talaat el-Fiki, an Egyptian physician, donated \$150,000 to Al-Haramain Oregon to support Muslims fighting Russian rule in Chechnya.¹⁴⁸⁹ On March 7, 2000, al-Buthe traveled from Saudi Arabia to Ashland, where, on March 10, he and Seda converted a wire transfer into 130 \$1,000 travelers checks, which was the bank’s entire inventory, and the remaining amount to a cashier’s check, which would be more difficult to convert overseas.¹⁴⁹⁰ Al-Buthe returned to Saudi Arabia with the money, without declaring it as required.¹⁴⁹¹

The charity was indicted on February 17, 2005, for falsely claiming on its 2000 tax return that the money was used to acquire the Missouri mosque.¹⁴⁹² Seda

1485. *Id.* at 15–24; *see Al-Kidd Summary Judgment Against FBI Agents Report and Recommendation*, *supra* note 1475, at 32–38 (deferring to Judge Lodge the question of whether the warrant application was facially deficient, because the issue called into question the competence of Judge Williams).

1486. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2012), D.E. 351, *available at* 2012 WL 4470782; *see Report and Recommendation*, *id.* (June 26, 2012), D.E. 337, *available at* 2012 WL 4470860.

1487. Docket Sheet, *Al-Kidd v. United States*, No. 12-35957 (9th Cir. Nov. 19, 2012) (D.E. 39, oral argument May 14, 2014).

1488. Dismissal, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Jan. 13, 2015), D.E. 366 (retaining jurisdiction to enforce the settlement); Order, *Al-Kidd*, No. 12-35957 (9th Cir. Jan. 6, 2015), D.E. 50; *see Matt Apuzzo & Steven Erlanger, Patriot Act Idea Rises in France, and Is Ridiculed*, *N.Y. Times*, Jan. 17, 2015, at 1; *Man Settles Lawsuit Over Post-9/11 Arrest*, *Wash. Post*, Jan. 17, 2015, at A3.

1489. *United States v. Sedaghaty*, 728 F.3d 885, 893 (9th Cir. 2013); *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 585 F. Supp. 2d 1233, 1243–44 (D. Or. 2008); *Sedaghaty Suppression Denial Order*, *supra* note 1429, at 3; *see Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 973, 978, 985 (9th Cir. 2012); *see also Zaitz, Charity Boss*, *supra* note 1431; *Zaitz*, *supra* note 1428.

1490. *Sedaghaty*, 728 F.3d at 893–94; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1244; *Sedaghaty Suppression Denial Order*, *supra* note 1429, at 4; *see Zaitz, Charity Boss*, *supra* note 1431; *Zaitz*, *supra* note 1430; *Zaitz*, *supra* note 1428.

1491. *See Zaitz*, *supra* note 1428.

“Al Buthe cashed the 130 \$1,000 traveler’s checks on about March 25, 2000, at a bank in Riyadh and deposited the \$21,000 cashier’s check.” *Sedaghaty Suppression Denial Order*, *supra* note 1429, at 4.

1492. Indictment, *United States v. Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Feb. 17, 2005), D.E. 1 [hereinafter *Al Haramain Indictment*]; *Sedaghaty*, 728 F.3d at 893; *Sedaghaty Suppression Denial Order* at 1–2, 4 *supra* note 1429; *see Bishop*, *supra* note 1433; *Zaitz, Tax Case Ends*, *supra* note 1437; *Zaitz*, *supra* note 1428; *see also Al-Buthe Declaration, attached as Ex. Y, Declaration in Support of Discovery Sanctions, In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Jan. 14, 2013), D.E. 2655 (“I reside in Riyadh, Saudi Arabia, and am currently the General Director of Environmental Health for the Capital City of Riyadh, Saudi Arabia.”).

was included in the indictment as Perouz Sedaghaty.¹⁴⁹³ Al-Buthe, who lives in Saudi Arabia and who has not been in the United States since 2001, was the third defendant.¹⁴⁹⁴ The indictment was filed in the Eugene Division of the U.S. District Court for the District of Oregon, and the court assigned the case to Judge Michael R. Hogan.¹⁴⁹⁵ The charity was dismissed as a defendant on September 8, because it was only a “functionless shell.”¹⁴⁹⁶

Al-Haramain’s Civil Actions

On April 26, 2006, Al-Haramain filed a lawsuit against the government seeking return of 155 cartons of religious pamphlets seized as part of the 2004 asset freeze.¹⁴⁹⁷ On July 21, the government agreed to return the pamphlets,¹⁴⁹⁸ so the action was dismissed.¹⁴⁹⁹

On August 6, 2007, Al-Haramain sued in the District of Oregon’s Portland Division to reverse its designation as a terrorist organization.¹⁵⁰⁰ Nine days later, Seda returned to the United States to defend himself against the 2005 indictment.¹⁵⁰¹

Seda had an accountant prepare records showing the donation used to acquire the Springfield, Missouri, mosque. *Sedaghaty* Suppression Denial Order, *supra* note 1429, at 4–5.

1493. *Al Haramain* Indictment, *supra* note 1492; *Sedaghaty*, 728 F.3d at 891 & n.1; see Bishop, *supra* note 1433; Zaitz, *Charity Boss*, *supra* note 1431; Zaitz, *Tax Case Ends*, *supra* note 1437.

1494. *Al Haramain* Indictment, *supra* note 1492; *Sedaghaty*, 728 F.3d at 891 n.1, 895; see Zaitz, *Tax Case Ends*, *supra* note 1437.

1495. Docket Sheet, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Feb. 17, 2005) [hereinafter D. Or. *Sedaghaty* Docket Sheet].

For this report, Tim Reagan interviewed Judge Hogan and his law clerk David Baker in the judge’s chambers on September 20, 2012. Judge Hogan retired on November 1, 2012. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

1496. Transcript, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 8, 2005, filed Sept. 16, 2005), D.E. 21; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1495; Redacted Indictment, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 21, 2005), D.E. 22; *Sedaghaty*, 728 F.3d at 895; see Zaitz, *Tax Case Ends*, *supra* note 1437.

1497. Complaint, *Al-Haramain Islamic Found. v. United States*, No. 6:06-cv-553 (D. Or. Apr. 26, 2006), D.E. 1; see Ashbel S. Green, *Islamic Charity Sues Feds Over Seized Pamphlets*, *Oregonian*, Apr. 28, 2006, at B5.

1498. See Ashbel S. Green, *Islamic Charity Will Get Literature Back*, *Oregonian*, July 22, 2006, at D2.

1499. Judgment, *Al-Haramain Islamic Found.*, No. 6:06-cv-553 (D. Or. July 27, 2006), D.E. 13.

1500. *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 970 (9th Cir. 2012); *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 585 F. Supp. 2d 1233, 1239 (D. Or. 2008); Complaint, *Al-Haramain Islamic Found. v. U.S. Dep’t of Treasury*, No. 3:07-cv-1155 (D. Or. Aug. 6, 2007), D.E. 1; see Supplemental Complaint, *id.* (Feb. 13, 2008), D.E. 43; see also Bishop, *supra* note 1433; Les Zaitz, *Ex-charity Sues Over Terrorist Labeling*, *Oregonian*, Aug. 7, 2007, at B1.

1501. Transcript, *Al-Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Aug. 15, 2007, filed July 21, 2008), D.E. 114 (arraignment); Order at 17 n.4, *id.* (Aug. 10, 2011), D.E. 570 [hereinafter *Sedaghaty* New Trial Denial], available at 2011 WL 3563145; see Bishop, *supra* note 1433; Zaitz, *Charity Boss*, *supra* note 1431.

Two months after freezing Al-Haramain Oregon's assets, the government provided the charity with unclassified information supporting its findings, but withheld supporting classified information.¹⁵⁰²

By mistake, among the supplemental documents produced to Al-Haramain's lawyers was a top secret document that apparently is evidence that the lawyers' communications with persons overseas were surveilled without warrants in March and April of 2004.¹⁵⁰³ The lawyers sued the government on February 28, 2006, after the *New York Times* reported on a warrantless surveillance program conducted by the National Security Agency.¹⁵⁰⁴ The government removed the mistakenly produced document from the administrative record.¹⁵⁰⁵ On August 7, 2012, the court of appeals reversed a judgment against the government in favor of the lawyers, determining that the government had sovereign immunity.¹⁵⁰⁶

Although it was eventually transferred to the Northern District of California as part of a multidistrict consolidation, the 2006 action by the lawyers was originally assigned to Judge Garr M. King.¹⁵⁰⁷ The 2007 action by Al-Haramain Oregon was assigned to Judge King as a related case.¹⁵⁰⁸

To support a February 6, 2008, redesignation, the government provided Al-Haramain with additional unclassified supporting information and provided the court, *ex parte* and *in camera*, with additional classified supporting information.¹⁵⁰⁹

On November 6, 2008, Judge King determined that the government violated Al-Haramain's due process rights by not giving it adequate notice of the reasons for its designation as a terrorist organization.¹⁵¹⁰ Judge King determined, after

1502. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1245.

1503. Opinion at 4, *Al Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. June 5, 2008), D.E. 69, available at 2008 WL 2381640; see Susan Goldsmith, *Islamic Charity, Lawyers File Wiretapping Lawsuit*, Oregonian, Mar. 1, 2006, at E5; Ashbel S. Green, *Sealed Document Reportedly Backs Up Eavesdropping Suit*, Oregonian, Mar. 4, 2006, at E7.

1504. See Goldsmith, *supra* note 1503; Green, *supra* note 1503; see also *infra* "Warrantless Wiretaps."

1505. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1247 n.7.

1506. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); see *infra* "Warrantless Wiretaps."

1507. Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006).

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on September 19, 2012.

1508. Interview with Hon. Garr M. King, Sept. 19, 2012.

1509. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1246.

1510. *Id.* at 1253–57, 1272–73; see Ashbel S. Green, *Judge Won't Lift Charity's Terrorist Designation*, Oregonian, Nov. 8, 2008, at B1.

additional briefing however, that this due process violation was harmless.¹⁵¹¹ The court of appeals, on September 23, 2011, affirmed both rulings.¹⁵¹²

The court of appeals determined that the government's seizure of Al-Haramain's assets without a warrant also violated due process and remanded the case to the district court for a determination of whether Al-Haramain was entitled to a remedy.¹⁵¹³ On remand, Al-Haramain conceded that no remedy for the due process violation would be effective.¹⁵¹⁴

In addition, the court of appeals held that the Multicultural Association of Southern Oregon's First Amendment right to advocate on behalf of Al-Haramain's interests were unconstitutionally constrained by an executive order prohibiting the contribution of services for the benefit of organizations designated as terrorist organizations.¹⁵¹⁵ On August 21, 2013, Judge King awarded the association \$17,228.69 in attorney fees and costs.¹⁵¹⁶

Seda's Conviction Reversed

Four weeks after Seda's return to the United States, Magistrate Judge Thomas M. Coffin agreed to release Seda pending trial, finding unpersuasive government arguments that Seda posed a risk of dangerousness or flight.¹⁵¹⁷ On the following day, Judge Hogan heard an appeal of Judge Coffin's decision.¹⁵¹⁸ On November 30, Judge Hogan agreed that Seda could be released.¹⁵¹⁹

1511. Opinion at 18–19, *Al-Haramain Islamic Found. v. U.S. Dep't of Treasury*, No. 3:07-cv-1155 (D. Or. Nov. 5, 2009), D.E. 118, available at 2009 WL 3756363.

1512. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 970, 979–90, 1001 (9th Cir. 2012), amending 660 F.3d 1019 (2011); see *Officials Improperly Seized Assets of Islamic Charity, Court Finds*, N.Y. Times, Sept. 24, 2011, at A13 [hereinafter *Officials Improperly Seized Assets*].

1513. *Al Haramain Islamic Found.*, 686 F.3d at 970, 990–95, 1001; see *Officials Improperly Seized Assets*, *supra* note 1512.

1514. Opinion at 13, *Al-Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. Dec. 12, 2012), D.E. 141.

1515. *Al Haramain Islamic Found.*, 686 F.3d at 970, 995–1001; see Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also Mark Freeman, *Court Rules for Pro-Seda Group in Civil Rights Case*, Medford Mail Trib., Sept. 27, 2011.

1516. Order, *Al-Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. Aug. 21, 2013), D.E. 162.

1517. Transcript, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 10, 2007, filed Sept. 11, 2007), D.E. 41 (3:32 p.m. proceeding); D. Or. *Sedaghaty* Docket Sheet, *supra* note 1495 (D.E. 39); see Bill Bishop, *Fraud Suspect Released Before Trial*, Eugene Reg.-Guard, Sept. 11, 2007, at C1.

Tim Reagan interviewed Judge Coffin for this report in the judge's chambers on September 20, 2012.

1518. Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 11, 2007, filed Oct. 22, 2007), D.E. 51; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1495 (D.E. 42); see Bill Bishop, *In Reversal, Suspect Tied to Terror Group Ordered Held*, Eugene Reg.-Guard, Sept. 12, 2007, at A1.

1519. Release Order, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 30, 2007), D.E. 66; see Bill Bishop, *Court Sets Founder of Islamic Charity Free*, Eugene Reg.-Guard, Dec. 1, 2007, at D41.

As the only magistrate judge in Eugene, Judge Coffin handles all pretrial detention matters there, and this was one of only a few release orders issued in his twenty years on the bench that the government appealed.¹⁵²⁰

Seda was convicted on September 9, 2010.¹⁵²¹ Following the conviction, the government disclosed that it had withheld from the defendant evidence that one of the government's witnesses was a paid informant.¹⁵²² The government had intended to use her husband as a witness—he had a more extensive relationship with the government as an informant—but he died before trial.¹⁵²³ Judge Hogan determined that although the government had committed a discovery violation, the witness's testimony was more related to sentence, a matter for the court, than to the jury's determination of guilt.¹⁵²⁴ On September 27, 2011, Judge Hogan sentenced Seda to two years and nine months in prison.¹⁵²⁵ Seda reported to a low-security prison near Denver, Colorado, on February 29, 2012.¹⁵²⁶

On August 23, 2013, Seda was released to home confinement to serve the few remaining months of his sentence.¹⁵²⁷ On the same day, the court of appeals determined, over a dissent, that the discovery violation required a new trial.¹⁵²⁸ In addition, the court of appeals ruled that an unclassified substitution offered by the government and approved by Judge Hogan for exculpatory classified evidence did not “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information,” as required by the Classified Information Procedures Act (CIPA).¹⁵²⁹

1520. Interview with Hon. Thomas M. Coffin, Sept. 20, 2012.

1521. Verdict, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2010), D.E. 466; Transcript, *id.* (Sept. 9, 2010, filed Sept. 16, 2010), D.E. 473; see *United States v. Sedaghaty*, 728 F.3d 885, 897 (9th Cir. 2013); see also Bryan Denson, *Evidence Withheld, Lawyers Say*, *Oregonian*, Jan. 13, 2011. See generally Human Rights Watch, *Illusion of Justice* 87–89, 111, 196–97 (2014).

1522. *Sedaghaty* New Trial Denial, *supra* note 1501, at 14–22; *Sedaghaty*, 728 F.3d at 897–99; see Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. June 7, 2011, filed June 23, 2011), D.E. 563 (evidentiary hearing on a motion for a new trial); Transcript, *id.* (Mar. 1, 2011, filed Mar. 2, 2011), D.E. 542 (oral argument on a motion for a new trial).

1523. *Sedaghaty*, 728 F.3d at 898–99 & n.7; *Sedaghaty* New Trial Denial, *supra* note 1501, at 15, 17–19 & n.3.

1524. *Sedaghaty* New Trial Denial, *supra* note 1501, at 17, 20–22; see *Sedaghaty*, 728 F.3d at 898.

1525. Judgment, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 22, 2011), D.E. 599; Transcript at 11–12, *id.* (Sept. 27, 2011, filed Oct. 5, 2011), D.E. 588; see *Sedaghaty*, 728 F.3d at 897; see also Mark Freeman, *Pete Seda Sentenced to Nearly Three Years*, *Medford Mail Trib.*, Sept. 28, 2011.

1526. See Mark Freeman, *Seda Starts 33-Month Sentence Today*, *Medford Mail Trib.*, Feb. 29, 2012.

1527. Release Motion at 2, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Aug. 30, 2013), D.E. 630; see www.bop.gov (noting a release date of August 30, 2013, reg. no. 69971-065).

1528. *Sedaghaty*, 728 F.3d at 892–93, 898–903 (opinion by Circuit Judge M. Margaret McKeown, joined by Circuit Judge Mary M. Schroeder); see *id.* at 918–32 (Circuit Judge Richard C. Tallman, dissenting).

1529. *Id.* at 892, 903–08; see 18 U.S.C. app. 3 § 6(c)(1) (2013).

The court of appeals also found that evidence against Seda derived from a search that exceeded the applicable search warrant. *Sedaghaty*, 728 F.3d at 892, 910–15.

Following Judge Hogan's November 1, 2012, retirement, the court reassigned Seda's case to Judge Ann Aiken.¹⁵³⁰ On August 30, 2013, Judge Aiken approved an unopposed motion to release Seda from confinement pending further proceedings.¹⁵³¹ On July 29, 2014, Judge Aiken granted a government motion to dismiss Seda's indictment and accepted a plea of guilty from Al-Haramain to a superseding information.¹⁵³²

September 11 Damages

Various Al-Haramain organizations were among the defendants in actions to recover damages for the September 11, 2001, attacks from alleged supporters of the hijackers.¹⁵³³ On June 17, 2011, September 11 plaintiffs sought relief from the U.S. District Court for the Southern District of New York from Seda's failure to produce documents in response to a December 10, 2010, discovery request.¹⁵³⁴ On November 22, 2011, Magistrate Judge Frank Maas overruled Seda's objections that the discovery request infringed a Fifth Amendment privilege against self-incrimination, because the criminal trial was over, and Judge Maas overruled Seda's objections that the discovery request violated a protective order in the criminal case, because the protective order only covered information provided to Seda's attorneys that was not available to Seda from other sources.¹⁵³⁵ On January 11, 2012, District Judge George B. Daniels approved Judge Maas's ruling.¹⁵³⁶ On

1530. Notice, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Dec. 5, 2012), D.E. 627.

1531. Release Order, *id.* (Aug. 30, 2013), D.E. 631.

1532. Dismissal, *id.* (July 29, 2014), D.E. 660; Judgment, *id.* (Aug. 6, 2014), D.E. 662 (sentencing Al-Haramain to three years of probation); Superseding Information, *id.* (July 29, 2014), D.E. 652; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1495 (D.E. 654).

1533. Docket Sheet, *World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); Docket Sheet, *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); Docket Sheet, *O'Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003); Docket Sheet, *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Complaint, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); Docket Sheet, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, *Salvo v. Al Qaeda Islamic Army*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); Docket Sheet, *Adone v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002); Docket Sheet, *Iwachiv v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, *Tremsky v. Bin Laden*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, *Mayore Estates, L.L.C. v. Al Qaeda Islamic Army*, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002); Docket Sheet, *Schneider v. Al Qaeda Islamic Army*, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002); see Zaitz, "Watch List," *supra* note 1429; *infra* "September 11 Damages."

1534. Motion, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 17, 2011), D.E. 2486.

1535. Order, *id.* (Nov. 22, 2011), D.E. 2491.

1536. Order, *id.* (Jan. 11, 2012), D.E. 2529, available at 2012 WL 104512.

March 28, the court of appeals denied Seda's petition for mandamus relief from the discovery order.¹⁵³⁷

Challenge: Classified Evidence

Judge King

For this litigation and for other criminal cases, Judge King's law clerks and court reporter have security clearances.¹⁵³⁸

In response to Al-Haramain's legal challenge to its identification as a specially designated global terrorist, the government compiled an administrative record and redesignated Al-Haramain.¹⁵³⁹ The government shared unclassified portions of its administrative case file with Al-Haramain.¹⁵⁴⁰ The government shared some classified portions of the case file with the court *ex parte* and *in camera*.¹⁵⁴¹ The intelligence community allowed some information to be declassified so that it could be shared with Al-Haramain.¹⁵⁴² The intelligence community did not permit the government to share some classified information with the court, and the government assured the court that it did not rely on this information for redesignation or include it in the administrative record.¹⁵⁴³

The government refused counsel's request to obtain security clearances for access to classified portions of the record.¹⁵⁴⁴ Judge King determined, "The government's interest in keeping materials secret takes precedence over [Al-Haramain Oregon's] due process right to review the record against it. . . . It is not required by the Constitution to give [Al-Haramain Oregon] access to the classified record or to try to give the attorneys security clearances."¹⁵⁴⁵

The court of appeals opined that the government should have tried harder to provide Al-Haramain with the substance of the classified evidence against it:

To the extent that an unclassified summary could provide helpful information, such as the subject matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable. . . .

. . . [A]n unclassified summary, by definition, does not implicate national security because it is unclassified. Similarly, a lawyer for the designated entity who has the appropriate security clearance also does not implicate national secu-

1537. Order, *In re Sedaghaty*, No. 11-5371 (2d Cir. Mar. 28, 2012), D.E. 30.

1538. Interview with Hon. Garr M. King, Sept. 19, 2012 (noting that the judge's judicial assistant has not sought or needed a security clearance).

1539. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233, 1246 (D. Or. 2008).

1540. *Id.*

1541. *Id.*

1542. *Id.*

1543. *Id.*

1544. *Id.* at 1259.

1545. *Id.* at 1260.

urity when viewing the classified material because, by definition, he or she has the appropriate security clearance.¹⁵⁴⁶

Judge Hogan

All members of Judge Hogan’s chambers staff obtained security clearances to work on this case, and the classified information security officer delivered to Judge Hogan a safe for storing classified material and a laptop computer to use when preparing documents based on classified information.¹⁵⁴⁷ Some material in the case was designated for the judge’s eyes only.¹⁵⁴⁸ Some sensitive compartmented information (SCI) was stored in the FBI’s sensitive compartmented information facility (SCIF) in Portland.¹⁵⁴⁹ Some SCI was also stored under the classified information security officer’s control in Washington, D.C.¹⁵⁵⁰

So that only one chambers had to deal with the security precautions required for classified materials, Judge Hogan handled discovery issues pertaining to classified information instead of Magistrate Judge Coffin.¹⁵⁵¹ Judge Hogan had the defense submit ex parte a memorandum of its theory of the case to guide the judge’s review of classified material for decisions on what needed to be disclosed to the defense in discovery.¹⁵⁵²

While the case was in trial, the lock on Judge Hogan’s safe broke.¹⁵⁵³ While the safe’s door was being repaired, the classified information security officer arranged for classified papers to be stored in a safe in the marshal’s office.¹⁵⁵⁴

Seda was represented by the federal defender, who already had a secret security clearance, and a private attorney, who did not have a security clearance.¹⁵⁵⁵ Seda’s attorneys argued that they needed security clearances in order to discuss with the court matters related to the top secret document mistakenly produced to

1546. *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 982–83 (9th Cir. 2012).

1547. Transcript at 5–6, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 18, 2008, filed July 21, 2008), D.E. 120 [hereinafter *Sedaghaty* Mar. 18, 2008, Transcript]; Transcript at 13, *id.* (Jan. 23, 2008, filed July 21, 2008), D.E. 119; Interview with Hon. Michael R. Hogan, Sept. 20, 2012 (noting that the cleared court reporter sometimes works as needed in other districts); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

1548. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1549. *Id.*; see Reagan, *supra* note 1547, at 22–23 (describing SCIFs).

1550. Interview with Dep’t of Justice Litig. Sec. Group Staff, July 20, 2011.

1551. *Sedaghaty* Mar. 18, 2008, Transcript, *supra* note 1547, at 8–9.

“The district judge, now retired, was meticulous in his review of the classified material.” *United States v. Sedaghaty*, 728 F.3d 885, 909 (9th Cir. 2013).

1552. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1553. Transcript at 259–60, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 1, 2010, filed Sept. 11, 2010), D.E. 458.

1554. *Id.*; Interview with Dep’t of Justice Litig. Sec. Group Staff, Dec. 19, 2012.

1555. Transcript at 9, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 29, 2008, filed July 2, 2008), D.E. 111.

Al-Haramain.¹⁵⁵⁶ The government's initial position was that defense counsel should not receive security clearances because the government did not intend to use classified evidence against Seda.¹⁵⁵⁷ The classified information security officer informed Judge Hogan that the federal defender's clearance could be upgraded if necessary and the clearance process could begin for the other attorney.¹⁵⁵⁸

As part of Seda's defense, his attorneys sought discovery of potentially exculpatory classified information, including discovery related to the mistakenly produced top secret document.¹⁵⁵⁹ On advice of the government as to national security interests concerning the document, Judge Hogan ordered the attorneys not to discuss further, orally or in writing, the contents of the document, even with each other.¹⁵⁶⁰ The court of appeals denied Seda's petition for a writ of mandamus.¹⁵⁶¹

On September 5, 2008, the government filed three public notices that it was providing the court with in camera, ex parte submissions pursuant to CIPA.¹⁵⁶² Four days later, Seda's attorneys filed a motion to establish a suitable procedure for them to present potentially classified information with the court.¹⁵⁶³ Judge Hogan allowed the attorneys to submit the intended filing to the classified information security officer for a classification review.¹⁵⁶⁴ The filing had to be prepared on a computer provided by the security officer.¹⁵⁶⁵

In March 2009, Judge Hogan examined the government's classified submissions in Washington, D.C., when he was there for a celebration of the Eugene

1556. *Id.* at 7–8.

1557. *Id.* at 10–11.

1558. *Id.* at 14.

1559. Discovery Motion, *id.* (Mar. 17, 2008), D.E. 90; see Brief, *id.* (Oct. 10, 2008), D.E. 136 (renewing a motion for access to the top secret document); see also *Sedaghaty* Suppression Denial Order, *supra* note 1429, at 6–7 (“There is no reason to believe the activity on the part of the government regarding possible warrantless surveillance, to the extent such activity exists and was illegal, resulted in any information being used in the affidavit in support of the search warrant [for Seda's residence] or prompted the decision to seek the warrant.”).

1560. Transcript at 4–13, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. July 15, 2008, filed June 30, 2009), D.E. 187; Minute Order, *id.* (May 16, 2008), D.E. 103; see *United States v. Sedaghaty*, 728 F.3d 885, 909–10 (9th Cir. 2013).

“The records and representations of the Classified Information Security Officers entrusted with the material reflect that no one has accessed the documents except the court and the Classified Information Security Officer on one occasion, and the defense counsel together with the Classified Information Security Officer, on another occasion.” *Sedaghaty*, 728 F.3d at 910 n.15.

1561. Order, *Sedaghaty v. U.S. Dist. Court (United States)*, No. 09-73924 (9th Cir. May 12), D.E. 22, *cert. denied*, 562 U.S. 867 (2010).

1562. Notices, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 5, 2008), D.E. 127 to 129; see 18 U.S.C. app. 3 (2013) (text of CIPA); Reagan, *supra* note 1547.

1563. Filing Motion, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008), D.E. 131.

1564. D. Or. *Sedaghaty* Docket Sheet, *supra* note 1495 (D.E. 133, September 10, 2008, submission order).

1565. Transcript at 4–10, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008, filed June 30, 2009), D.E. 189 [hereinafter *Sedaghaty* Sept. 9, 2008, Transcript].

courthouse's winning a building award.¹⁵⁶⁶ Judge Hogan ruled that the defendant was not entitled to discovery of classified information, and Judge Hogan approved, pursuant to CIPA, unclassified summaries of classified information in the government's possession as providing the defendant with substantially the same ability to make his defense as would disclosure of the original classified information.¹⁵⁶⁷

As trial approached, it was determined that the government should provide defense counsel with some classified information: "a classified summary in lieu of disclosure of original classified materials."¹⁵⁶⁸ Judge Hogan issued a protective order specifying how defense counsel would handle classified information.¹⁵⁶⁹

Had Judge Hogan to do it over again, he would have made a greater effort to look at classified information earlier.¹⁵⁷⁰ Litigation over classified materials tends to slow down the case.¹⁵⁷¹

The court of appeals ruled that one substitution approved by Judge Hogan did not afford Seda an adequate defense.¹⁵⁷² "After careful review of the materials at issue, we conclude that the substitution's language unfairly colored presentation of the information and, even more problematic, that the substitution omitted facts helpful to Seda's defense."¹⁵⁷³ "[I]t is a fundamental principle underlying CIPA that the summary should be evenhanded, worded in a neutral fashion and not tilted or shaded to the government's advantage."¹⁵⁷⁴

Judge Lodge

It was necessary to establish secure space in the Boise courthouse to store and review classified material.¹⁵⁷⁵ This included establishment of a SCIF for storage.¹⁵⁷⁶ The Justice Department pays for required construction, but the court had to find space for the project, and court staff had to devote some of their time to coordination of the effort.¹⁵⁷⁷ Judges can often review classified material in chambers;

1566. See Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Feb. 26, 2009, filed Sept. 22, 2011), D.E. 576; Transcript, *id.* (Jan. 6, 2009, filed Jan. 28, 2009), D.E. 150; *Sedaghaty* Sept. 9, 2008, Transcript, *supra* note 1565, at 3.

1567. Orders, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 20, 2009), D.E. 160, 161; see also Order, *id.* (July 1, 2009), D.E. 191, available at 2009 WL 1916712 (denying renewed motions for access to classified information).

1568. Order, *id.* (Feb. 26, 2010), D.E. 278.

1569. Protective Order, *id.* (Mar. 19, 2010), D.E. 297.

1570. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1571. *Id.*

1572. *United States v. Sedaghaty*, 728 F.3d 885, 892, 905–08 (9th Cir. 2013).

"The defense [filed] an ex parte submission outlining its theory of the defense to aid the court in its review of the classified material. *Id.* at 906.

1573. *Id.* at 905; see *id.* at 906 ("It is no surprise that Seda ultimately chose not to use the substitution at trial.").

1574. *Id.* at 906.

1575. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1576. *Id.*

1577. *Id.*

the court also had to find space for defense counsel to review protected material.¹⁵⁷⁸

Challenge: Classified Arguments

In the terrorist designation challenge, the government submitted to Judge King, ex parte and in camera, classified versions of documents supporting its summary judgment motion, and the government filed public notices of lodging to that effect.¹⁵⁷⁹

The court of appeals reviewed the classified record.¹⁵⁸⁰ The appeal was heard by Judges Dorothy W. Nelson, who has chambers in Pasadena, California; Sidney R. Thomas, who has chambers in Billings, Montana; and Susan P. Graber, who has chambers in Portland, Oregon.¹⁵⁸¹ Classified information in this case included information designated SCI, which cannot be stored in an ordinary safe but must be stored in a SCIF.¹⁵⁸²

There is no SCIF in Billings, so the classified information security officer flew SCI materials to Judge Thomas for his review and flew them out the same day.¹⁵⁸³ In Portland, the U.S. attorney has a SCIF, in which classified information security officers have their own safes, under their exclusive control, for storing SCI while Judge Graber was not reviewing it.¹⁵⁸⁴ There is no SCIF in Pasadena, but the district court in downtown Los Angeles has one that can be used to store SCI for Pasadena judges.¹⁵⁸⁵

Challenge: Closed Proceedings

Seda's prosecution included several closed proceedings from which Seda was excluded.¹⁵⁸⁶ Seda was not cleared for access to classified information and could not be present during discussions of procedural matters at which classified information might be discussed.¹⁵⁸⁷

One procedure Judge Hogan used for conducting a hearing partially in open court and partially in closed session was to retire to a jury room for the closed session at which classified information was discussed.¹⁵⁸⁸ During trial, Judge Ho-

1578. *Id.*

1579. Notice, *Al-Haramain Islamic Found. v. U.S. Dep't of Treasury*, No. 3:07-cv-1155 (D. Or. June 12, 2008), D.E. 76; Notice, *id.* (Feb. 7, 2008), D.E. 39.

1580. *Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 979 (9th Cir. 2012).

1581. *Id.*, 686 F.3d 965; Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

1582. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

1583. *Id.*

1584. *Id.*

1585. *Id.*

1586. *Sedaghaty* New Trial Denial, *supra* note 1501, at 13.

1587. *Id.* ("Precluding defendant, who does not have a security clearance, from these conferences was necessary and did not violate his rights to be present and to a public trial.")

1588. Transcript at 27, 39–40, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 1, 2010, filed Apr. 1, 2010), D.E. 313.

gan used a jury room on another floor.¹⁵⁸⁹ The classified information security officer ensured that the room was safe for these purposes.¹⁵⁹⁰

Seda's appeal was heard on December 3, 2012.¹⁵⁹¹ Following an open session, the court met in consecutive closed sessions to hear the parties' classified arguments: one session including both sides, an ex parte session with the prosecution, and an ex parte session with another government attorney, and not the prosecution, on whether the prosecution had access to classified information that the defense had submitted to the court.¹⁵⁹²

Challenge: Classified Orders and Opinions

The court of appeals issued both a public published opinion and a sealed classified supplemental opinion explaining its remand of Seda's conviction for a new trial.¹⁵⁹³ The court's dissenting judge also issued both public and classified opinions.¹⁵⁹⁴

On occasion, Judge Lodge asked the classified information security officer to review his orders and opinions to make sure he had not inadvertently included classified information.¹⁵⁹⁵

Challenge: Foreign Evidence

Seda's prosecution "involved substantial evidence from abroad, which presented obstacles for both parties. Nevertheless, both parties conducted investigations overseas and were able to obtain some evidence from foreign countries."¹⁵⁹⁶

Seda sought testimony from the Egyptian donor el-Fiki.¹⁵⁹⁷ He asked the court to either (1) compel the government to obtain el-Fiki's trial or deposition testimony pursuant to a Mutual Legal Assistance Treaty, signed in 1998 and effective since 2001, or (2) obtain the testimony by letter rogatory to the Egyptian

1589. Transcript at 95, *id.* (Sept. 3, 2010, filed Sept. 11, 2010), D.E. 461; Transcript at 277, *id.* (Sept. 2, 2010, filed Sept. 11, 2010), D.E. 460.

1590. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1591. www.ca9.uscourts.gov/media/view.php?pk_id=0000010164 (audio recording of oral argument); Docket Sheet, *United States v. Sedaghaty*, No. 11-30342 (9th Cir. Dec. 1, 2011) (D.E. 71).

1592. *United States v. Sedaghaty*, 728 F.3d 885, 891–92 n.2 (9th Cir. 2013); Order, *United States v. Sedaghaty*, No. 11-30342 (9th Cir. Nov. 28, 2012), D.E. 69; *see* Appellee Brief at 135, *id.* (Aug. 3, 2012) (noting that the defendant's "concern that the prosecution accessed the sealed document the defense had placed in a sensitive compartmented information facility" was addressed at a classified ex parte second supplemental brief stating that "the prosecution did not access the sealed document").

1593. *Sedaghaty*, 728 F.3d at 891, 905.

1594. *Id.* at 918 n.1 (Judge Tallman, dissenting).

1595. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1596. *Sedaghaty*, 728 F.3d at 916.

1597. *Id.* at 917; MLAT and Letter Rogatory Opinion at 3, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Jan. 26, 2010), D.E. 252; Transcript, *id.* (Jan. 19, 2010, filed Feb. 8, 2010), D.E. 260.

courts.¹⁵⁹⁸ Judge Hogan denied the request.¹⁵⁹⁹ He determined that it would be improper for the court to impose on the Executive Branch's treaty relationship,¹⁶⁰⁰ and the court of appeals agreed.¹⁶⁰¹ Judge Hogan declined to issue a letter rogatory because el-Fiki's testimony concerning his charitable intentions would not negate a false tax return.¹⁶⁰² The court of appeals affirmed that decision as well.¹⁶⁰³

Judge Hogan did, however, issue a letter rogatory to the courts of Saudi Arabia for testimony by Sami 'Abd al-'Aziz al-Sanad.¹⁶⁰⁴ The Saudi Arabian courts did not respond.¹⁶⁰⁵

The government issued a subpoena to the Saudi Arabian bank at which al-Buthe cashed the travelers checks and cashier's check at issue in the claim for a false tax return.¹⁶⁰⁶ The bank moved to quash the subpoena in the U.S. District Court for the District of the District of Columbia, and that court granted the government a stay pending resolution of the subpoena issued by Judge Hogan.¹⁶⁰⁷ Judge Hogan overruled the bank's objection that the subpoena asked the bank to violate Saudi Arabian privacy laws, holding that the government was free to pursue U.S. sanctions against the bank for failure to comply.¹⁶⁰⁸ Compliance with the subpoena was worked out while the issue was on appeal.¹⁶⁰⁹

Judge Hogan took long-distance video testimony for Seda's sentencing hearing from a colonel in Russia's Federal Security Service.¹⁶¹⁰ The witness accommodated time-zone issues by testifying at 1:00 in the morning, his time.¹⁶¹¹

1598. *Sedaghaty*, 728 F.3d at 916–17; MLAT and Letter Rogatory Opinion, *supra* note 1597, at 1–4.

1599. MLAT and Letter Rogatory Opinion, *supra* note 1597, at 9–10, 12.

1600. *Id.* at 5–10.

1601. *Sedaghaty*, 728 F.3d at 916–17.

1602. MLAT and Letter Rogatory Opinion, *supra* note 1597, at 10–12.

1603. *Sedaghaty*, 728 F.3d at 917. *See generally* T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory (Federal Judicial Center 2014).

1604. Letter Rogatory, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 16, 2010), D.E. 327-2; *Sedaghaty*, 728 F.3d at 917.

1605. *Sedaghaty*, 728 F.3d at 917.

1606. Saudi Arabian Bank Subpoena Opinion at 1–3, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Feb. 26, 2010), D.E. 277; Transcript, *id.* (Feb. 16, 2010, filed Feb. 17, 2010), D.E. 270.

1607. Docket Sheet, *In re Administrative Subpoena to Al-Rajhi Banking & Inv. Corp.*, No. 1:10-mc-55 (D.D.C. Jan. 19, 2010) (noting the granting of a stay on February 9, 2010).

1608. Saudi Arabian Bank Subpoena Opinion, *supra* note 1606, at 19.

1609. Order, *United States v. Sedaghaty*, No. 10-30061 (9th Cir. July 12, 2010), D.E. 41 (dismissing the appeal as moot); *see* Order, *In re Administrative Subpoena*, No. 1:10-mc-55 (D.D.C. Mar. 2, 2010), D.E. 5 (dismissing the motion to quash as moot).

1610. Transcript at 17–94, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 23, 2010, filed Nov. 29, 2010), D.E. 510.

1611. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

Challenge: FISA Evidence

In al-Kidd's civil action challenging his detention as a material witness, the government notified the court and the plaintiff that it intended to offer evidence in the case derived from warrants issued by the Foreign Intelligence Surveillance Court.¹⁶¹²

The government disclosed to al-Kidd all information obtained pursuant to the Foreign Intelligence Surveillance Act (FISA) in an investigation of al-Hussayen that referred to, mentioned, related to, or involved al-Kidd.¹⁶¹³ Magistrate Judge Williams reviewed other FISA information on al-Hussayen and determined that it was properly obtained.¹⁶¹⁴ Moreover, Judge Williams determined that as to al-Kidd the information was privileged.¹⁶¹⁵

Judge Williams's review of the FISA materials was delayed by several months, because an appropriate review facility had to be constructed at the courthouse.¹⁶¹⁶ The FISA documents were produced to a classified information security officer on January 14, 2008, but a review facility was not established until July 31.¹⁶¹⁷

1612. Notice, *Al-Kidd v. Gonzales*, No. 1:05-cv-93 (D. Idaho Sept. 13, 2007), D.E. 173.

1613. Opinion at 4, *id.* (Dec. 4, 2008), D.E. 267, available at 2008 WL 5123009.

1614. *Id.* at 10.

1615. *Id.* at 12; *see id.* at 4 (noting the government's assertion of the state-secrets privilege, the law enforcement privilege, and the official files privilege).

1616. *Id.* at 2.

1617. *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.¹⁶¹⁸ The U.S. District Court for the Northern District of Texas assigned the case to Judge A. Joe Fish.¹⁶¹⁹

The Occupied Land Fund was established in the late 1980s by Shukri Abu Baker and Ghassan Elashi; in 1991, the fund reorganized as the Holy Land Foundation.¹⁶²⁰ The foundation was an offshoot of the Islamic Association for Palestine, an information group.¹⁶²¹ Both groups were headquartered in Richardson, Texas, approximately fifteen miles north of Dallas.¹⁶²² The FBI had been investigating the foundation's ties to Hamas since shortly after its reorganization.¹⁶²³

The foundation and its principals had already been parties in other cases. Parents of David Boim, a 17-year-old boy killed in a 1996 terrorist attack in Israel, filed a federal civil action in Chicago in 2000 against the Holy Land Foundation

1618. *United States v. El-Mezain*, 664 F.3d 467, 483, 485, 573 (5th Cir. 2011); *Indictment, United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004), D.E. 1 [hereinafter *Holy Land Found. Indictment*]; 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. See generally Nancy Hollander, *The Holy Land Foundation Case: The Collapse of American Justice*, 20 Wash. & Lee J. Civil Rts. & Soc. Just. 45 (2013); Human Rights Watch, *Illusion of Justice* 65–67, 91–94, 96, 105, 128, 172, 199 (2014); Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 509–12 (2014).

1619. Docket Sheet, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004) [hereinafter N.D. Tex. *Holy Land Found. Docket Sheet*].

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

1620. *El-Mezain*, 664 F.3d at 486; *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003); *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); Representation Order at 18, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 24, 2010), D.E. 1447; see Brooke & Sciolino, *supra* note 1618; 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.

1621. *El-Mezain*, 664 F.3d at 486; see Brooke & Sciolino, *supra* note 1618; Reaves & McGonigle, *supra* note 1620.

1622. *El-Mezain*, 664 F.3d at 485; see Brooke & Sciolino, *supra* note 1618; Reaves & McGonigle, *supra* note 1620.

1623. 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.

and other defendants, alleging that the defendants provided financial support to Hamas, whom the parents alleged had killed their son.¹⁶²⁴

On November 29, 2004, the district court granted the plaintiffs summary judgment on liability against some of the defendants, including the foundation.¹⁶²⁵ The jury returned a damages verdict of \$52 million,¹⁶²⁶ which the court statutorily trebled to \$156 million.¹⁶²⁷ 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.¹⁶²⁸ The district court again granted the plaintiffs summary judgment against the foundation on August 31, 2012, finding that the foundation "knew about the character of Hamas and that it provided material support to Hamas during the relevant time period."¹⁶²⁹ Magistrate Judge Arlander Keys reinstated the \$156 million damages award.¹⁶³⁰

In December 2001, the Treasury Department's Office of Foreign Asset Control designated the foundation a terrorist organization and froze its assets.¹⁶³¹ On March 11, 2002, the foundation challenged the designation and the freezing in the

1624. Complaint, *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000), D.E. 1; see *Boim v. Holy Land Found.*, 549 F.3d 685, 687 (7th Cir. 2008); *Boim v. Quranic Literacy Inst.*, 349 F. Supp. 2d 1097 (N.D. Ill. 2004) (resolving motions in limine); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004) (resolving motions for summary judgment); *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying motions to dismiss), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); see also Steve McGonigle, *Suit Accuses Islamic Groups of Aiding in Terrorist Attack*, Dallas Morning News, May 13, 2000, at 29A; Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, Chi. Trib., May 15, 2000, Metro Chi., at 1.

1625. *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 Chi., at 1; Steve McGonigle, *Former Richardson Charities Tied to Hamas, Judge Rules*, Dallas Morning News, Nov. 11, 2004, at 14A.

1626. *Boim*, 549 F.3d at 688; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004), D.E. 666.

1627. *Boim*, 549 F.3d at 688; Amended Judgment, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Feb. 25, 2005), D.E. 692; see 18 U.S.C. § 2333(a) (2013); see also Matt O'Connor, *\$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

1628. *Boim*, 549 F.3d at 691, *cert. denied*, 558 U.S. 981 (2009).

1629. Opinion at 27, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Aug. 31, 2012), D.E. 883.

1630. Order, *id.* (Oct. 12, 2012), D.E. 889.

1631. *United States v. El-Mezain*, 664 F.3d 467, 488 (5th Cir. 2011); *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 159–60 (D.C. Cir. 2003); *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002); Representation Order, *supra* note 1620, at 18; see *United States v. Holy Land Found.*, 493 F.3d 469, 471 n.3 (5th Cir. 2007); Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. Times, Oct. 23, 2007, at A1; David Jackson, *Holy Land Charity Shut Down*, Dallas Morning News, Dec. 5, 2001, at 1A; Whoriskey, *supra* note 1623.

Hamas, a word that means "zeal" in Arabic, is an acronym for "Harakat al-Muqawama al-Islamiyya," which means "The Islamic Resistance Movement." *Holy Land Found.*, 493 F.3d at 471 n.1; see *El-Mezain*, 664 F.3d at 485; see also Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Reaves & McGonigle, *supra* note 1620. The government declared Hamas a terrorist organization on January 23, 1995. *El-Mezain*, 664 F.3d at 483, 487; *Holy Land Found.*, 333 F.3d at 159; *Holy Land Found.*, 219 F. Supp. 2d at 64 n.2.

U.S. District Court for the District of the District of Columbia.¹⁶³² On June 20, 2003, the court of appeals affirmed a judgment in the government's favor.¹⁶³³

The foundations's codefendants in the Northern District of Texas prosecution were CEO Abu Baker; Elashi, chairman; Mohammed el-Mezain, director of endowments; Mufid Abdulqader, a top fundraiser; Abdulrahman Odeh, the foundation's New Jersey representative; Haitham Maghawri; and Akram Mishal.¹⁶³⁴ Maghawri and Mishal were living abroad and considered fugitives.¹⁶³⁵

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, a leader of Hamas's political branch.¹⁶³⁶ 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, 2002.¹⁶³⁷ Also included in the superseding indictment were a fifth brother, Hazim Elashi; the men's cousin, Nadia Elashi; and her husband Abu Marzook.¹⁶³⁸ The court assigned the case to Judge Sam A. Lindsay.¹⁶³⁹

On July 7, 2004, a jury found the brothers and their company guilty of export improprieties.¹⁶⁴⁰ On April 13, 2005, a separate jury found Ghassan, Bayan, and Basman Elashi and their company guilty of funneling funds to terrorists.¹⁶⁴¹ Judge Lindsay sentenced Ghassan Elashi to a term of six years and eight months on October 16, 2006.¹⁶⁴² The other brothers' sentences ranged from five to seven

1632. Docket Sheet, *Holy Land Found. v. Ashcroft*, No. 1:02-cv-442 (D.D.C. Mar. 8, 2002); see *Holy Land Found.*, 219 F. Supp. 2d at 64.

1633. *Holy Land Found.*, 333 F.3d 156; see *Holy Land Found.*, 219 F. Supp. 2d 57; see also Michelle Mittelstadt, *Ruling Keeps Charity's Assets Frozen*, Dallas Morning News, June 21, 2003, at 1A.

1634. *El-Mezain*, 664 F.3d at 485–86; *Holy Land Found.* Indictment, *supra* note 1618; see Mittelstadt et al., *supra* note 1618; Trahan, *supra* note 1623.

1635. See Mittelstadt et al., *supra* note 1618; Trahan, *supra* note 1623.

1636. *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] (D.E. 1); see *El-Mezain*, 664 F.3d at 486; see also David Brooks, Op-Ed, *No War Is an Island*, N.Y. Times, July 29, 2014, at 21; 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.

1637. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1636.

1638. *Id.*; see *El-Mezain*, 664 F.3d at 488 & n.3.

1639. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1636.

1640. *Id.*

1641. *Elashi*, 440 F. Supp. 2d at 544; N.D. Tex. *Elashi* Docket Sheet, *supra* note 1636; see Roy Appleton & Matt Stiles, *3 Guilty of Terror Dealings*, Dallas Morning News, Apr. 14, 2005, at 1B.

1642. Judgment, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Oct. 16, 2006), D.E. 441; see Michael Grabell, *Holy Land Founder Gets 6 Years*, Dallas Morning News, Oct. 13, 2006, at 5B.

years.¹⁶⁴³ Nadia Elashi and Abu Marzook were fugitives.¹⁶⁴⁴ Ghassan's brothers were released from prison in 2008 and 2009.¹⁶⁴⁵

Jury selection in the Holy Land Foundation trial began on July 16, 2007.¹⁶⁴⁶ Judge Fish used a jury questionnaire.¹⁶⁴⁷

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.¹⁶⁴⁸ 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.¹⁶⁴⁹ 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.¹⁶⁵⁰

On September 19, the jury began to deliberate.¹⁶⁵¹ Jurors deliberated on 197 counts for nineteen days.¹⁶⁵² On Thursday, October 18, the jury announced a par-

1643. Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 1, 2006), D.E. 373 (Hazim); Judgment, *id.* (Jan. 26, 2006), D.E. 371 (Ihsan); Judgment, *id.* (Oct. 16, 2006), D.E. 428 (Bayan); Judgment, *id.* (Oct. 16, 2006), D.E. 437 (Basman); see Michael Grabell, *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.

1644. See N.D. Tex. *Elashi* Docket Sheet, *supra* note 1636; see also Appleton & Stiles, *supra* note 1641.

1645. www.bop.gov (noting release dates of April 14, 2008, for Hazim, reg. no. 29685-177; October 8, 2008, for Basman, reg. no. 29686-177; January 22, 2009, for Bayan, reg. no. 29688-177; and January 30, 2009, for Ihsan, reg. no. 28265-177).

1646. Representation Order, *supra* note 1620, at 4; see Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. Times, July 17, 2007, at A14; Trahan, *supra* note 1623.

In advance of jury selection, Judge Fish granted the defendants' motion for information on how the grand and petit jury were constituted so that the defendants could assess whether there was a structural or statistical bias against Arabs or Muslims. Opinion, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), D.E. 550, available at 2007 WL 1452489.

1647. A. Joe Fish, *United States v. Holy Land Foundation: Jury Questionnaire* (July 16, 2007).

1648. *United States v. El-Mezain*, 664 F.3d 467, 574 (5th Cir. 2011); Representation Order, *supra* note 1620, at 4–5; Transcript at 1013–16, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 20, 2007, filed Sept. 25, 2008), D.E. 1195 [hereinafter N.D. Tex. *Holy Land Found.* July 20, 2007, Transcript]; Transcript at 821–23, *id.* (July 18, 2007, filed Sept. 25, 2008), D.E. 1193 [hereinafter N.D. Tex. *Holy Land Found.* July 18, 2007, Transcript]; Transcript at 523–26, *id.* (July 17, 2007, filed Sept. 25, 2008), D.E. 1192; Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1649. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1620, at 4–5; N.D. Tex. *Holy Land Found.* July 18, 2007, Transcript, *supra* note 1648, at 822.

1650. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1620, at 5, 13; N.D. Tex. *Holy Land Found.* July 20, 2007, Transcript, *supra* note 1648, 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.

1651. 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).

tial verdict, but Judge Fish was at a judges' conference out of town.¹⁶⁵³ So the verdict was presented to Magistrate Judge Paul D. Stickney, who kept it sealed until Judge Fish's return.¹⁶⁵⁴

On Monday, Judge Fish unsealed the verdict.¹⁶⁵⁵ According to the verdict, one defendant was acquitted, but the jury was deadlocked on some charges for each of the other defendants.¹⁶⁵⁶ When the judge polled the jury, three jurors said that the verdict did not represent their views, so Judge Fish ordered the jury to resume deliberations.¹⁶⁵⁷ After additional deliberation, the jury returned that day deadlocked on counts against all defendants, so Judge Fish declared a mistrial.¹⁶⁵⁸ Mohammed el-Mezain, the foundation's former chairman, was acquitted of all but one charge.¹⁶⁵⁹ The jury was deadlocked on counts against all of the other defendants.¹⁶⁶⁰

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.¹⁶⁶¹ Judge Solis also used a jury questionnaire.¹⁶⁶²

Opening arguments in the retrial began on September 22, 2008.¹⁶⁶³ On November 24, after eight days of deliberation, the jury found all defendants guilty on

1652. *El-Mezain*, 664 F.3d at 559; see Leslie Eaton, *Reading of Verdict in Terror Case Is Delayed*, N.Y. Times, Oct. 19, 2007, at A18; Jason Trahan, *Holy Land Verdict Sealed*, Dallas Morning News, Oct. 19, 2007, at 1A.

1653. Interview with Hon. A. Joe Fish, Oct. 6, 2009 (reporting that Judge Fish was at an annual conference for judges handling multidistrict consolidations); see Eaton, *supra* note 1652; Trahan, *supra* note 1652.

1654. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1652; Trahan, *supra* note 1652.

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 1652.

1655. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1631; Jason Trahan, "There Was Not Enough Evidence," Dallas Morning News, Oct. 23, 2007, at 1A; Whoriskey, *supra* note 1623.

1656. *El-Mezain*, 664 F.3d at 559.

1657. *Id.* at 559–60; see Eaton, *supra* note 1631.

1658. *El-Mezain*, 664 F.3d at 485, 560; see Eaton, *supra* note 1631; Trahan, *supra* note 1655; Whoriskey, *supra* note 1623.

1659. *El-Mezain*, 664 F.3d at 560; Jury Verdicts, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Oct. 22, 2007), D.E. 863 to 868; see Eaton, *supra* note 1631; Trahan, *supra* note 1655.

1660. *El-Mezain*, 664 F.3d at 560; see Eaton, *supra* note 1631; Trahan, *supra* note 1655.

1661. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Jason Trahan, *For Holy Land Judge, a Change*, Dallas Morning News, Nov. 13, 2007, at 1B; Jason Trahan, *Senate Attorney Named U.S. Judge*, Dallas Morning News, Nov. 26, 2007, at 1B.

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

1662. Jorge A. Solis, *United States v. Holy Land Foundation: Jury Questionnaire* (Sept. 4, 2008).

1663. See Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, Wash. Post, Sept. 21, 2008, at A2.

all 108 counts included in the retrial.¹⁶⁶⁴ Judge Solis sentenced Ghassan Elashi to sixty-five years in prison, a sentence to be served consecutive to the sentence in his computer-company prosecution.¹⁶⁶⁵ Abu Baker was also sentenced to sixty-five years; Abdulqader was sentenced to twenty years; el-Mezain and Odeh were each sentenced to fifteen years.¹⁶⁶⁶ The court of appeals affirmed the judgments.¹⁶⁶⁷

On July 1, 2009, Judge Solis resolved a third-party matter of judicial confidentiality.¹⁶⁶⁸ In preparation for the first trial, the government filed a trial brief on May 29, 2007.¹⁶⁶⁹ As an attachment, to lay the foundation for possible admissible hearsay during trial, the government included a list of 246 individuals and organizations headed “Unindicted Co-conspirators and/or Joint Venturers.”¹⁶⁷⁰ Three organizations on the list asked the court to remove from the public record all references to them.¹⁶⁷¹ Judge Solis agreed to seal the trial brief attachment, but declined to excise other references to the organizations in the trial record.¹⁶⁷² Judge Solis sealed his order and all documents pertaining to the organizations’ requests for relief.¹⁶⁷³ Not only were the documents sealed, but their docket entries were also omitted from the public docket sheet. One organization appealed the sealing of the order, and, on October 20, 2010, the court of appeals ordered the order unsealed.¹⁶⁷⁴ Docket entries for the other sealed documents then became public,

1664. *El-Mezain*, 664 F.3d at 483, 485, 490, 574; see Tanya Eiserer & Jason Trahan, *5 Ex-Leaders Guilty in Holy Land Trial*, Dallas Morning News, Nov. 25, 2008, at 1A; Gretel C. Kovach, *U.S. Wins Convictions in Retrial of Terrorism-Financing Case*, N.Y. Times, Nov. 25, 2008, at A16; see also Jorge A. Solis, *United States v. Holy Land Foundation: Supplemental Jury Instructions* (Nov. 24, 2008); Jorge A. Solis, *United States v. Holy Land Foundation: Jury Instructions* (Nov. 10, 2008).

1665. Judgment, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009), D.E. 1298; *El-Mezain*, 664 F.3d at 490; see www.bop.gov (noting a release date of October 28, 2009, reg. no. 29687-177); see also Jason Trahan, *5 Decry Jail Terms in Holy Land Case*, Dallas Morning News, May 28, 2009, at 1A.

1666. *El-Mezain*, 664 F.3d at 490; Judgment, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009), D.E. 1299 (Baker); Judgment, *id.* (May 28, 2009), D.E. 1294 (Abdulqader); Judgment, *id.* (May 28, 2009), D.E. 1293 (el-Mezain); Judgment, *id.* (May 28, 2009), D.E. 1295 (Odeh); see www.bop.gov (noting release dates of June 29, 2005, for Abu Baker, reg. no. 32589-177; April 29, 2006, for Abdulqader, reg. no. 32590-177; December 27, 2021, for el-Mezain, reg. no. 92412-198; and December 4, 2021, for Odeh, reg. no. 26548-050); see also Trahan, *supra* note 1665.

1667. *El-Mezain*, 664 F.3d at 484, 579, *cert. denied*, 568 U.S. ___, 133 S. Ct. 525 (petition for el-Mezain), and 568 U.S. ___, 133 S. Ct. 525 (2012) (petition for Elashi, Abu Baker, Abdulqader, and Odeh); see Jason Trahan, *Holy Land Verdicts Upheld*, Dallas Morning News, Dec. 8, 2011, at B3.

1668. Sealing Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 1, 2009), D.E. 1356; see *United States v. Holy Land Found.*, 624 F.3d 685, 689 (5th Cir. 2010).

1669. Trial Brief, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2007), D.E. 656; see *Holy Land Found.*, 624 F.3d at 688.

1670. *Holy Land Found.*, 624 F.3d at 688.

1671. *Id.* at 688–89 & n.1; Trial Brief, *supra* note 1669, at 1–2.

1672. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1668.

1673. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1668, at 20.

1674. *Holy Land Found.*, 624 F.3d 685; see Jason Trahan, *Judge’s Ruling: Release of List Violated Group’s Rights*, Dallas Morning News, Nov. 7, 2010, at B1.

showing only the filing dates of sealed documents.¹⁶⁷⁵ No one challenged the sealing of the trial brief attachment, and it remains sealed.¹⁶⁷⁶ In May 2011, however, Judge Solis granted a motion by two of the listed organizations to unseal their filings so that they could provide them to a congressional investigation.¹⁶⁷⁷

On September 24, 2009, the court of appeals remanded the case to Judge Solis for findings on the prosecution of the foundation without representation.¹⁶⁷⁸ 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.¹⁶⁷⁹ On May 24, 2010, Judge Solis appointed a University of Texas law professor to represent the foundation pro bono and ruled that the foundation had been effectively represented de facto during the trials.¹⁶⁸⁰ The court of appeals determined that because no one could speak for the foundation, no one could authorize an appeal.¹⁶⁸¹

Judge Solis entered a final order of forfeiture against the Holy Land Foundation on January 7, 2014.¹⁶⁸²

Challenge: Classified Evidence

Some of the government's evidence concerning the defendants was classified.¹⁶⁸³ This included information obtained under the Foreign Intelligence Surveillance Act (FISA) and information provided by the government of Israel.¹⁶⁸⁴

1675. N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1619.

1676. *Holy Land Found.*, 624 F.3d at 689 n.3; N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1619 (D.E. 656-1).

1677. Order, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 2, 2011), D.E. 1484.

1678. Order, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Sept. 24, 2009); *see United States v. El-Mezain*, 664 F.3d 467, 575 (5th Cir. 2011).

1679. Representation Order, *supra* note 1620, at 12; Interview with Hon. Jorge A. Solis, Oct. 6, 2009; *see El-Mezain*, 664 F.3d at 575.

1680. Representation Order, *supra* note 1620, at 14–19; *see Trahan*, *supra* note 1650.

1681. *El-Mezain*, 664 F.3d at 576–78; *see id.* at 578 (“Our foregoing analysis regarding a district court’s authority to authorize a notice of appeal is expressly confined to the facts of this case.”).

The Holy Land Foundation appealed the decision that it had been represented de facto at trial. Docket Sheet, *United States v. Holy Land Found.*, No. 10-10590 (5th Cir. June 15, 2009); *see also* Docket Sheet, *United States v. Holy Land Found.*, No. 10-10661 (5th Cir. June 29, 2010) (third-party appeal). The government appealed Judge Solis’s appointment of an attorney to represent the Holy Land Foundation. Docket Sheet, *United States v. Holy Land Found.*, No. 10-10690 (5th Cir. July 13, 2010). The attorney whom Judge Fish had permitted to withdraw from representing the Holy Land Foundation appealed Judge Solis’s characterization of her as being less than candid with the court about whether the Holy Land Foundation was represented at the second trial. Docket Sheet, *United States v. Abu Baker*, No. 10-10586 (5th Cir. June 15, 2009).

1682. Order, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Jan. 7, 2014).

On June 25, 2013, the U.S. Court of Appeals for the Fifth Circuit held that winners of a 2004 judgment against Hamas for a September 4, 1997, suicide bombing in Jerusalem could not recover frozen funds from the Holy Land Foundation in satisfaction of the judgment. *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013).

Judge Fish's law clerks received security clearances.¹⁶⁸⁵ Judge Fish could store classified documents in chambers safes.¹⁶⁸⁶ All defense counsel also received security clearances,¹⁶⁸⁷ but they were not allowed to reveal classified information to the defendants.¹⁶⁸⁸ Judge Fish had to find space in the courthouse that could be fitted as a room for defense attorneys to store and review classified documents.¹⁶⁸⁹ A separate safe was established for each defendant.¹⁶⁹⁰

Members of Judge Solis's staff also received security clearances, including a career law clerk, his courtroom deputy, and his court reporter.¹⁶⁹¹ Judge Solis also kept classified documents in a chambers safe.¹⁶⁹²

Challenge: FISA Evidence

Evidence against the defendants was based in part on surveillance authorized by the FISA court.¹⁶⁹³

In April 2005, the government mistakenly disclosed to cleared defense counsel the contents of FISA warrant applications.¹⁶⁹⁴ This is not the usual procedure for affording a defendant an opportunity to challenge evidence based on FISA warrants.¹⁶⁹⁵ The usual procedure is for the government to present the FISA warrant records to the district judge *ex parte*.¹⁶⁹⁶ In fact, Judge Fish spent several days conducting an *in camera* review of FISA warrants leading to evidence the gov-

1683. Nov. 2, 2006, Opinion at 4, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Nov. 2, 2006), D.E. 443; *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”).

1684. Nov. 2, 2006, Opinion, *supra* note 1683, at 3.

1685. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1686. *Id.*

1687. *United States v. El-Mezain*, 664 F.3d 467, 518 (5th Cir. 2011); Dec. 8, 2006, Opinion at 5–6, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Dec. 8, 2006), D.E. 484; Nov. 2, 2006, Opinion, *supra* note 1683, at 17; *see* Steve McGonigle, *Attorney: Terror Case Not Derailed*, Dallas Morning News, Feb. 17, 2006, at 1B.

Some classified information reviewed by the court was classified above defense counsels' security clearance level. *El-Mezain*, 664 F.3d at 568.

1688. Dec. 8, 2006, Opinion, *supra* note 1687, at 3; Nov. 2, 2006, Opinion, *supra* note 1683, at 17; *see El-Mezain*, 664 F.3d at 518–19.

1689. Interview with Hon. A. Joe Fish, Oct. 6, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

Because of the level of classification of the documents with which defense attorneys worked, the secure room did not have to satisfy all of the technical specifications of a sensitive compartmented information facility (SCIF). Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 23, 2009.

1690. Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

1691. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

1692. *Id.*

1693. *El-Mezain*, 664 F.3d at 485, 487, 563–70; *see* McGonigle, *supra* note 1687.

1694. *See* McGonigle, *supra* note 1687.

1695. *See id.*

1696. *El-Mezain*, 664 F.3d at 565, 567; *see* McGonigle, *supra* note 1687.

ernment sought to use in the case.¹⁶⁹⁷ The court of appeals also reviewed the FISA warrants in camera and ex parte.¹⁶⁹⁸

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.¹⁶⁹⁹ The FBI asked the judge for relief because the attorneys refused to return them.¹⁷⁰⁰ Judge Fish issued an order preserving the status quo and then ultimately granted the FBI substantially the relief requested.¹⁷⁰¹

The government also produced to defense counsel evidence obtained as a result of the FISA warrants.¹⁷⁰² Much of this evidence was in the form of declassified “tech-cuts,” which are English-language summaries of recorded conversations.¹⁷⁰³ 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.¹⁷⁰⁴

The government also declassified some of the defendants’ recorded conversations, and that evidence could be shared with the defendants.¹⁷⁰⁵ The court approved an offer by the government to seek declassification of additional conversations, which were in Arabic, that defense counsel, who did not speak Arabic, could specifically identify.¹⁷⁰⁶ Defense counsel argued that the offer was unconstitutional because it required them to reveal too much about their own conversations with their clients and their trial strategy.¹⁷⁰⁷ Judge Fish overruled this objection.¹⁷⁰⁸

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.¹⁷⁰⁹

1697. Opinion at 5, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), D.E. 710, available at 2007 WL 2011319.

1698. *El-Mezain*, 664 F.3d at 567.

1699. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1700. *Id.*

1701. *Id.*

1702. Nov. 2, 2006, Opinion, *supra* note 1683, at 3.

1703. Dec. 8, 2006, Opinion, *supra* note 1687, at 7; Nov. 2, 2006, Opinion, *supra* note 1683, at 3, 18 n.6; see *El-Mezain*, 664 F.3d at 518.

1704. Opinion at 5, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), D.E. 550, available at 2007 WL 628059.

1705. *El-Mezain*, 664 F.3d at 518; Nov. 2, 2006, Opinion, *supra* note 1683, at 17.

1706. *El-Mezain*, 664 F.3d at 519; Dec. 8, 2006, Opinion, *supra* note 1687, at 5–6; Nov. 2, 2006, Opinion, *supra* note 1683, at 17, 22.

1707. Nov. 2, 2006, Opinion, *supra* note 1683, at 17; see Opinion at 5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 5, 2007), D.E. 704, available at 2007 WL 1974769 (“as of the end of February, [2007,] defense counsel had presented no classified communications to the government for declassification”); Nov. 2, 2006, Opinion, *supra* note 1683, at 4 (“To the court’s knowledge, the defendants have yet to request that any specific FISA intercepts be declassified.”).

1708. Nov. 2, 2006, Opinion, *supra* note 1683, at 19–20.

1709. Dec. 8, 2006, Opinion, *supra* note 1687, at 6.

Challenge: Witness Security

Two trial witnesses testified under cover.¹⁷¹⁰ 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.¹⁷¹¹ 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.¹⁷¹² The witnesses' identities were not disclosed to defense counsel.¹⁷¹³

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.¹⁷¹⁴ Judge Fish observed that "information that is classified under Israeli law is also classified under American law."¹⁷¹⁵

One witness was a lawyer in the counterterrorism section of the Israel Security Agency (ISA), also known as Shin Bet, who was to testify as an expert on Hamas financing.¹⁷¹⁶ Israeli law prohibits the disclosure of ISA agents' identities.¹⁷¹⁷ He testified under the alias "Avi."¹⁷¹⁸ The other witness worked for the Israeli Defense Forces, which looks to ISA rules for the protection of its personnel.¹⁷¹⁹ He testified as a fact witness under the alias "Major Lior."¹⁷²⁰

Both witnesses testified under cover in the retrial as well.¹⁷²¹

1710. *El-Mezain*, 664 F.3d at 490–94.

1711. *Id.* at 490; Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), D.E. 709, available at 2007 WL 2004458; May 4, 2007, Opinion, *id.* (May 4, 2007), D.E. 628; 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 1623.

1712. May 4, 2007, Opinion, *supra* note 1711; see Trahan, *Israeli Agent*, *supra* note 1711.

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.

1713. *El-Mezain*, 664 F.3d at 490, 493; see Trahan, *Israeli Agent*, *supra* note 1711.

1714. May 4, 2007, Opinion, *supra* note 1711.

1715. *Id.* at 6; see *El-Mezain*, 664 F.3d at 492.

1716. *El-Mezain*, 664 F.3d at 489–90; Opinion at 3–5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 16, 2007), D.E. 717, available at 2007 WL 2059722; May 4, 2007, Opinion, *supra* note 1711; see Trahan, *Another Anonymous Witness*, *supra* note 1711.

1717. May 4, 2007, Opinion, *supra* note 1711; see *El-Mezain*, 664 F.3d at 490.

1718. *El-Mezain*, 664 F.3d at 489–90; see Trahan, *Another Anonymous Witness*, *supra* note 1711.

1719. *El-Mezain*, 664 F.3d at 490; May 4, 2007, Opinion, *supra* note 1711; see Trahan, *Israeli Agent*, *supra* note 1711.

1720. *El-Mezain*, 664 F.3d at 490; see Trahan, *Israeli Agent*, *supra* note 1711.

1721. *El-Mezain*, 664 F.3d at 489–90; see Jason Trahan, *Jurors to Hear Key Israeli Witnesses*, Dallas Morning News, Oct. 20, 2008, at 1B.

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.¹⁷²² Even Judge Fish did not know where the jurors met each morning.¹⁷²³ Jurors took lunch in the jury room.¹⁷²⁴

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.¹⁷²⁵

1722. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1723. *Id.*

1724. *Id.*

1725. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

Chicago Fundraising

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.¹⁷²⁶ 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.¹⁷²⁷

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 1970.¹⁷²⁸ He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip checkpoint and charged with providing aid to Hamas.¹⁷²⁹ Police found \$97,400 in his Jerusa-

1726. *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), D.E. 59; 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. See generally Human Rights Watch, *Illusion of Justice* 78–79, 96, 105, 112, 126, 190–91, 196–97 (2014).

1727. Docket Sheet, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter N.D. Ill. *Abu Marzook* Docket Sheet]; see Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, Chi. Trib., Nov. 4, 2003, Metro, at 1; *Palestinian Activist Faces New Charge*, Chi. Trib., June 26, 2004, Metro, at 16 [hereinafter *New Charge*].

The indictment against Salah, Ashqar, and Marzook was filed as the second superseding indictment in the preexisting case against Ashqar.

Tim Reagan interviewed Judge St. Eve for this report in the judge's chambers on July 2, 2007.

1728. See Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, Chi. Trib., June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 1726; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, N.Y. Times, Oct. 20, 2006, at A16.

1729. *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, *Chicago*, 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 1728.

lem YMCA hotel room.¹⁷³⁰ 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.¹⁷³¹ He was released in November 1997.¹⁷³²

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."¹⁷³³ 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.¹⁷³⁴

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.").

1730. *In re Ford Van*, 50 F. Supp. 2d at 794; see Jackson et al., *supra* note 1729 (reporting \$96,400 found); Sander, *2 Men Cleared*, *supra* note 1729 (reporting \$97,000 found); Sander, *supra* note 1728 (same).

1731. *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 1729; Sander, *supra* note 1728.

1732. *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 1729; Sander, *supra* note 1728. 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 1728; Lighty & Cohen, *supra* note 1726. 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 1726.

1733. *Boim*, 340 F. Supp. 2d at 917; *In re Ford Van*, 50 F. Supp. 2d at 793; see Laurie Cohen, Stephen Franklin & Sam Roe, *Struggle for the Soul of Islam*, Chi. Trib., Feb. 8, 2004, News, at 1; Matt O'Connor, *FBI Seizes \$1 Million Linked to Terrorism*, Chi. Trib., June 10, 1998, News, at 1.

1734. 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 1733; William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Jackson et al., *supra* note 1729; Lighty & Cohen, *supra* note 1726.

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 Chi., 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 Chi., 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), D.E. 88 (approving forfeiture of \$1 million and a van against the Quranic Literacy Institute and forfeiture of \$1.2 million and a house against Salah); see Transcript, *id.* (Nov. 20, 2009, filed Jan. 26, 2010), D.E. 104. The court of appeals denied a third-party appeal,

In 2000, Salah and the Quranic Literacy Institute were among the defendants in a civil action for the alleged 1996 Hamas killing of David Boim.¹⁷³⁵ The parents attached to their complaint the government's forfeiture action against Salah and the institute.¹⁷³⁶ 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.¹⁷³⁷

Abdelhaleem Ashqar

On February 23, 1998, Ashqar was jailed in Manhattan for refusing to testify before a grand jury investigating Hamas funding.¹⁷³⁸ Although offered immunity, Ashqar refused to cooperate and was jailed for civil contempt.¹⁷³⁹ Ashqar protested his jailing with a hunger strike.¹⁷⁴⁰ 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.¹⁷⁴¹ He was released after six months in prison on a finding that continued confinement would not induce testimony.¹⁷⁴²

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 con-

Opinion, *United States v. Kadi*, No. 10-1758 (7th Cir. May 21, 2010), D.E. 22, *cert. denied*, 1221 (2011).

1735. *See supra* "Prosecution of a Charity."

1736. Complaint, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998), D.E. 1, *attached as Ex. A*, Complaint, *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000), D.E. 1.

1737. *Boim v. Holy Land Found.*, 549 F.3d 685, 691 (7th Cir. 2008), *cert. denied*, 558 U.S. 981 (2009); Transcript at 4, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Mar. 6, 2009, filed May 23, 2011), D.E. 863 (noting dismissal of the complaint against Salah); *see also* Opinion, *id.* (Oct. 27, 2010), D.E. 854, *available at* 2010 WL 4504876 (denying Salah's petition for costs).

1738. *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 1729; Sander, *supra* note 1728. He came to the United States on an academic fellowship. *See* Sander, *supra* note 1728.

1739. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1738.

1740. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1738.

1741. *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.

1742. *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 fifty pounds in prison).

tempt on September 5.¹⁷⁴³ Ashqar again protested his imprisonment for contempt with a hunger strike.¹⁷⁴⁴ After the court of appeals affirmed the holding of civil contempt against Ashqar,¹⁷⁴⁵ the government indicted him for criminal contempt.¹⁷⁴⁶ The U.S. District Court for the Northern District of Illinois assigned the prosecution of Ashqar for criminal contempt to Judge Amy St. Eve,¹⁷⁴⁷ who released Ashqar to home detention in Virginia on bail after two months of confinement.¹⁷⁴⁸ On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.¹⁷⁴⁹ Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.¹⁷⁵⁰

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.¹⁷⁵¹

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.¹⁷⁵² During his trip he was expelled from Jordan at the United States' urging after setting

1743. *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), D.E. 1 [hereinafter *Ashqar* Indictment]; see also *Jailing*, *supra* note 1742.

1744. See *Jailing*, *supra* note 1742; Franklin & Cohen, *supra* note 1738.

1745. *In re Grand Jury Proceedings*, 347 F.3d 197; see *Jailing*, *supra* note 1742.

1746. *Ashqar* Indictment, *supra* note 1743; see *Ashqar*, 582 F.3d at 822; see also Franklin & Cohen, *supra* note 1738.

1747. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1727; see Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

1748. See O'Connor, *supra* note 1727.

1749. Superseding Indictment, United States v. Ashqar, No. 1:03-cr-978 (N.D. Ill. June 24, 2004), D.E. 47; see *Ashqar*, 582 F.3d at 822; see also *New Charge*, *supra* note 1727.

1750. 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.

1751. *In re* Extradition of Marzook, 924 F. Supp. 565, 568 (S.D.N.Y. 1996); *Marzook v. Christopher*, No. 1:96-cv-4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996); see United States v. El-Mezain, 664 F.3d 467, 486 (5th Cir. 2011); see also Stephen Franklin, *Terror Bombs Rip Hopes in Mideast*, Chi. Trib., July 31, 1997, News, at 1 (identifying Abu Marzook as Hamas's former political leader); Youssef M. Ibrahim, *Hamas Political Chief Says Group Can't Curb Terrorists*, N.Y. Times, Mar. 9, 1996, at 5 ("in his first interview since his detention, Mr. Abu Marzook, 45, a businessman, said he was the head of the political bureau of Hamas"); see also Jason Trahan, *Agent: Charity Was Part of Plot*, Dallas Morning News, Aug. 8, 2007, at 1B (reporting that Abu Marzook is "currently Hamas' No. 2 political leader").

1752. *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.

up a Hamas support office in Amman.¹⁷⁵³ Five days after his detention, Israel decided to seek his extradition.¹⁷⁵⁴ On May 7, 1996, the district court in Manhattan approved extradition.¹⁷⁵⁵

While his appeal was pending, Abu Marzook decided to stop challenging his extradition, which meant he would have to be extradited or freed within sixty days.¹⁷⁵⁶ A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.¹⁷⁵⁷ 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.¹⁷⁵⁸ Abu Marzook remained detained pending immigration exclusion proceedings, and one month later, Jordan announced that it would accept Abu Marzook back.¹⁷⁵⁹ Abu Marzook was deported to Jordan on May 5.¹⁷⁶⁰

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.¹⁷⁶¹ Jordan deported him in 1999.¹⁷⁶² Abu Marzook was reported to be in Syria in 2001.¹⁷⁶³ In 2002, the

1753. See Greenhouse, *supra* note 1752; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 1752.

1754. See Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

1755. *In re Marzook*, 924 F. Supp. 565; see *Marzook*, 1996 WL 583378, at *2; see also Don Van Natta, Jr., *Judge Orders Hamas Leader Extradited to Israel*, N.Y. Times, May 9, 1996, at 9.

Abu Marzook became a specially designated terrorist on August 16, 1995. *Elashyi*, 554 F.3d at 490, 498.

Judge Kevin Thomas Duffy also denied Abu Marzook's petition for habeas corpus. *In re Marzook*, 924 F. Supp. at 569; Docket Sheet, *Abu Marzook v. Christopher*, No. 1:95-cv-9799 (S.D.N.Y. Nov. 20, 1995). Abu Marzook's appeal of this decision was dismissed on August 4, 1997, for failure to comply with the scheduling order. Docket Sheet, *Abu Marzook v. Christopher*, No. 96-2372 (2d Cir. May 10, 1996). On October 10, 1996, Judge Kimba M. Wood denied another petition for habeas corpus. *Marzook*, 1996 WL 583378; Docket Sheet, *Abu Marzook v. Christopher*, No. 1:95-cv-4107 (S.D.N.Y. May 31, 1996); see *Judge Backs Extradition of a Palestinian to Israel*, N.Y. Times, Oct. 10, 1996, at 17. On February 6, 1997, the court of appeals granted Abu Marzook's motion to withdraw his appeal of this decision. Docket Sheet, *Abu Marzook v. Christopher*, No. 96-2841 (2d Cir. Oct. 24, 1996).

1756. See Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

1757. See Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

1758. See Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

1759. 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 1752; 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.

1760. See MacFarquhar, *supra* note 1752.

1761. 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.

1762. See Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1006–07 (N.D. Ill. 2001).

1763. 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*

fugitive Abu Marzook was indicted in the Northern District of Texas for conspiring with a computer business owned by his wife's cousins to fund terrorism.¹⁷⁶⁴ From 2006 through 2011, identified as the deputy political bureau chief of Hamas, he published op-eds in the *Washington Post*,¹⁷⁶⁵ the *Los Angeles Times*,¹⁷⁶⁶ and the *Guardian*.¹⁷⁶⁷ He has recently resettled in Cairo.¹⁷⁶⁸

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.¹⁷⁶⁹ 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.¹⁷⁷⁰

Salah's prosecution was based, in part, on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.¹⁷⁷¹ But Salah argued that the confession was obtained by more than fifty days of torture by the Israeli secret police.¹⁷⁷² Salah also argued that his financial activity was humanitarian, intended

Choose Top Gaza Figure as Prime Minister, Wash. Post, Feb. 17, 2006, at A14 (identifying Abu Marzook as speaking from Syria in 2006).

1764. *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying codefendants' post-trial motions for acquittal); Docket Sheet, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002); see *supra* "Prosecution of a Charity"; Lichtblau & Miller, *supra* note 1636; Simpson, *supra* note 1636.

1765. Mousa Abu Marzook, Op-Ed, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections).

1766. Mousa Abu Marzook, Op-Ed, *Palestinian Statehood: What Is the U.N.'s Role?*, L.A. Times, June 12, 2011, at 30 (promoting a U.N. resolution recognizing a Palestinian state); Mousa Abu Marzook, Op-Ed, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at 15 (inviting the President to visit a Palestinian refugee camp); Mousa Abu Marzook, Op-Ed, *Hamas' Stand*, L.A. Times, July 10, 2007 (concerning the release of a BBC journalist).

1767. Mousa Abu Marzook, Op-Ed, *Hamas Is Ready to Talk*, Guardian (London), Aug. 16, 2007, at 34 (extolling the virtues of Hamas's governing).

1768. See David D. Kirkpatrick & Isabel Kershner, *Israel Is Anxiously Watching Egyptian Vote*, N.Y. Times, May 26, 2012, at 11; Jodi Rudoren, *Hamas Emerges Buoyant Despite Bloodshed and Devastation in Gaza*, N.Y. Times, Sept. 4, 2014, at 5.

1769. See Lichtblau, *supra* note 1726; Lighty & Cohen, *supra* note 1726; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 1726.

1770. See O'Connor, *supra* note 1769.

1771. *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 1729; Sander, *supra* note 1728.

1772. See Sander, *2 Men Cleared*, *supra* note 1729; Sander, *supra* note 1728.

to aid the Palestinian people and not to support terrorism.¹⁷⁷³ Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.¹⁷⁷⁴

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 1993.¹⁷⁷⁵ Judge St. Eve denied Ashqar's motion to suppress evidence seized, because the search was reasonable and in good faith, and exclusion would not deter such searches, as such searches later became legal.¹⁷⁷⁶

The trial began on October 12, 2006.¹⁷⁷⁷ The jury began to deliberate on January 11, 2007,¹⁷⁷⁸ and on February 1, the jury acquitted Salah and Ashqar of aiding terrorists.¹⁷⁷⁹ The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.¹⁷⁸⁰ Judge St. Eve sentenced Salah to one year and nine months in prison,¹⁷⁸¹ and she sentenced Ashqar to eleven years and three months.¹⁷⁸² The court of appeals affirmed.¹⁷⁸³ Salah was released from prison on April 10, 2009.¹⁷⁸⁴

1773. See Eggen, *supra* note 1738; Jackson et al., *supra* note 1729; Sander, *2 Men Cleared*, *supra* note 1729; Sander, *supra* note 1728.

1774. 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.

1775. 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 1729.

1776. Marzook, 435 F. Supp. 2d at 788–94.

1777. Minute Entry, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006), D.E. 767.

1778. Minute Entry, *id.* (Jan. 11, 2007), D.E. 882; see Jury Instructions, *id.* (Jan. 12, 2007), D.E. 881; see also Azam Ahmed, *Deliberations Begin in Hamas Case*, Chi. Trib., Jan. 12, 2007, Metro, at 8.

1779. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007), D.E. 908; 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 1738; Sander, *2 Men Cleared*, *supra* note 1729.

1780. Ashqar, 582 F.3d at 822; see Bush & Coen, *supra* note 1779; Eggen, *supra* note 1738; Sander, *2 Men Cleared*, *supra* note 1729.

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), D.E. 948; see Bush & Coen, *supra* note 1779; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

1781. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2007), D.E. 973; see Michael Higgins, *21-Month Sentence for Salah*, Chi. Trib., July 12, 2007, Metro, at 1; Sander, *American Gets Prison*, *supra* note 1780.

1782. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007), D.E. 1031; see Ashqar, 582 F.3d at 822; www.bop.gov (noting a release date of June 13, 2017, reg. no. 41500-054); see also *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

1783. Ashqar, 582 F.3d at 821, 827, cert. denied, 559 U.S. 974 (2010).

Judge St. Eve denied Ashqar's habeas petition alleging ineffective assistance of counsel. Opinion, Ashqar v. United States, No. 1:11-cv-569 (N.D. Ill. Sept. 29, 2011), D.E. 26, available at 2011 WL 4540729.

1784. www.bop.gov (reg. no. 21677-424).

Challenge: Foreign Evidence

Salah sought to discover Israeli police documents to support his claim that his Israeli confession was obtained by torture and coercion.¹⁷⁸⁵ Judge St. Eve suggested that he follow letter-rogatory procedures, but Salah ultimately relied on testimony from Israeli police officers.¹⁷⁸⁶

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).¹⁷⁸⁷ It was unprecedented for such officers to provide testimony outside of Israel.¹⁷⁸⁸

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.¹⁷⁸⁹ The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.¹⁷⁹⁰ All other persons in court during the testimony had security clearances.¹⁷⁹¹

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.¹⁷⁹² The agents and their Israeli attorneys were identified in court documents by code names.¹⁷⁹³ But Judge St. Eve denied a

On September 9, 2011, Judge St. Eve terminated Salah's supervised release seven months early. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Sept. 20, 2011), D.E. 1094. Salah was diagnosed with stage four kidney cancer in June 2010. Motion, *id.* (Sept. 13, 2011), D.E. 1092.

1785. Salah's Discovery Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005), D.E. 342; see Higgins, *supra*, note 1771.

1786. Interview with Hon. Amy St. Eve, July 2, 2007; see 28 U.S.C. § 1781 (2013); Fed. R. Civ. P. 28(b). See generally T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory (Federal Judicial Center 2014).

1787. *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.

1788. *Abu Marzook*, 412 F. Supp. 2d at 918 ("Israel has never before permitted ISA agents to give live testimony in the United States."); Government's Time Extension Motion at 2, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 16, 2005), D.E. 350 ("The appearance of the ISA operational personnel as witnesses in a proceeding outside the State of Israel is unprecedented."); see Michael Higgins, *supra* note 1787 (quoting the government's brief).

1789. *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.

1790. *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), D.E. 652 [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.").

1791. *Abu Marzook*, 412 F. Supp. 2d at 919.

1792. *Id.* at 928; see Higgins, *supra* note 1789.

1793. See Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

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.¹⁷⁹⁴

The hearing was open for the testimony of other witnesses, including Israeli police officers.¹⁷⁹⁵

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.¹⁷⁹⁶ Again Judge St. Eve permitted the witnesses to use private entrances.¹⁷⁹⁷ She permitted the defendants’ immediate family members to remain in the courtroom during the agents’ testimony.¹⁷⁹⁸ 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.¹⁷⁹⁹ But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.¹⁸⁰⁰ Judge St. Eve decided that the rest of the trial would be public.¹⁸⁰¹

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.¹⁸⁰² 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.¹⁸⁰³

1794. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

1795. *Id.* at 928; see Higgins, *supra* note 1789.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1727.

1796. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, 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 1738.

1797. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, at 6.

1798. *Id.* at 4; see Bush, *Conspiring with Israel*, *supra* note 1796.

1799. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, at 5–6; see Bush, *Conspiring with Israel*, *supra* note 1796.

1800. Interview with Hon. Amy St. Eve, July 2, 2007.

1801. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, at 5; see Bush, *Conspiring with Israel*, *supra* note 1796.

1802. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, at 4–5; see Bush, *Conspiring with Israel*, *supra* note 1796; Bush, *Torture Denied*, *supra* note 1796.

1803. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1790, at 5–6.

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)¹⁸⁰⁴ to a substantial amount of classified evidence.¹⁸⁰⁵ 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.¹⁸⁰⁶ For hearings concerning classified documents, the court reporter used a laptop provided by the classified information security officer, which was also stored in the safe.¹⁸⁰⁷

Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances.¹⁸⁰⁸ The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law clerk assistance.¹⁸⁰⁹

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.¹⁸¹⁰

Deputy marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.¹⁸¹¹

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.¹⁸¹²

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.¹⁸¹³ For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.¹⁸¹⁴ Judge St. Eve ap-

1804. 18 U.S.C. app. 3 (2013); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

1805. Interview with Hon. Amy St. Eve, July 2, 2007; see Robert Timothy Reagan, *Classified Information in Federal Court*, 53 Vill. L. Rev. 889, 889–911 (2008).

1806. *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).

1807. Interview with Hon. Amy St. Eve, July 2, 2007; see Reagan, *supra* note 1804, at 21–22 (providing information about classified information security officers).

1808. Interview with Hon. Amy St. Eve, July 2, 2007.

1809. *Id.*

1810. *Id.*

1811. *Id.*

1812. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); see Higgins, *supra* note 1789.

1813. *United States v. Salah*, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

1814. *Id.* at 917.

proved these evidence substitutions.¹⁸¹⁵ 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.¹⁸¹⁶ As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.¹⁸¹⁷

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.¹⁸¹⁸

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.¹⁸¹⁹ To support its motion, the government presented a classified affidavit from the FBI's Assistant Director for Counterintelligence; the affidavit was stored in Judge St. Eve's safe.¹⁸²⁰

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession¹⁸²¹ occupies seventy pages of the *Federal Supplement*.¹⁸²² Nineteen portions of the opinion are redacted.¹⁸²³ The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.¹⁸²⁴

1815. *Id.* at 925.

1816. *Id.* at 919–24.

1817. *Id.* at 925.

1818. *Id.* at 924.

1819. See Higgins, *supra* note 1789.

1820. Interview with Hon. Amy St. Eve, July 2, 2007; see Higgins, *supra* note 1789.

1821. Opinion, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. June 8, 2006), D.E. 557.

1822. United States v. Marzook, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

1823. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51, 758, 767.

1824. Interview with Hon. Amy St. Eve, July 2, 2007.

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.¹⁸²⁵ Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.¹⁸²⁶ 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.¹⁸²⁷

1825. Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006), D.E. 571; see Jeff Coen, *Anonymous Jury Urged in Hamas Funds Case*, Chi. Trib., June 28, 2006, Metro, at 4.

1826. Ashqar's Response to Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006), D.E. 597; Salah's Response to Government's Anonymous Jury Motion, *id.* (July 18, 2006), D.E. 591; see Jeff Coen, *Hamas-Case Motion Challenged*, Chi. Trib., June 29, 2006, Metro, at 3.

1827. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006), D.E. 624; Interview with Hon. Amy St. Eve, July 2, 2007; see Rudolph Bush, *Hamas-Case Jury to Be Named*, Chi. Trib., Aug. 10, 2006, Metro, at 3.

Lodi

United States v. Hayat (Garland E. Burrell, Jr., E.D. Cal.)

On June 5, 2005, the government arrested Hamid Hayat and his father, Umer, of Lodi, California, an agricultural town forty miles south of Sacramento.¹⁸²⁸ Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.¹⁸²⁹

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.¹⁸³⁰ A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.¹⁸³¹ He is reported to have encouraged support of terrorism as part of his undercover work.¹⁸³² The government is reported to have paid him approximately \$225,000.¹⁸³³

1828. *United States v. Hayat*, 710 F.3d 875, 883 (9th Cir. 2013); see Randal C. Archibold & Jeff Kearns, *In California Terror Case, a Mistrial for a Father, but a Son Is Guilty*, N.Y. Times, Apr. 26, 2006, at A17; Greg Krikorian & Rone Tempest, *2 Men Held in Links to Terror*, L.A. Times, June 8, 2005, at 1; Dean E. Murphy & David Johnston, *California Father and Son Face Charges in Terrorism Case*, N.Y. Times, June 9, 2005, at A18.

1829. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *Enemy Within*], available at www.pbs.org/wgbh/pages/frontline/enemywithin/; Krikorian & Tempest, *supra* note 1828; Murphy & Johnston, *supra* note 1828; Rone Tempest, Greg Krikorian & Lee Romney, *Ties to Terror Camps Probed*, L.A. Times, June 9, 2005, at 1.

The younger Hayat's maternal grandfather was Pakistan's minister of religious affairs in the late 1980s. See Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

1830. *Hayat*, 710 F.3d at 880–81; see Eric Bailey, *Attorney Says Lodi Terror Suspect Told Tall Tales to FBI Mole*, L.A. Times, Mar. 3, 2006, at 6; Rone Tempest, *FBI Informer Begins His Testimony in Terror Trial*, L.A. Times, Feb. 23, 2006, at 1 [hereinafter *FBI Informer*]; Rone Tempest, *Lodi Terror Trial Enters Final Round*, L.A. Times, Apr. 11, 2006, at 3 [hereinafter *Final Round*]; Rone Tempest, *Onetime Clerk Is at Center of Lodi Trial*, L.A. Times, Mar. 21, 2006, at 1 [hereinafter *Onetime Clerk*]; Rone Tempest, *Tape Recording Surfaces in Lodi Terrorism Trial*, L.A. Times, Apr. 5, 2006, at 3 [hereinafter *Tape Recording Surfaces*]; Denny Walsh, *Hayat Released from Custody*, Sacramento Bee, Aug. 26, 2006, at B1.

1831. *Hayat*, 710 F.3d at 880–81; see Bailey, *supra* note 1830; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 1830 (“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 1830.

1832. E.g., Redacted Government’s Motion for Protective Order at 4, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 170 (“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 1831 (“But in

The Hayats went to Pakistan in April 2003.¹⁸³⁴ Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.¹⁸³⁵ 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.¹⁸³⁶ Four days after Hamid's return to California, federal agents interviewed him again.¹⁸³⁷ They also interviewed his father.¹⁸³⁸ Both denied the son's involvement with terrorists.¹⁸³⁹ After failing a polygraph examination, however, Hamid confessed to attending an

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 1829 ("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 1830 ("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.").

1833. 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 1830 (more than \$200,000); Bailey, *Mixed Picture*, *supra* note 1831 (about \$250,000); *Enemy Within*, *supra* note 1829 (hundreds of thousands of dollars); Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. Times, Apr. 27, 2007, at A1 (about \$225,000); Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. Times, Sept. 11, 2007, at A20 (more than \$200,000); Rone Tempest, *Al Qaeda in Lodi "Unlikely,"* L.A. Times, Mar. 30, 2006, at 9 (nearly \$230,000 in salary and expenses); Tempest, *FBI Informer*, *supra* note 1830 (nearly \$250,000 "for his efforts in Lodi alone"); Tempest, *Terrorist Training*, *supra* note 1831 (more than \$200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 1830 (about \$3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 1831 (\$250,000); Tempest, *Onetime Clerk*, *supra* note 1830 (more than \$200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 1830 (nearly \$230,000); *see Hayat*, 710 F.3d at 880 n.2 ("The FBI paid Khan between \$3,000 and \$4,500 per month plus expenses.").

1834. *Hayat*, 710 F.3d at 881; *see* Second Superseding Indictment at 2, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 26, 2006), D.E. 162; First Superseding Indictment at 3, *id.* (Sept. 22, 2005), D.E. 50; *see Enemy Within*, *supra* note 1829; Krikorian & Tempest, *supra* note 1828; Tempest, *FBI Informer*, *supra* note 1830.

1835. *Hayat*, 710 F.3d at 882; *see* Archibold, *Diverging Views*, *supra* note 1833; Krikorian & Tempest, *supra* note 1828; Murphy & Johnston, *supra* note 1828.

1836. *Hayat*, 710 F.3d at 882; *see* Second Superseding Indictment, *supra* note 1834, at 3; First Superseding Indictment, *supra* note 1834, at 3; *see* Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

1837. *Hayat*, 710 F.3d at 882; *see Enemy Within*, *supra* note 1829; Krikorian & Tempest, *supra* note 1828.

1838. Government's Trial Brief at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); *see Enemy Within*, *supra* note 1829; Krikorian & Tempest, *supra* note 1828.

1839. Government's Trial Brief, *supra* note 1838, at 4-5, 8-9; *see* Krikorian & Tempest, *supra* note 1828.

Al-Qaeda training camp in Pakistan for six months in 2003 and 2004.¹⁸⁴⁰ The father and son were indicted on June 16, 2005, for making false statements to federal officials.¹⁸⁴¹ 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.¹⁸⁴² The government added an additional false statement charge against each defendant on January 26, 2006.¹⁸⁴³ The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.¹⁸⁴⁴

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.¹⁸⁴⁵ Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.¹⁸⁴⁶ They agreed to return to Pakistan to avoid terrorism-related charges.¹⁸⁴⁷

1840. Government's Trial Brief, *supra* note 1838, at 8; see Krikorian & Tempest, *supra* note 1828; Tempest, *supra* note 1836; Tempest et al., *supra* note 1829.

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 Denying New Trial at 41–55, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 17, 2007), D.E. 482, available at 2007 WL 1454280; see Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times, May 28, 2006, West Mag., at 16; Archibold, *Diverging Views*, *supra* note 1833; *Enemy Within*, *supra* note 1829; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 719 (2010); Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. Pa. J. Const. L. 1475, 1493 (2009).

1841. Indictment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005), D.E. 8; see Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. Times, June 17, 2005, at 1; Chris Heffelfinger, *Radical Islam in America* 130 (2011); Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, *supra* note 1836; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

1842. First Superseding Indictment, *supra* note 1834; see Tempest, *supra* note 1836; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

1843. Second Superseding Indictment, *supra* note 1834; *United States v. Hayat*, 710 F.3d 875, 883 (9th Cir. 2013).

1844. Docket Sheet, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005) [hereinafter E.D. Cal. Docket Sheet]; see Tempest & Krikorian, *supra* note 1841.

Tim Reagan interviewed Judge Burrell for this report in the judge's chambers on February 13, 2007.

1845. See Tempest et al., *supra* note 1829.

1846. See Murphy & Johnston, *supra* note 1828; Tempest, *supra* note 1836; Tempest et al., *supra* note 1829.

1847. See Archibold, *Diverging Views*, *supra* note 1833 (reporting a voluntary return to Pakistan to avoid deportation); *Enemy Within*, *supra* note 1829 (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, *Ter-*

The two Hayats were tried together, but before separate juries.¹⁸⁴⁸ The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.¹⁸⁴⁹

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.¹⁸⁵⁰ After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.¹⁸⁵¹ A new trial was denied.¹⁸⁵² The son was sentenced on September 10, 2007, to twenty-four years in prison.¹⁸⁵³ Over a dissent,¹⁸⁵⁴ the court of appeals affirmed on March 13, 2013.¹⁸⁵⁵

The government initially decided to retry the father,¹⁸⁵⁶ but decided to drop the charges in exchange for his pleading guilty to a false customs declaration re-

terrorist Training, *supra* note 1831 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, *supra* note 1842 (reporting that Khan was deported in August 2005).

1848. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 19, 2006), D.E. 150 (ordering the empannelment of dual juries); see Rone Tempest, *Jury in Lodi Case Asks to See Video*, L.A. Times, Apr. 14, 2006, at 3.

1849. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006), D.E. 331 (finding Hamid Hayat guilty); E.D. Cal. Docket Sheet, *supra* note 1844 (D.E. 325, noting the granting of a mistrial as to Umer Hayat because the jury was not able to reach a verdict); *United States v. Hayat*, 710 F.3d 875, 881 n.3, 884 (9th Cir. 2013); see Order Denying New Trial, *supra* note 1840, at 1; see also Archibold & Kearns, *supra* note 1828; *Enemy Within*, *supra* note 1829; Walsh, *supra* note 1830 ("The jury split 7-5 for conviction on one count and 6-6 on a second count . . ."); Tempest, *supra* note 1836 ("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.").

1850. Order Denying New Trial, *supra* note 1840, at 6, 8–13; see Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

1851. Order Denying New Trial, *supra* note 1840, at 8–13; see Demian Bulwa, *Lodi Man Loses Bid for New Terror Trial*, S.F. Chron., May 18, 2007, at B2; Denny Walsh, *Hayat Juror Was Biased, His Accuser Testifies*, Sacramento Bee, Apr. 14, 2007, at B1.

1852. Order Denying New Trial, *supra* note 1840; see Bulwa, *supra* note 1851.

1853. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007), D.E. 505; *Hayat*, 710 F.3d at 884; see Marshall, *supra* note 1833.

1854. *Hayat*, 710 F.3d at 915 (Judge Tashima, dissenting: "Because the district court plainly erred in preventing Hayat from introducing exculpatory evidence and in allowing inflammatory expert testimony that usurped the jury's role as finder of fact, I would reverse Hayat's conviction and remand to the district court for a new trial. I therefore respectfully dissent.").

1855. *Hayat*, 710 F.3d 875; see www.bop.gov (noting a release date of May 2, 2026, reg. no. 15804-097); see also Bob Egelko, *Appeals Court Backs Terrorist Conviction*, S.F. Chron., Mar. 14, 2013, at D5; Sam Stanton, Denny Walsh & Stephen Magagnini, *Divided Appellate Panel Upholds Terrorist Conviction of Lodi's Hamid Hayat*, Sacramento Bee, Mar. 14, 2013.

1856. 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.

lated to his taking too much money to his family on the 2003 trip to Pakistan.¹⁸⁵⁷ 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.¹⁸⁵⁸

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.¹⁸⁵⁹ Meanwhile, two family members—both U.S. citizens—who were trying to return to Lodi from Pakistan discovered that they were on the no-fly list, and initially they were not permitted to return without submitting to interrogation first.¹⁸⁶⁰ They declined to be interrogated¹⁸⁶¹ and were permitted to return home five months later after intervention of counsel.¹⁸⁶²

The government and Hamid Hayat's new attorneys agreed to depositions of Hayat's trial attorneys in Hayat's April 30, 2014, habeas corpus action.¹⁸⁶³

Challenge: Classified Evidence

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)¹⁸⁶⁴ may apply to this

1857. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006), D.E. 380; Information, *id.* (May 31, 2006), D.E. 379; *Hayat*, 710 F.3d at 881 n.3; see *Enemy Within*, *supra* note 1829; Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 1830.

1858. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006), D.E. 391; *Hayat*, 710 F.3d at 881 n.3; see Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 1830.

1859. *Enemy Within*, *supra* note 1829; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 1830.

1860. 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*.

1861. See Archibold, *supra* note 1860; Bulwa, *supra* note 1860.

1862. 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.

1863. Stipulation, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Aug. 28, 2014), D.E. 540; see Habeas Motion, *id.* (Apr. 30, 2014), D.E. 531; Docket Sheet, *Hayat v. United States*, No. 2:14-cv-1073 (E.D. Cal. Apr. 30, 2014); see also Bob Egelko, *Lodi Man's Terror Conviction Appealed*, S.F. Chron., May 2, 2014, at D1; Sam Stanton & Denny Walsh, *Attorneys for Lodi Man Seek to Overturn His Terrorism Conviction*, Sacramento Bee, Apr. 30, 2014, at 853.

case.¹⁸⁶⁵ 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.¹⁸⁶⁶

Six times the government noticed submission of material to the court *ex parte*, *in camera*, and under seal,¹⁸⁶⁷ and twice the government noticed a hearing *ex parte*, *in camera*, and under seal.¹⁸⁶⁸

1864. 18 U.S.C. app. 3 (2013); *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

1865. CIPA Notice, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 27, 2005), D.E. 13.

1866. CIPA Motion at 3, *id.* (July 6, 2005), D.E. 19.

1867. Six times the government noticed the submission of *ex parte*, *in camera*, under seal material:

1. CIPA Notice, *id.* (Oct. 6, 2005), D.E. 69; *see* Redacted Government's CIPA Brief, *id.* (Dec. 16, 2005), D.E. 126 (specifying a hearing date of October 7, 2005).
2. CIPA Notice, *id.* (Nov. 18, 2005), D.E. 105.
3. CIPA Notice, *id.* (Dec. 9, 2005), D.E. 122; *see* Redacted Government's CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005), D.E. 127 (specifying a hearing date of December 9, 2005).
4. CIPA Notice, *id.* (Jan. 28, 2006), D.E. 167; *see* Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 2, 2006), D.E. 177 (specifying a hearing date of January 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 170 (specifying a hearing date of January 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 171 (specifying a hearing date of January 27, 2005).
5. CIPA Notice, *id.* (Apr. 3, 2006), D.E. 279; *see* Redacted Government's CIPA Motion, *id.* (Apr. 4, 2006), D.E. 284 (specifying a hearing date of April 4, 2006); Redacted Order, *id.* (Apr. 3, 2006), D.E. 281.
6. CIPA Notice, *id.* (Dec. 13, 2006), D.E. 445; *see* Order, *id.* (Dec. 21, 2006), D.E. 446 (granting *in camera ex parte* motion for a protective order).

1868. Twice the government noticed an *ex parte*, *in camera*, under seal hearing:

1. CIPA Hearing Notice, *id.* (Dec. 5, 2005), D.E. 116 (specifying a hearing date of December 9, 2005); *see* Redacted Government's CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005), D.E. 127 (specifying a hearing date of December 9, 2005).
2. CIPA Hearing Notice, *id.* (Dec. 9, 2005), D.E. 123 (specifying a hearing date of Dec. 16, 2005); *see* Redacted Government's CIPA Brief, *id.* (Dec. 16, 2005), D.E. 128 (specifying a hearing date of December 16, 2005).

There may have been a third sealed hearing. *See* Redacted Government's CIPA Motion, *id.* (dated Jan. 6, 2005 [sic], filed Jan. 6, 2006), D.E. 138 (specifying a hearing date of January 6, 2005 [sic]).

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.¹⁸⁶⁹ 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.¹⁸⁷⁰

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.¹⁸⁷¹ The classified information security officer could not find a local defense attorney with a security clearance, but he was able to identify two in the Northern District of California who were cleared.¹⁸⁷² Ultimately, Judge Burrell decided that cleared counsel for the defendants was not necessary.¹⁸⁷³

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

1869. See *Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of February 14, 2006); see also Order at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 10, 2006) (announcing a trial date of February 14, 2006, and discussing a government motion that defense counsel obtain a security clearance).

The evidence apparently resulted in four exhibits—satellite images in the vicinity of Balakot, Pakistan—that the parties ultimately stipulated were admissible. Exhibit 4 Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006), D.E. 183; Exhibit 3 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 182; Exhibit 2 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 181; Exhibit 1 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 180.

1870. Defendants' Joint CIPA Response at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 16, 2006), D.E. 148.

1871. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1872. *Id.*; see Reagan, *supra* note 1864, at 21–22 (providing information about classified information security officers).

1873. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

them.¹⁸⁷⁴ Judge Burrell’s court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.¹⁸⁷⁵

Hamid Hayat’s motion for a new trial¹⁸⁷⁶ 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.¹⁸⁷⁷ Judge Burrell filed his ruling on this argument under seal.¹⁸⁷⁸

The court of appeals reviewed classified information withheld from the defense in discovery and affirmed its withholding.¹⁸⁷⁹

1874. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006), D.E. 179.

1875. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1876. New Trial Brief, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006), D.E. 441.

1877. Sealing Order, *id.* (Feb. 5, 2007), D.E. 450; Defendant’s Sealing Request, *id.* (Oct. 27, 2006), D.E. 440; *see also* Order, *id.* (Mar. 21, 2007), D.E. 451 (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).

1878. Order Denying New Trial, *supra* note 1840, at 35; E.D. Cal. Docket Sheet, *supra* note 1844 (D.E. 484, noting that “counsel for the parties are authorized to obtain from the clerk’s office a copy of the sealed order”).

1879. *United States v. Hayat*, 710 F.3d 875, 900 (9th Cir. 2013).

Toledo

United States v. Amawi and Related Actions (James G. Carr, N.D. Ohio)

On Thursday, February 16, 2006, the government filed a sealed indictment against three Muslim men of Toledo for conspiracy to fight United States forces in Iraq.¹⁸⁸⁰ 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. Mazloun was a permanent resident of the United States.¹⁸⁸¹ El-Hindi and Mazloun 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.¹⁸⁸² The U.S. District Court for the Northern District of Ohio assigned the case to Judge James G. Carr.¹⁸⁸³

Amawi was born in the United States of Jordanian parents; the family moved back to Jordan when Amawi was two years old.¹⁸⁸⁴ After the parents divorced, Amawi's mother moved with him to Toledo, about five years before the indictment.¹⁸⁸⁵ In 2005, he worked at AZ Travel and Services.¹⁸⁸⁶ Later that year, he returned to Jordan.¹⁸⁸⁷ El-Hindi was born in Jordan.¹⁸⁸⁸ In the United States, he dropped out of Onondaga Community College.¹⁸⁸⁹ He had been married twice

1880. Indictment, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006), D.E. 1 [hereinafter *Amawi* Indictment]; see Dan Eggen, *Ohio Men Accused of Plot to Kill Troops in Iraq*, Wash. Post, Feb. 22, 2006, at A3; Amanda Garrett, Mike Tobin, Christopher Evans & Stephen Koff, *3 Ohioans Face Terror Charges*, Cleveland Plain Dealer, Feb. 22, 2006, at A1; Neil A. Lewis, *3 Charged with Conspiring to Kill U.S. Troops in Iraq*, N.Y. Times, Feb. 22, 2006, at A12; Mike Wilkinson & Christina Hall, *3 Charged in Terror Plot*, Toledo Blade, Feb. 22, 2006, at A1; Andrew Zajac, *Ohio Men Indicted on Terror Charges*, Chi. Trib., Feb. 22, 2006, News, at 3.

1881. See *Amawi* Indictment, *supra* note 1880; Eggen, *supra* note 1880; Lewis, *supra* note 1880; Zajac, *supra* note 1880.

1882. Docket Sheet, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Docket Sheet]; see Eggen, *supra* note 1880; Garrett et al., *supra* note 1880; Wilkinson & Hall, *supra* note 1880; Zajac, *supra* note 1880.

1883. *Amawi* Docket Sheet, *supra* note 1882; 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.

1884. Interview with Hon. James G. Carr, Sept. 9, 2008.

1885. *Id.*; see Erika Ray, *Experts Say Terror Links Are Formed Overseas*, Toledo Blade, Feb. 23, 2006, at A6.

1886. See Ignazio Messina & Christina Hall, *Business Falls at Firms Tied to 3 Suspects*, Toledo Blade, Feb. 23, 2006, at A6.

1887. See Ray, *supra* note 1885.

1888. See *Amawi* Indictment, *supra* note 1880; *Few Clues Available on Accused Toledo Man*, Toledo Blade, Feb. 22, 2006, at A4 [hereinafter *Few Clues*].

1889. See Christopher Evans, Amanda Garrett, Mark Rollenhagen & Mike Tobin, *Nickel-and-Dime Hustler, or Something Worse?*, Cleveland Plain Dealer, May 21, 2006, at A1.

before his current marriage.¹⁸⁹⁰ Mazloum was born in Lebanon and grew up in Venezuela; he moved to the United States in 2000.¹⁸⁹¹ With his brother, he operated City Auto Sales, a used-car business, and he studied computer science and engineering at the University of Toledo.¹⁸⁹²

Information about the conspiracy was provided to the government by a man called “the Trainer” in the indictment.¹⁸⁹³ 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.”¹⁸⁹⁴ The Trainer began passing information about the defendants to the government in 2004.¹⁸⁹⁵

Part of his pitch to the defendants was that Muslims needed to protect themselves. This morphed into suggestions and then offers that he could provide training to the defendants in jihadist methods. This, in turn, he told them, would prepare them either to engage in combat against American forces in Iraq and/or provide training to do so for others.

The defendants fell for his spurious blandishments.¹⁸⁹⁶

On March 2, newspapers identified the Trainer as Darren Griffin, also known as Bilal, who had worked at a charity called KindHearts, which the government shut down the same week it indicted Amawi, el-Hindi, and Mazloum.¹⁸⁹⁷ Two days after Amawi’s indictment, the government obtained a warrant to search AZ Travel, where he worked.¹⁸⁹⁸ The supporting affidavit refers to Griffin as a paid cooperating witness who had been reporting to the FBI for four years.¹⁸⁹⁹ On June 6, 2006, Judge Carr issued an order forbidding public dissemination of Griffin’s image or identity.¹⁹⁰⁰

1890. *See id.*; *Few Clues*, *supra* note 1888.

1891. *See* Erica Blake, *Local Man in Terror Case Is Released on Bail*, Toledo Blade, Sept. 1, 2007, at B1.

1892. *See* Christina Hall, *Indictment of UT Student Shocks Family, Acquaintances*, Toledo Blade, Feb. 22, 2006, at A4; Messina & Hall, *supra* note 1886; David Yonke & Tom Troy, *Toledo-Area Muslims Ask for Justice, Fear Backlash*, Toledo Blade, Feb. 22, 2006, at A1.

1893. *Amawi* Indictment, *supra* note 1880; *see* Eggen, *supra* note 1880; Garrett et al., *supra* note 1880; Lewis, *supra* note 1880; Wilkinson & Hall, *supra* note 1880; Zajac, *supra* note 1880.

1894. *Amawi* Indictment, *supra* note 1880.

1895. *See* Joshua Boak, *Detainee Served as Imam at Prison*, Toledo Blade, Feb. 23, 2006, at A1.

1896. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 6, 2011), D.E. 1129, available at 2011 WL 4696477 (denying a motion for a new trial based on new evidence).

1897. Mike Tobin, Mark Rollenhagen & Christopher Evans, *FBI’s Informant Worked at Muslim Charity 3 Years*, Cleveland Plain Dealer, Mar. 2, 2006, at A1; David Yonke, *Insider in Local Terror Arrests ID’d*, Toledo Blade, Mar. 2, 2006, at A1; Christopher D. Kirkpatrick & David Yonke, *Muslims Find Giving to Charity Now Harder*, Toledo Blade, Mar. 6, 2006, at A1.

1898. Search Warrant, *United States v. AZ Travel Inc.*, No. 3:06-mj-7025 (N.D. Ohio Feb. 18, 2006), D.E. 2.

1899. Affidavit, *id.* (filed unsealed Apr. 17, 2006), D.E. 8; *see* Mark Reiter, *Feds Suspected Plot by Toledo Trio in ’04*, Toledo Blade, Apr. 18, 2006, at A1.

1900. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 6, 2006), D.E. 95.

A year after the original indictment was filed, a superseding indictment added as defendants two Chicago men, cousins Zubair and Khaleel Ahmed.¹⁹⁰¹ A separate indictment charged el-Hindi and Ashraf Zaim, the owner of AZ Travel, with grant fraud.¹⁹⁰² A third indictment charged Mazloum's brother Bilal with making a false statement to federal agents during the investigation of Mazloum.¹⁹⁰³ The court assigned the two new cases to Judge Carr.¹⁹⁰⁴ Judge Carr decided that the Ahmeds and Wassim Mazloum could be released on bond and electronic monitoring.¹⁹⁰⁵ 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.¹⁹⁰⁶

Jury selection for the trial of the original three defendants began on March 4, 2008.¹⁹⁰⁷ Judge Carr allowed the attorneys to prepare and use a jury questionnaire.¹⁹⁰⁸ Judge Carr permits attorneys to question potential jurors during voir dire,¹⁹⁰⁹ 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.¹⁹¹⁰ Voir dire proceeded more efficiently after that.¹⁹¹¹

Judge Carr gave both sides extra peremptory challenges, but he was not lenient with challenges for cause.¹⁹¹² After all potential jurors had been questioned,

1901. Superseding Indictment, *id.* (Feb. 7, 2007), D.E. 186; 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.

1902. Indictment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007), D.E. 1; see Reiter, *supra* note 1901; Sander, *supra* note 1901.

1903. Indictment, United States v. Mazloum, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007), D.E. 1; see Reiter, *supra* note 1901; Sander, *supra* note 1901.

1904. Docket Sheet, *Mazloum*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007) [hereinafter *Mazloum* Docket Sheet]; Docket Sheet, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007) [hereinafter *El-Hindi* Docket Sheet].

1905. See Blake, *supra* note 1891.

1906. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Dec. 27, 2007), D.E. 525; Indictment, United States v. Ahmed, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007), D.E. 1.

1907. *Amawi* Docket Sheet, *supra* note 1882; 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.

1908. James G. Carr, United States v. Amawi: Jury Questionnaire (Mar. 4, 2008); Interview with Hon. James G. Carr, Sept. 9, 2008; see Transcript, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Jan. 15, 2008, filed Jan. 25, 2010), D.E. 1048; Transcript at 48–64, *id.* (Jan. 10, 2008, filed Jan. 25, 2010), D.E. 1047 [hereinafter *Amawi* Jan. 10, 2008, Transcript].

Judge Carr wishes he had given the questions greater scrutiny, because some proved to be too confusing to the potential jurors. Interview with Hon. James G. Carr, Sept. 9, 2008.

1909. Interview with Hon. James G. Carr, Sept. 9, 2008; *Amawi* Jan. 10, 2008, Transcript, *supra* note 1908, at 62–63.

1910. Interview with Hon. James G. Carr, Sept. 9, 2008.

1911. *Id.*

1912. *Id.*

there remained many more than needed for the jury, alternates, and peremptory challenges.¹⁹¹³ So Judge Carr invited the attorneys to file a joint motion to reconsider denials of cause challenges.¹⁹¹⁴ The attorneys accepted the invitation, potentially appealable issues were removed, and a jury satisfactory to both sides and the court heard the case.¹⁹¹⁵

On March 24, Judge Carr severed from the trial two counts that were only against Amawi for threats against the President,¹⁹¹⁶ and the government later dismissed those counts.¹⁹¹⁷ Opening statements began on April 1.¹⁹¹⁸ Griffin testified on the following day.¹⁹¹⁹ 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.¹⁹²⁰ Closing arguments concluded on Tuesday, June 10.¹⁹²¹ The jury reached guilty verdicts on Friday.¹⁹²²

Judge Carr deferred sentencing of the three original defendants until after the separate indictment against el-Hindi was resolved.¹⁹²³ After a bench trial of five court days in November 2008,¹⁹²⁴ Judge Carr convicted el-Hindi on the fraud indictment and sentenced him to one year and a half,¹⁹²⁵ the court of appeals affirmed.¹⁹²⁶ Zaim pleaded guilty,¹⁹²⁷ and Judge Carr sentenced him to one day of

1913. *Id.*

1914. *Id.*

1915. *Id.*

1916. Order, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Mar. 24, 2008), D.E. 690.

1917. Government Motion, *id.* (July 15, 2008), D.E. 840.

1918. *Amawi* Docket Sheet, *supra* note 1882.

Following opening statements, Judge Carr provided the jurors with preliminary instructions. James G. Carr, United States v. Amawi: Preliminary Jury Instructions (Apr. 1, 2008).

1919. See Erica Blake, “*The Trainer*” Begins Terror Trial Testimony, Toledo Blade, Apr. 3, 2008, at A1.

1920. See *id.*

1921. *Amawi* Docket Sheet, *supra* note 1882; 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).

1922. Jury Verdicts, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 13, 2008), D.E. 806; see Mark Reiter, *3 Guilty in Plot to Kill Troops*, Toledo Blade, June 14, 2008, at A1.

1923. See Erica Blake, *Millions Spent on Terror Case*, June 22, 2008, at A1.

1924. *El-Hindi* Docket Sheet, *supra* note 1904; see Erica Blake, *Convicted Terrorist to Face Another Trial*, Toledo Blade, Nov. 5, 2008, at B1.

1925. Judgment and Commitment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009), D.E. 119 [hereinafter *El-Hindi* El-Hindi Judgment]; El-Hindi Sentencing Transcript at 163, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 21, 2009, filed Jan. 22, 2010), D.E. 1045; see Erica Blake, *El-Hindi Guilty of Conspiracy, Theft Charges*, Toledo Blade, Nov. 13, 2008, at B1.

1926. United States v. El-Hindi, 408 F. App’x 957 (6th Cir. 2011).

1927. *El-Hindi* Docket Sheet, *supra* note 1904.

custody.¹⁹²⁸ In October 2009, Judge Carr sentenced the three original defendants:¹⁹²⁹ twenty years for Amawi;¹⁹³⁰ twelve years for el-Hindi,¹⁹³¹ to be served in advance of the sentence on the fraud indictment;¹⁹³² and eight years and four months for Mazloun.¹⁹³³ On August 23, 2012, the court of appeals affirmed “all opinions and judgments of the district court.”¹⁹³⁴

Bilal Mazloun was sentenced on August 26, 2008, to one year of probation on a guilty plea.¹⁹³⁵ On January 15, 2009, the Ahmeds both pleaded guilty to a single count of material support to terrorists.¹⁹³⁶ They surrendered to begin serving their sentences in advance of sentencing.¹⁹³⁷ On July 12, 2010, Judge Carr sentenced Zubair Ahmed to ten years and Khaleel Ahmed to eight years and four months.¹⁹³⁸

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.¹⁹³⁹ One month after the indictment was filed, the assistant federal defender representing Amawi filed a motion “to compel the United States to de-

1928. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Dec. 8, 2008), D.E. 91.

1929. See Erica Blake, *3 in Toledo Terror Plot Will Serve up to 20 Years*, Toledo Blade, Oct. 22, 2009, at A1.

1930. Amended Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009), D.E. 998 (noting a release date of December 1, 2023, reg. no. 30547-160).

Judge Carr denied a habeas corpus petition on November 6, 2014. Opinion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Nov. 6, 2014), D.E. 1158, available at 2014 WL 5795551.

1931. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009), D.E. 997; *El-Hindi Sentencing Transcript*, *supra* note 1925, at 163; see www.bop.gov (noting a release date of February 1, 2018, reg. no. 43530-060).

1932. *El-Hindi* *El-Hindi* Judgment, *supra* note 1925; *El-Hindi Sentencing Transcript*, *supra* note 1925, at 163.

1933. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 27, 2009), D.E. 1000; *Mazloun Sentencing Transcript* at 65, *id.* (Oct. 21, 2009, filed Jan. 22, 2010); see www.bop.gov (noting a release date of April 23, 2014, reg. no. 43528-060).

1934. *United States v. Amawi*, 695 F.3d 457, 465 (6th Cir. 2012), *cert. denied*, 568 U.S. ___, 133 S. Ct. 1474 (2013).

1935. *Mazloun* Docket Sheet, *supra* note 1904.

1936. Docket Sheet, *United States v. Ahmed*, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007) [hereinafter *Ahmed* Docket Sheet]; see *2 Men Plead Guilty in Local Terror Case*, Toledo Blade, Jan. 16, 2009, at B1.

1937. Surrender Order, *Ahmed*, No. 1:07-cr-647 (N.D. Ohio Jan. 8, 2010), D.E. 178; Quarterly Report, *id.* (May 1, 2009), D.E. 155.

1938. Sentencing Transcript at 44, 66, *id.* (July 12, 2010, filed Dec. 8, 2010), D.E. 202; *Ahmed* Docket Sheet, *supra* note 1936; see www.bop.gov (noting release dates of July 27, 2018, for Zubair Ahmed, reg. no. 19303-424, and May 8, 2016, for Khaleel Ahmed, reg. no. 19304-424).

1939. Transcript at 37–39, 41–43, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 7, 2006, filed Jan. 22, 2010), D.E. 1038 [hereinafter *Amawi* Mar. 7, 2006, Transcript]; see Christina Hall, *Scrutiny of Terror Suspects Strict*, Toledo Blade, Feb. 25, 2006, at A1.

scribe with particularity the extent to which attorney–client communications have been or may be monitored, or in the alternative, for pretrial release on bond.”¹⁹⁴⁰ Mazloum’s attorney joined the motion on the next court day.¹⁹⁴¹ Government attorneys responded that they were not aware of any monitoring other than customary monitoring by the Bureau of Prisons.¹⁹⁴²

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.¹⁹⁴³ 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.¹⁹⁴⁴ Balancing Amawi’s attorney’s desire for more time to prepare for trial and el-Hindi’s desire for a speedy trial, Judge Carr granted Amawi a short continuance to afford his reappointed attorney time to prepare.¹⁹⁴⁵

Challenge: FISA Evidence

At an early status conference—before the Ahmeds had been indicted—Judge Carr, who sat on the court that reviewed surveillance warrants under the Foreign Intelligence Surveillance Act (FISA), asked government counsel if the case would include FISA evidence.¹⁹⁴⁶ The attorney, who appeared by telephone, responded, “The answer to that question alone, it could be considered classified, and we wouldn’t be authorized to discuss that over this telephone line.”¹⁹⁴⁷

On the day before the Ahmeds’ April 24, 2007, detention hearing, the government filed notices that it intended to use at the hearing evidence obtained pursuant to FISA warrants.¹⁹⁴⁸ On September 14, the government filed a notice that it intended to use FISA evidence pertaining to each defendant at some point during the case.¹⁹⁴⁹ Judge Carr determined that it was not necessary to disclose to defense counsel FISA application materials for the FISA evidence for the court to determine the validity of the FISA evidence *ex parte* and *in camera*.¹⁹⁵⁰

1940. Amawi Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 17, 2006), D.E. 34; see *Attorney Seeks Data on Inmate Privacy*, Toledo Blade, Mar. 18, 2006, at B1.

1941. Mazloum Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 20, 2006), D.E. 39.

1942. Government Responses, *id.* (Mar. 21, 2006), D.E. 40.

1943. Transcript, *id.* (Oct. 19, 2006, filed Jan. 22, 2010), D.E. 1039; *Amawi* Docket Sheet, *supra* note 1882; see Mark Reiter, *Local Terror Suspect Will Get New Lawyer*, Toledo Blade, Oct. 20, 2006, at B3.

1944. Transcript at 3–7, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Jan. 18, 2008, filed Sept. 27, 2010), D.E. 1068; *Amawi* Jan. 10, 2008, Transcript, *supra* note 1908, at 3; Interview with Hon. James G. Carr, Sept. 9, 2008.

1945. Interview with Hon. James G. Carr, Sept. 9, 2008.

1946. *Amawi* Mar. 7, 2006, Transcript, *supra* note 1939, at 5.

1947. *Id.*

1948. FISA Notices, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Apr. 23, 2007), D.E. 234, 235.

1949. FISA Notice, *id.* (Sept. 14, 2007), D.E. 365.

1950. *United States v. Amawi*, 531 F. Supp. 2d 832 (N.D. Ohio 2008).

The court of appeals agreed with Judge Carr that no FISA-derived evidence was discoverable.¹⁹⁵¹

Challenge: Court Security

Judge Carr was distressed to learn about unnecessarily visible court security.¹⁹⁵² For example, prospective jurors had to walk by an SUV conspicuously marked as a Department of Homeland Security vehicle.¹⁹⁵³ It did not help that one news station reported on the case with a graphic titled, “Terror in Toledo.”¹⁹⁵⁴ Chief Judge Carr was able to persuade security forces to convey less of a siege image.¹⁹⁵⁵

Challenge: Jury Security

Judge Carr used an anonymous jury and had jurors report off-site instead of to the courthouse during the trial.¹⁹⁵⁶ 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.¹⁹⁵⁷

1951. *United States v. Amawi*, 695 F.3d 457, 474–75 (6th Cir. 2012).

1952. Interview with Hon. James G. Carr, Sept. 9, 2008.

1953. *Id.*

1954. *Id.*

1955. *Id.*

1956. Interview with Hon. James G. Carr, Sept. 9, 2008.

1957. *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.¹⁹⁵⁸ The court initially assigned the case to District Judge Clarence Cooper and Magistrate Judge Joel M. Feldman.¹⁹⁵⁹ With the defendant's consent, the government obtained from Judge Feldman permission to proceed initially under seal with closed proceedings.¹⁹⁶⁰ But on the following day, April 20, the day Ahmed pleaded not guilty at a closed hearing,¹⁹⁶¹ the *Atlanta Journal-Constitution* reported Ahmed's arrest,¹⁹⁶² and as a result the government moved to unseal the case.¹⁹⁶³

Also on April 20, Magistrate Judge Linda T. Walker took over for Judge Feldman,¹⁹⁶⁴ because of Judge Feldman's impending retirement.¹⁹⁶⁵ Two months later, because of Judge Walker's recusal, Magistrate Judge Gerrilyn G. Brill took over for Judge Walker.¹⁹⁶⁶

1958. Indictment, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006), D.E. 1; see Brenda Goodman, *Student Is Held in Terror Case*, N.Y. Times, Apr. 21, 2006, at A18; Bill Torpy, *Terror Charge for Student*, Atlanta J. & Const., Apr. 21, 2006, at A1.

1959. 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. Judge Feldman retired on October 22, 2006. The Third Branch, Nov. 2006, at 8; www.uscourts.gov/news/TheThirdBranch/06-11-01/Judicial_Milestones.aspx.

1960. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006), D.E. 16.

1961. Bill Torpy & Jeremy Redmon, *Path Traced in Suspects' Terror Case*, Atlanta J. & Const., Apr. 22, 2006, at A1.

1962. Bill Torpy & Mike Morris, *FBI Detains Tech Student, but Won't Say Why*, Atlanta J. & Const., Apr. 20, 2006, at A1.

1963. Motion to Unseal, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006), D.E. 21; see Goodman, *supra* note 1958.

1964. N.D. Ga. Docket Sheet, *supra* note 1959.

1965. Reassignment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006), D.E. 23 ("In light of the potential length required to dispose of the above-styled case which may extend beyond the undersigned's scheduled October 22, 2006 retirement, IT IS HEREBY ORDERED that this case be reassigned from the undersigned to the next magistrate scheduled to receive a long case, to wit: the Honorable Linda T. Walker."); see Order, *id.* (Apr. 19, 2006), D.E. 18 (declaring the case to be complex under 18 U.S.C. § 3161(h)(8)(A), (B)(ii) (2006), now § 3161(h)(7)(A), (B)(ii) (2013)).

1966. Reassignment Order, *id.* (June 21, 2006); Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

Tim Reagan interviewed Judge Brill for this report in the judge's chambers on November 18, 2009.

Ahmed is an American citizen born in Pakistan.¹⁹⁶⁷ He moved to the United States with his parents and siblings in 1997.¹⁹⁶⁸ At Georgia Tech, he majored in mechanical engineering.¹⁹⁶⁹

On July 19, 2006, the indictment against Ahmed was superseded to add Ehsanul Islam Sadequee as a defendant.¹⁹⁷⁰ Sadequee was arrested while shopping in Dhaka, Bangladesh, on April 17 and turned over to U.S. authorities.¹⁹⁷¹ The U.S. District Court for the Eastern District of New York had issued a warrant for Sadequee's arrest on March 28.¹⁹⁷² American authorities transported him to the District of Alaska;¹⁹⁷³ the court there committed Sadequee to the Eastern District of New York.¹⁹⁷⁴ Sadequee was arraigned in Brooklyn on April 22.¹⁹⁷⁵ On August 1, the court in the Eastern District of New York committed Sadequee to the Northern District of Georgia.¹⁹⁷⁶ Sadequee pleaded not guilty in Atlanta to the superseding indictment on August 9.¹⁹⁷⁷

Ahmed and Sadequee met at Al-Farooq Masjid, a mosque near Georgia Tech.¹⁹⁷⁸ They agreed to prepare for violent jihad, including by playing paintball in the north Georgia mountains.¹⁹⁷⁹

Sadequee is a U.S. citizen born in Fairfax, Virginia; his parents are Bangladeshi.¹⁹⁸⁰ He moved to the Atlanta area in 1988.¹⁹⁸¹ From 1999 to 2001, he studied at an Islamic seminary in Ajax, Ontario.¹⁹⁸² In August 2005, he traveled to Bang-

1967. See Goodman, *supra* note 1958; Torpy & Morris, *supra* note 1962.

1968. See Torpy & Morris, *supra* note 1962.

1969. See *id.*

1970. Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. July 19, 2006), D.E. 39; see Jeffrey Scott, *Georgia Terror Suspects Accused of Dobbins Plot*, Atlanta J. & Const., July 20, 2006, at D1.

1971. 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 1958; Torpy & Redmon, *supra* note 1961.

1972. Arrest Warrant, *United States v. Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006), D.E. 2.

1973. 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.

1974. Commitment to Another District, *Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006), D.E. 4.

1975. Docket Sheet, *Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

1976. Docket Sheet, *United States v. Sadequee*, No. 1:06-mj-820 (E.D.N.Y. Aug. 1, 2006).

1977. Minutes, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006), D.E. 52; see Bill Torpy, *Terror Case Suspect Returned to Atlanta*, Atlanta J. & Const., Aug. 10, 2006, at D12.

1978. See Torpy & Redmon, *supra* note 1961.

1979. Specific Findings at 2–4, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 10, 2009), D.E. 510.

1980. See Bill Torpy, *Suspected Terrorists*, Atlanta J. & Const., June 11, 2006, at A1; Redmon & Torpy, *supra* note 1973.

1981. See Torpy, *supra* note 1980.

1982. See *id.*

ladesh to marry a cousin.¹⁹⁸³ While there, he studied business administration at North South University in Dhaka.¹⁹⁸⁴

On March 6, 2005, Ahmed and Sadequee traveled together to Toronto, which has a very large Muslim community.¹⁹⁸⁵ Two of the men they met were subsequently prosecuted by Canada after a seventeen-suspect terrorism sweep.¹⁹⁸⁶

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.¹⁹⁸⁷ A suspected terrorist in Britain, Younis Tsouli, was discovered to have received the videos over the Internet.¹⁹⁸⁸

On July 17, Ahmed traveled to Pakistan.¹⁹⁸⁹ His family claimed the trip was for religious education, but the government claimed the purpose was military training.¹⁹⁹⁰ On August 18, Sadequee traveled to Bangladesh.¹⁹⁹¹

Ahmed returned to the United States on August 19, and federal agents interviewed him upon his arrival.¹⁹⁹² They interviewed him again the following March.¹⁹⁹³

In October 2008, because of Judge Cooper's taking senior status four months later, District Judge William S. Duffey, Jr., became the presiding judge.¹⁹⁹⁴ The government decided to try Ahmed and Sadequee by separate indictments.¹⁹⁹⁵

1983. See Rashbaum & Goodman, *supra* note 1971; Redmon & Torpy, *supra* note 1973.

1984. See Redmon & Torpy, *supra* note 1973.

1985. Specific Findings, *supra* note 1979, 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 1980.

1986. 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 1980.

1987. Specific Findings, *supra* note 1979, 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 1971; Redmon & Torpy, *supra* note 1973; Torpy, *supra* note 1980; Craig Whitlock & Spencer S. Hsu, *Terror Webmaster Sentenced in Britain*, Wash. Post, Jan. 24, 2008, at A10.

1988. Specific Findings, *supra* note 1979, at 13; see Torpy, *supra* note 1980.

On July 5, 2007, Tsouli was sentenced by a British court to ten years in prison. See Whitlock & Hsu, *supra* note 1987.

1989. Specific Findings, *supra* note 1979, at 10; see Torpy, *supra* note 1980.

1990. See Torpy, *supra* note 1980.

1991. Specific Findings, *supra* note 1979, at 10.

1992. *Id.* at 11.

1993. *Id.* at 15.

1994. Order, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 1, 2008), D.E. 344 (exchanging the criminal case for two civil cases); Interview with Hon. Clarence Cooper, Nov. 18, 2009; see First Jan. 26, 2009, Transcript at 3, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Jan. 26, 2009, filed Feb. 12, 2009), D.E. 384; Second Jan. 26, 2009, Transcript at 2–3, *id.* (Jan. 26, 2009, filed Jan. 30, 2009), D.E. 376; Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Cooper’s taking senior status on February 9, 2009).

As trial approached, each of the defendants expressed a desire to represent himself.¹⁹⁹⁶ Ahmed wanted to address the court during closing arguments.¹⁹⁹⁷ Sadequee said that he wanted to question witnesses.¹⁹⁹⁸

Judge Duffey agreed to let Ahmed proceed with counsel but make his own closing statement if the trial were to the bench rather than to a jury.¹⁹⁹⁹ Ahmed opted for a bench trial,²⁰⁰⁰ which began on June 1, 2009.²⁰⁰¹ He said that he thought that Judge Duffey would be more objective than the average juror.²⁰⁰² On the fourth day of trial, as the court prepared to hear closing arguments, Judge Duffey clarified that Ahmed elected not to testify and that his closing remarks could not be considered as evidence.²⁰⁰³ On June 9, Judge Duffey announced that Ahmed was guilty.²⁰⁰⁴

Tim Reagan interviewed Judge Duffey for this report in the judge's chambers on June 16, 2009, and by telephone on February 18, 2010.

1995. Third Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 9, 2008), D.E. 347 (superseding indictment against Sadequee); Second Superseding Indictment, *id.* (Dec. 9, 2008), D.E. 343 (superseding indictment against Ahmed).

1996. Second Jan. 26, 2009, Transcript, *supra* note 1994, at 21 (“[Sadequee]: I also wanted to ask about I’m considering going *pro se*. And I understand that there is a number of categories, like standby counsel.”); *id.* at 27 (Ahmed “would like to address [the court] again about an issue that he just raised for the first time at counsel table similar to what Mr. Sadequee—the discussion you had with Mr. Sadequee.”); First Jan. 26, 2009, Transcript, *supra* note 1994, at 14 (“[Ahmed]: I wanted to file a motion to terminate counsel.”); see Bill Rankin, *Terror Suspects May Want to Defend Selves*, Atlanta J. & Const., Jan. 28, 2009, at C3.

1997. 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.

1998. Transcript at 31, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 3, 2009, filed Mar. 13, 2009), D.E. 401 (“I would definitely intend to interview witnesses. . . . I also perhaps would make some statements in the opening statement or closing statement.”); Second Jan. 26, 2009, Transcript, *supra* note 1994, at 23 (“maybe I would just interview one or two witnesses”); see Rankin, *supra* note 1996.

1999. May 19, 2009, Transcript at 6–7, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. May 19, 2009, filed Jan. 12, 2010), D.E. 643; Transcript, *id.* (May 18, 2009, filed Jan. 12, 2010), D.E. 642.

2000. May 19, 2009, Transcript, *supra* note 1999, at 3–6; Specific Findings, *supra* note 1979, at 2; Interview with Hon. William S. Duffey, Jr., June 16, 2009; see Rankin, *supra* note 1997.

2001. Minutes, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 1, 2009), D.E. 496; Transcript, *id.* (June 1, 2009, filed June 19, 2009), D.E. 519; Specific Findings, *supra* note 1979, at 2; see Bill Rankin, *Defendant “Fell Prey” to Extremist, Lawyer Says*, Atlanta J. & Const., June 2, 2009, at A10.

2002. May 19, 2009, Transcript, *supra* note 1999, at 9.

2003. Transcript at 877–78, 910, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 4, 2009, filed June 19, 2009), D.E. 522; see May 19, 2009, Transcript, *supra* note 1999, at 8 (“THE DEFENDANT: . . . Can I explain something? I mean, as long as I can say this statement, I don’t care if it’s considered for my trial or not. For me that’s—to say the statement, deliver it in public is all I care about.”).

2004. Verdict, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 10, 2009), D.E. 509; June 10, 2009, Transcript at 4, *id.* (June 10, 2009, filed June 19, 2009), D.E. 523; Specific Findings, *supra* note 1979, 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.

The case received extensive coverage, especially by local news media.²⁰⁰⁵ 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.²⁰⁰⁶ Judge Brill observed that sealing documents and closing proceedings often intensifies news media interest.²⁰⁰⁷

One local journalist sat through the entire trial.²⁰⁰⁸ Judge Duffey reserved a row of seats for the press, and he permitted sketch artists to sit in the jury box.²⁰⁰⁹ 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.²⁰¹⁰ 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 questions about scheduling.²⁰¹¹

Judge Duffey sealed his special findings supporting Ahmed's guilty verdict until after Sadequee's jury trial.²⁰¹² News media initially objected to the idea, but they came to accept the temporary sealing as proper.²⁰¹³ Judge Duffey provided copies of the sealed findings to the parties' attorneys of record, forbidding them from revealing them to anyone else; the defendant was permitted to examine his attorney's copy but not to retain a copy.²⁰¹⁴

For Sadequee's trial, Judge Duffey used a jury questionnaire.²⁰¹⁵ Prospective jurors filled out the questionnaire a week in advance of voir dire.²⁰¹⁶ This gave the lawyers and the court ample time to review the questionnaires to focus follow-up voir dire on the most important issues.²⁰¹⁷

Judge Duffey bifurcated the questionnaire so that prospective jurors filled out the first part, which focused on general background issues and matters that might affect a panel member's service, before they filled out the second part, which focused on issues related to the nature of the trial, beliefs about Islam, and other case-specific matters.²⁰¹⁸

2005. 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.

2006. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2007. *Id.*

2008. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2009. *Id.*

2010. *Id.*

2011. *Id.*

2012. June 10, 2009, Transcript, *supra* note 2004, at 5; Specific Findings, *supra* note 1979; N.D. Ga. Docket Sheet, *supra* note 1959; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2013. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2014. June 10, 2009, Transcript, *supra* note 2004, at 6.

2015. William S. Duffey, Jr., United States v. Sadequee: Jury Questionnaire (July 22, 2009) [hereinafter Jury Questionnaire]; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

2016. Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

2017. *Id.*

Judge Duffey tries to minimize the amount of jurors' idle time at the courthouse. *Id.*

2018. Jury Questionnaire, *supra* note 2015; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

Jury selection in Sadequee's trial began on August 3, 2009.²⁰¹⁹ That morning, Sadequee announced that he would represent himself.²⁰²⁰ Judge Duffey appointed his attorneys as standby counsel.²⁰²¹ Sadequee cross-examined the government's witnesses and called only his sister as his own witness.²⁰²² He did not testify himself,²⁰²³ but he did present a closing argument.²⁰²⁴ On, August 12, the jury found Sadequee guilty on all four counts presented.²⁰²⁵

The defendants represented themselves at sentencing, although their lawyers were allowed to argue some sentencing guidelines issues.²⁰²⁶ On December 14, Judge Duffey sentenced Ahmed to thirteen years and sentenced Sadequee to seventeen years.²⁰²⁷ Both defendants voluntarily dismissed their appeals.²⁰²⁸

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.²⁰²⁹ Deputy marshals taped newspapers to the windows on the courtroom door so that no one could see inside.²⁰³⁰

2019. Minutes, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 3, 2009), D.E. 574.

2020. *Id.*; Aug. 3 and 4, 2009, Transcript at 3, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 3 and 4, 2009, filed Aug. 31, 2009), D.E. 592; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

2021. Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

2022. Aug. 10, 2009, Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 10, 2009, filed Sept. 2, 2009), D.E. 596; Transcripts, *id.* (Aug. 5–7, 2009, filed Aug. 31 and Sept. 2, 2009), D.E. 593, 594, 595; Aug. 3 and 4, 2009, Transcript, *supra* note 2020.

2023. Aug. 10, 2009, Transcript, *supra* note 2022, at 1241–42.

2024. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 11, 2009, filed Sept. 2, 2009), D.E. 597.

2025. Jury Verdict, *id.* (Aug. 12, 2009), D.E. 588 (guilty of conspiracy to provide material support to terrorists, providing and attempting to provide material support to terrorists, conspiracy to provide material support to a designated foreign terrorist organization, and attempting to provide material support to a designated foreign terrorist organization); Transcript, *id.* (Aug. 12, 2009, filed Sept. 2, 2009), D.E. 598.

2026. Transcript, *id.* (Dec. 14, 2009, filed Jan. 12, 2010), D.E. 645 (Ahmed's sentencing); Transcript, *id.* (Dec. 14, 2009, filed Jan. 8, 2010), D.E. 635 (Sadequee's sentencing); N.D. Ga. Docket Sheet, *supra* note 1959; *see* Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 7, 2009), D.E. 602.

2027. Judgment and Commitment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 15, 2009), D.E. 620 (Ahmed's sentence); Judgment and Commitment, *id.* (Dec. 14, 2009), D.E. 622 (Sadequee's sentence); *see* www.bop.gov (noting release dates of August 11, 2017, for Ahmed, reg. no. 57987-019, and February 9, 2021, for Sadequee, reg. no. 15240-006); *see also* Bill Rankin, *Two Terrorists Get Prison Sentences*, Atlanta J. & Const., Dec. 15, 2009, at A1.

2028. Docket Sheet, *United States v. Ahmed*, No. 09-16452 (11th Cir. Dec. 29, 2009) (noting a dismissal on May 20, 2011); Docket Sheet, *United States v. Sadequee*, No. 09-16325 (11th Cir. Dec. 21, 2009) (noting a dismissal on April 9, 2010).

2029. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006), D.E. 16.

2030. *See* Torpy & Redmon, *supra* note 1961.

Judge Brill granted the news media's motion to intervene for the purpose of possibly challenging sealing and closure orders.²⁰³¹

Challenge: Attorney Appointment

Initially, one of the attorneys appointed to represent Sadequee was an attorney in the Federal Public Defender's office.²⁰³² But Sadequee was assaulted in detention by another inmate who was also represented by that office, so the office could no longer represent Sadequee.²⁰³³ Judge Brill appointed a Muslim attorney with offices in Miami as a replacement.²⁰³⁴

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.²⁰³⁵ 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.²⁰³⁶ News media were vigilant in arguing that the case be prosecuted openly.²⁰³⁷ Judge Brill insisted that specific reasons be articulated for the sealing of any filings.²⁰³⁸ The parties subsequently agreed to a protective order that Judge Brill could sign.²⁰³⁹

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)²⁰⁴⁰ and a motion for a protective order, pursuant to the Classified Information Procedures Act, laying out ground rules for defense access to classified evidence.²⁰⁴¹ On February 8, 2007, Judge Cooper signed a protective order laying out procedures for handling classified information.²⁰⁴²

2031. Minutes, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 1, 2006), D.E. 71.

2032. Appointment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006), D.E. 56.

2033. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; see Transcript at 5, 7–8, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Jan. 5, 2009, filed Jan. 30, 2009), D.E. 375.

2034. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; see Sept. 18, 2008, Transcript at 11–12, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 18, 2008, filed Sept. 23, 2008), D.E. 320.

2035. Protective Order *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006), D.E. 20.

2036. Order, *id.* (Oct. 26, 2006); see Bill Torpy, *Terror Case Files to Remain Open*, Atlanta J. & Const., Oct. 27, 2006, at D3.

2037. See Moni Basu, *Judge Seeks Balance on Terror Case Evidence*, Atlanta J. & Const., Dec. 16, 2006, at B3.

2038. See *id.*

2039. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 20, 2006), D.E. 142.

2040. Notice, *id.* (June 16, 2006), D.E. 35.

2041. Motion, *id.* (June 16, 2006), D.E. 33.

2042. Protective Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 8, 2007), D.E. 160.

Defense counsel had to obtain security clearances.²⁰⁴³ So did court staff.²⁰⁴⁴ District judges have security clearances by virtue of their office, but magistrate judges must obtain security clearances to see classified information.²⁰⁴⁵

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.²⁰⁴⁶ 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.”²⁰⁴⁷

Much pretrial work in criminal cases in the Northern District of Georgia is done by magistrate judges.²⁰⁴⁸ Judge Brill reviewed classified foundations for trial evidence at an *in camera* proceeding with counsel for both sides present.²⁰⁴⁹

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.²⁰⁵⁰ Judges and court staff could view this information at a sensitive compartmented information facility (SCIF) at the U.S. Attorney’s office in the same building as the courthouse.²⁰⁵¹ Judges Duffey and Brill were permitted to keep some classified materials in chambers safes.²⁰⁵² A secure room was set aside for defense counsel to store and review classified information.²⁰⁵³ Classified information security officers reviewed any documents prepared based on classified information for possible redaction.²⁰⁵⁴

2043. See Bill Torpy, *Security Clearance Slows Terror Case*, Atlanta J. & Const., Sept. 2, 2006, at D3.

2044. 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.

2045. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2* (Federal Judicial Center, 2d ed. 2013); see also Torpy, *supra* note 2043.

2046. 18 U.S.C. app. 3 §§ 4, 6(c)(1) (2013); see Reagan, *supra* note 2045, at 16–19; Sept. 18, 2008, Transcript, *supra* note 2034, at 4–5.

2047. Sept. 18, 2008, Transcript, *supra* note 2034, at 16.

2048. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; see Sept. 18, 2008, Transcript, *supra* note 2034, at 2.

2049. Report and Recommendation, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 2, 2007), D.E. 226, *adopted*, Order, *id.* (Dec. 19, 2008), D.E. 358; see Minutes, *id.* (Sept. 24, 2007), D.E. 222.

2050. See Reagan, *supra* note 2045, at 3 (describing sensitive compartmented information).

2051. See Torpy, *supra* note 2036; see also Reagan, *supra* note 2045, at 22–23 (describing SCIFs).

2052. Interview with Hon. William S. Duffey, Jr., June 16, 2009; Interview with Dep’t of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

2053. Interview with Dep’t of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

2054. 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 2036; see also Reagan, *supra* note 2045, at 21–22 (providing information about classified information security officers).

From 2001 until his becoming a judge in 2004, Judge Duffey was the district's U.S. Attorney.²⁰⁵⁵ He was, therefore, familiar with the security staff at the U.S. Attorney's office.²⁰⁵⁶ 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.²⁰⁵⁷

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.²⁰⁵⁸ Judge Brill issued a report and recommendation finding no errors in FISA procedures and finding that none of the FISA materials were discoverable.²⁰⁵⁹ Judge Brill acknowledged that defense counsel are in a difficult position when arguing for suppression of FISA evidence, because they do not have access to the FISA records.²⁰⁶⁰ 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.²⁰⁶¹

Ahmed also filed a motion that the government disclose whether he had been subject to warrantless surveillance by the National Security Agency outside FISA.²⁰⁶² Judge Cooper denied the motion.²⁰⁶³

2055. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; see Rankin, *supra* note 1997.

2056. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

2057. *Id.*

2058. FISA Motion, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006), D.E. 59.

2059. Report and Recommendation, *id.* (Aug. 22, 2007), D.E. 203.

2060. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

2061. *Id.*

2062. NSA Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006), D.E. 60.

2063. Order, *id.* (Feb. 7, 2007), D.E. 163.

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, 2006.²⁰⁶⁴ Narseal Batiste, Burson Augustin, his brother Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor were American citizens.²⁰⁶⁵ Phanor was already in jail for a probation violation; the others were arrested in Miami on the day of indictment.²⁰⁶⁶ Patrick Abraham was a Haitian arrested in Miami on May 9 for overstaying his tourist visa.²⁰⁶⁷ Lyglenson Lemorin was a legal Haitian immigrant who had moved to Atlanta approximately two months previously, and he was arrested there on June 22.²⁰⁶⁸ The defendants became known as the Liberty City Seven.²⁰⁶⁹

2064. Indictment, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006), D.E. 3; *United States v. Augustin*, 661 F.3d 1105, 1114–15 (11th Cir. 2011); see Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. Times, July 1, 2006, at A1; Chris Heffelfinger, *Radical Islam in America* 132 (2011); David Ovalle, Evan S. Benn, Larry Lebowitz & Luisa Yanez, *Terrorism Raid Targets a Warehouse in Miami*, Miami Herald, June 23, 2006, at 1A; Walter Pincus, *FBI Role in Terror Probe Questioned*, Wash. Post, Sept. 2, 2006, at A1; Scott Shane & Andrea Zarate, *F.B.I. Killed Plot in Talking State, a Top Aide Says*, N.Y. Times, June 24, 2006, at A1; Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts*, Wash. Post, June 24, 2006, at A3.

In 2009, the Sears Tower became known as the Willis Tower. See Mary Ellen Podmolik, *Tower Title Holds Power*, Chi. Trib., Mar. 13, 2009, News, at 5; see also Michael J. del la Merced, *Blackstone Group Purchases Landmark Chicago Tower*, N.Y. Times, Mar. 17, 2015, at B3 (“It is unclear if or when Blackstone will change the name of the building, which was rechristened the Willis Tower after the Willis Group, an insurance brokerage, bought the naming rights in 2009.”).

2065. See Shane & Zarate, *supra* note 2064; Whoriskey & Eggen, *supra* note 2064.

2066. *Augustin*, 661 F.3d at 1114; see Trenton Daniel, Nicole White & Andres Vignucci, *Bible Their Book, Work Their Life, Family Says*, Miami Herald, June 24, 2006, at 1A; Shane & Zarate, *supra* note 2064; Whoriskey & Eggen, *supra* note 2064.

2067. *Augustin*, 661 F.3d at 1114; see Shane & Zarate, *supra* note 2064; Whoriskey & Eggen, *supra* note 2064.

2068. *Augustin*, 661 F.3d at 1114; see Daniel et al., *supra* note 2066; Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. Times, Dec. 14, 2007, at A22; Shane & Zarate, *supra* note 2064; Jay Weaver & Luisa Yanez, *Mistrial Called for 6 of “Liberty City 7,”* Miami Herald, Dec. 14, 2007, at 1A; Peter Whoriskey, *Man Acquitted in Terror Case Faces Deportation*, Wash. Post, Mar. 2, 2008, at A3; Whoriskey & Eggen, *supra* note 2064.

2069. See Abby Goodnough, *Trial Starts for Men in Plot to Destroy Sears Tower*, N.Y. Times, Oct. 3, 2007, at A14.

Batiste, married with four children, was born in Chicago and grew up there and in Louisiana, where his father was a Baptist preacher.²⁰⁷⁰ His mother died in 2000.²⁰⁷¹ At one time, he worked for FedEx in Chicago.²⁰⁷² Batiste and his wife operated a stucco and masonry business, and he held Bible readings at his warehouse.²⁰⁷³ 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.²⁰⁷⁴ He called his religious group the Seas of David.²⁰⁷⁵

Abraham was Batiste's right-hand man.²⁰⁷⁶ Phanor was born in Miami of Haitian parents.²⁰⁷⁷ He attended Edison Senior High School and finished high school in Tallahassee.²⁰⁷⁸ At the time of his arrest, he was living in Batiste's warehouse.²⁰⁷⁹ Herrera's parents were from the Dominican Republic.²⁰⁸⁰ Lemorin, born in Haiti and married with two children, came to the United States as a child in 1993 and had permanent resident status.²⁰⁸¹

The case against the men was established by Elie Assad, a veteran government informant who posed as a representative of Al-Qaeda.²⁰⁸² Assad provided the suspects with military boots and a video camera for casing targets.²⁰⁸³ The FBI paid

2070. See Daniel et al., *supra* note 2066; Drew & Lichtblau, *supra* note 2064; Charles Rabin & Susannah A. Nesmith, *Family: Suspect Grew Up Deeply Religious*, Miami Herald, June 27, 2006, at 1A.

2071. See Rabin & Nesmith, *supra* note 2070.

2072. See Drew & Lichtblau, *supra* note 2064; Pincus, *supra* note 2064.

2073. See Drew & Lichtblau, *supra* note 2064.

2074. United States v. Augustin, 661 F.3d 1105, 1111 (11th Cir. 2011); see Drew & Lichtblau, *supra* note 2064; Charles Rabin & Alexandra Alter, *Group Denies Violent Doctrine*, Miami Herald, June 24, 2006, at 29A; Whoriskey, *supra* note 2068; Peter Whoriskey, *Trial Begins for 7 Accused of Plotting to Destroy Sears Tower*, Wash. Post, Oct. 3, 2007, at A9 [hereinafter *Trial Begins*].

2075. See Drew & Lichtblau, *supra* note 2064; Goodnough, *supra* note 2069; Shane & Zarate, *supra* note 2064.

2076. See Jay Weaver & David Ovalle, *How FBI Moles Snared Terror Suspects*, Miami Herald, July 16, 2006, at 1A.

2077. See *id.*

2078. See *id.*

2079. See *id.*

2080. See *id.*

2081. See Daniel et al., *supra* note 2066; Whoriskey, *supra* note 2068.

2082. United States v. Augustin, 661 F.3d 1105, 1112 (11th Cir. 2011); see Goodnough, *supra* note 2069; Shane & Zarate, *supra* note 2064; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 725–26 (2010); Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. Pa. J. Const. L. 1475, 1489–93 (2009); Whoriskey, *Trial Begins*, *supra* note 2074; Whoriskey & Eggen, *supra* note 2064.

Assad was born in Lebanon of Syrian descent. See Jay Weaver, *Liberty City Seven Defense Faces Setbacks*, Miami Herald, Oct. 23, 2007, at 1B (reporting that Assad was paid \$80,000 and al-Saidi was paid about \$40,000).

2083. Augustin, 661 F.3d at 1112; see Goodnough, *supra* note 2069; Shane & Zarate, *supra* note 2064; Whoriskey & Eggen, *supra* note 2064.

him \$17,000 plus \$19,570 in expenses, and the government granted him political asylum.²⁰⁸⁴ Abbas al-Saidi, another informant, was paid \$10,500 plus \$8,815 in expenses.²⁰⁸⁵

The court assigned the case to Judge Joan A. Lenard.²⁰⁸⁶ Jury selection began on September 18, 2007.²⁰⁸⁷ Judge Lenard did not use a jury questionnaire; in a dozen years on the bench, she had never used one.²⁰⁸⁸ 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.²⁰⁸⁹

Opening statements began on October 2.²⁰⁹⁰ Later that month, a Miami police counterterrorism pamphlet, which was distributed at a Metrorail station, was discovered in the jury room.²⁰⁹¹ Judge Lenard dismissed two jurors and an alternate who said they had read it.²⁰⁹²

Jury deliberations began on December 3.²⁰⁹³ On December 13, the jury acquitted Lemorin.²⁰⁹⁴ But the jury deadlocked on the other defendants, and Judge Lenard declared a mistrial.²⁰⁹⁵ On the following day, the government transferred Lemorin to an immigration detention center and initiated deportation proceed-

2084. See Pincus, *supra* note 2064; Jay Weaver, *Trial for “Liberty City Seven” to Start March 3*, Miami Herald, July 27, 2006, at 3B.

2085. See Pincus, *supra* note 2064; Weaver, *supra* note 2084.

2086. Docket Sheet, United States v. Batiste, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006) [hereinafter S.D. Fla. Docket Sheet]; see Weaver, *supra* note 2084.

Tim Reagan interviewed Judge Lenard for this report in the judge’s chambers on October 8, 2009.

2087. *Augustin*, 661 F.3d at 1115; see Jay Weaver, *Proving Liberty City 7’s Intentions Is Task for Feds*, Miami Herald, Sept. 18, 2007, at 1A.

2088. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2089. Joan A. Lenard, United States v. Batiste: Voir Dire Questions (Sept. 18, 2007) [hereinafter Voir Dire Questions]; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see United States v. Campa, 459 F.3d 1121 (11th Cir. 2006) (finding Judge Lenard’s voir dire procedures in a previous case to be a meticulous model); see also Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. Feb. 3, 2009, filed Jan. 20, 2010), D.E. 1485 (phase one and phase two questions in third trial).

2090. See Goodnough, *supra* note 2069; Whoriskey, *supra* note 2074.

2091. See Weaver, *supra* note 2082.

2092. See *id.*

2093. See Kirk Semple, *Defense Ends Its Arguments in Terrorism Trial in Miami*, N.Y. Times, Dec. 1, 2007, at A12.

2094. United States v. Augustin, 661 F.3d 1105, 1111, 1115 (11th Cir. 2011); see Semple, *supra* note 2068; Weaver & Yanez, *supra* note 2068; Peter Whoriskey, *Terrorism Case Ends in Mistrial; 1 Acquitted*, Wash. Post, Dec. 14, 2007, at A3.

2095. *Augustin*, 661 F.3d at 1115; see Semple, *supra* note 2068; Weaver & Yanez, *supra* note 2068; Whoriskey, *supra* note 2094.

ings against him.²⁰⁹⁶ He was deported to Haiti on January 20, 2011; his wife and three children continued to live in Miami Beach.²⁰⁹⁷

After thirteen days of deliberation, a second jury deadlocked, on April 16, 2008, and Judge Lenard again declared a mistrial.²⁰⁹⁸ Jury selection in the third trial began on January 27, 2009.²⁰⁹⁹ Selection proceedings were interrupted by briefing on whether the government's using a peremptory challenge against a young Haitian-American man was improper.²¹⁰⁰

Opening statements began on February 19.²¹⁰¹ Jury deliberations began on April 27 and were interrupted when one juror took ill and Judge Lenard replaced him with an alternate, which meant that deliberations had to begin again.²¹⁰² Then jurors reported that one of their members had refused to participate in deliberations.²¹⁰³ After questioning all of the jurors, including the juror in question, and with consent of the parties, Judge Lenard replaced this juror as well.²¹⁰⁴ Ultimately, on May 12, the jury acquitted Herrera and convicted each of the others on at least some of the pending counts.²¹⁰⁵ The court of appeals affirmed the convictions.²¹⁰⁶

2096. See *Lemorin v. Attorney Gen.*, 416 F. App'x 35 (11th Cir. 2011); *Ex-Terror Suspect Is Charged Anew*, N.Y. Times, Feb. 7, 2008, at A27; Whoriskey, *supra* note 2068.

2097. See *Ex-Terror Suspect May Be Deported*, Wash. Post, Dec. 6, 2008, at A2; Andres Viglucci, *Haitian Acquitted in Liberty City 7 Case Is Ordered Deported*, Miami Herald, Dec. 6, 2008, at 5B; Jay Weaver & Trenton Daniel, *Acquitted Haitian Defendant in Liberty City Seven Terror Case Is Deported*, Miami Herald, Jan. 21, 2011, at 1B.

2098. *Augustin*, 661 F.3d at 1115; see Damien Cave, *Mistrial for 6 in Sears Tower Terror Case*, N.Y. Times, Apr. 17, 2008, at A21; Julianne Gage, *2nd Mistrial in "Liberty City 7" Case*, Wash. Post, Apr. 17, 2008, at A2.

During deliberations, the jury decided to replace the foreperson. Transcript, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. Apr. 4, 2008, filed Mar. 24, 2010), D.E. 1512.

2099. *Augustin*, 661 F.3d at 1115; see Jay Weaver, *Jurors Vetted in Liberty City 6 Trial*, Miami Herald, Jan. 28, 2009, at 3B.

2100. See Jay Weaver, *Racial Concerns Halt Jury Selection in Third Liberty City Six Terrorism Trial*, Miami Herald, Feb. 12, 2009, at 3B.

2101. See Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. Times, Feb. 19, 2009, at A18.

2102. *Augustin*, 661 F.3d at 1115; Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. May 4, 2009, filed Aug. 24, 2010), D.E. 1515; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Jury Deliberations in Terror-Conspiracy Retrial Delayed Again*, Miami Herald, May 2, 2009, at 3B.

2103. *Augustin*, 661 F.3d at 1115, 1129; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Five Members of Liberty City Six Guilty in Terror Plot*, Miami Herald, May 13, 2009, at 11A [hereinafter *Five Members*]; Weaver, *supra* note 2102; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

2104. *Augustin*, 661 F.3d at 1115, 1129–32; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Weaver, *supra* note 2103; Weaver, *supra* note 2102; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at 1A.

2105. *Augustin*, 661 F.3d at 1110–11, 1115; see Damen Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. Times, May 13, 2009, at A19; Weaver, *Five Members*, *supra* note 2103.

2106. *Augustin*, 661 F.3d at 1134, *cert. denied*, *Batiste v. United States*, 566 U.S. ___, 132 S. Ct. 2447 (petition by Batiste and Phanor), *Augustine v. United States*, 566 U.S. ___, 132 S. Ct. 2444,

From November 18 through 20, 2009, Judge Lenard sentenced Batiste to thirteen and one-half 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; Augustine was released in 2013, and Abraham was released in 2014.²¹⁰⁷

Augustin was released on September 12, 2012.²¹⁰⁸ On August 21, 2013, he was indicted for selling cocaine to a confidential informant.²¹⁰⁹ Judge John E. Steele accepted Augustin's guilty plea on February 5, 2014.²¹¹⁰ On May 5, Judge Steele sentenced Augustin to one year and four months on the indictment and to an additional two years for violation of supervised release.²¹¹¹ Augustin's appeals are pending.²¹¹²

Following Abraham's release, he was deported on September 16, 2014, to Haiti, where he was detained pending further review by Haitian authorities.²¹¹³

Challenge: Classified Evidence

No part of this case involved classified information.²¹¹⁴

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.²¹¹⁵ Because of this and other inappropriate disclosures, Judge Lenard used an anonymous jury for the next two trials.²¹¹⁶ For the second trial, she also used partial sequestration, which

and *Abraham v. United States*, 566 U.S. ___, 132 S. Ct. 2118 (2012); see Jay Weaver, *Convictions Upheld in "Liberty City 7,"* Miami Herald, Nov. 2, 2011, at 6B.

2107. S.D. Fla. Docket Sheet, *supra* note 2086; see www.bop.gov (noting release dates of March 25, 2018, for Batiste, reg. no. 76736-004; August 20, 2014, for Abraham, reg. no. 76737-004; June 28, 2016, for Phanor, reg. no. 64959-004; and August 7, 2013, for Augustine, reg. no. 76732-004); see also *Opinion, Batiste v. United States*, No. 1:13-cv-21905 (S.D. Fla. Dec. 17, 2014), D.E. 57 (denying habeas relief to Batiste), *appeal pending*, Docket Sheet, No. 15-10696 (11th Cir. Feb. 18, 2015).

2108. Record formerly available at www.bop.gov (reg. no. 76734-004).

2109. Indictment, *United States v. Augustin*, No. 2:13-cr-123 (M.D. Fla. Aug. 21, 2013), D.E. 15; Complaint, *id.* (Aug. 9, 2013), D.E. 3.

2110. Adjudication of Guilt, *id.* (Feb. 5, 2014), D.E. 46; see Transcript, *id.* (Feb. 4, 2014, filed Feb. 5, 2014), D.E. 47 (plea colloquy by Magistrate Judge Douglas N. Frazier).

2111. Transcript, *id.* (May 5, 2014, filed July 17, 2014), D.E. 64; Minutes, *United States v. Augustin*, No. 2:13-cr-124 (M.D. Fla. May 5, 2014), D.E. 25; Minutes, *Augustin*, No. 2:13-cr-123 (M.D. Fla. May 5, 2014), D.E. 56.

2112. Docket Sheets, *United States v. Augustin*, Nos. 14-12157 and 14-12221 (11th Cir. May 15, 2014) (noting that the appellee brief was filed on January 2, 2015).

2113. See Jacqueline Charles, "Liberty City" Terrorist Is Deported, Jailed in Haiti, Miami Herald, Sept. 25, 2014, at 8A.

2114. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2115. *Id.*

2116. Voir Dire Questions, *supra* note 2089; Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

meant that jurors met at undisclosed locations and were shuttled to the courthouse.²¹¹⁷ The court provided them with lunch.²¹¹⁸

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.²¹¹⁹ 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.²¹²⁰

Challenge: Pro Se Defendant

The court of appeals denied Augustin's motion to fire his attorney and proceed pro se on appeal.²¹²¹

2117. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

2118. *Id.*

2119. *Id.*

2120. *Id.*

2121. Docket Sheet, *United States v. Augustin*, No. 09-15985 (11th Cir. Nov. 27, 2009) (noting the denial on August 15, 2011).

Fort Dix

United States v. Shnewer (Robert B. Kugler, D.N.J.)

On May 7, 2007, the government filed criminal complaints in the U.S. District Court for the District of New Jersey against six men, alleging a plot to attack U.S. military installations, including Fort Dix.²¹²² Authorities arrested them that evening.²¹²³ The grand jury returned an indictment on June 5.²¹²⁴ The court assigned the case to Judge Robert B. Kugler.²¹²⁵

Mohamad Shnewer, a taxi driver and naturalized U.S. citizen born in Jordan, was the alleged coordinator.²¹²⁶ He was the only defendant fluent in Arabic.²¹²⁷ Also charged were his brother-in-law Eljvir Duka and Eljvir's brothers Dritan and Shain, roofers who were Albanian and who had been in the United States illegally since they were children.²¹²⁸ The two other defendants were Serdar Tatar, a legal resident born in Turkey who worked as a 7-Eleven clerk, and Agron Abdullahu, a legal resident who was born in Yugoslavia, had Egyptian military training, and

2122. Docket Sheet, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. June 5, 2007) [hereinafter D.N.J. Docket Sheet]; see *United States v. Duka*, 671 F.3d 329, 333–34 (3d Cir. 2011); see also George Anastasia, *Fort Dix Targeted in "Jihad," U.S. Says*, Phila. Inquirer, May 9, 2007, at A1; Chris Heffelfinger, *Radical Islam in America* 129 (2011); David Kocieniewski, *6 Men Arrested in a Terror Plot Against Ft. Dix*, N.Y. Times, May 9, 2007, at A1; Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, Wash. Post, May 9, 2007, at A1; John Shiffman & Jan Hefler, *Ordinary Lives, Radical Words*, Phila. Inquirer, May 9, 2007, at A1; John Shiffman & Jennifer Moroz, *Step by Step, Fort Dix Suspects Snared*, Phila. Inquirer, May 11, 2007, at A1. See generally Human Rights Watch, *Illusion of Justice* 25, 41–42, 52–54, 85–87, 105–06, 112, 130, 192–93, 198–200 (2014).

2123. *Duka*, 671 F.3d at 335; D.N.J. Docket Sheet, *supra* note 2122; see George Anastasia & Troy Graham, *Fort Dix Suspects Indicted*, Phila. Inquirer, June 6, 2007, at B1; Kocieniewski, *supra* note 2122; Russakoff & Eggen, *supra* note 2122.

2124. D.N.J. Docket Sheet, *supra* note 2122; see Kareem Fahim, *Charges Filed Against 6 Men in Plot to Attack Base*, N.Y. Times, June 6, 2007, at B6.

2125. D.N.J. Docket Sheet, *supra* note 2122; 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.

2126. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 2122; see Kocieniewski, *supra* note 2122; Russakoff & Eggen, *supra* note 2122; Shiffman & Hefler, *supra* note 2122.

2127. See Heffelfinger, *supra* note 2122, at 112.

2128. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 2122; see Kocieniewski, *supra* note 2122; Russakoff & Eggen, *supra* note 2122; Shiffman & Hefler, *supra* note 2122.

baked dough for a supermarket.²¹²⁹ It was reported that Fort Dix may have been selected as a target because Tatar's family frequently delivered pizza there.²¹³⁰

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 shouting about jihad while training with firearms in the Poconos.²¹³¹ The government sent Mahmoud Omar, an informant, to investigate the group, and by March the informant had befriended Shnewer.²¹³² Arrests immediately followed a sham sale of guns by Omar to Dritan and Shain Duka.²¹³³ It was reported that the government paid Omar more than \$230,000.²¹³⁴ Besnik Bakalli, a second informant reportedly paid \$150,000, had encouraged the defendants to avenge Muslims.²¹³⁵

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, 2008.²¹³⁶

On July 11, Tatar initiated a civil action challenging his and his codefendants' conditions of confinement.²¹³⁷ Because they were detained in the Philadelphia

2129. *Duka*, 671 F.3d at 335; D.N.J. Docket Sheet, *supra* note 2122; *see* Kocieniewski, *supra* note 2122; Russakoff & Eggen, *supra* note 2122; Shiffman & Hefler, *supra* note 2122.

2130. *See* Edward Colimore, *Dismay at Cookstown Pizzeria*, Phila. Inquirer, May 9, 2007, at A4; Kocieniewski, *supra* note 2122; Russakoff & Eggen, *supra* note 2122; Shiffman & Hefler, *supra* note 2122.

2131. *Duka*, 671 F.3d at 334; *see* Anastasia, *supra* note 2122; 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 2122; Russakoff & Eggen, *supra* note 2122.

2132. *Duka*, 671 F.3d at 334; *see* Anastasia, *supra* note 2122; Feuer, *supra* note 2131; *Informer Appears at Trial, but His Recordings Talk*, N.Y. Times, Nov. 2, 2008, NJ, at 1 [hereinafter *Informer Appears*]; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 722–24 (2010).

According to a 2010 newspaper article on Omar, "He has an eviction notice for overdue rent, an application for welfare, a foundering export business, and an uncertain immigration status." George Anastasia, *From Star FBI Witness to Ostracism, Loss*, Phila. Inquirer, June 27, 2010, at A1.

2133. *Duka*, 671 F.3d at 335; *see* George Anastasia, *Details Emerge in Terror Sting*, Phila. Inquirer, May 10, 2007, at A1; Fahim, *supra* note 2124; *Informer Appears*, *supra* note 2132; Shiffman & Hefler, *supra* note 2122.

2134. *See* George Anastasia, *Terror Trial Opens for Ft. Dix 5*, Phila. Inquirer, Oct. 21, 2008, at A1; *Informer Appears*, *supra* note 2132; 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.").

2135. *Duka*, 671 F.3d at 334; *see* Von Zielbauer & Hurdle, *supra* note 2134.

2136. D.N.J. Docket Sheet, *supra* note 2122; *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. www.bop.gov (reg. no. 61286-066).

Detention Center,²¹³⁸ across the Delaware River from the Camden courthouse where they were to be tried, Tatar filed his handwritten complaint in the Eastern District of Pennsylvania.²¹³⁹ The district court there transferred the action to Judge Kugler in the District of New Jersey as related to the criminal case.²¹⁴⁰ Tatar filed a handwritten amended complaint on April 1, 2009,²¹⁴¹ and a typed amended complaint on January 4, 2011.²¹⁴² Judge Kugler granted the defendants summary judgment on June 19, 2012.²¹⁴³

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 were posted.²¹⁴⁴ This allowed access to the documents without going through PACER.²¹⁴⁵ Evidence was posted the moment it was admitted.²¹⁴⁶ Each side loaded digitized exhibits on a secure server in advance of moving for their admissibility.²¹⁴⁷ Neither side had access to the other side's exhibits on the server until they were admitted.²¹⁴⁸

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.²¹⁴⁹ Transcript text rolled on the public website in continuous loops so that a viewer would see whatever few lines of text were displayed when the viewer looked at the transcript and whatever lines of text scrolled by while the viewer watched.²¹⁵⁰

Jury selection for the trial against the five remaining defendants began on September 29, 2008.²¹⁵¹ Judge Kugler used a jury questionnaire.²¹⁵² For five days, approximately 150 prospective jurors reported to the courthouse each day to fill

2137. Docket Sheet, *Tartar v. Levi*, No. 2:08-cv-3270 (E.D. Pa. July 11, 2008).

2138. Opinion at 1, *Tatar v. Levi*, No. 1:08-cv-4422 (D.N.J. Sept. 20, 2010), D.E. 49, *available at* 2010 WL 3740610.

2139. Motion, *Tartar*, No. 2:08-cv-3270 (E.D. Pa. July 25, 2008), D.E. 4.

2140. Order, *id.* (Sept. 2, 2008), D.E. 7.

2141. First Amended Complaint, *Tatar*, No. 1:08-cv-4422 (D.N.J. Apr. 1, 2009), D.E. 20.

2142. Second Amended Complaint, *id.* (Jan. 4, 2011), D.E. 64; *see* Danielle Camilli, *Fort Dix Conspirator Sues Prison Officials*, Bucks County Courier Times, Jan. 6, 2011, at 9.

2143. Opinion, *Tatar*, No. 1:08-cv-4422 (D.N.J. June 19, 2012), D.E. 88, *available at* 2012 WL 2339814.

2144. Decorum Order, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. July 13, 2007), D.E. 49; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* Graham, *supra* note 2125.

"Judge Kugler managed this extraordinarily complex trial in an exemplary way." *United States v. Duka*, 671 F.3d 329, 333 (3d Cir. 2011).

2145. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2146. *Id.*; *see* Graham, *supra* note 2125.

2147. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2148. *Id.*

2149. *Id.*

2150. *Id.*

2151. D.N.J. Docket Sheet, *supra* note 2122; *see* George Anastasia, *Trial for Fort Dix Five Begins Tomorrow*, Phila. Inquirer, Sept. 28, 2008, at A1.

2152. Robert B. Kugler, *United States v. Shnewer: Jury Questionnaire* (Sept. 29, 2008); *see* Anastasia, *supra* note 2151.

out the questionnaire in the jury room, where Judge Kugler greeted them.²¹⁵³ In the courtroom, Judge Kugler and the attorneys reviewed answered questionnaires.²¹⁵⁴ Approximately two-thirds of the prospective jurors were disqualified on the basis of the questionnaires alone.²¹⁵⁵

During the following week, fifteen prospective jurors reported in the morning and fifteen reported in the afternoon for individual voir dire.²¹⁵⁶ Judge Kugler observed that once the questionnaires were filled out, there were few questions left to ask.²¹⁵⁷ Although it is unusual in federal courts for attorneys to ask questions directly during voir dire, Judge Kugler permitted it in this case.²¹⁵⁸ Judge Kugler also granted the parties double the number of usual peremptory challenges.²¹⁵⁹

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.²¹⁶⁰ 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.²¹⁶¹ Recording devices were not permitted in the courtroom, nor were published likenesses of the jurors, and the general public was not permitted to bring in electronic equipment.²¹⁶² 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.²¹⁶³

Trial began on October 20, 2008, with opening arguments.²¹⁶⁴ On December 22, after six days of deliberation, a jury convicted Shnewer, the Dukas, and Tatar of conspiring to kill American soldiers.²¹⁶⁵ On April 28 and 29, 2009, Judge Kugler sentenced Tatar to thirty-three years, and he sentenced the other defendants to life.²¹⁶⁶

2153. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2154. *Id.*

2155. *Id.*

2156. *Id.*

2157. *Id.*

2158. *Id.*

2159. *Id.*

2160. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2161. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* Graham, *supra* note 2125.

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.

2162. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2163. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2164. *See* Anastasia, *supra* note 2134.

2165. D.N.J. Docket Sheet, *supra* note 2122; *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 2134.

2166. United States v. Duka, 671 F.3d 329, 335–36 (3d Cir. 2011); D.N.J. Docket Sheet, *supra* note 2122; *see* www.bop.gov (noting life sentences for Shnewer, reg. no. 61283-066, Dritan Duka, reg. no. 61285-066, Shain Duka, reg. no. 61284-066, and Eljvir Duka, reg. no. 61282-066, and noting a release date of February 27, 2036, for Tatar, reg. no. 61287-066); *see also* Troy Graham,

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.²¹⁶⁷ The government addressed the media for the first half hour, and defense counsel and families addressed the media thereafter.²¹⁶⁸ The media could bring in cameras and recording devices for this purpose.²¹⁶⁹ Because it worked well, a similar procedure was used after sentencing.²¹⁷⁰

In June and August of 2010, friends and relatives of the defendants organized rallies in front of the courthouse protesting the convictions.²¹⁷¹

On December 28, 2011, the court of appeals affirmed the convictions and sentences, with the exception of a defective charge against Shnewer.²¹⁷² One week before oral argument, the government informed the court that an attempted weapons possession charge was not technically a crime, but it did not affect Shnewer's life sentence.²¹⁷³

Challenge: Classified Evidence

Attorneys representing defendants who went to trial needed security clearances, and they were not permitted to share classified information with their clients.²¹⁷⁴ 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.²¹⁷⁵ Judge Kugler's staff—law clerks, court reporters, courtroom deputies, and his judicial assistant—all received security clearances; Judge Kugler observed that the clearance process went smoothly.²¹⁷⁶

The Camden courthouse does not have a facility for storing sensitive compartmented information, but the defense attorneys did not have to examine such

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.

2167. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2168. *Id.*

2169. *Id.*

2170. *Id.*

2171. See George Anastasia, *Dix Appeal Spotlights Two Sides of Security*, Phila. Inquirer, Sept. 5, 2010, at B1; Barbara Boyer, *Protesters at City Court Back "Fort Dix Five,"* Phila. Inquirer, June 2, 2010, at B1.

2172. *United States v. Duka*, 671 F.3d 329, 333, 356 (3d Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2756 (Shnewer), 567 U.S. ___, 132 S. Ct. 2754 (Dritan Duka), 567 U.S. ___, 132 S. Ct. 2754 (Eljvir Duka), 567 U.S. ___, 132 S. Ct. 2764 (Shain Duka), and 567 U.S. ___, 132 S. Ct. 2763 (2012) (Tatar); see Geoff Mulvihill, *Court Upholds Fort Dix Attack Plot Conviction*, Trenton Times, Dec. 29, 2011, at A1.

2173. *Duka*, 671 F.3d at 353, 356; see Mulvihill, *supra* note 2172.

2174. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2175. *Id.*

2176. *Id.*

information and the little that Judge Kugler examined was brought to him by a classified information security officer and taken away the same day.²¹⁷⁷

Challenge: FISA Evidence

Much of the case against the defendants was based on evidence obtained pursuant to Foreign Intelligence Surveillance Act (FISA) warrants.²¹⁷⁸ Much of the FISA evidence was declassified, but the affidavits supporting the FISA warrants generally were not.²¹⁷⁹ Judge Kugler reviewed FISA files to determine what was discoverable and to determine that the FISA surveillance was properly supported.²¹⁸⁰ FISA discoverability decisions are somewhat hampered by the judge's not knowing, particularly early in the case, what the defenses might be.²¹⁸¹

The court of appeals found no constitutional infirmity to the government's use of the FISA evidence.²¹⁸²

Challenge: Classified Opinion

Judge Kugler's August 14, 2008, opinion on the validity of FISA evidence is classified.²¹⁸³ A redacted opinion was filed publicly on December 29, 2009, after review by intelligence agencies.²¹⁸⁴ Redactions appear to conceal what agents of Al-Qaeda were the targets of FISA surveillance resulting in evidence against the defendants.²¹⁸⁵

2177. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

2178. FISA Evidence Order at 2, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. Aug. 14, 2008, filed Dec. 29, 2009), D.E. 457 (redacted); Interview with Hon. Robert B. Kugler, Dec. 15, 2009; see George Anastasia, *More Ft. Dix Suspects Want to Suppress Evidence*, *Phila. Inquirer*, June 21, 2008, at B4; Mulvihill, *supra* note 2172.

On appeal, the government made a showing that FISA evidence was de minimis; although the court was skeptical that the government had identified all FISA-derived evidence, the quantity of FISA-derived evidence did not affect the outcome of the appeal. *Duka*, 671 F.3d at 337 n.4.

2179. FISA Evidence Order, *supra* note 2178, at 2–9; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2180. FISA Evidence Order, *supra* note 2178, at 13–23; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2181. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2182. *Duka*, 671 F.3d at 336–47; see Mulvihill, *supra* note 2172.

2183. FISA Evidence Order, *supra* note 2178, at 1; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2184. D.N.J. Docket Sheet, *supra* note 2122; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2185. See FISA Evidence Order, *supra* note 2178.

Challenge: Jury Security

Judge Kugler used an anonymous jury.²¹⁸⁶ Each juror met at one of two secret locations; deputy marshals shuttled the jurors to the courthouse.²¹⁸⁷ During deliberations, the jurors were sequestered at a nearby hotel.²¹⁸⁸

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.²¹⁸⁹

Challenge: Court Security

Court security was enhanced for the trial.²¹⁹⁰ Additional precautions were taken during the two days of sentencing.²¹⁹¹ No other judge scheduled proceedings for those days, and court staff were encouraged to work at home.²¹⁹² Because a jury was not present, there was a greater visible presence of security.²¹⁹³

Challenge: Attorney Appointment

In February and March of 2010, nearly ten months after their appeals were filed, each of the Dukas penned a five- or six-page handwritten pro se motion for new appellate counsel, claiming insufficient contacts with counsel and counsels' failures to keep them informed of their appeals' progress.²¹⁹⁴ The court of appeals denied the requests, finding no extraordinary circumstances justifying departure from the usual practice of trial counsel continuing on appeal.²¹⁹⁵ The court nevertheless permitted the defendants to file pro se appellate briefs in addition to their attorneys' briefs.²¹⁹⁶

Shnewer's attorney filed Shnewer's request for new counsel on Shnewer's behalf, stating that Shnewer wanted to argue on appeal ineffective assistance of trial counsel.²¹⁹⁷ The court denied this request as well.²¹⁹⁸

2186. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2187. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2188. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2189. Decorum Order, *supra* note 2144; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2190. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2191. *Id.*

2192. *Id.*

2193. *Id.*

2194. New Counsel Motion, *United States v. Duka*, No. 09-2301 (3d Cir. signed Mar. 4, 2010, filed Mar. 15, 2010) (Shain Duka's motion); New Counsel Motion, *United States v. Duka*, No. 09-2300 (3d Cir. signed Feb. 19, 2010, filed Mar. 1, 2010) (Dritan Duka's motion); New Counsel Motion, *United States v. Duka*, No. 09-2292 (3d Cir. signed Feb. 15, 2010, filed Feb. 22, 2010) (Eljvir Duka's motion); *see United States v. Duka*, 671 F.3d 329, 351 (3d Cir. 2011).

2195. Order, *Duka*, No. 09-2301 (3d Cir. Mar. 23, 2010) (Shain Duka's appeal); Order, *Duka*, No. 09-2300 (3d Cir. Mar. 23, 2010) (Dritan Duka's appeal); Order, *Duka*, No. 09-2292 (3d Cir. Mar. 23, 2010) (Eljvir Duka's appeal).

2196. *Duka*, 671 F.3d at 333, 350–51.

2197. New Counsel Motion, *United States v. Shnewer*, No. 09-2299 (3d Cir. Mar. 1, 2010).

2198. Order, *id.* (Mar. 23, 2010).

Triangle Takedown²¹⁹⁹

United States v. Boyd (Louise W. Flanagan, Malcolm J. Howard, William Arthur Webb, and James E. Gates, E.D.N.C.) and United States v. Sherifi (W. Earl Britt, E.D.N.C.)

Sabrina Boyd answered her front door on Monday, July 27, 2009, to news that her husband and her three sons had been in a serious automobile accident.²²⁰⁰ Another son had been killed in an automobile accident in 2007.²²⁰¹ The man at the door offered her, her daughter, and her daughter-in-law a ride to Duke Hospital in a highway patrol car.²²⁰² At the hospital, she was greeted by a man dressed as a doctor, who offered her his hand.²²⁰³ She declined to shake his hand, because of her religious beliefs.²²⁰⁴ He grabbed her wrists and handcuffed her.²²⁰⁵

Sabrina was lured away from her home and detained so that her home could be searched.²²⁰⁶ Meanwhile, her husband, Daniel Patrick Boyd; two of her sons, Zakariya and Dylan Boyd; and four other men, Hysen Sherifi, Anes Subasic, Mohammad Omar Aly Hassan, and Ziyad Yaghi, were arrested and indicted on material support and conspiracy terrorism charges.²²⁰⁷ The three Boyds had also been lured away from the family home under false pretenses²²⁰⁸ in an operation de-

2199. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

2200. See Campbell Robertson, *Wife Disputes Jihad Charge Against Husband and Sons*, N.Y. Times, July 30, 2009, at A20; Yonat Shimron, *Wife Adamantly Denies Suicide Plot*, Raleigh News & Observer, July 29, 2009, at A1.

2201. See Transcript at 19, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011, filed Jan. 9, 2012), D.E. 1618 [hereinafter *Boyd* Dec. 20, 2011, Transcript]; see also Mandy Locke, Yonat Shimron & Josh Shafer, *7 Arrested in Terror Plot*, Raleigh News & Observer, July 28, 2009, at A1; Robertson, *supra* note 2200; Shimron, *supra* note 2200.

2202. See Shimron, *supra* note 2200.

2203. See Robertson, *supra* note 2200; Shimron, *supra* note 2200.

2204. See Shimron, *supra* note 2200.

2205. See Robertson, *supra* note 2200; Shimron, *supra* note 2200.

2206. See Shimron, *supra* note 2200.

2207. Indictment, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. July 22, 2009), D.E. 3 [hereinafter *Boyd* Indictment]; *United States v. Hassan*, 742 F.3d 104, 110 (4th Cir. 2014); see Carrie Johnson & Spencer S. Hsu, *Seven Face Terrorism Charges in N.C.*, Wash. Post, July 28, 2009, at A3; Locke et al., *supra* note 2201; Sarah Ovaska, *Eighth Terror Suspect Named*, Raleigh News & Observer, Aug. 4, 2009, at A1. See generally Human Rights Watch, *Illusion of Justice* 72–74, 196–98 (2014).

2208. Transcript at 77–78, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 4–5, 2009, filed Aug. 10, 2009), D.E. 111 [hereinafter *Boyd* Aug. 4–5, 2009, Transcript].

scribed as a Triangle Takedown.²²⁰⁹ Authorities seized gas masks, 27,000 rounds of ammunition, and twenty-six guns from the Boyds' home and truck.²²¹⁰

Sherifi was a legal resident from Kosovo, and the other defendants were United States citizens.²²¹¹ An eighth defendant, Jude Kenan Mohammad, was a fugitive²²¹² until he was killed in a drone strike on November 16, 2011.²²¹³

Bajram Asllani, another fugitive conspiracy suspect, was not included in the indictment.²²¹⁴ He was arrested in Kosovo, but the United States and Kosovo do not have an extradition treaty.²²¹⁵

The defendants were indicted on Wednesday, July 22, 2009.²²¹⁶ The court randomly assigned the case to Chief Judge Louise W. Flanagan.²²¹⁷ Originally, the defendants were going to be arrested on Saturday, so Chief Judge Flanagan arranged for some court staff to discreetly come to work on Saturday for initial appearances.²²¹⁸ In the event, the defendants were arrested on a weekday.²²¹⁹

On September 24, the indictment was superseded to include allegations of plans to attack the Quantico, Virginia, Marine base.²²²⁰

Daniel Boyd grew up near Washington, D.C.²²²¹ Raised an Episcopalian, he converted to Islam after his mother married a Muslim.²²²² He and Sabrina were

2209. See *The FBI's Takedown*, Editorial, Raleigh News & Observer, July 29, 2009 (referring to North Carolina's research triangle comprising Duke University, University of North Carolina at Chapel Hill, North Carolina State University, and the cities of Raleigh, Durham, and Chapel Hill).

2210. Detention Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 11, 2009), D.E. 112; see Mandy Locke, Josh Shaffer, Sarah Ovaska & Yonat Shimron, *The Bulk of Terror-Case Evidence Concerns Boyd*, Raleigh News & Observer, Aug. 6, 2009, at A1; Sarah Ovaska & Mandy Locke, *FBI Agent: Boyd Spoke of "Jihad Right Here,"* Raleigh News & Observer, Aug. 5, 2009, at A1.

2211. See Johnson & Hsu, *supra* note 2207; Locke et al., *supra* note 2201.

2212. Reassignment Order at 2 n.2, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 17, 2011), D.E. 1323; see Anne Blythe, *Sentence Today in NC "Homegrown Terrorism" Ring*, Raleigh News & Observer, Jan. 13, 2012, B.

2213. Dismissal, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 18, 2013), D.E. 2191; see Karen DeYoung & Peter Finn, *4 Americans Killed in Drone Strikes Since '09*, Wash. Post, May 23, 2013, at A1; Scott Shane & Eric Schmitt, *One Drone Victim's Trail from Raleigh to Pakistan*, N.Y. Times, May 23, 2013, at A10; *Wanted International Terrorist Hails from Triangle, Could Be Dead*, WRAL.com, Feb. 16, 2012, www.wral.com/news/local/wral_investigates/story/10733078.

2214. See Complaint, United States v. Asllani, No. 5:10-mj-1350 (E.D.N.C. Apr. 19, 2010).

2215. See Anne Blythe, *N.C. Trio Found Guilty in Terror Plot*, Raleigh News & Observer, Oct. 14, 2011, A.

2216. *Boyd* Indictment, *supra* note 2207.

2217. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012. Tim Reagan interviewed Judge Flanagan for this report in the judge's New Bern chambers on March 5, 2012, and in her Raleigh chambers on May 17, 2013.

2218. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2219. *Id.*

2220. Superseding Indictment, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Sept. 24, 2009); United States v. Hassan, 742 F.3d 104, 110 (4th Cir. 2014); see Spencer S. Hsu, *2 N.C. Men Now Accused of Targeting U.S. Military*, Wash. Post, Sept. 25, 2009, at A3.

2221. *Hassan*, 742 F.3d at 115; see Carrie Johnson & Spencer S. Hsu, *From Suburban D.C. Childhood to Indictment on Terror Charges*, Wash. Post, July 29, 2009, at A1.

high-school sweethearts in Alexandria, Virginia; she also converted to Islam.²²²³ In 1989, the Boyds moved to Peshawar, Pakistan.²²²⁴

In 1991, a Pakistani appellate court overturned a criminal sentence against Daniel Boyd that would have resulted in amputation of his right hand and his left foot.²²²⁵ His brother was also spared a similar sentence, which was for a bank robbery that occurred shortly after a disagreement between the brothers and the bank manager.²²²⁶ Following the prosecution ordeal, Daniel Boyd moved his family first to Massachusetts and then to North Carolina.²²²⁷ At the time of the 2009 arrest, they lived in Willow Spring, a suburb south of Raleigh.²²²⁸

The Boyd investigation had been underway since approximately 2005.²²²⁹ An informant facilitated the investigation by befriending Daniel Boyd and recording conversations with him over the course of several years.²²³⁰

Magistrate Judge William Arthur Webb presided over the defendants' detention hearing, which was conducted on August 4 and 5 in the district's Raleigh courthouse.²²³¹ The hearing was attended by more than 100 friends, relatives, and neighbors present to support the defendants.²²³² Spectators who prayed aloud during proceedings were required to leave the courtroom.²²³³

On August 5, Judge Webb continued Subasic's detention hearing and denied bail for the other defendants, who were then transferred to Virginia for detention.²²³⁴ On August 10, Judge Webb denied bail for Subasic, and he also was transferred to Virginia.²²³⁵

2222. See Steve Coll, *The Brothers & the Grisly Sentence*, Wash. Post, Oct. 2, 1991, at B1; Johnson & Spencer, *supra* note 2221; Mandy Locke, Josh Shaffer & Yonat Shimron, *Contrasts Veil Daniel Boyd*, Raleigh News & Observer, Aug. 2, 2009, at A1 [hereinafter *Contrasts*]; Locke et al., *supra* note 2201; Ovaska, *supra* note 2207.

2223. See Coll, *supra* note 2222; Johnson & Spencer, *supra* note 2221; Locke et al., *Contrasts*, *supra* note 2222; Shimron, *supra* note 2200.

2224. See Locke et al., *Contrasts*, *supra* note 2222.

2225. See Steve Coll, *Brothers Spared Ghastly Sentence*, Wash. Post, Oct. 15, 1991, at E1.

2226. See Coll, *supra* note 2222; Coll, *supra* note 2225.

2227. See Locke et al., *Contrasts*, *supra* note 2222.

2228. See Johnson & Spencer, *supra* note 2221; Locke et al., *Contrasts*, *supra* note 2222; Ovaska, *supra* note 2207.

2229. *United States v. Hassan*, 742 F.3d 104, 115 (4th Cir. 2014); *Boyd* Aug. 4–5, 2009, Transcript, *supra* note 2208, at 11; see Johnson & Spencer, *supra* note 2221.

2230. Detention Order, *supra* note 2210, at 2–4 (noting that the identity of the witness was not revealed for detention proceedings); see Locke et al., *supra* note 2210; Ovaska & Locke, *supra* note 2210; *Hassan*, 742 F.3d at 115–16 (noting that three informants testified at trial against Sherifi, Hassan, and Yaghi).

2231. *Boyd* Aug. 4–5, 2009, Transcript, *supra* note 2208; see Ovaska & Locke, *supra* note 2210; Yonat Shimron, *Muslims Turn Out in Court*, Raleigh News & Observer, Aug. 5, 2009, at A8.

Tim Reagan interviewed Judge Webb for this report in the judge's chambers on March 20, 2012.

2232. See Ovaska & Locke, *supra* note 2210; Shimron, *supra* note 2231.

2233. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2234. Detention Order, *supra* note 2210; Docket Sheet, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. July 22, 2009) [hereinafter *Boyd* Docket Sheet] (D.E. 102); Interview with Hon. Louise

Judge Flanagan, whose chambers are in New Bern, held her first status conference in the case on August 27 at the Raleigh courthouse.²²³⁶ Early in the case, Judge Flanagan held pretrial proceedings in Raleigh for the convenience of the attorneys and the U.S. Marshals Service, as transportation issues involved in bringing the defendants back from Virginia to that courthouse then were easier to address.²²³⁷ As the trial date became closer, Judge Flanagan began to hold proceedings in New Bern.²²³⁸

On November 24, 2010, the government filed a second superseding indictment, which added two counts against Subasic for immigration fraud.²²³⁹ Judge Flanagan determined, on January 28, 2011, that these charges were improperly joined, so she severed them.²²⁴⁰ Several months later, to promote a speedy trial, the new charges were assigned to Judge Malcolm J. Howard.²²⁴¹

On February 9, Daniel Boyd pleaded guilty.²²⁴² His son Zakariya pleaded guilty on June 7.²²⁴³ Dylan pleaded guilty on September 14, five days before trial.²²⁴⁴

As trial approached, Judge Flanagan completely severed the prosecution against Subasic, because he was by that time proceeding pro se and his unconven-

W. Flanagan, May 17, 2013; see Sarah Ovaska, *Six Terror Suspects Are Now in a Va. Jail*, Raleigh News & Observer, Aug. 7, 2009, at B2.

2235. Detention Order, *supra* note 2210; Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 10, 2009, filed Aug. 23, 2010), D.E. 559; *Boyd* Docket Sheet, *supra* note 2234 (D.E. 110); Interview with Hon. Louise W. Flanagan, May 17, 2013; see Mandy Locke & Sarah Ovaska, *No Bail for Suspect in Terror Plot*, Raleigh News & Observer, Aug. 11, 2009, at B3.

2236. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 130); see Mandy Locke, *Terror Case May Be Long Coming to Trial*, Raleigh News & Observer, Aug. 28, 2009, at B3.

2237. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012, and May 17, 2013.

2238. *Id.* Mar. 5, 2012.

2239. Second Superseding Indictment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 24, 2010), D.E. 670; *United States v. Hassan*, 742 F.3d 104, 110–11 (4th Cir. 2014); *United States v. Sherif*, 793 F. Supp. 2d 751, 752 (E.D.N.C. 2011).

2240. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 28, 2011), D.E. 750.

2241. Reassignment Order, *supra* note 2212; *Boyd* Docket Sheet, *supra* note 2234 (D.E. 1321, minutes August 16, 2011); Interview with Hon. Louise W. Flanagan, May 17, 2013.

Tim Reagan interviewed Judge Howard for this report in the judge's Greenville chambers on March 21, 2012.

2242. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 799); *Hassan*, 742 F.3d at 111; see Transcript at 36, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012, filed Nov. 24, 2014), D.E. 2204 [hereinafter *Boyd* Aug. 24, 2012, Afternoon Transcript] (statement by Daniel Boyd at sentencing: "I know there's never a wrong time to do the right thing."); see also Anne Blythe & Yonat Shimron, *N.C. Man Admits Terror Plot*, Raleigh News & Observer, A; Campbell Robertson, *North Carolina Man Admits to Aiding a Jihadist Plot*, N.Y. Times, Feb. 10, 2011, at A14; Francine Sawyer, *Boyd Pleads Guilty to Terrorism Charges*, New Bern Sun J., Feb. 9, 2011.

2243. *Hassan*, 742 F.3d at 111; see Mandy Locke, *2nd Man Admits Aiding Terrorism*, Raleigh News & Observer, June 8, 2011, B; Campbell Robertson, *Second Guilty Plea in Terror Case*, N.Y. Times, June 8, 2011, at A17; "Homegrown Terrorist" Pleaded Guilty Tuesday in Federal Court in New Bern, New Bern Sun J., June 7, 2011.

2244. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 1432); *Hassan*, 742 F.3d at 111; see Anne Blythe, *3rd Man Guilty in Terror Plot*, Raleigh News & Observer, Sept. 15, 2011, A.

tional representation might have been disruptive or prejudicial to the other defendants.²²⁴⁵

On Monday, September 19, the trial of Sherifi, Hassan, and Yaghi began before Judge Flanagan in New Bern, and the trial of Subasic for immigration fraud began before Judge Howard in Greenville.²²⁴⁶ The Boyds appeared as cooperating witnesses against their codefendants.²²⁴⁷

Subasic's jury found him guilty of immigration fraud on September 23.²²⁴⁸ On October 13, the day after receiving its charge, the other jury convicted Sherifi, Hassan, and Yaghi.²²⁴⁹ Sherifi testified in his defense; Hassan and Yaghi presented no evidence.²²⁵⁰

In December 2011 and January 2012,²²⁵¹ Judge Flanagan sentenced Sherifi to forty-five years,²²⁵² Yaghi to thirty-one years and eight months,²²⁵³ Hassan to fifteen years,²²⁵⁴ Zakariya Boyd to nine years,²²⁵⁵ and Dylan Boyd to eight years.²²⁵⁶

2245. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2011), D.E. 1283; see *Hassan*, 742 F.3d at 111.

2246. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 1459, 1463); Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed June 10, 2012), D.E. 2033 (first day of jury selection); see *Hassan*, 742 F.3d at 114–15.

2247. Transcript at 6–154, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 6, 2011, filed Mar. 23, 2012), D.E. 1838 (Dylan Boyd); Transcript at 52–224, *id.* (Oct. 5, 2011, filed Mar. 23, 2012), D.E. 1837 (Zakariya Boyd); *id.* at 225–78 (Dylan Boyd); Transcript at 15–57, *id.* (Sept. 29, 2011, filed Mar. 2, 2012), D.E. 1744 (Daniel Boyd); Transcript at 34–279, *id.* (Sept. 28, 2011, filed Feb. 28, 2012), D.E. 1751 (same); *Hassan*, 742 F.3d at 115 (noting that Daniel Boyd was the prosecution's chief trial witness).

2248. Jury Verdict, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 23, 2011), D.E. 1472.

2249. Jury Verdicts, *id.* (Oct. 13, 2011), D.E. 1504, 1506, 1508, 1510; Transcripts, *id.* (Oct. 12–13, 2011, filed June 10, 2012), D.E. 2035, 2036; *Hassan*, 742 F.3d at 124; see Blythe, *supra* note 2215.

2250. Transcript at 47–183, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 10, 2011, filed June 11, 2012), D.E. 2043 (Sherifi's testimony); *id.* at 194 (Hassan's attorney: "We see no reason to put on any evidence. We rest."); *id.* at 195 ("Likewise for Mr. Yaghi, your Honor."); *Hassan*, 742 F.3d at 115; see Blythe, *supra* note 2215; Francine Sawyer, *Federal Terrorism Trial Goes to Jury*, New Bern Sun J., Oct. 12, 2011.

2251. Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2012, filed June 10, 2012), D.E. 2037 (sentencing of Hassan, Sherifi, and Yaghi); *Hassan*, 742 F.3d at 124–25.

2252. Opinion, *id.* (Jan. 18, 2012), D.E. 1653; Judgment, *id.* (Jan. 13, 2012), D.E. 1663; *Hassan*, 742 F.3d at 111.

2253. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), D.E. 1655, available at 2012 WL 147955; Yaghi Judgment, *id.* (Jan. 13, 2012), D.E. 1666; *Hassan*, 742 F.3d at 111; see www.bop.gov (noting a release date of April 15, 2037, reg. no. 51771-056).

2254. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), D.E. 1654, available at 2012 WL 147952; Hassan Judgment, *id.* (Jan. 13, 2012), D.E. 1668; *Hassan*, 742 F.3d at 111; see www.bop.gov (noting a release date of August 21, 2022, reg. no. 51769-056).

2255. Zakariya Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011), D.E. 1600; *Boyd* Dec. 20, 2011, Transcript, *supra* note 2201, at 31; see *id.* ("The oppression that you endured during your upbringing really left you quite scarred, it's evident, and it would seem that there was some enabling in your household that took from you any adult to which you could turn for reasoned guidance.").

On February 4, 2014, the court of appeals affirmed Sherifi, Hassan, and Yaghi's convictions and sentences.²²⁵⁷

On January 20, 2012, the government filed criminal complaints alleging that Sherifi conspired with his brother Shkumbin Sherifi²²⁵⁸ and another person²²⁵⁹ to have three trial witnesses against him beheaded.²²⁶⁰ The complaint also alleged a plot to kill a fellow inmate by whom Sherifi believed he was defrauded.²²⁶¹ Codefendant Nevine Elshiekh was a teacher; Hassan was one of her former students.²²⁶² After attending trial proceedings, she began to correspond with Sherifi, and in time their correspondence became romantic.²²⁶³ Judge Flanagan recused herself from this case,²²⁶⁴ and the court assigned it to Judge W. Earl Britt.²²⁶⁵

Subasic's pro se trial on the original indictment began on May 8.²²⁶⁶ Judge Flanagan welcomed seventy potential jurors, and sixteen were empaneled on the following day.²²⁶⁷ Subasic's defense was that he was a Christian conducting free-lance surveillance on Muslim jihadists for the benefit of a future report.²²⁶⁸

The Boyds testified as government witnesses.²²⁶⁹ Subasic called as witnesses Yaghi, Hassan, Hysen Sherifi, and three unindicted members of the Boyd family.²²⁷⁰ Subasic's Boyd witnesses invoked their Fifth Amendment rights not to an-

2256. Dylan Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011), D.E. 1598; *Boyd* Dec. 20, 2011, Transcript, *supra* note 2201, at 31; *see id.* ("you were not as involved as others in the crime").

2257. *Hassan*, 742 F.3d 104, *cert. denied*, *Yaghi v. United States*, 574 U.S. ___, 135 S. Ct. 192 (2014), 574 U.S. ___, 135 S. Ct. 157 (2014), and *Sherifi v. United States*, 573 U.S. ___, 134 S. Ct. 2737 (2014); *see Terrorists' Convictions Upheld*, New Bern Sun J., Feb. 5, 2014.

2258. Complaint, *United States v. Sherifi*, No. 7:12-mj-1008 (E.D.N.C. Jan. 20, 2012), D.E. 5.

2259. Complaint, *United States v. Elshiekh*, No. 7:12-mj-1009 (E.D.N.C. Jan. 20, 2012), D.E. 6.

2260. *See* Indictment, *United States v. Sherifi*, No. 7:12-cr-20 (E.D.N.C. Feb. 21, 2012), D.E. 40; *see also* Anne Blythe, *2 More Held in NC Terror Case*, Raleigh News & Observer, Jan. 25, 2012, A.

2261. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; *see* Blythe, *supra* note 2260.

2262. *See* Anne Blythe, *Inmate Convicted in Murder-for-Hire Case*, Raleigh News & Observer, Nov. 9, 2012.

2263. *See id.*

2264. Notice, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Feb. 24, 2012), D.E. 48.

2265. Docket Sheet, *id.* (Feb. 21, 2012) [hereinafter *Sherifi* Docket Sheet].

For this report, Tim Reagan interviewed Judge Britt and his law clerk Amy Petty in the judge's home chambers on May 16, 2013.

2266. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 1945).

2267. *Id.* (D.E. 1950).

2268. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2269. Transcript at 10–105, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. May 31, 2012, filed May 22, 2013), D.E. 2164 (Dylan Boyd); Transcript at 60–222, *id.* (May 30, 2012, filed Apr. 19, 2013), D.E. 2163 (same); *id.* at 6–55 (Zakariya Boyd); Transcript at 113–251, *id.* (May 29, 2012, filed Apr. 19, 2013), D.E. 2162 (same); Transcript at 7–225, *id.* (May 23, 2012, filed Apr. 19, 2013), D.E. 2159 (Daniel Boyd); Transcript at 19–254, *id.* (May 22, 2012, filed Apr. 19, 2013), D.E. 2158 (same); Transcript at 35–195, *id.* (May 21, 2012, filed Apr. 19, 2013), D.E. 2157 (same); Transcript at 159–272, *id.* (May 18, 2012, filed Apr. 19, 2013), D.E. 2156 (same).

2270. Transcript at 47–179, *id.* (June 7, 2012, filed May 22, 2013), D.E. 2172 (Sherifi); June 6, 2012, Transcript at 147–61, *id.* (June 6, 2012, filed May 22, 2013), D.E. 2170 (Sabrina Boyd); *id.* at 161, 167–69 (Maryam Boyd); *id.* at 170–72 (Noah Boyd); Transcript at 210–59, *id.* (June 5, 2012,

swer Subasic's questions.²²⁷¹ Initially, Yaghi and his attorney agreed that Yaghi would rely on his Fifth Amendment right not to testify.²²⁷² After establishing what Subasic's questioning would entail, Judge Flanagan asked Subasic, "Do you want the jury to hear you ask the question and the witness to take the Fifth Amendment?"²²⁷³ Yaghi interrupted and announced that he would like to testify after all.²²⁷⁴ At the end of the trial, Subasic testified for three days on his own behalf.²²⁷⁵

Jury deliberations began on June 13;²²⁷⁶ on the following day, the jury found Subasic guilty.²²⁷⁷ On August 24, Judge Flanagan sentenced Subasic to thirty years;²²⁷⁸ on the following day, she revoked his citizenship.²²⁷⁹ The court of appeals affirmed both of Subasic's convictions and his sentence on April 25, 2014.²²⁸⁰

Following Subasic's trial, Judge Flanagan sentenced Daniel Boyd to eighteen years,²²⁸¹ and she resentenced his sons to seven years and nine months for Zakariya²²⁸² and seven years for Dylan.²²⁸³

filed May 22, 2013), D.E. 2169 (Hassan); June 4, 2012, Transcript at 37–62, *id.* (June 4, 2012, filed May 22, 2013), D.E. 2167 (Yaghi).

2271. June 6, 2012, Transcript, *supra* note 2270, at 148–61, 163–72.

2272. June 4, 2012, Transcript, *supra* note 2270, at 38–45.

2273. *Id.* at 45.

2274. *Id.*

2275. Transcript at 6–172, *Boyd*, No. 5:09-cr-216 (E.D.N.C. June 12, 2012, filed May 22, 2013), D.E. 2176; Transcript at 9–210, *id.* (June 11, 2012, filed May 22, 2013), D.E. 2175; Transcript at 41–171, *id.* (June 8, 2012, filed May 22, 2013), D.E. 2174.

2276. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 2053).

2277. Jury Verdict, *Boyd*, No. 5:09-cr-216 (E.D.N.C. June 14, 2012), D.E. 2060; *United States v. Hassan*, 742 F.3d 104, 111; *see Accused Terrorist Found Guilty in New Bern Court*, *New Bern Sun J.*, June 14, 2012; *Jury Convicts 7th Man in NC Terror Plot*, *Raleigh News & Observer*, June 14, 2012.

2278. Subasic Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012), D.E. 2117; Transcript at 185–90, *id.* (Aug. 24, 2012, filed May 22, 2013), D.E. 2179 ("THE COURT: Mr. Subasic, you're a bully. And you've demonstrated that from the age of 15 forward, in your school life and in your community life. You took what didn't belong to you through threat of violence, force and intimidation, and you terrorized those in your community."); *Hassan*, 742 F.3d at 111; *see* www.bop.gov (noting a release date of October 8, 2035, reg. no. 51766-056).

2279. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 25, 2012), D.E. 2137.

2280. *United States v. Subasic*, 568 F. App'x 234 (4th Cir. 2014), *cert. denied*, 574 U.S. ___, 135 S. Ct. 1443 (2015).

2281. Daniel Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012), D.E. 2115; *Boyd* Aug. 24, 2012, Afternoon Transcript, *supra* note 2242, at 39; *see* www.bop.gov (noting a release date of April 1, 2025, reg. no. 51765-056).

"It would appear that the need to protect the public from this defendant has been largely mitigated, though it's recognized the defendant needs continued mental health treatment by his own statements here today." *Boyd* Aug. 24, 2012, Afternoon Transcript, *supra* note 2242, at 38.

2282. Zakariya Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012), D.E. 2133; *Hassan*, 742 F.3d at 111; *see* www.bop.gov (noting a release date of April 27, 2016, reg. no. 51767-056).

2283. Dylan Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012), D.E. 2132; *Hassan*, 742 F.3d at 111; *see* www.bop.gov (noting a release date of September 1, 2015, reg. no. 51770-056).

Sherifi's codefendants pleaded guilty on November 1, and Sherifi's trial, at which he appeared pro se, began on Monday, November 5.²²⁸⁴ On Thursday, the jury found Sherifi guilty.²²⁸⁵ On May 10, 2013, Judge Britt sentenced Sherifi to life in prison; he sentenced the brother to three years, and he sentenced Elshiekh to three and a half years.²²⁸⁶

Challenge: Attorney Appointment

The court appointed the federal defender to represent David Boyd and experienced CJA panel attorneys to represent the other defendants.²²⁸⁷

Under the Criminal Justice Act, Judge Flanagan supervised defense expenses as well as presided over the criminal case. She required the panel attorneys to submit time and expense budgets, and she authorized monthly payments for this complex case rather than requiring the attorneys to wait until the case was over to get paid.²²⁸⁸ This was only the second time in recent memory that monthly CJA payments had been authorized in the Eastern District of North Carolina.²²⁸⁹ Judge Flanagan encouraged the defense attorneys to pool resources as much as possible.²²⁹⁰

Defense expenses in this case were high, in part, because of the amount of surveillance evidence that the attorneys had to review.²²⁹¹ Magistrate Judge James E. Gates presided over discovery matters.²²⁹² Judge Gates appointed liaisons among the defense attorneys for various discovery issues, such as paper discovery, electronic files, and transcripts.²²⁹³ Judge Gates and Judge Flanagan kept in especially frequent contact throughout this case, sometimes directly and sometimes through law clerks.²²⁹⁴

2284. *Sherifi* Docket Sheet, *supra* note 2265 (D.E. 313, 315, 321); see Transcript, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Nov. 7, 2012, filed Jan. 28, 2013), D.E. 340 (testimony by Sherifi's codefendants); see also Anne Blythe, *2 Plead Guilty in Beheading Plot*, Raleigh News & Observer, Nov. 2, 2012.

2285. Jury Verdict, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Nov. 8, 2012), D.E. 329; see Blythe, *supra* note 2262.

2286. *Sherifi* Docket Sheet, *supra* note 2265 (D.E. 361 to 363); Judgments, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. May 10, 2013), D.E. 357 to 359; see www.bop.gov (noting a life sentence for Hysen Sherifi, reg. no. 51768-056, and noting release dates of September 2, 2014, for Shkumbin Sherifi, reg. no. 55984-056, and May 15, 2016, for Elshiekh, reg. no. 55983-056); see also Anne Blythe, *Primary Suspect in Murder-for-Hire Gets Life in Prison*, Raleigh News & Observer, May 10, 2013.

2287. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012 (noting that the federal defender's office arranges for CJA appointments).

2288. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2289. *Id.* and May 17, 2013.

Monthly vouchers had been approved earlier for a death penalty case. *Id.* May 17, 2013.

2290. *Id.* Mar. 5, 2012.

2291. *Id.*

2292. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012. Tim Reagan interviewed Judge Gates for this report in the judge's chambers.

2293. Interview with Hon. James E. Gates, Mar. 6, 2012.

2294. *Id.*

Judge Gates held regular status conferences with all sides present, followed by *ex parte* meetings as desired.²²⁹⁵ The defendants themselves were not routinely present for status conferences, but Judge Gates ensured that each defendant was present at least once and present for anything particularly substantive.²²⁹⁶

The biggest discovery problem was approximately 270 hours of surveillance transcripts.²²⁹⁷ A careful review turned out to be important because the first transcripts had many errors.²²⁹⁸ Many of the recordings from which they were made were poor in quality.²²⁹⁹

Affirming convictions for Sherifi, Hassan, and Yaghi, the court of appeals “commend[ed] defense counsel for ably and robustly representing the [defendants].”²³⁰⁰

Sherifi’s second prosecution also was based on voluminous surveillance recordings, many in languages other than English, and Judge Gates closely managed discovery issues pertaining to those as well.²³⁰¹

When Sherifi decided to proceed *pro se*, the court continued assigned counsel as standby counsel.²³⁰² As trial approached, however, Judges Britt and Gates decided that the expense of standby counsel was not necessary.²³⁰³

Challenge: Pro Se Defendants

Subasic’s first attorney was appointed two days after Subasic’s arrest.²³⁰⁴ A week later, the court appointed substitute counsel, because the first attorney determined that she was not available to take the case.²³⁰⁵ One year after that, the new attorney notified the court that his client had instructed him to resign.²³⁰⁶ Subasic filed a handwritten motion for substitute counsel a month later, on September 3, 2010.²³⁰⁷ On November 1, Judge Gates granted the motion, permitting the dismissed attorney to remain on the case for an overlap period to assist new coun-

2295. *Id.*

2296. *Id.*

2297. *Id.*; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2298. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2299. Interview with Hon. James E. Gates, Mar. 6, 2012.

2300. *United States v. Hassan*, 742 F.3d 104, 125 n.15 (4th Cir. 2014).

2301. Interview with Hon. W. Earl Britt, May 16, 2013.

2302. *Id.*

2303. *Id.*

2304. Subasic Substitute Counsel Order at 1, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 1, 2010), D.E. 631; Notice of Appearance, *id.* (July 29, 2009), D.E. 69.

2305. Subasic Substitute Counsel Order, *supra* note 2304, at 1; Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2009), D.E. 104; Motion to Withdraw, *id.* (Aug. 4, 2009), D.E. 101.

2306. Notice of Instruction to Resign, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 13, 2010), D.E. 542; Subasic Substitute Counsel Order, *supra* note 2304, at 1.

2307. Pro Se Motion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 3, 2010), D.E. 568; Subasic Substitute Counsel Order, *supra* note 2304, at 1.

sel.²³⁰⁸ Substitute counsel entered his appearance on November 5,²³⁰⁹ and the dismissed attorney withdrew from the case on January 3, 2011.²³¹⁰ The public record does not reflect the precise nature of Subasic's difficulties with his attorney,²³¹¹ but the attorney's notice of his client's instruction that he resign indicates that Subasic was dissatisfied with the attorney's zeal.²³¹²

Subasic expressed dissatisfaction with his new counsel and sought other relief in pro se filings.²³¹³ Four times, Judge Flanagan ordered Subasic to seek relief from the court through counsel.²³¹⁴ On April 28, Subasic moved pro se to dismiss his new attorney.²³¹⁵ The attorney filed a motion on Subasic's behalf on the following day for Subasic to represent himself from then on.²³¹⁶ Subasic expressed the opinion that it would be suicide for him to be represented by an attorney.²³¹⁷ On May 13, Judge Flanagan granted the motion.²³¹⁸ Judge Flanagan, however, kept the attorney in the case as standby counsel.²³¹⁹

Judge Flanagan agreed that because Subasic was representing himself, and because of the nature of the evidence, he would need a computer where he was detained.²³²⁰ It was particularly difficult to find a detention facility that would permit an inmate to keep a computer in his cell.²³²¹

2308. Subasic Substitute Counsel Order, *supra* note 2304.

2309. Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 5, 2010), D.E. 645; *see* Transcript, *id.* (Nov. 16, 2010, filed Feb. 28, 2011), D.E. 858 (first court appearance of substitute counsel).

2310. Notice of Withdrawal, *id.* (Jan. 3, 2011), D.E. 694.

2311. *See* Transcript at 10–11, *id.* (Oct. 5, 2010, filed Oct. 27, 2010), D.E. 627 (noting the judge's sealing of the courtroom for a discussion of Subasic's motion for new counsel).

2312. Notice of Instruction to Resign, *supra* note 2306.

2313. Motions, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Apr. 15, 2011), D.E. 932, 933; Motion, *id.* (Feb. 14, 2011), D.E. 811; Motion, *id.* (Feb. 3, 2011), D.E. 798; Motion, *id.* (Feb. 1, 2011), D.E. 791.

2314. Order, *id.* (Feb. 28, 2011), D.E. 854; Order, *id.* (Feb. 24, 2011), D.E. 828; Order, *id.* (Feb. 15, 2011), D.E. 808; Order, *id.* (Feb. 7, 2011), D.E. 796.

2315. Motion, *id.* (Apr. 28, 2011), D.E. 943.

2316. Motion, *id.* (Apr. 29, 2011), D.E. 944.

2317. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2318. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 978); Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 16, 2011), D.E. 980 [hereinafter *Boyd* May 16, 2011, Order]; *see* Waiver of Counsel, *id.* (May 13, 2011), D.E. 979; *see also* Anne Blythe, *Five Triangle Terror Suspects Enter Not Guilty Pleas*, Raleigh News & Observer, Aug. 16, 2011, A (reporting on Subasic's self representation).

2319. *Boyd* May 16, 2011, Order, *supra* note 2318, at 10; *see* Immigration Fraud Trial Day One Transcript at 5, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed Mar. 4, 2013), D.E. 2144 (noting standby counsel's participation in the immigration fraud case).

2320. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2321. *Id.*; Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012.

There are no federal detention facilities in the district; the marshal service has contracts with approximately ten state and county facilities. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

At the immigration fraud trial, Subasic's standby attorney was always near at hand.²³²² He helped Subasic subpoena witnesses.²³²³ At Subasic's terrorism trial, the attorney helped Subasic catalog evidence and locate and subpoena witnesses.²³²⁴ He also answered Subasic's legal questions.²³²⁵

On one occasion, the court and the marshals' service worked together to allow Subasic to return to his cell to collect materials related to government witnesses who had traveled from Nevada.²³²⁶ Although the government provided notice of the witnesses on the night before they were to be examined, Subasic did not get the notice until he appeared at court in the morning.²³²⁷ Judge Flanagan allowed an hour and a quarter during the lunch break for Subasic to retrieve materials from his cell,²³²⁸ and she admonished the government to provide better notice, including voice notice to standby counsel, of any future last-minute changes.²³²⁹

The court of appeals did not permit Subasic to proceed pro se until after it affirmed his convictions and sentence.²³³⁰

For his murder conspiracy trial, Sherifi chose to proceed pro se; the other defendants had assigned counsel.²³³¹ Because Sherifi's ankles were shackled out of the jury's sight, he questioned witnesses from a seated position.²³³² So as to not draw the jury's notice to seated questioning by the defendant, government attorneys also questioned witnesses and addressed the court from a seated position while the jury was present.²³³³

Judge Britt admonished Sherifi that if his conduct ever became disruptive he would have to watch proceedings from the holding cell outside the courtroom.²³³⁴ Judge Britt arranged for closed-circuit transmission of proceedings to the cell,

2322. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; see Immigration Fraud Trial Day One Transcript, *supra* note 2319, at 23–24.

2323. Immigration Fraud Trial Day One Transcript, *supra* note 2319, at 7.

2324. Interview with Hon. Louise W. Flanagan, May 17, 2013; see Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 17, 2012, filed Feb. 5, 2012), D.E. 1701 [hereinafter *Boyd* Jan. 17, 2012, Transcript] (reflecting standby counsel's participation in a discovery proceeding).

2325. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2326. Transcript at 7–13, 99–101, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 15, 2012, filed Apr. 19, 2013), D.E. 2153.

2327. *Id.* at 8.

2328. *Id.* at 11–12, 99.

2329. *Id.* at 100–101.

2330. Order, *United States v. Subasic*, No. 12-4683 (4th Cir. Aug. 1, 2014), D.E. 124 (granting the motion to proceed pro se); Order, *id.* (Feb. 11, 2014), D.E. 106 (denying the motion to proceed pro se).

2331. Interview with Hon. James E. Gates, Mar. 6, 2012.

2332. Interview with Hon. W. Earl Britt, May 16, 2013.

2333. *Id.*

2334. *Id.*

should they have become necessary.²³³⁵ On one occasion, Sherifi came close to eliciting an expulsion order, but he did not quite cross Judge Britt's line.²³³⁶

Sherifi pushed Judge Britt's tolerance during Sherifi's closing, but Sherifi's straying from propriety did not require more than the occasional caution from Judge Britt, who did not want to exacerbate the event.²³³⁷

Challenge: Interpreters

Subasic's native language was Bosnian, but he had fairly good command of English, and he often expressed himself in court in English.²³³⁸ He nevertheless wanted an interpreter with him at court proceedings.²³³⁹ Frequently, however, he disagreed with the interpreter's translations,²³⁴⁰ especially translations of what Subasic said.²³⁴¹ When Subasic realized that one of the interpreters recognized him from Serbia, Subasic threatened her with physical harm.²³⁴²

At his pro se terrorism trial, the interpreters asked for and received, on the first day of jury selection, permission to have in court electronic tablets so that they could access online dictionaries.²³⁴³

Challenge: Court Security

At the August 2009 detention hearing, security officers kept a watchful eye on the large crowd of spectators for sudden movements.²³⁴⁴ There were sixteen armed deputy marshals at hand in the jury room.²³⁴⁵ Judge Webb permitted women wearing burkhas to attend the proceedings upon positive identification, and extra female security officers were recruited to help screen the heavily covered female visitors.²³⁴⁶

2335. *Id.*

2336. *Id.*

2337. *Id.*

2338. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012; *e.g.*, Transcript at 62–63, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 7, 2011, filed Mar. 12, 2012), D.E. 1808; Transcript at 9–16, *id.* (July 29, 2011, filed June 10, 2012), D.E. 2032.

Subasic pronounced the word “exhibit” with an accent on the first syllable, and other trial participants, including Judge Howard, came to adopt that pronunciation as well. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2339. *E.g.*, *Boyd* Jan. 17, 2012, Transcript, *supra* note 2324; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2340. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2341. Interview with Hon. James E. Gates, Mar. 6, 2012.

2342. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2343. Transcript at 5–6, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 8, 2012, filed Apr. 19, 2013), D.E. 2147.

2344. *See* *Ovaska & Locke*, *supra* note 2210.

2345. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2346. *Id.*

It was convenient for a case requiring special security to be tried in New Bern, because the federal courthouse had recently been given congressionally approved security renovations.²³⁴⁷ The U.S. Marshals Service worked with the Methodist church across the street, which operated a daycare center,²³⁴⁸ to allay the church's security concerns.²³⁴⁹ The church hosted community meetings on the topic.²³⁵⁰

For Subasic's pro se immigration fraud trial in Greenville, Judge Howard decided that Subasic would not be shackled, although Subasic had been shackled at preliminary proceedings.²³⁵¹ Four experienced deputy marshals were at hand in the courtroom. Usually, two stood in the corners of the courtroom behind the judge and two stood behind the defendant.²³⁵² Judge Howard conducted sidebar conferences at a table next to the bench, and deputy marshals moved to stand near Subasic, so that Subasic would be separated from court staff.²³⁵³

At Subasic's pro se terrorism trial, he was frequently shackled beneath counsel table, but he was not shackled during jury selection and for opening and closing arguments.²³⁵⁴ When he was permitted to move around the courtroom, he was required to wear a stun belt, and two deputy marshals stood near him.²³⁵⁵ Subasic's behavior never created a security concern.²³⁵⁶

Sherifi's murder conspiracy trial began with the security precautions recommended by the U.S. Marshal and based on the precautions developed for Subasic's trial, but after one day Judge Britt decided that they were not necessary.²³⁵⁷

Challenge: Jury Security

Judge Flanagan used an anonymous jury, and jurors reported to a secret location from which they were bused to court.²³⁵⁸

Judge Britt used an anonymous jury for the first time in his nearly thirty-two years on the bench, but the jurors reported directly to the courthouse.²³⁵⁹ Judge

2347. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. D, tit. V, 123 Stat. 524, 661 (providing \$10.6 million for the New Bern courthouse and \$153 million for the Chicago courthouse); Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; see Nikie Mayo, *Money for Courthouse Renovation Clears Hurdle in Congress*, New Bern Sun J., July 31, 2008.

2348. See Francine Sawyer, *Terror Trial Could Be Held in New Bern*, New Bern Sun J., Aug. 2, 2010.

2349. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2350. *Id.*

2351. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2352. *Id.*

2353. *Id.*

2354. Transcript at 98–99, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. May 10, 2012, filed Apr. 19, 2013), D.E. 2150; Interview with Hon. Louise W. Flanagan, May 17, 2013.

2355. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2356. *Id.*

2357. Interview with Hon. W. Earl Britt, May 16, 2013.

2358. Transcript at 85, 171–73, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 9, 2012, filed Apr. 19, 2013), D.E. 2148; Transcript at 6, *id.* (May 7, 2012, filed June 13, 2013), D.E. 2181; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

Britt characterized the jurors' anonymity as routine.²³⁶⁰ Judge Britt reassured the jury that he would not be anonymous and he was not concerned about his safety as a result of the trial.²³⁶¹

Judge Howard did not employ any special security measures with respect to the jury, who knew virtually nothing about Subasic's dangerousness.²³⁶²

Challenge: FISA Evidence

On the day that the indictment was unsealed and the defendants were arrested, the government filed notices that it would rely on evidence against each defendant obtained pursuant to the Foreign Intelligence Surveillance Act (FISA).²³⁶³ In motions filed from December 10, 2010, to February 24, 2011, "defendants contend that aside from providing this notice, the government has not confirmed any details about what evidence derived from FISA searches and surveillance will be used in the prosecution of the case."²³⁶⁴

Judge Flanagan reviewed all FISA warrant applications resulting in the government's evidence and found all of the warrants were issued properly.²³⁶⁵ The court of appeals reviewed the same materials and came to the same conclusion.²³⁶⁶

Challenge: Classified Evidence

At the beginning of the case, Judge Flanagan had one law clerk, her judicial assistant, and a court reporter obtain security clearances.²³⁶⁷ As the case got going, she had additional staff obtain security clearances, including a member of the court's information technology staff.²³⁶⁸ Judge Flanagan uses term law clerks; new law clerks start the clearance paperwork before they come aboard.²³⁶⁹

Magistrate Judges Webb and Gates were cleared to see classified information in this case.²³⁷⁰ District judges automatically have security clearances, but magistrate judges must obtain them, a process that is greatly facilitated by the back-

2359. Interview with Hon. W. Earl Britt, May 16, 2013.

2360. *Id.*

2361. *Id.*

2362. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2363. Notices, *Boyd*, No. 5:09-cr-216 (E.D.N.C. July 27, 2009), D.E. 34 to 40; *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014); *United States v. Sherifi*, 793 F. Supp. 2d 751, 753 (E.D.N.C. 2011).

2364. *Sherifi*, 793 F. Supp. 2d at 753.

2365. *Id.* at 760–61.

2366. *Hassan*, 742 F.3d at 139.

2367. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2368. *Id.*

2369. *Id.*

2370. *Id.*; Interview with Hon. William Arthur Webb, Mar. 20, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012.

ground checks they receive when they become judges.²³⁷¹ Both of Judge Gates's career law clerks were cleared.²³⁷² Judge Webb also had a career law clerk cleared.²³⁷³

On August 3, 2009, one week after the defendants were arrested, the government filed a notice that classified information might be at issue in the case and requested a hearing to discuss the matter, pursuant to the Classified Information Procedures Act.²³⁷⁴ At the detention hearing on the following day, the government stated that classified methods were used to obtain evidence against the defendants.²³⁷⁵ A classified information security officer attended the detention hearing in case her expertise on how courts handle classified information became needed.²³⁷⁶

On January 4, 2010, the government filed a notice that it was submitting to the court an ex parte classified motion.²³⁷⁷ The classified motion was filed with the classified information security officer, upon which it became part of the court record.²³⁷⁸ On January 13, Judge Flanagan filed an ex parte classified order requesting supplementation.²³⁷⁹ The government filed notices of ex parte classified supplementations on January 13²³⁸⁰ and 27.²³⁸¹ Judge Flanagan resolved the ex parte issues addressed in these classified filings in a classified order issued on February 18 and amended on February 19.²³⁸² On January 28, in another classified order, Judge Flanagan had granted a classified ex parte motion to strike and substitute,²³⁸³ which was filed on January 27.²³⁸⁴

On February 18, Judge Flanagan signed a protective order that required defense attorneys who received access to classified materials to keep those materials confidential.²³⁸⁵

From February through May, the government filed an additional eleven notices of ex parte classified filings.²³⁸⁶ The docket sheet notes seven classified ex

2371. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2* (Federal Judicial Center, 2d ed. 2013).

2372. Interview with Hon. James E. Gates, Mar. 6, 2012.

2373. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2374. Government Motion, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 3, 2009), D.E. 91, 92.

2375. *Boyd* Aug. 4–5, 2009, Transcript, *supra* note 2208, at 11.

2376. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 27, 2012; see Reagan, *supra* note 2371, at 21–22 (providing information about classified information security officers).

2377. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 4, 2010), D.E. 205.

2378. *Id.*

2379. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 209, 231).

2380. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2010), D.E. 210.

2381. Notice, *id.* (Jan. 27, 2010), D.E. 220.

2382. *Boyd* Docket Sheet, *supra* note 2234 (D.E. 236, 241).

2383. *Id.* (D.E. 221).

2384. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 27, 2010), D.E. 219.

2385. Classified Information Protective Order, *id.* (Feb. 18, 2010), D.E. 237.

parte orders filed by Judge Flanagan in response to these classified filings.²³⁸⁷ On May 24, Judge Flanagan explained in a public notice that she had, in classified orders, “authorized the government to delete specified items of classified information from discovery and to substitute summaries for certain classified documents.”²³⁸⁸

As discovery proceeded over the next few months, both the defendants²³⁸⁹ and the government²³⁹⁰ filed notices of classified filings.

When Subasic began to represent himself, he sought access to classified evidence and did not want to rely on appointed cleared counsel to assist him with such materials.²³⁹¹ Judge Flanagan sought additional briefing from the cleared attorney and reasoned that the defendant’s direct access to classified information would arise as an issue only if it were material to his defense, the government declined to declassify it or share it with him, and suitable substitutions could not be provided.²³⁹²

Classified evidence was stored and reviewed by defense counsel in secure rooms at the Raleigh courthouse next to a secure room originally established for the prosecution of David Passaro.²³⁹³ There was a separate safe for each defendant.²³⁹⁴ Judge Flanagan also had a safe for storage of classified materials at the New Bern courthouse.²³⁹⁵

Challenge: Sensitive Unclassified Evidence

Early in the case, on December 10, 2009, Judge Flanagan signed a protective order permitting the government to designate some discovery materials as sensitive, which would prohibit the defendants from sharing the materials with persons outside the litigation and require them to return the materials at the end of the case.²³⁹⁶ According to the protective order,

2386. Notices, *id.* (Feb. 25 and 26, Mar. 1, 11, and 18, Apr. 12 and 29, and May 18 and 20, 2010), D.E. 242, 243, 247, 257, 265, 295 to 297, 323, 345, 353.

2387. *Boyd* Docket Sheet, *supra* note 2234 (classified orders, 2010: D.E. 244, February 26; D.E. 253, March 8; D.E. 258, March 12; D.E. 267, March 19; D.E. 289, April 6; D.E. 324, April 30; D.E. 338, May 14; D.E. 339, 340, May 17).

2388. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 24, 2010), D.E. 362.

2389. Notices, *id.* (Mar. 29 and May 24 and 26, 2010), D.E. 279, 365, 369.

2390. Notice, *id.* (June 7, 2010), D.E. 407.

2391. Order, *id.* (May 19, 2011), D.E. 989, *available at* 2011 WL 1930628.

2392. *Id.*

2393. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Dep’t of Justice Litig. Sec. Group Staff, Apr. 27, 2012; *see* Ovaska, *supra* note 2207; *infra* “Interrogation Death in Afghanistan.”

2394. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Dep’t of Justice Litig. Sec. Group Staff, Apr. 27, 2012.

2395. Interview with Dep’t of Justice Litig. Sec. Group Staff, Apr. 27, 2012.

2396. Sensitive Discovery Protective Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 10, 2009), D.E. 188; Protective Order Amendment, *id.* (Dec. 23, 2009), D.E. 202.

Terrorism Prosecutions: Triangle Takedown

such material may include information relevant to ongoing national security investigations and prosecutions; information provided to the United States by foreign law enforcement, some of which may have led to prosecutions in other countries that are sensitive to pre-trial publicity; and materials implicating the privacy interests of the defendants and third parties.²³⁹⁷

A year later, Judge Flanagan noticed that procedures for protecting sensitive information in court filings while preserving as public a record as possible needed some adjustment, so Judge Flanagan issued an order that, among other things, made clear that filings could be sealed only with the court's permission.²³⁹⁸

2397. Sensitive Discovery Protective Order, *supra* note 2396, at 1.

2398. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 30, 2010), D.E. 693.

ESPIONAGE PROSECUTIONS

Espionage cases, as loosely defined here, include prosecutions for leaking or attempting to leak government secrets. Courts presiding over espionage prosecutions typically must handle classified information. A frequent difference between espionage cases and terrorism cases is that the defendant himself must frequently be given access to classified materials as he prepares his defense against espionage charges.

Brian Patrick Regan (“Would-Be Spy”) was prosecuted at the beginning of the century for trying to sell secrets, and he was ultimately sentenced to life in prison. Shortly after Regan’s case concluded, the government launched a prosecution for “Giving State Secrets to Lobbyists,” which the government eventually decided not to bring to trial. Senior NSA employee Thomas Drake pleaded guilty to a misdemeanor after three years of investigation and two months of prosecution in another high-profile leak case (“NSA Expenditures”).

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.²³⁹⁹

Regan had been under surveillance for months, after a foreign source passed on a letter from an unidentified US intelligence official offering to sell information. The letter was riddled with misspellings like “enprisoned” and “esponage,” which led the FBI to look for a bad speller within the intelligence community. Regan, who was dyslexic, became the prime suspect. He would later be known as the spy who couldn’t spell.²⁴⁰⁰

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.²⁴⁰¹ 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).²⁴⁰² Regan was indicted on October 23, 2001,²⁴⁰³ and superseding indictments were filed on February 14²⁴⁰⁴ and July

2399. *United States v. Regan*, 221 F. Supp. 2d 672, 675 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 666, 669 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 661, 662–63 (E.D. Va. 2002); see Yudhijit Bhattacharjee, *Tale of a Would-Be Spy, Buried Treasure, and Uncrackable Code*, *Wired*, Feb. 2010, at 82 (reporting that Regan was arrested aboard a mobile lounge); Rona Kobel, *An Unlikely Setting for Global Intrigue Espionage*, *Balt. Sun*, Feb. 11, 2003, at 1B; *Retired Air Force Sergeant Accused of Spying Is Going to Trial*, *N.Y. Times*, Jan. 13, 2003, at A19 [hereinafter *Going to Trial*]; Susannah Rosenblatt, *Arduous Dig to Find Spy’s Buried Stash*, *L.A. Times*, July 31, 2003, at 24.

2400. Bhattacharjee, *supra* note 2399.

2401. *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).

2402. *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 2399.

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 2399. 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.

2403. *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 2401.

2404. *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 2401 (D.E. 101).

24, 2002.²⁴⁰⁵ The government filed a notice of intent to seek the death penalty on April 19, 2002.²⁴⁰⁶ The court assigned the case to Judge Gerald Bruce Lee.²⁴⁰⁷

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.²⁴⁰⁸ The jury rejected the death penalty on February 24,²⁴⁰⁹ and Regan was sentenced on March 20 to life in prison without the possibility of parole.²⁴¹⁰ 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.²⁴¹¹

Regan also agreed to disclose what he had done with classified information.²⁴¹² 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.²⁴¹³ These containers held coded descriptions of the locations of nineteen 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.²⁴¹⁴

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.²⁴¹⁵ The de-

2405. *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 2401 (D.E. 157).

2406. *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 2401; *see Going to Trial*, *supra* note 2399.

2407. Docket Sheet, *supra* note 2401; *see* Lloyd Smith, *An Interview with Judge Gerald Bruce Lee*, *Landslide*, Nov./Dec. 2013, at 7; *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.

2408. Docket Sheet, *supra* note 2401 (D.E. 312); *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 2407.

2409. Docket Sheet, *supra* note 2401; *see* Meyer, *supra* note 2408; Rosenblatt, *supra* note 2399; *The Week That Was*, *Balt. Sun*, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 2407.

2410. Docket Sheet, *supra* note 2401; *see* Rosenblatt, *supra* note 2399; *Life in Prison*, *supra* note 2407.

2411. *See* Bhattacharjee, *supra* note 2399; *Life in Prison*, *supra* note 2407; *see also* www.bop.gov (reg. no. 41051-083).

2412. *See* Bhattacharjee, *supra* note 2399; Rosenblatt, *supra* note 2399.

2413. *See* Rosenblatt, *supra* note 2399.

2414. *See* Bhattacharjee, *supra* note 2399; Rosenblatt, *supra* note 2399.

2415. *United States v. Regan*, 281 F. Supp. 2d 795, 801 (E.D. Va. 2002).

fendant and his attorneys were given access to the classified information and a computer in a sensitive compartmented information facility (SCIF) located in the courthouse.²⁴¹⁶

The SCIF is a secure facility located in the courthouse where the Defendant and his attorneys may lawfully view classified information. Defense counsel may not remove certain classified information from the SCIF, and the Defendant may not remove classified information from the SCIF. . . . The SCIF has been provided to the espionage defendant and his counsel so that they may have access to classified information to prepare for trial. The Defendant and his counsel must have access to classified information in a “prosecution free zone.” Defense counsel and their client reasonably expect to be free to work in the SCIF to compose work papers, trial memoranda, and trial strategy, free from the roving eye of the prosecutor or the Court. Because the classified information involved in this case relates to national security, the information must be kept secure. The SCIF affords the Government a place to continue to protect classified information.²⁴¹⁷

Discovered in Regan’s jail cell were apparently typewritten letters to his wife and children and a page of code.²⁴¹⁸ These documents appeared to concern the locations of hidden classified information.²⁴¹⁹ The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.²⁴²⁰ Judge Lee allowed a search, but established special procedures to preserve the attorney–client privilege and work-product protection.²⁴²¹

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 secu-

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.

2416. *Regan*, 281 F. Supp. 2d at 800–01; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs); see also Dana Priest & William M. Arkin, *Top Secret America* 50 (2011) (noting that SCIF is pronounced “skiff”).

Defense experts also had to obtain security clearances to examine classified documents. See *Prosecutors Reconsider*, *supra* note 2407.

2417. *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”).

2418. *Regan*, 281 F. Supp. 2d at 800, 807.

2419. *Id.* at 800, 804–05.

2420. *Id.* at 799–800.

2421. *Id.* at 800.

rity clearances to image the Defendant's computer hard drives and to search for the enumerated four items: (1) two letters to Anette Regan; (2) letters or memoranda to his children; and (3) a page of code composed of letters and numbers. All of the items listed above will be attached to the court's Order, UNDER SEAL. If these items are found on the hard drive, then the computer expert will provide this information in electronic and hard copy to the United States Magistrate Judge for review. The United States Magistrate Judge is directed to report the computer expert's findings to all counsel and the District Judge. [The CIPA classified information security officer] is directed to maintain the imaged hard drive in a secure location until the verdict is reached in this case and further order of the court. The accompanying order will provide specific details regarding the logistics of the computer imaging and search process.

VIII. Post-Verdict Search Procedures

After the jury has reached its verdict in this case, the Government may seek leave of Court to conduct a further search on the hard drives and floppy disks. The Government shall notify defense counsel of its intentions by a written motion. The Government must notice its motion for a hearing with the Clerk's Office, and then the motion shall be heard 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.²⁴²²

The unit of the Justice Department that provides the courts with classified information security officers—the Litigation Security Group within the Management Division²⁴²³—conducted the search.²⁴²⁴

In 2009, a journalist moved the court to unseal a government motion concerning the jail cell documents and Regan's response.²⁴²⁵ In 2012, after inviting briefing from both sides, Judge Lee ordered the government to publicly file suitably redacted copies of the documents.²⁴²⁶

2422. *Id.* at 806–07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 2401.

2423. *See* Reagan, *supra* note 2416, at 21–22 (providing information about classified information security officers).

2424. Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

2425. Docket Sheet, *supra* note 2401 (D.E. 341, May 26, 2009, filing by Yudhijit Bhattacharjee).

2426. *Id.* (D.E. 345, Feb. 17, 2012, order).

Giving State Secrets to Lobbyists

*United States v. Franklin (T.S. Ellis III, E.D. Va.)*²⁴²⁷

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).²⁴²⁸ On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.²⁴²⁹

It was reported that for several years the FBI had been investigating not the analyst but two men who worked at AIPAC.²⁴³⁰ 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.²⁴³¹ On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,²⁴³² and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.²⁴³³

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.²⁴³⁴ It was reported that Franklin was seen

2427. An appeal was heard by Fourth Circuit Judges Robert B. King, Roger L. Gregory, and Dennis W. Shedd.

2428. *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).

2429. 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).

2430. 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.

2431. *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.

2432. 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).

2433. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 2431.

2434. 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 2430 (“Franklin, wearing a recording device, met with Weissman and ‘induced him into believing that he had to communicate certain information right away in order to save innocent lives,’ according to the [defense] lawyers.”).

joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.²⁴³⁵ 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.²⁴³⁶ His security clearance was suspended in June 2004.²⁴³⁷ In July, Franklin cooperated in a recorded sting meeting with Weissman in which Franklin gave the lobbyist classified information.²⁴³⁸ Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.²⁴³⁹

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.²⁴⁴⁰ The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.²⁴⁴¹ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.²⁴⁴² 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.²⁴⁴³ On January 20, 2006, Judge Ellis provisionally sentenced Franklin to twelve years and seven months in prison, leaving room for an adjustment after the completion of Franklin's assistance in a trial against Rosen and

2435. 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.

2436. 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).

2437. See Markon, *Defense Analyst Charged*, *supra* note 2436.

2438. *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”).

2439. *Rosen*, 445 F. Supp. 2d at 609–10; see Markon, *supra* note 2438.

2440. Docket Sheet, *United States v. Franklin*, No. 1:05-cr-225 (E.D. Va. May 26, 2005) [hereinafter E.D. Va. Docket Sheet] (D.E. 1); see David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. Times, May 5, 2005, at A1.

2441. E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 8, 25); T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1615 (2013).

2442. E.D. Va. Docket Sheet, *supra* note 2440; Ellis, *supra* note 2441, at 1614.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

2443. *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 2440; see Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. Times, Oct. 6, 2005, at A21; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, Wash. Post, Oct. 6, 2005, at A2.

Weissman.²⁴⁴⁴ Franklin's sentence ultimately was reduced, and he was ordered released on May 31, 2010.²⁴⁴⁵

AIPAC fired Rosen and Weissman on March 21, 2005.²⁴⁴⁶ The August 4 superseding indictment added Rosen and Weissman as defendants.²⁴⁴⁷ 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.²⁴⁴⁸ 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.²⁴⁴⁹

According to the indictment, Rosen met Franklin in 2002.²⁴⁵⁰ Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."²⁴⁵¹ Rosen allegedly passed information about the document to foreign officials, journalists,

2444. E.D. Va. Docket Sheet, *supra* note 2440; see David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

2445. E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 906, May 26, 2010); see www.bop.gov (reg. no. 70425-083).

2446. *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.

2447. E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 25); see David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

2448. *Rosen*, 599 F. Supp. 2d at 693; *Rosen*, 445 F. Supp. 2d at 608; see Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law 234* (2010) (describing the prosecution as "the most radical antileak prosecution in American history").

2449. *Rosen*, 445 F. Supp. 2d at 608–09; see David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. Times, Aug. 18, 2005, at A22 (identifying USGO-2).

2450. *Rosen*, 445 F. Supp. 2d at 609.

2451. *Id.*

and a think-tank fellow.²⁴⁵² Weissman allegedly participated in several of these conversations.²⁴⁵³

Judge Ellis ruled that at trial the government would have to prove that the information passed by the defendants qualified as national defense information (NDI).²⁴⁵⁴ “To qualify as NDI, information must be closely held by the government and potentially damaging to national security if disclosed.”²⁴⁵⁵ “It is important to recognize that NDI and classified material may not be coextensive sets.”²⁴⁵⁶ “In short, the government designates what information is labeled and treated as classified, while a court or jury determines what information qualifies as NDI”²⁴⁵⁷

Rosen and Weissman’s trial was originally scheduled to begin in April 2006,²⁴⁵⁸ but it was postponed several times as the court dealt with constitutional issues and the handling of classified information.²⁴⁵⁹ Judge Ellis ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.²⁴⁶⁰

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

2452. *Id.*

2453. *Id.*

2454. *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 (2013).

2455. *United States v. Rosen*, 487 F. Supp. 2d 703, 705 n.1 (E.D. Va. 2007).

2456. *Id.*

2457. *Rosen*, 599 F. Supp. 2d 690; see Walter Pincus, *Opinion Could Dampen Zeal to Classify Government Information*, Wash. Post, Feb. 23, 2009, at A17; see also *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011), available at <http://thekojonnamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification> (defense expert and former head of the National Archives’ Information Security Oversight Office—sometimes known as the classification czar—opining that “what these individuals were accused of passing along, clearly in my mind, did not meet the qualifications or standards for classification”).

2458. See Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

2459. 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 2430 (“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 2457 (reporting a tentative trial date of Apr. 21, 2009); Richard B. Schmitt, *Lobbyists’ Lawyers Say Rice Leaked Information*, L.A. Times, Apr. 22, 2006, at 24 (reporting that the trial was postponed from May 23, 2006, to Aug. 7, 2006); Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case*, L.A. Times, Aug. 11, 2006, at 13 [hereinafter *Lobbyists to Stand Trial*] (reporting that the trial was postponed indefinitely from Aug. 7, 2006).

2460. Ellis, *supra* note 2441, at 1624; see Markon, *Judge Rejects Dismissal*, *supra* note 2459; Schmitt, *Lobbyists to Stand Trial*, *supra* note 2459.

after launching the investigation.²⁴⁶¹ “The government was neither required to give reasons for dismissing the indictment, nor did it do so.”²⁴⁶²

Challenge: Classified Evidence

A large amount of classified evidence was at issue in this case.²⁴⁶³ Judge Ellis’s career law clerk has a top-secret security clearance, and she can help the judge deal with issues concerning classified information.²⁴⁶⁴ One of Judge Ellis’s temporary law clerks, however, was a Canadian citizen, and so he was not eligible for a security clearance.²⁴⁶⁵

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.²⁴⁶⁶

Pursuant to the Classified Information Procedures Act (CIPA),²⁴⁶⁷ 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.”²⁴⁶⁸ In an opinion by Judge Robert B. King, joined by Judges Roger L. Gregory and Dennis W. Shedd, the appellate court affirmed Judge Ellis’s rulings.²⁴⁶⁹

2461. E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 890, 891); Ellis, *supra* note 2441, at 1617; 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 2430; Schoenfeld, *supra* note 2448, at 246–47 (“as the case subsequently unfolded in a series of motions and countermotions, it became increasingly clear that the government would be unable to prove that the secrets at issue in the case were of the proscribed character”); see also *id.* at 247 (“The only benefit to the public came from T.S. Ellis III, who bequeathed to the nation the most comprehensive and probing explication of the Espionage Act to date.”).

2462. Ellis, *supra* note 2441, at 1617.

2463. *United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009); Ellis, *supra* note 2441, at 1614.

2464. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

2465. *Id.*; see 28 C.F.R. § 17.41(b) (2014) (“Eligibility for access to classified information is limited to United States citizens . . .”).

2466. E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 632); Ellis, *supra* note 2441, at 1618; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23* (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2467. 18 U.S.C. app. 3 (2013); see Reagan, *supra* note 2466 (discussing CIPA).

2468. *Rosen*, 557 F.3d at 196; see Markon, *Classified Documents Allowed*, *supra* note 2459 (“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.”).

2469. *Rosen*, 557 F.3d at 194, 199–200; Ellis, *supra* note 2441, at 1622; 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 2459.

For this report, Tim Reagan interviewed Judge King in the judge’s Richmond chambers on March 19, 2008; Judge Shedd by telephone on September 3, 2009; and Judge Gregory in the judge’s chambers on September 25, 2009.

As required by section 5(a) of CIPA, the defendants gave notice of their intent to introduce classified evidence at trial.²⁴⁷⁰ Pursuant to section 6 of CIPA, Judge Ellis “determined that a substantial volume of the classified information was indeed relevant and admissible.”²⁴⁷¹ 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.”²⁴⁷² 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.²⁴⁷³

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the “silent witness rule.”²⁴⁷⁴ The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public.²⁴⁷⁵ It is a partial closing of the trial.²⁴⁷⁶ 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.”²⁴⁷⁷

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

2470. *Rosen*, 557 F.3d at 195 (“a large volume of classified evidence”); see 18 U.S.C. app. 3 § 5(a).

2471. *Rosen*, 557 F.3d at 195; see 18 U.S.C. app. 3 § 6.

2472. *Rosen*, 557 F.3d at 196; see 18 U.S.C. app. 3 § 6(c)(1).

2473. *Rosen*, 557 F.3d at 196.

2474. *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007); Ellis, *supra* note 2441, at 1622–23; see Reggie B. Walton, *Prosecuting International Terrorism Cases in Article III Courts*, 39 Geo. L.J. Ann. Rev. Crim. Proc. iii, xiv (2010) (noting that Judge Ellis’s opinion was “the first published opinion to explicitly approve of the use of the silent witness procedure in the CIPA context”).

2475. *Rosen* 520 F. Supp. 2d at 793–94.

2476. *Id.* at 794.

The government in *Rosen* proposed widespread use of the Silent Witness Rule to protect classified information and I rejected that effort as it would effectively and impermissibly close the courtroom. Nonetheless, I did approve a far more limited use of the Rule to protect a very small amount of the classified information.

Ellis, *supra* note 2441, at 1623 (footnotes omitted).

2477. *Rosen* 520 F. Supp. 2d at 793–94.

[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.²⁴⁷⁸

Challenge: Subpoenaing a Cabinet Officer

The defendants requested that subpoenas be issued to twenty 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.²⁴⁷⁹ The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the witnesses objected to would be at best cumulative.²⁴⁸⁰ Judge Ellis sustained the government's objection as to five witnesses, but overruled its objection as to Secretary Rice; then National Security Advisor Stephen Hadley, who was her deputy; Paul Wolfowitz and Richard Armitage, each formerly Deputy Secretary of State; and seven others.²⁴⁸¹

[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.²⁴⁸²

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.²⁴⁸³

Because so many issues in this case concerned classified information, Judge Ellis filed separate orders under seal stating (1) how the silent witness rule would

2478. *Id.* at 799.

2479. *United States v. Rosen*, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007); *see Pincus, supra* note 2457.

2480. *Rosen*, 520 F. Supp. 2d at 807 & n.8, 810.

2481. *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.

2482. *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).

2483. *See Jerry Markon, Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

be applied²⁴⁸⁴ and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.²⁴⁸⁵

As the final trial date approached, and shortly before the government dropped the case, Judge Ellis issued a sealed order concerning the defendants' evidence.²⁴⁸⁶

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.²⁴⁸⁷ But the court held several closed hearings, each of which required a court reporter with a security clearance.²⁴⁸⁸

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."²⁴⁸⁹ Eight portions of the court's published opinion resolving the appeal are redacted.²⁴⁹⁰

Challenge: Classified Arguments

In the interlocutory appeal of Judge Ellis's rulings on admissibility of classified evidence, the parties filed classified briefs with the classified information security officer and redacted briefs in the public record.²⁴⁹¹

Appellate judges' options for reviewing classified documents depend on where they have chambers. Judge Gregory's chambers are at the court of appeals in Richmond, where classified materials can be stored in a SCIF. Judge Gregory can retrieve classified materials from the SCIF and bring them back to his chambers for a private review.²⁴⁹²

Judge Shedd's chambers in Columbia are not in a courthouse.²⁴⁹³ When he needs to review classified materials, he reviews them at the FBI's SCIF in town.²⁴⁹⁴

2484. *United States v. Rosen*, 520 F. Supp. 2d 786, 789, 802 (E.D. Va. 2007).

2485. *Rosen*, 520 F. Supp. 2d at 814; E.D. Va. Docket Sheet, *supra* note 2440 (D.E. 603).

2486. E.D. Va. Docket Sheet, *supra* note 2440 (noting a sealed order filed on April 14, 2009).

2487. *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.

2488. E.D. Va. Docket Sheet, *supra* note 2440 (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); Ellis, *supra* note 2441, at 1622.

2489. Order, *United States v. Rosen*, No. 08-4358 (4th Cir. Oct. 28, 2008) (government's appeal, D.E. 101); see also Docket Sheet, *United States v. Rosen*, No. 08-4410 (4th Cir. Apr. 11, 2008) (defendants' cross-appeal, dismissed).

2490. *United States v. Rosen*, 557 F.3d 192, 197, 199–200 (4th Cir. 2009).

2491. Docket Sheet, *United States v. Rosen*, No. 08-4358 (4th Cir. Mar. 31, 2008); see Reagan, *supra* note 2466, at 21–22 (providing information about classified information security officers).

2492. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

2493. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

2494. *Id.*

Both Judge Shedd and Judge King, who has chambers in Charleston, West Virginia, can also review classified materials in Richmond when they are there to hear cases.²⁴⁹⁵

²⁴⁹⁵. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with Hon. Robert B. King, March 19, 2008.

NSA Expenditures

United States v. Drake (Richard D. Bennett, D. Md.)

On April 5, 2010, Magistrate Judge James K. Bredar appointed the District of Maryland's federal defender to represent Thomas A. Drake in a criminal case that would begin with an indictment for misusing classified information filed nine days later.²⁴⁹⁶ The court assigned the criminal case to Judge Richard D. Bennett.²⁴⁹⁷

According to the indictment, “between on or about February 27, 2006, and on or about November 28, 2007, Reporter A published a series of newspaper articles about NSA” for which Drake was a source.²⁴⁹⁸ The *New York Times* reported on April 16 that “the description applies to articles written by Siobhan Gorman, then a reporter for the *Baltimore Sun*, that examined in detail the failings of several major N.S.A. programs, costing billions of dollars, using computers to collect and sort electronic intelligence. The efforts were plagued with technical flaws and cost overruns.”²⁴⁹⁹

“Drake’s history of whistle-blowing stretches back to high school, in Manchester, Vermont, where his father, a retired Air Force officer, taught. When

2496. Order, *In re Drake*, No. 1:10-mj-1257 (D. Md. Apr. 6, 2010), D.E. 2; see Indictment, *United States v. Drake*, No. 1:10-cr-181 (D. Md. Apr. 14, 2010), D.E. 1.

“Thomas Andrews Drake is the son of a World War II veteran and the secretary of famed American novelist Pearl S. Buck.” Michael Gurnow, *The Edward Snowden Affair* 25 (2014).

Judge Bredar became a district judge on December 17, 2010. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/public/home.nsf/hisj.

2497. Docket Sheet, *Drake*, No. 1:10-cr-181 (D. Md. Apr. 14, 2010).

Tim Reagan interviewed Judge Bennett for this report in the judge’s chambers on September 26, 2013.

2498. Indictment, *supra* note 2496, at 6; see *United States v. Drake*, 818 F. Supp. 2d 909, 912 (D. Md. 2011); see also Robert Little, *Md. Man Charged with Leaking NSA Documents*, *Balt. Sun*, Apr. 16, 2010, at 1A; Jane Mayer, *The Secret Sharer*, *New Yorker*, May 23, 2011, at 47, 47, 56–57.

2499. Scott Shane, *A Former N.S.A. Official Is Charged with Leaking Classified Information*, *N.Y. Times*, Apr. 16, 2010, at A16; see also Mayer, *supra* note 2498, at 47; Greg Miller, Spencer S. Hsu & Ellen Nakashima, *Ex-NSA Official Accused of Leaks*, *Wash. Post*, Apr. 16, 2010, at A1.

The National Security Agency developed a pilot program in the late 1990s that would have enabled it to gather and analyze huge amounts of communications data without running afoul of privacy laws. But after the Sept. 11 attacks, it shelved the project—not because it failed to work but because of bureaucratic infighting and a sudden White House expansion of the agency’s surveillance powers, according to several intelligence officials.

Siobhan Gorman, *NSA Rejected System That Sifted Phone Data Legally*, *Balt. Sun*, May 18, 2006, at 1A; see also Siobhan Gorman, *System Error*, *Balt. Sun*, Jan. 29, 2006, at 1A (“A program that was supposed to help the National Security Agency pluck out electronic data crucial to the nation’s safety is not up and running more than six years and \$1.2 billion after it was launched, according to current and former government officials.”). “[T]he agency was rejecting a \$3 million in-house program called ThinThread in favor of a \$1-billion-plus contractor-run program called Trailblazer.” Schott Shane, *Ex-N.S.A. Official Gets Plea Deal; Setback for U.S.*, *N.Y. Times*, June 10, 2011, at A1.

drugs infested the school, Drake became a police informant.²⁵⁰⁰ He enlisted in the Air Force in 1979; he served in the Air Force and Navy Reserve for fifteen years.²⁵⁰¹

Drake's first day of work as a civilian employee at the NSA was September 11, 2001.²⁵⁰² Twelve years before that, he worked as an NSA contractor, testing and improving the agency's computer software.²⁵⁰³

As part of an investigation of leaks that led to a December 16, 2005, *New York Times* report that the NSA had conducted warrantless wiretaps of international communications with people in the United States,²⁵⁰⁴ the government searched Drake's home on November 28, 2007.²⁵⁰⁵ After spending \$82,000 on legal fees and taking out a second mortgage on his house, he qualified for indigent representation.²⁵⁰⁶

News media observed that the prosecution of Drake was one of five, so far, by the Obama administration for leaking government secrets, more than all previous administrations combined.²⁵⁰⁷ Drake was charged with taking classified information home, not with leaking it to the news media.²⁵⁰⁸

After Judge Bennett and the parties determined what evidence based on classified and otherwise protected information would be presented at trial, the parties agreed to a plea bargain.²⁵⁰⁹ Drake pleaded guilty to a misdemeanor information

2500. Mayer, *supra* note 2498, at 51.

2501. See Tricia Bishop, *No Jail Time for Ex-NSA Official*, *Balt. Sun*, July 16, 2011, at 1A; Schott Shane, *No Jail Time in Trial Over N.S.A. Leak*, *N.Y. Times*, July 16, 2011, at A13.

2502. See *60 Minutes: U.S. v. Whistleblower Tom Drake* (CBS television broadcast May 22, 2011) [hereinafter *Whistleblower*], available at www.cbsnews.com/videos/us-v-whistleblower-tom-drake/; Gurnow, *supra* note 2496, at 25; Mayer, *supra* note 2498, at 47–49; *Silenced* (Morninglight Films 2014); Emily Wax, *Life After the Whistle*, *Wash. Post*, July 29, 2013, at C1.

2503. See Mayer, *supra* note 2498, at 49.

2504. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y. Times*, Dec. 16, 2005, at A1; see *infra* “Warrantless Wiretaps.”

2505. See *Frontline: United States of Secrets (Part One)* (PBS television broadcast May 13, 2014), available at www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/; Mayer, *supra* note 2498, at 56; see also Jesselyn Radack, *Traitor: The Whistleblower and the “American Taliban”* 152 (2012) (“Drake was *not* one of the *Times*'s sources and was never charged with being one of the *Times*'s sources.”).

2506. See Shane, *supra* note 2501.

2507. Bishop, *supra* note 2501; Mayer, *supra* note 2498, at 47 (“The Drake case is one of two that Obama's Justice Department has carried over from the Bush years.”); Greg Miller, *Former CIA Officer Accused of Leaking Information About Iran*, *Wash. Post*, Jan. 7, 2011, at A3; Shane, *supra* note 2499 (“three or four in history, depending on how they are counted, and never more than one under any other president”).

2508. Indictment, *supra* note 2496; *Whistleblower*, *supra* note 2502.

2509. Plea Agreement, *United States v. Drake*, No. 1:10-cr-181 (D. Md. June 10, 2011), D.E. 158; see Tricia Bishop, *Charges Dropped in NSA Leak Case*, *Balt. Sun*, June 10, 2011, at 1A (“Prosecutors apparently sought to reword classified documents that were deemed too sensitive to be introduced as evidence.”); Ellen Nakashima & Jerry Markon, *NSA Leak Trial Exposes Dilemma for Prosecutors*, *Wash. Post*, June 11, 2011, at A4 (“a federal judge ruled that the prosecution could not shield from public disclosure classified information it wanted to present as evidence”); Dana Priest

charging him with intentionally exceeding the authorized use of NSA computers.²⁵¹⁰

Judge Bennett sentenced Drake on July 15 to one year of probation and 240 hours of community service.²⁵¹¹ At the sentencing hearing, Judge Bennett expressed his disapproval of the government's bringing the case:

What kind of message is sent by the government when the government dismisses a ten count indictment a year after indictment, on the eve of trial, after days and days of hearings under the Classified Information Procedures Act, and in what I find to be an extraordinary position taken by the government, probably unprecedented in this courthouse, for a case of this profile, literally on a Thursday afternoon before a Monday trial, subject to the government to be prepared as you will in a moment to dismiss the entire ten count indictment and allow the defendant to plead guilty to a misdemeanor?²⁵¹²

Challenge: Classified Evidence

For this case, Judge Bennett's two law clerks and his court reporter obtained security clearances.²⁵¹³ The court established in the courthouse two sensitive compartmented information facilities (SCIFs) where classified information was stored: one was for the court's use, and the other was for the defense.²⁵¹⁴ The defense worked with classified materials in its SCIF.²⁵¹⁵ Very early in the case, on June 29, 2010, Judge Bennett issued a protective order specifying how classified discovery would be handled.²⁵¹⁶

& William M. Arkin, *Top Secret America* xxi (2011) ("the government was forced to offer Drake a deal because its lawyers said they did not want to reveal classified information related to the case in court"); Shane, *supra* note 2499 ("Judge Bennett ruled last week that the government would have to show some of the allegedly classified material to the jury").

Another possible factor in the parties' calculation was the extent to which the defendant could show that alleged leaks had otherwise been publicly disclosed. Interview with Hon. Richard D. Bennett, Sept. 26, 2013.

2510. Information, *Drake*, No. 1:10-cr-181 (D. Md. June 10, 2011), D.E. 157; Sentencing Transcript at 2, *id.* (July 15, 2011, filed July 28, 2011), D.E. 173; see Tricia Bishop, *NSA Espionage Case Closes Quietly*, Balt. Sun, June 11, 2011, at 2A; *Ex-Official for N.S.A. Accepts Deal in Leak Case*, N.Y. Times, June 11, 2011, at A14.

2511. Judgment, *Drake*, No. 1:10-cr-181 (D. Md. July 15, 2011), D.E. 169; see Bishop, *supra* note 2501; Shane, *supra* note 2501.

2512. Sentencing Transcript, *supra* note 2510, at 18; see Ellen Nakashima, *Judge Slams Prosecutors' Handling of Leak Suspect*, Wash. Post, July 30, 2011, at A2.

2513. Interview with Hon. Richard D. Bennett, Sept. 26, 2013.

2514. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2013; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23* (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2515. Interview with Hon. Richard D. Bennett, Sept. 26, 2013; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2013.

2516. Protective Order, *Drake*, No. 1:10-cr-181 (D. Md. June 29, 2010), D.E. 18.

From July 2010 through May 2011, there was at least one status conference or status report docketed each month, except for the month of January 2011.²⁵¹⁷ During the last three months, there were three status conferences each month.²⁵¹⁸ Most of the status conferences were conducted over the telephone.²⁵¹⁹ Judge Bennett holds status conferences frequently in order to keep his thumb on the pulse of the case.²⁵²⁰

On April 13, 2011, Judge Bennett held constitutional a requirement by the Classified Information Procedures Act (CIPA) that a defendant give the government and the court advance notice of any intent to use classified information at trial.²⁵²¹

On April 8, 2011, Mr. Drake filed his Section 5 notice of the classified information he expected to rely upon at trial. On April 25, 2011, the Government provided Defendant with a binder containing both classified and unclassified exhibits that it intended to introduce at trial. The Government's exhibits contained numerous handwritten annotations by its classification expert . . . indicating which portions of the proposed exhibits were classified and which were unclassified.²⁵²²

On June 1, Judge Bennett ruled admissible various pieces of classified defense evidence, noting that the government could produce suitable "substitutions where appropriate."²⁵²³ Judge Bennett determined that the government could propose substitutions for both classified evidence and unclassified evidence that nonetheless included privileged secrets.²⁵²⁴ A June 7 "Order Regarding Admissibility of Substitutions for Classified Information" was filed with the classified information security officer, and its cover sheet, including only the filing's header and title, was filed on the public record.²⁵²⁵

After the case was over, the room established as a defense SCIF no longer needed to remain a SCIF, but the court SCIF was kept in operation, and it can be used by circuit judges whose chambers are in Baltimore.²⁵²⁶

2517. Docket Sheet, *supra* note 2497.

2518. *Id.*

2519. *Id.*

2520. Interview with Hon. Richard D. Bennett, Sept. 26, 2013.

For example, one of Judge Bennett's rules of case management is that parties should not file discovery motions without letting him know in advance in case the matter can be resolved more efficiently than through formal motions. *Id.*

2521. *United States v. Drake*, 818 F. Supp. 2d 909, 912–15 (D. Md. 2011); *see* CIPA, 18 U.S.C. app. 3 § 5 (2013); *see also* Reagan, *supra* note 2514, at 11.

2522. CIPA Opinion at 3, *United States v. Drake*, No. 1:10-cr-181 (D. Md. June 2, 2011), D.E. 129, *available at* 2011 WL 2175007.

2523. Order, *id.* (June 1, 2011), D.E. 128.

2524. CIPA Opinion, *supra* note 2522.

2525. Order, *Drake*, No. 1:10-cr-181 (D. Md. June 7, 2011), D.E. 140; *see* Reagan, *supra* note 2514, at 21–22 (providing information about classified information security officers).

2526. Interview with Hon. Richard D. Bennett, Sept. 26, 2013; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2013.

Challenge: Closed Proceedings

Pursuant to section 6 of CIPA, Judge Bennett held closed hearings with the parties to determine how classified information would be presented at trial.²⁵²⁷ The essential task was to determine what substitutions for classified information would “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”²⁵²⁸

Classified materials were brought from the SCIF to the closed courtroom.²⁵²⁹ Only persons with security clearances were present.²⁵³⁰ The proceedings were recorded by the cleared court reporter, but a transcript was never prepared; the case was never appealed.²⁵³¹ For each of many pieces of information over which there was a disagreement about what could be presented at trial, Judge Bennett presided over arguments about what would suffice as a substitution.²⁵³² To mitigate fatigue, two attorneys on each side took turns, but Judge Bennett presided over each individual dispute and issued rulings from the bench.²⁵³³

2527. *Id.*; see 18 U.S.C. app. 3 § 6 (2013); see also Reagan, *supra* note 2514, at 12–19.

2528. § 6(c)(1).

2529. Interview with Hon. Richard D. Bennett, Sept. 26, 2013.

2530. *Id.*

2531. *Id.*

2532. *Id.*

2533. *Id.*

OTHER CRIMINAL CASES

The Classified Information Procedures Act was enacted in response to what was sometimes called graymail efforts by defendants in criminal cases during the Cold War who claimed governmental authorization for their crimes and threatened to reveal state secrets as part of their defense.

Cases of those type are not as common now, but two case studies follow that bear some similarity to the Cold War prosecutions.

“Interrogation Death in Afghanistan” is a prosecution of a CIA contractor who was prosecuted for interrogating a suspect to death. Among the challenges the case presented to the court were handling classified information and protecting a witness’s identity.

“Castro Foe” describes the perjury prosecution of a man who once worked for the CIA and became wanted in Cuba and Venezuela for violent crimes. This case also required the court to meet the challenges of classified information and witness security against the backdrop of some accusations that the United States was harboring a terrorist.

Interrogation Death in Afghanistan²⁵³⁴

United States v. Passaro (Terrence W. Boyle, E.D.N.C.)

On June 21, 2003, Abdul Wali was found dead in his cell at the American-controlled Asadabad Firebase in the Kunar province of Afghanistan.²⁵³⁵ On August 17, 2006, an Eastern District of North Carolina jury found David Passaro guilty of assault in connection with Wali's death.²⁵³⁶

Passaro was born in South Carolina; while he was very young, the family moved to Connecticut.²⁵³⁷ In 1991, he was convicted of misdemeanor assault in a bar fight; the Hartford, Connecticut, police department fired him for the assault shortly after his graduation from the police academy.²⁵³⁸

Later, Passaro worked as a medic for the U.S. Army's special forces at Fort Bragg in Fayetteville, North Carolina.²⁵³⁹ From December 2002, he was on leave as a paramilitary contractor for the CIA.²⁵⁴⁰ In May 2003, he arrived in Asadabad.²⁵⁴¹ On June 19, he was assigned the task of interrogating Wali.²⁵⁴² The interrogation was brutal, and it lasted for two days, the remainder of Wali's life.²⁵⁴³

2534. Margaret S. Williams collaborated on the research for this case study.

2535. *United States v. Passaro*, 577 F.3d 207, 210–12 (4th Cir. 2009); Jurisdictional Order at 3, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 12, 2005), D.E. 129; see Said Hyder Akbar, *Come Back to Afghanistan* 194 (2005); John Hendren & Mark Mazzetti, *U.S. Charges Contractor Over Beating of Afghan Detainee*, L.A. Times, June 18, 2004, at 6; Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, Wash. Post, June 18, 2004, at A1; *This American Life: Come Back to Afghanistan* (PRI radio broadcast Jan. 31, 2003), available at www.thisamericanlife.org/radio-archives/episode/230/come-back-to-afghanistan; *This American Life: Teenage Embed, Part Two* (PRI radio broadcast Dec. 12, 2003), available at www.thisamericanlife.org/radio-archives/episode/254/teenage-embed-part-two.

2536. *Passaro*, 577 F.3d at 212; see Julian E. Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. Times, Aug. 18, 2006, at 18; Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. Times, Aug. 18, 2006, at 8; Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, Raleigh News & Observer, Aug. 18, 2006, at A1.

2537. See Jennifer Brevorka, *CIA Contractor Had Other Faults*, Raleigh News & Observer, June 20, 2004, at A1.

2538. See *id.*; James Dao, *A Man of Violence, or Just "110 Percent" Gung-Ho?*, N.Y. Times, June 19, 2004, at 6; Craig Jarvis & Kristin Collins, *N.C. Man Charged in Afghan Case*, Raleigh News & Observer, June 18, 2004, at A1; Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, N.Y. Times, June 18, 2004, at 1.

2539. *Passaro*, 577 F.3d at 211; see Akbar, *supra* note 2535, at 261 ("a former Army Ranger"); Jarvis & Collins, *supra* note 2538; Oppel & Hart, *supra* note 2538.

2540. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Nov. 12, 2004), D.E. 50; Oppel & Hart, *supra* note 2538; Estes Thompson, *Former CIA Contractor to Be Jailed Until Trial in Afghan Prisoner Assault*, Wash. Post, June 26, 2004, at A17.

2541. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *supra* note 2540.

2542. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2535, at 2–3.

2543. *Passaro*, 577 F.3d at 211–12; Jurisdictional Order, *supra* note 2535, at 2–3; see Hendren & Mazzetti, *supra* note 2535.

Other Criminal Cases: Interrogation Death in Afghanistan

Wali was being detained as a suspected orchestrator of rocket attacks on the base.²⁵⁴⁴ He was a well-known commander in fighting against the Soviet army.²⁵⁴⁵ On June 18, he voluntarily presented himself for questioning.²⁵⁴⁶ Sayed Fazl Akbar, governor of the province, arranged the visit, and Said Hyder Akbar, the governor's son, who had grown up in northern California, accompanied Wali as an interpreter.²⁵⁴⁷

Passaro returned to North Carolina in July.²⁵⁴⁸ Nearly a year later, on June 17, 2004, the government indicted him for assault.²⁵⁴⁹ Attorney General John D. Ashcroft announced the indictment at a news conference in Washington.²⁵⁵⁰

Passaro was not charged with homicide, because Wali's family refused to allow an autopsy, so the precise cause of Wali's death could not be proved.²⁵⁵¹ Passaro was arrested at Fort Bragg and detained upon his indictment.²⁵⁵²

This was the first exercise of the government's extraterritorial jurisdiction under the USA PATRIOT Act.²⁵⁵³ The Asadabad Firebase was a mud compound

2544. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2535, at 2–3; *see Akbar*, *supra* note 2535, at 185.

2545. *See Dao*, *supra* note 2538.

2546. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2535, at 2; *see Akbar*, *supra* note 2535, at 186–93, 328 (reporting that “Abdul Wali had come to clear his name, not to admit to any wrongdoing”); Hendren & Mazzetti, *supra* note 2535; Opper & Hart, *supra* note 2538.

2547. *See Akbar*, *supra* note 2535, at 186–93; Dao, *supra* note 2538; Matthew Easley, *Young Afghan Adds Chapter to Striking Story*, Raleigh News & Observer, Aug. 10, 2006, at A1 (“Hyder Akbar was born in Afghanistan, but his ruling-class family fled to California when he was too young to remember. He grew up the youngest of four children in Oakland, where his father, Said Fazel Akbar, owned a hip-hop clothing store.”); Schmidt & Priest, *supra* note 2535 (reporting that the governor “had returned to his native Kunar province to become the governor there after the fall of the Taliban”); *Come Back to Afghanistan*, *supra* note 2535; *Teenage Embed, Part Two*, *supra* note 2535.

On June 18, 2003, Abdul Wali visited my father's office. He knew that the Americans wanted to question him about some recent rocket attacks. He told us he was innocent, and he said he was terrified of going to the U.S. base, because there were pervasive rumors that prisoners were tortured there. My father told him that he needed to go, and he sent me along to reassure him.

Hyder Akbar, *Interrogation Unbound*, N.Y. Times, July 11, 2004, at 17 (reflections by the governor's son).

2548. *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2535, at 3.

2549. Docket Sheet, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. June 17, 2004); *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2535, at 3; *see Brevorka*, *supra* note 2537; Hendren & Mazzetti, *supra* note 2535; Jarvis & Collins, *supra* note 2538; Opper & Hart, *supra* note 2538; Schmidt & Priest, *supra* note 2535.

2550. *See Hendren & Mazzetti*, *supra* note 2535; Opper & Hart, *supra* note 2538; Schmidt & Priest, *supra* note 2535.

2551. *Passaro*, 577 F.3d at 212 n.1; Interview with Hon. Terrence W. Boyle, Mar. 6, 2012 (noting the cultural norm of rapid internment); *see Akbar*, *supra* note 2535, at 197, 258, 261 (Wali's father “would not permit an autopsy. To do so would break Islamic law.”); Schmidt & Priest, *supra* note 2535; Shane, *supra* note 2536.

2552. Docket Sheet, *supra* note 2549; *see Akbar*, *supra* note 2535, at 260; Brevorka, *supra* note 2537; Hendren & Mazzetti, *supra* note 2535; Jarvis & Collins, *supra* note 2538; Opper & Hart, *supra* note 2538; Schmidt & Priest, *supra* note 2535.

constructed by the Soviet Union,²⁵⁵⁴ but it was U.S. soil for jurisdictional purposes.²⁵⁵⁵

The court assigned the case to Judge Terrence W. Boyle.²⁵⁵⁶ On June 25, after a detention hearing, Magistrate Judge William Arthur Webb ordered that Passaro remain detained.²⁵⁵⁷ In August, Judge Boyle released Passaro with electronic monitoring and a curfew.²⁵⁵⁸ Detention resumed in June 2005 after Passaro was arrested for assaulting his girlfriend.²⁵⁵⁹ Judge Boyle released him again in March 2006, so that he could more effectively assist his attorneys with his defense.²⁵⁶⁰ After he

2553. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; see 18 U.S.C. § 7(9) (2013) (extending U.S. criminal jurisdiction to acts by or against U.S. citizens in places controlled by the U.S. government), enacted by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377; see also Gregory P. Bailey, Note, *United States v. Passaro: Exercising Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States*, 58 Cath. U. L. Rev. 1143 (2009); Craig Jarvis, *Secrecy Act Might Affect Passaro Case*, Raleigh News & Observer, July 10, 2004, at A1; Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 Stan. J. C.R. & C.L. 365, 375 (2006); Andrea Weigl, *Patriot Act's Reach Questioned*, Raleigh News & Observer, July 21, 2005, at B1.

2554. Jurisdictional Order, *supra* note 2535, at 2 & n.1 (“Asadabad is a small agricultural town in the eastern mountains of Afghanistan which is probably most famous for being the birthplace of jihad against the Soviets in the late 1970’s.”)

2555. *Passaro*, 577 F.3d at 212–19; Jurisdictional Order, *supra* note 2535, at 5–8; see Andrea Weigl, *Passaro's Dismissal Try Rejected*, Raleigh News & Observer, Aug. 13, 2005, at B5.

2556. Docket Sheet, *supra* note 2549.

Tim Reagan interviewed Judge Boyle for this report in the judge’s Raleigh chambers on March 6, 2012.

2557. Docket Sheet, *supra* note 2549; Detention Order, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. Mar. 14, 2006), D.E. 199; see *C.I.A. Contractor to Be Held Til Trial*, N.Y. Times, June 26, 2004, at 11; Craig Jarvis, *Passaro Will Await Trial in Jail*, Raleigh News & Observer, June 26, 2004, at A1; Thompson, *supra* note 2540.

2558. Docket Sheet, *supra* note 2549; Detention Order, *supra* note 2557; see Barbara Barrett, *Passaro Released from Jail*, Raleigh News & Observer, Aug. 28, 2004, at B1; *Fatal Beating Case*, N.Y. Times, Aug. 28, 2004, at 9.

2559. Docket Sheet, *supra* note 2549; Detention Order, *supra* note 2557; see Government Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. June 2, 2005), D.E. 112 (citing a sheriff’s report alleging that Passaro grabbed his girlfriend “by the shoulder, pushed and grabbed her again, forcing her into a door and out the front door, leaving scratches and marks on her left knee,” damaged her cell phone, and stole her ruby ring); see also *Case of Ex-C.I.A. Contractor*, N.Y. Times, June 9, 2005, at 20; Sarah Ovaska, *Abuse Suspect Back in Custody*, Raleigh News & Observer, June 3, 2005, at A1.

Before Passaro was detained again, he also was reported to have acted as a good Samaritan by rescuing the driver of a dump truck that overturned on the shoulder of highway 421. See *Suspect in Beating Helps Rescue Driver*, Raleigh News & Observer, Mar. 31, 2005.

2560. Detention Order, *supra* note 2557; see Andrea Weigl, *Passaro Gets Release to Prepare for Trial*, Raleigh News & Observer, Mar. 16, 2006, at B5.

was involved in a traffic accident later that month without permission to be away from home, he was detained again.²⁵⁶¹

On November 12, 2004, Passaro filed a notice that he would rely on a “public authority defense.”²⁵⁶² On January 31, 2006, Judge Boyle denied the government’s motion to exclude the defense.²⁵⁶³

Jury selection began on Monday, August 7, 2006.²⁵⁶⁴ Evidence concluded on Wednesday of the following week, and the jury reached its guilty verdict on Thursday.²⁵⁶⁵ On February 13, 2007, Judge Boyle sentenced Passaro to eight years and four months in prison.²⁵⁶⁶

On August 10, 2009, the court of appeals affirmed the conviction, but remanded for resentencing because of an error in applying sentencing guidelines.²⁵⁶⁷ Judge Boyle sentenced Passaro to six years and eight months on April 6, 2010.²⁵⁶⁸ He was released on January 26, 2011.²⁵⁶⁹

Challenge: Classified Evidence

A large amount of classified information was at issue in this case.²⁵⁷⁰ There were ninety-five classified docket entries,²⁵⁷¹ out of approximately 300 total.²⁵⁷² Before this case, the federal court in the Eastern District of North Carolina had little to no experience handling classified information.²⁵⁷³ Judge Boyle’s courtroom deputy and one of his law clerks obtained security clearances.²⁵⁷⁴ The defense team also

2561. Docket Sheet, *supra* note 2549; see Detention Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 5, 2006), D.E. 207; see also Andrea Weigl, *Judge Sends Passaro Back to Jail*, Raleigh News & Observer, Apr. 12, 2006, at B1; Andrea Weigl, *Passaro Returns to Wake Jail*, Raleigh News & Observer, Apr. 6, 2006, at B5.

2562. Public Authority Defense Notice, *supra* note 2540; see *United States v. Passaro*, 577 F.3d 207, 220–21 (4th Cir. 2009); see Shane, *supra* note 2536.

2563. Order, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Feb. 1, 2006), D.E. 184; see Andrea Weigl, *Passaro Can Claim He Was Doing His Job*, Raleigh, News & Observer, Feb. 3, 2006, at B5.

2564. Docket Sheet, *supra* note 2549.

2565. Jury Verdict, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 17, 2006), D.E. 259.

2566. Judgment, *id.* (Feb. 13, 2007), D.E. 268; *Passaro*, 577 F.3d at 212; see *C.I.A. Contractor Is Sentenced*, N.Y. Times, Feb. 14, 2007, at 20; Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, Raleigh News & Observer, Feb. 14, 2007, at B1.

2567. *Passaro*, 577 F.3d at 211, 223.

2568. Amended Judgment, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 6, 2010), D.E. 308; see Mandy Locke, *Passaro’s Sentence Is Cut*, Raleigh News & Observer, Apr. 7, 2010, at B; *Term Is Cut in Detainee Abuse Case*, L.A. Times, Apr. 7, 2010, at 17; see also Spencer Ackerman, *CIA Apologises After Admitting It Spied on Senate*, Guardian (London), Aug. 1, 2014, at 27 (“Only one man, a former CIA Contractor named David Passaro, has gone to jail in connection to the CIA’s post-9/11 torture.”).

2569. www.bop.gov (reg. no. 24708-056).

2570. Interview with Dep’t of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2571. *Id.*

2572. Docket Sheet, *supra* note 2549.

2573. Interview with Dep’t of Justice Litig. Sec. Group Staff, Mar. 29, 2011; see Jarvis, *supra* note 2553.

2574. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep’t of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

received security clearances.²⁵⁷⁵ Two sensitive compartmented information facilities (SCIFs) were constructed in the Raleigh federal building—one for the court and one for the U.S. Attorney.²⁵⁷⁶

The defendant himself had access to most classified evidence, which he reviewed in the SCIF.²⁵⁷⁷ After his arrest for assaulting his girlfriend, he was on twenty-four-hour video monitoring, even when in the SCIF.²⁵⁷⁸

On one occasion, the government presented classified information ex parte to Judge Boyle for in camera review, and Judge Boyle determined that the information was not material to Passaro's defense.²⁵⁷⁹ Judge Boyle granted the government a protective order in July 2005.²⁵⁸⁰ The order was not filed, but it was delivered to the classified information security officer for service on the defendant.²⁵⁸¹ Judge Boyle denied Passaro's request for additional information about the information he determined was not discoverable.²⁵⁸² He granted, however, Passaro's request that the order be included in the public record,²⁵⁸³ but it still does not appear to be available on PACER.²⁵⁸⁴

Challenge: Classified Arguments

Passaro's public-authority-defense notice was initially filed under seal,²⁵⁸⁵ but a redacted copy was later filed unsealed.²⁵⁸⁶ On April 12, 2005, Judge Boyle ordered that this and several other documents be redacted of their classified contents and unsealed.²⁵⁸⁷

The appellate briefs included some classified matters, and the court of appeals for the Fourth Circuit was experienced in handling classified briefs.²⁵⁸⁸

2575. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2576. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011; see Craig Jarvis, *Judge Shields Records*, Raleigh News & Observer, July 22, 2004, at B4; Andrea Weigl, *Room Designed to Keep Secrets*, Raleigh News & Observer, Mar. 29, 2005, at B1; see also Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23* (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2577. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2578. *Id.*

2579. Denial of Protective Order Reconsideration, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. Sept. 14, 2005), D.E. 134; Government Response, *id.* (Sept. 2, 2005), D.E. 132.

2580. Denial of Protective Order Reconsideration, *supra* note 2579.

2581. Motion, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 18, 2005), D.E. 130 (noting service on August 5, 2005); see Reagan, *supra* note 2576, at 21–22 (providing information about classified information security officers).

2582. Denial of Protective Order Reconsideration, *supra* note 2579.

2583. *Id.* at 2 n.1.

2584. Docket Sheet, *supra* note 2549 (D.E. 138).

2585. *Id.* (D.E. 50).

2586. Authority Defense Notice, *supra* note 2540.

2587. Docket Sheet, *supra* note 2549; see Andrea Weigl, *Court Unseals Passaro Papers*, Raleigh News & Observer, Apr. 13, 2005, at B1.

2588. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

Challenge: Subpoenaing Senior Government Officials

Passaro sought testimony from a large number of senior government officials: Attorney General Alberto Gonzales; former CIA director George J. Tenet; David Addington, counsel to the Vice President; and former attorneys from President Bush's Office of Legal Counsel, Judge Jay Bybee and Professor John Yoo.²⁵⁸⁹ Judge Boyle quashed the subpoenas.²⁵⁹⁰ Judge Boyle, however, permitted Passaro to depose six witnesses whose identities are classified.²⁵⁹¹

Challenge: Witness Security

Hyder Akbar, the Kunar governor's son who interpreted Wali's interrogation, testified openly at trial.²⁵⁹² Another interpreter, however, testified from behind a curtain.²⁵⁹³ His identity was kept secret because no one in Afghanistan knew that he worked for the United States.²⁵⁹⁴ He was screened from the public, but not from the defendant or the jury.²⁵⁹⁵ At first, the curtain was positioned so that nothing was in view of the public—not the witness, not the jury, not even the judge.²⁵⁹⁶ Judge Boyle had the curtain adjusted so that only the witness was screened.²⁵⁹⁷

Ten CIA trial witnesses were protected by light disguise.²⁵⁹⁸ They all sported the same look—wig, glasses, and moustache—and testified under pseudonyms.²⁵⁹⁹

Challenge: Closed Proceeding

For oral arguments on Passaro's appeal, the court prepared for a bifurcated proceeding in which closed arguments concerning classified information would follow open arguments.²⁶⁰⁰ It turned out that a closed session was not needed.²⁶⁰¹

2589. See Weigl, *supra* note 2587.

2590. See Andrea Weigl, *Afghan's Deadly Beating Detailed*, Raleigh News & Observer, Aug. 8, 2006, at A1.

2591. See *C.I.A. Contractor Goes to Trial in Abuse Case*, N.Y. Times, Aug. 8, 2006, at A14.

2592. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2593. *Id.*

2594. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012.

2595. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2596. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012.

2597. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2598. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011; see Shane, *supra* note 2536.

2599. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011, and May 8, 2012; see Andrea Weigl & Matthew Easley, *Agents Give Trial Air of Mystery*, Raleigh News & Observer, Aug. 9, 2006, at B1.

2600. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2601. *Id.*, May 8, 2012.

Castro Foe²⁶⁰²

United States v. Posada Carriles (Kathleen Cardone, W.D. Tex.)

Luis Posada Carriles left Cuba for the United States in 1960,²⁶⁰³ and he was reportedly trained by the CIA to participate in the 1961 Bay of Pigs invasion.²⁶⁰⁴ He was convicted in Panama in a prosecution related to a 2000 attempt to assassinate Castro.²⁶⁰⁵ In 2004, he was pardoned by Panama's outgoing President Mireya Moscoso.²⁶⁰⁶ Her successor criticized the pardon: "For me, there are not two classes of terrorism, one that is condemned and another that is pardoned."²⁶⁰⁷ In

2602. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

2603. *United States v. Posada Carriles*, 541 F.3d 344, 347 (5th Cir. 2008); *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007).

2604. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation at 3, *Posada-Carriles v. Campos*, No. 3:06-cv-130 (W.D. Tex. Sept. 11, 2006), D.E. 26; see *Cuban Exile Linked to Contras*, N.Y. Times, Oct. 22, 1986, at A1 [hereinafter *Cuban Exile*]; *Jury Clears Cuban Exile of Charges That He Lied to U.S.*, N.Y. Times, Apr. 9, 2011, at A16 [hereinafter *Jury Clears Cuban Exile*]; James C. McKinley, Jr., *Terror Accusations, but Perjury Charges*, N.Y. Times, Jan. 10, 2011, at A9; Joseph B. Treaster, *Accused Terrorist Helping to Supply the Contras*, N.Y. Times, Dec. 10, 1986, at A21; Tim Weiner, *Case of Cuban Exile Could Test the U.S. Definition of Terrorist*, N.Y. Times, May 9, 2005, at A1; Tim Weiner & Maria Herrera, *Cuban Exile Is Charged with Illegal Entry*, N.Y. Times, May 20, 2005, at A14.

2605. *United States v. Carriles*, 486 F. Supp. 2d 599, 601, 602, 604, 614, 619 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344; Report and Recommendation, *supra* note 2604, at 5; see Oscar Corral & Alfonso Chardy, *3 Lawmakers Sought Freedom for Posada and Then Fell Silent*, Miami Herald, July 3, 2005, at 6A (reporting that Posada Carriles was convicted on lesser charges on April 20, 2004); Elaine de Valle, *Panama Sentences Dismay Miami Exiles*, Apr. 22, 2004, at 14A; Abby Goodnough, Tim Weiner & Terry Aguayo, *U.S. Arrests Cuban Exile Accused in Deadly '76 Airline Bombing*, N.Y. Times, May 18, 2005, at A1; *Jury Clears Cuban Exile*, *supra* note 2604; McKinley, *supra* note 2604; *Panama Detains 4 After Castro Charges Plot to Kill Him*, N.Y. Times, Nov. 19, 2000, at 113; Frances Robles & Glenn Carvin, *4 Held in Plot Against Castro*, Miami Herald, Nov. 19, 2000, at 1A (reporting that Posada Carriles and three others were detained at Castro's request); Glenn Garvin, *Exile Says Aim Was Castro Hit*, Miami Herald, Jan. 13, 2001, at 1A (reporting that Posada Carriles called off the assassination attempt); Weiner, *supra* note 2604.

2606. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2604, at 5; see *4 Anti-Castro Cubans Pardoned*, N.Y. Times, Aug. 27, 2004, at A6; Goodnough et al., *supra* note 2605; *Jury Clears Cuban Exile*, *supra* note 2604; Marc Lacey, *Castro Foe with C.I.A. Ties Puts U.S. in an Awkward Spot*, N.Y. Times, Oct. 8, 2006, at 114; McKinley, *supra* note 2604; Weiner, *supra* note 2604; Weiner & Herrera, *supra* note 2604; see also Corral & Chardy, *supra* note 2605 (reporting that three Cuban-American members of Congress lobbied the Panamanian government to pardon Posada Carriles).

2607. See Weiner, *supra* note 2604.

Other Criminal Cases: Castro Foe

March 2005, he sneaked into the United States, seeking asylum.²⁶⁰⁸ On May 17, he was scheduled to have a naturalization interview, but he withdrew his asylum application and held a press conference at a secret location in Miami instead.²⁶⁰⁹ Later that afternoon, the Department of Homeland Security's Immigration and Customs Enforcement took him into custody.²⁶¹⁰ He was transported from Miami to El Paso.²⁶¹¹ On May 19, he was charged with illegal entry.²⁶¹² On January 11, 2007, the government filed an illegal immigration indictment in the Western District of Texas.²⁶¹³ The court assigned the case to Judge Kathleen Cardone.²⁶¹⁴

Posada Carriles was born on February 15, 1928, in Cienfuegos, Cuba.²⁶¹⁵ When he was seventeen, his family moved to Havana, where he enrolled in the University of Havana.²⁶¹⁶ Fidel Castro, who took control of Cuba on January 1, 1959, was a law student at the University, three years ahead of Posada Carriles.²⁶¹⁷

In the 1960s, Posada Carriles served in the U.S. Army, and he was honorably discharged in March 1964.²⁶¹⁸ Unclassified records showed that he had a working relationship with the CIA from 1965 until 1974, but he claimed that he worked with the CIA into the 1980s.²⁶¹⁹

In 1967, the CIA helped Posada Carriles get a job with Venezuela's intelligence service, and he came to direct counter-insurgency operations.²⁶²⁰ Upon the election in Venezuela of Carlos Andres Perez as president in 1974, Posada Carriles left the intelligence service to start his own private security agency.²⁶²¹

2608. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Corral & Chardy, *supra* note 2605; *Jury Clears Cuban Exile*, *supra* note 2604; Weiner, *supra* note 2604; Weiner & Herrera, *supra* note 2604.

2609. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Goodnough et al., *supra* note 2605.

2610. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; Report and Recommendation, *supra* note 2604, at 1, 5; see Goodnough et al., *supra* note 2605.

2611. See Weiner & Herrera, *supra* note 2604.

2612. See *id.*

2613. Indictment, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007), D.E. 1; *Posada Carriles*, 541 F.3d at 350; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Alfonso Chardy, Jay Weaver & Oscar Corral, *Cuban Exile Militant, 2 Allies Indicted*, Miami Herald, Jan. 12, 2007, at 1A.

2614. Criminal Docket Sheet, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007).

Tim Reagan interviewed Judge Cardone for this report in the judge's chambers on April 2, 2012.

2615. Report and Recommendation, *supra* note 2604, at 3; see Ann Louise Bardach & Larry Rohter, *Decades of Intrigue*, N.Y. Times, July 13, 1998, at A1.

2616. See Bardach & Rohter, *supra* note 2615.

2617. See *id.*

2618. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2604, at 3.

2619. *Posada Carriles*, 541 F.3d at 347.

2620. *Id.* at 347; see McKinley, *supra* note 2604; Weiner, *supra* note 2604.

2621. See McKinley, *supra* note 2604; Weiner, *supra* note 2604.

An October 6, 1976, bombing of a Cubana Aerolineas airplane killed all 73 persons on board.²⁶²² The flight originated in Georgetown, Guyana; two men who boarded the plane in Port-of-Spain, Trinidad, got off in Barbados before the plane continued to Havana, leaving explosives on board in a tube of toothpaste and a camera bag.²⁶²³ Posada Carriles was arrested in Venezuela for suspected involvement with the bombing.²⁶²⁴ In Cuba, he was tried in absentia and sentenced to death.²⁶²⁵ In August 1985, he escaped from detention in Venezuela by bribing a guard and walking out disguised as a priest.²⁶²⁶ He is still wanted for trial there.²⁶²⁷

In El Salvador, Posada Carriles provided support to the Contras, who were opposing the government of Nicaragua.²⁶²⁸ In 1989, he moved to Guatemala, where he was seriously injured in an apparent attempt to assassinate him in 1990.²⁶²⁹ He lived in other Central American countries throughout the 1990s.²⁶³⁰

2622. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2604, at 3; see Merrill Collett, *Bosch Ruled Not Guilty in Bombing*, Miami Herald, July 22, 1986, at 1A; Lacey, *supra* note 2606; McKinley, *supra* note 2604; Simon Romero, '76 Bomb Resonates with Diplomats, Not with the Bomber, N.Y. Times, Feb. 3, 2007, at A4.

2623. See Collett, *supra* note 2622; Lacey, *supra* note 2606; Romero, *supra* note 2622.

2624. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2604, at 3–4; see Collett, *supra* note 2622; Lacey, *supra* note 2606 (“By the time the Cubana Airlines plane exploded, Mr. Posada was no longer in the employ of the C.I.A. But records show that he may have notified his former bosses that a bomb was going to be set off on a plane shortly before it happened.”); McKinley, *supra* note 2604.

2625. See Glenn Garvin, *Cuba Seeks Custody of Anti-Castro Plotter*, Miami Herald, Nov. 20, 2000, at 1A.

2626. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2604, at 4; see Lacey, *supra* note 2606; McKinley, *supra* note 2604; Ana Puga, *Bosch Bombing Case May Be Nearing End After 10-Year Delay*, Miami Herald, June 5, 1986, at 14A (“Squeezed between Cuba’s pressure for a harsh sentence and Cuban exile pressure for a quick release, ‘nobody wants to decide anything,’ said a member of the Venezuelan Congress’ foreign policy commission who declined to be named. ‘This case is what you call a hot potato.’”); Treaster, *supra* note 2604.

Posada Carriles previously escaped on August 8, 1982, and sought asylum at the Chilean embassy in Caracas, but the embassy turned him over to the Venezuelan government. See *Chile Denies Asylum to Caracas Escapees*, Miami Herald, Aug. 12, 1982, at 28A.

2627. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2604, at 4; see James C. McKinley, Jr., *At Trial of Cuban Exile, a Rebuffed Venezuela Sits Quietly on the Sidelines*, N.Y. Times, Jan. 30, 2011, at A21; William Neuman & Randal C. Archibold, *U.S. Is Pressing Latin Americans to Reject Leaker*, N.Y. Times, July 12, 2013, at A1.

2628. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2604, at 4; see *Cuban Exile*, *supra* note 2604; Tim Golden, *Sandinistas Say Escapee Ran Supplies*, Miami Herald, Oct. 16, 1986, at 1A (reporting that Posada Carriles was the number two figure in the contra supply operation); McKinley, *supra* note 2604; Weiner, *supra* note 2604.

2629. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2604, at 4; see Christopher Marquis, *Shooting Deepens Mystery of Itinerant Spy*, Miami Herald, May 13, 1990, at 1A (reporting that Posada Carriles was shot in his jaw, his chest, and his hip in forty rounds fired from two cars while he was driving to work on February 26, 1990); see also Lacey, *supra* note 2606; McKinley, *supra* note 2604; Weiner, *supra* note 2604.

At first, news media reported that Posada Carriles was killed. E.g., *Anti-Castro Agent Reported Killed*, Miami Herald, Apr. 10, 1990, at 7A.

Other Criminal Cases: Castro Foe

In the spring and summer of 1997, bombs damaged several tourist facilities in Havana, killing an Italian tourist and injuring three others.²⁶³¹ From a secret location in the Caribbean, Posada Carriles consented to a three-day interview with Ann Louise Bardach, who published a series of three related articles in the *New York Times* in July 1998.²⁶³² According to the articles, Posada Carriles admitted to organizing the bombings.²⁶³³ Later, he claimed that he was misunderstood.²⁶³⁴

News of Posada Carriles's presence in the United States in 2005 resulted in pressure from Cuba and Venezuela to extradite him and accusations that the U.S. government was harboring a terrorist.²⁶³⁵ The Venezuelan government threatened to sever diplomatic ties if Posada Carriles was not arrested.²⁶³⁶ At his May 2005 news conference, he said that he was withdrawing his asylum application to relieve international pressure on the United States.²⁶³⁷

After his transfer to El Paso, Posada Carriles renewed his petition for asylum.²⁶³⁸ He received an immigration interview on May 21²⁶³⁹ and dropped the asylum request on August 31.²⁶⁴⁰ On September 27, he was ordered deported to a

2630. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2604, at 4 (reporting that Posada Carriles's countries of residence included Honduras and the Dominican Republic).

2631. Report and Recommendation, *supra* note 2604, at 5; see Ann Louise Bardach & Larry Rohter, *A Cuban Exile Details the "Horrendous Matter" of a Bombing Campaign*, N.Y. Times, July 12, 1998, at 110; Juan O. Tamayo, *Cuba Bombs Stir a Wild Guessing Game*, Miami Herald, Aug. 14, 1997, at 1A; Juan O. Tamayo, *Cuban Hotels Were Bombed by Miami-Paid Salvadorans*, Miami Herald, Nov. 16, 1997, at 1A.

2632. Bardach & Rohter, *supra* note 2631; Bardach & Rohter, *supra* note 2615; Ann Louise Bardach & Larry Rohter, *Taking Aim at Castro*, N.Y. Times, July 12, 1998, at 11 [hereinafter *Taking Aim*]; see Dan Frosch, *Castro Enemy Said to Have Recounted Role in Attacks*, N.Y. Times, Mar. 17, 2011, at A21; *Jury Clears Cuban Exile*, *supra* note 2604; Andres Viglucci & Christopher Marquis, *Exile Denies CANF Leaders Financed Attacks in Cuba*, Miami Herald, July 14, 1998, at 1A.

At trial, Bardach disclosed that the interview was conducted in Posada Carriles's house in Aruba. Transcript at 91–92, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Mar. 16, 2011, filed Apr. 8, 2011), D.E. 714.

2633. Bardach & Rohter, *Taking Aim*, *supra* note 2632; Report and Recommendation, *supra* note 2604, at 5; see Goodnough et al., *supra* note 2605; Weiner, *supra* note 2604; Weiner & Herrera, *supra* note 2604.

2634. See Frosch, *supra* note 2632; Dan Frosch, *Motives of Journalist Questioned in Exile's Trial*, N.Y. Times, Mar. 19, 2011, at A16 [hereinafter *Motives*]; James C. McKinley, Jr., *Cuban Exile Lied to U.S., Prosecutor Tells Texas Jury*, N.Y. Times, Jan. 13, 2011, at A17; James C. McKinley, Jr., *Lawyer in Perjury Case Tries to Discredit Reporter*, N.Y. Times, Mar. 22, 2011, at A18 [hereinafter *Tries to Discredit Reporter*]; Juan O. Tamayo & Jay Weaver, *Hero to Some, Terrorist to Others, Posada Gets Day in Court*, Miami Herald, Jan. 9, 2011, at 1A.

2635. See Goodnough et al., *supra* note 2605.

2636. See Steven R. Weisman & Juan Forero, *U.S. Rejects Venezuelan Move on Extradition of Bombing Suspect*, N.Y. Times, May 28, 2005, at A2.

2637. See Goodnough et al., *supra* note 2605.

2638. See Alfonso Chardy & Oscar Corral, *Posada Asylum Trial to Open*, Miami Herald, Aug. 29, 2005, at 1B; Weiner & Herrera, *supra* note 2604.

2639. *United States v. Posada Carriles*, 541 F.3d 344, 348 (5th Cir. 2008).

2640. See *Foe of Castro Withdraws U.S. Asylum Request*, N.Y. Times, Sept. 1, 2005, at A24.

country willing to accept him other than Cuba or Venezuela, where he might be tortured.²⁶⁴¹ No other country was willing to accept him.²⁶⁴² He filed an application for naturalization on October 12 on the basis of his U.S. military service.²⁶⁴³

On April 6, 2006, Posada Carriles sought habeas corpus relief from his immigration detention.²⁶⁴⁴ Magistrate Judge Norbert J. Garney recommended that the petition be granted.²⁶⁴⁵ The government objected.²⁶⁴⁶ District Judge Phillip R. Martinez issued an order to show cause by February 1, 2007, why the petition should not be granted.²⁶⁴⁷ Because Posada Carriles was indicted before that deadline, he was transferred from immigration detention to criminal pretrial detention.²⁶⁴⁸

On April 26 and 27, 2006, while his habeas petition was pending, Posada Carriles had a naturalization interview.²⁶⁴⁹ His interviewer specialized in national security and fraud cases.²⁶⁵⁰ Also present were government attorneys from the Department of Homeland Security and the Department of Justice's Office of Immigration Litigation.²⁶⁵¹ Posada Carriles had two attorneys present, who were in-

2641. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2604, at 2 (noting a finding of a likelihood that Cuban agents would torture Posada Carriles if he were deported to either Cuba or Venezuela); see Oscar Corral, *Judge: Posada to Stay in U.S. for Now*, Miami Herald, Sept. 28, 2005, at 1A; McKinley, *supra* note 2604; *Texas Judge Bars Deportation of Exile*, N.Y. Times, Sept. 28, 2005, at A22; Sunjay Trehan, *The Politicization of the Convention Against Torture: The Immigration Hearing of Luis Posada-Carriles and Its Inconsistency with the "War on Terror,"* 37 U. Miami Inter-Am. L. Rev. 567 (2006).

2642. *Posada Carriles*, 541 F.3d at 348; see Alfonso Chardy, *6 Nations Refused to Take Posada*, Miami Herald, Aug. 15, 2006, at 3B (reporting that Mexico, Canada, Honduras, Costa Rica, Guatemala, and El Salvador refused to take Posada Carriles); McKinley, *supra* note 2604.

2643. *Posada Carriles*, 541 F.3d at 348–49; see *Cuban Militant Wants to Be U.S. Citizen*, N.Y. Times, Apr. 27, 2006, at A23.

2644. *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007); Report and Recommendation, *supra* note 2604, at 2; Habeas Petition, *Posada-Carriles v. Campos*, No. 3:06-cv-130 (W.D. Tex. Apr. 6, 2006), D.E. 2; see Alfonso Chardy, *Posada Seeks Release from Federal Detention*, Miami Herald, Apr. 7, 2006, at 3B.

2645. Report and Recommendation, *supra* note 2604, at 22; see Alfonso Chardy, *Posada Should Be Released, Magistrate Tells Judge*, Miami Herald, Sept. 12, 2006, at 1B.

2646. *Posada Carriles*, 481 F. Supp. 2d at 793; Objection, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Oct. 5, 2006), D.E. 30.

2647. *Posada Carriles*, 481 F. Supp. 2d at 793; Order Denying Reconsideration, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Dec. 28, 2006), D.E. 45; Order to Show Cause, *id.* (Nov. 2, 2006), D.E. 42; see Alfonso Chardy, *Judge: Posada Carriles' Time in Detention "Well Beyond" Limit*, Miami Herald, Nov. 4, 2006, at 5B.

2648. *Posada Carriles*, 481 F. Supp. 2d at 794; Arrest Warrant, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007, filed Aug. 16, 2007), D.E. 119; Order to Dismiss, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Feb. 21, 2007), D.E. 47 (dismissing the habeas corpus petition because of a transfer to pretrial detention); see Denial of Reconsideration, *id.* (Mar. 15, 2007), D.E. 56.

2649. *United States v. Posada Carriles*, 541 F.3d 344, 350 (5th Cir. 2008).

2650. *Id.*; see Juan O. Tamayo, *Immigration Papers Raised Red Flags, Official Says*, Miami Herald, Jan. 20, 2011, at 12A.

2651. *Posada Carriles*, 541 F.3d at 350.

structed not to interrupt the interview, and an interpreter provided by the government.²⁶⁵² On August 24, the government denied Posada Carriles naturalization.²⁶⁵³

The seven-count indictment filed on January 11, 2007, charged Posada Carriles with false statements about the particulars of his 2005 travel to the United States for immigration.²⁶⁵⁴ He claimed that he entered the United States by land from Mexico to Texas, but there was evidence that he entered the United States by sea in Miami.²⁶⁵⁵

The parties agreed to defer a pretrial detention hearing, but later they disagreed on precisely what they had agreed to.²⁶⁵⁶ On February 28, 2007, Posada Carriles sought to reopen his pretrial detention hearing, but Judge Garney denied the motion as failing to meet a statutory standard for detention reconsideration.²⁶⁵⁷ Judge Cardone conducted a hearing on the matter on Tuesday, April 3, and determined on Thursday that the “Defendant does not pose a flight risk at this time, nor does he present a danger to the community,” so she ordered him released on bond.²⁶⁵⁸

On the following Tuesday, Judge Cardone denied the government’s motion for reconsideration of her release order,²⁶⁵⁹ and the government filed a notice of appeal two days later.²⁶⁶⁰ The court of appeals immediately stayed the release order,²⁶⁶¹ but on April 17, over a dissent, it lifted the stay.²⁶⁶² Posada Carriles returned to Miami to live with his family pending trial.²⁶⁶³ Venezuela’s ambassador

2652. *Id.*

2653. *Id.*

2654. Indictment, *supra* note 2613; *see* Chardy et al., *supra* note 2613.

Indicted separately were two men who refused to testify before the grand jury empaneled to indict Posada Carriles. *See* Chardy et al., *supra* note 2613.

2655. *Posada Carriles*, 541 F.3d at 348–49; Report and Recommendation, *supra* note 2604, at 5; *see* Habeas Petition, *supra* note 2644, at 6 (claiming entrance from Mexico on March 26, 2005); *see also* Chardy et al., *supra* note 2613; Goodnough et al., *supra* note 2605.

2656. *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 794 (W.D. Tex. 2007).

2657. *Id.*

2658. *Id.* at 796–97; *see* Jay Weaver, *Bond Ruling Could Be a Victory for Posada*, *Miami Herald*, Apr. 11, 2007, at 3B.

2659. Order, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 10, 2007), D.E. 50; *see* Jay Weaver, *Posada Is a Step Closer to Release*, *Miami Herald*, Apr. 12, 2007, at 1B.

2660. Notice of Appeal, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 12, 2007), D.E. 51.

2661. Order, *United States v. Posada Carriles*, No. 07-50456 (5th Cir. Apr. 12, 2007).

2662. Order, *id.* (Apr. 17, 2007) (order by Circuit Judges W. Eugene Davis and Jacques L. Wiener, Jr., with Circuit Judge Rhessa H. Barksdale dissenting); *see* Jay Weaver, *Posada Closer to Moving to Miami*, *Miami Herald*, Apr. 18, 2007, at 3B.

2663. *See* Oscar Corral & Alfonso Chardy, *Posada Is with Family but Unable to Comment*, *Miami Herald*, Apr. 21, 2007, at 3B; Anthony DePalma & Terry Aguayo, *U.S. Releases Cuban Bombing Suspect, Angering Havana*, *N.Y. Times*, Apr. 20, 2007, at A8; McKinley, *supra* note 2604.

to the United States opposed Posada Carriles's release in a *New York Times* op-ed.²⁶⁶⁴

On May 8, Judge Cardone dismissed the indictment.²⁶⁶⁵ First, Judge Cardone found that the indictment was based on statements Posada Carriles made during an immigration interview at which interpretation was incompetent.²⁶⁶⁶ Second, Judge Cardone found that the purpose of the immigration interview was not to assess Posada Carriles's fitness for citizenship but rather to create a criminal case against him:²⁶⁶⁷ "the Government's tactics in this case are so grossly shocking and so outrageous as to violate the universal sense of justice."²⁶⁶⁸

Posada Carriles returned to Miami to live in a secret location.²⁶⁶⁹ In July 2008, Panama's supreme court overturned his pardon.²⁶⁷⁰

The court of appeals reversed Judge Cardone's dismissal, finding that "nothing in the record suggests that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations."²⁶⁷¹ As for incompetent interpretation, the court of appeals held that that was a question for the jury and that Posada Carriles's indictable answers were not tainted by incompetent interpretation.²⁶⁷² The court of appeals remanded the case back to Judge Cardone on August 14, 2008.²⁶⁷³

Meanwhile, the government and Cuba cooperated on an investigation of the 1997 bombings in Cuba.²⁶⁷⁴ On April 8, 2009, the government filed an eleven-count superseding indictment that added charges for perjury pertaining to Posada Carriles's involvement in the bombings.²⁶⁷⁵

2664. Bernardo Alvarez Herrera, Op-Ed, *A Terrorist Goes Free*, N.Y. Times, Apr. 21, 2007, at A15.

2665. *United States v. Carriles*, 486 F. Supp. 2d 599, 601, 607, 621 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344 (5th Cir. 2008); see Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile Brings Both Glee and Rage*, N.Y. Times, May 10, 2007, at A20; Jay Weaver & Alfonso Chardy, *Judge Frees Posada, Rips Feds' Tactics*, Miami Herald, May 9, 2007, at 1A.

2666. *Carriles*, 486 F. Supp. 2d at 607–14; see Weaver & Chardy, *supra* note 2665.

2667. *Carriles*, 486 F. Supp. 2d at 614–20; see Weaver & Chardy, *supra* note 2665.

2668. *Carriles*, 486 F. Supp. 2d at 620.

2669. See Tania Valdemoro, *Posada Comes Back to Dade, but He's Under Wraps*, Miami Herald, May 14, 2007, at 3B.

2670. See Frances Robles & Alfonso Chardy, *Posada's Pardon Illegal, Panama's Top Court Rules*, Miami Herald, July 2, 2008, at 16A.

2671. *United States v. Posada Carriles*, 541 F.3d 344, 358 (5th Cir. 2008); see Alfonso Chardy, *Cuba Critical of Posada Ruling*, Miami Herald, Aug. 16, 2008, at 3B ("The Cuban government on Friday called the reinstatement of a criminal indictment against Cuban exile militant Luis Posada Carriles a 'maneuver' to delay and prevent his extradition.").

2672. *Posada Carriles*, 541 F.3d at 361–66.

2673. *Id.* at 366; see *Militant Ordered to Stand Trial*, N.Y. Times, Aug. 15, 2008, at A12.

2674. See Alfonso Chardy, Oscar Corral & Jay Weaver, *FBI, Cuba Cooperating on Posada*, Miami Herald, May 3, 2007, at 1A.

2675. Superseding Indictment, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 8, 2009), D.E. 133; see Alfonso Chardy, *U.S. Indicts Cuban Exile Militant Luis Posada Carriles, Links Him to Tourist Bombings*, Miami Herald, Apr. 9, 2009, at 1A; *New Charges for Cuban Militant*, N.Y. Times, Apr. 9, 2009, at A19.

Jury selection began on January 10, 2011.²⁶⁷⁶ Judge Cardone called 130 potential jurors to empanel sixteen for this case, many more than the usual forty-two called.²⁶⁷⁷ She decided not to use a jury questionnaire.²⁶⁷⁸ Most people in El Paso did not know about the defendant or his case.²⁶⁷⁹ The judge thought that a questionnaire would only increase potential jurors' curiosity about the case.²⁶⁸⁰

Since the development of the Internet, Judge Cardone has found it considerably more important to provide jurors with clear instructions not to do independent research during the trial; people tend to feel entitled to immediate information now.²⁶⁸¹ Judge Cardone has found her instructions to jurors to be effective because she provides them with reasons for the instructions.²⁶⁸² There was no indication of outside research in this case.²⁶⁸³

The Department of Justice's counterterrorism section prosecuted the case rather than the local U.S. Attorney's office.²⁶⁸⁴ The trial lasted nearly three months because to prove that Posada Carriles lied about his involvement in the Havana bombings the government had to prove his involvement in the bombings.²⁶⁸⁵

On April 8, the jury found Posada Carriles not guilty.²⁶⁸⁶

Challenge: Classified Evidence

On May 3, 2007, not quite four months after Posada Carriles's indictment, the government sought from Judge Cardone a protective order shielding from discovery classified information pertaining to the defendant.²⁶⁸⁷ Judge Cardone determined that the government's classified information was not discoverable, and she granted the protective order.²⁶⁸⁸

As the trial on the superseding indictment commenced, Judge Cardone reviewed government information that would have been discoverable but for its

2676. Criminal Docket Sheet, *supra* note 2614.

2677. See Juan O. Tamayo, *Luis Posada Carriles Trial: Defense Dealt a Blow*, Miami Herald, Jan. 11, 2011, at 4A.

2678. Transcript at 4, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Feb. 5, 2010, filed Mar. 12, 2010), D.E. 434; Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2679. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2680. *Id.*

2681. *Id.*

2682. *Id.*

2683. *Id.*

2684. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2685. Interview with Hon. Kathleen Cardone, Apr. 2, 2012; see Tamayo & Weaver, *supra* note 2634.

2686. Jury Verdict, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 8, 2011), D.E. 710; see Alfonso Chardy, *After Being Acquitted, Cuban Ex-CIA Agent Plans to Return to Miami*, Miami Herald, Apr. 8, 2011.

2687. Criminal Docket Sheet, *supra* note 2614.

2688. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. May 7, 2007), D.E. 103.

classified status.²⁶⁸⁹ This review kept Judge Cardone's chambers busy for two weeks, sometimes until 1:00 a.m.²⁶⁹⁰

On January 27, 2011, Judge Cardone issued a protective order approving the production in discovery of substitutions for the classified information.²⁶⁹¹ Obtaining substitutions from the government that she could approve required a substantial amount of back and forth.²⁶⁹² Because classified information was held by different parts of the intelligence community, it was sometimes difficult to determine precisely what information the government had.²⁶⁹³ Judge Cardone was especially careful to review representations by the government that information was already known to the defendant or was duplicative.²⁶⁹⁴ The order was prepared on a special laptop computer provided by the classified information security officer.²⁶⁹⁵

The classified information security officer supervised security precautions for the ex parte discovery proceedings involving classified information.²⁶⁹⁶

It turned out that it was not necessary to give defense counsel access to classified information in this case.²⁶⁹⁷ Two of Posada Carriles's attorneys already had clearances,²⁶⁹⁸ but the government never determined that they had a need to know classified information for this case.²⁶⁹⁹ Judge Cardone thinks that it is a good idea for defense attorneys to have security clearances in cases such as this in case access to classified information is necessary.²⁷⁰⁰

To help Judge Cardone handle classified information, her career law clerk, her courtroom deputy, and a court reporter obtained security clearances.²⁷⁰¹ Filings pertaining to classified information were handled by the cleared courtroom deputy rather than the regular docket clerk.²⁷⁰²

Classified materials were stored at the local FBI's sensitive compartmented information facility (SCIF) and couriered to and from the courthouse by FBI

2689. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2690. *Id.*

2691. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 27, 2011), D.E. 605; see Transcript at 3–6, *id.* (Mar. 4, 2011, filed Apr. 8, 2011), D.E. 712.

2692. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2693. *Id.*

2694. *Id.*

2695. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22* (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

2696. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2697. Interview with Hon. Kathleen Cardone, Apr. 2, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2698. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2699. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2700. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2701. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 23, 2013.

2702. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

staff.²⁷⁰³ The materials, as well as special laptops for the court and the court reporter to use when writing about classified information, were stored in locked bags to which only the court had a key.²⁷⁰⁴

On one occasion, the defense thought that it had classified information to present to the court.²⁷⁰⁵ The classified information security officer submitted the information to the intelligence community for a walled-off classification review.²⁷⁰⁶ The review was walled-off from the attorneys representing the government.²⁷⁰⁷ It turned out that the information was not classified.²⁷⁰⁸

Challenge: Classified Orders

Judge Cardone was called upon to issue discovery orders concerning classified information.²⁷⁰⁹ Such orders are difficult to craft because other judges' orders in similar cases tend to be unavailable.²⁷¹⁰ The classified information security officer was sometimes able to be helpful in advising the judge to whom in the intelligence community she should direct discovery orders.²⁷¹¹

Challenge: Sensitive Unclassified Evidence

For Posada Carriles's trial on the superseding indictment, the government sought a confidential-discovery protective order forbidding the defense from disclosing to others some discovery: "This discovery does not contain any classified information; however, the information potentially implicates the privacy, proprietary, law enforcement and other interests of third parties and foreign governments."²⁷¹² Protected material included unpublished portions of Bardach's 1998 interview with Posada Carriles.²⁷¹³ News media opposed the motion.²⁷¹⁴

Judge Cardone examined in camera the discovery that the government deemed sensitive,²⁷¹⁵ and she agreed to issue a protective order.²⁷¹⁶ The defendant

2703. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012; see Reagan, *supra* note 2695, at 22–23 (describing SCIFs).

2704. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2705. *Id.*

2706. *Id.*

2707. *Id.*

2708. *Id.*

2709. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2710. *Id.*

2711. *Id.*

2712. Government Motion at 3, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. June 5, 2009), D.E. 145.

2713. *Id.* at 3 n.1.

Bardach appeared as a witness at the trial. See Frosch, *supra* note 2632; Frosch, *Motives*, *supra* note 2634; McKinley, *Tries to Discredit Reporter*, *supra* note 2634.

2714. Miami Herald and Associated Press Motion, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. June 30, 2009), D.E. 153.

2715. Order at 3–4, *id.* (Aug. 25, 2009), D.E. 172.

2716. Protective Order, *id.* (Aug. 25, 2009), D.E. 173.

himself had access to the sensitive information, and his obligation to keep the information confidential was governed by the protective order.²⁷¹⁷

Challenge: Court Security

Located less than a mile from Juárez, Mexico, one of the most dangerous cities in the world, the El Paso courthouse is accustomed to proceedings requiring enhanced snipers-on-the-roof security, and enhanced security was used in this case.²⁷¹⁸

Security was provided for Posada Carriles's transportation to and from the court while he was in detention.²⁷¹⁹ After he was released, his attorneys took more responsibility for his security.²⁷²⁰ Because of his status on release, he was on a no-fly list, so he had to travel to the court from Miami by car.²⁷²¹

Challenge: Jury Security

Judge Cardone used an anonymous jury, and jurors met at an off-site location from which they were driven to the courthouse by deputy marshals.²⁷²²

Challenge: Witness Security

One witness required special security precautions.²⁷²³ The courtroom was closed during the witness's testimony, and the jury was admonished not to disclose some of the witness's evidence even after the trial was over.²⁷²⁴ Because the courtroom was closed to the public, the witness did not testify in disguise or from behind a screen.²⁷²⁵

2717. *Id.*; Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2718. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

On March 24, 2014, National Public Radio reported that Juárez had recently become considerably less dangerous. Steve Inskeep, *On the Mend, But Wounds of Violence Still Scar Juarez*, Morning Edition (NPR radio broadcast Mar. 24, 2014), available at www.npr.org/blogs/parallels/2014/03/24/292394476/on-the-mend-but-wounds-of-violence-still-scar-juarez.

2719. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2720. *Id.*

2721. *Id.*; see Valdemoro, *supra* note 2669.

2722. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2723. *Id.*

2724. *Id.*

2725. *Id.*

HABEAS CORPUS

The very complex collection of a few hundred petitions for habeas corpus relief from detention at the U.S. Naval Base at “Guantánamo Bay,” Cuba, is surely a unique case-management challenge for a single district court and its court of appeals, but just as surely these national security actions offer lessons that may be applicable to other cases, now and in the future.

Although the Classified Information Procedures Act technically applies only to criminal cases, its procedures were used as guidance for these habeas corpus cases. Security clearances for court staff and attorneys and the inclusion in the record of classified filings, under seal of course, were coordinated by the Litigation Security Group’s classified information security officers.²⁷²⁶

A very significant challenge in these cases was the judges’ presiding over proceedings in which one party was in court and the other party appeared by secure video link. The fact that interpreters were often required added to the challenge.

A common challenge in national security cases involving pretrial detention, which bears some similarity to Guantánamo Bay detention, is the health, especially the mental health, of detainees who are confined in highly secure conditions. Judges have only limited control over conditions of confinement, but judges are called upon to exert their authority when conditions of confinement affect the abilities of detainees to present their cases.

2726. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

Guantánamo Bay

In re Guantanamo Bay Detainee Litigation
(*Thomas F. Hogan, D.D.C.*) and *Related Actions* (*Louis F. Oberdorfer, Joyce Hens Green, Royce C. Lamberth, Paul L. Friedman, Gladys Kessler, Emmet G. Sullivan, Ricardo M. Urbina, James Robertson, Colleen Kollar-Kotelly, Henry H. Kennedy, Jr., Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton, John D. Bates, Richard J. Leon, Rosemary M. Collyer, and Alan Kay, D.D.C.*)

Habeas Corpus Rights

Jurisdiction Over Guantánamo Bay Detainees

On September 25, 2001, Australian David Hicks called his parents in Salisbury, Australia, a suburb of Adelaide, and told them that he had joined the Taliban.²⁷²⁷ Hicks, a high-school dropout described as a drifter, had converted to Islam and adopted the name Mohammed Dawood.²⁷²⁸ Apparently he joined the Taliban in 1999.²⁷²⁹ The Northern Alliance captured him near Kabul, Afghanistan, on December 9, 2001, and turned him over to the United States on December 17.²⁷³⁰ He was transferred to the *USS Peleliu*, the same ship that held John Walker Lindh at the time,²⁷³¹ and then to the Naval Base at Guantánamo Bay in January 2002.²⁷³²

2727. See Douglas Frantz, *Alliance Captures Australian Man Fighting for the Taliban*, N.Y. Times, Dec. 13, 2001, at B3; Richard Leiby, *Taliban from Down Under*, Wash. Post, Mar. 10, 2002, at F1.

2728. See Frantz, *supra* note 2727; Leiby, *supra* note 2727; see also Jess Bravin, *The Terror Courts* 193 (2013) (noting that Dawood is Arabic for David).

2729. See John Shaw, *Australians Debate Fate of Fighter Held by U.S.*, N.Y. Times, Dec. 30, 2001, at 8.

2730. *Al Odah v. United States*, 321 F.3d 1134, 1137 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 60 (D.D.C. 2002); see Frantz, *supra* note 2727; Shaw, *supra* note 2729.

2731. See Steve Vogel, *5 Detainees Held on U.S. Ship*, Wash. Post, Dec. 18, 2001, at A15; Steve Vogel & Molly Moore, *U.S. Warns Against Helping Bin Laden*, Wash. Post, Dec. 19, 2001, at A1; see also *supra* “American Taliban.”

2732. See Mark Landler & Katharine Q. Seelye, *U.N. Pleads for Afghan Aid While U.S. Jets Raid Compound*, N.Y. Times, Jan. 15, 2002, at A12; Leiby, *supra* note 2727; see also Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 63 (2006) (“On January 6, [2002,] Brigadier General Michael Lehnert received an urgent order from his boss, Defense Secretary Donald Rumsfeld. He was told to build a prison. He had ninety-six hours. . . . Lehnert finished the job with nine hours to spare.”).

Habeas Corpus: Guantánamo Bay

Shafiq Rasul and Asif Iqbal grew up together in Tipton, England, a town near Birmingham.²⁷³³ They also were described as drifters who converted to Islam.²⁷³⁴ They also were captured in Afghanistan and transferred to Guantánamo Bay.²⁷³⁵

On January 11, 2002, a cargo plane holding 20 detainees from Afghanistan landed at the U.S. naval base in Guantánamo Bay, Cuba, the first of many detainee transfers that eventually swelled the camp population at its height to over 600. Hooded and wearing earmuffs, detainees felt a blast of hot, humid air as they were escorted off the plane by U.S. soldiers, hustled onto a bus, and transported across the water by a ferry to a large building, part of the detention center located on the southeast corner of the 45-square-mile base. Once inside, detainees encountered a beehive of activity similar to their processing at Kandahar and Bagram. Camp personnel removed their outer clothing and earmuffs, lowered their goggles, and cut off their clothes.²⁷³⁶

On February 19, 2002, parents of Hicks, Rasul, and Iqbal filed a habeas corpus petition on their behalf in the U.S. District Court for the District of Columbia, and the court assigned the case to Judge Colleen Kollar-Kotelly.²⁷³⁷ This was the first habeas action filed on behalf of named Guantánamo Bay detainees, and it was filed at a time when there were approximately 300.²⁷³⁸ Six days later, Judge Kollar-Kotelly ordered the government to file a return.²⁷³⁹

2733. See Warren Hoge, *Hometown of British Prisoners Known for Tranquil Diversity*, N.Y. Times, Jan. 29, 2002, at A14.

2734. See Amy Waldman, *How in a Little English Town Jihad Found Young Converts*, N.Y. Times, Apr. 24, 2001, at A1.

2735. *Rasul*, 215 F. Supp. 2d at 60; see Waldman, *supra* note 2734.

2736. Laurel E. Fletcher & Eric Stover, *The Guantánamo Effect* 41 (2009); see Barry Kamins, *Opening Remarks*, 10 N.Y. City L. Rev. 313, 313 (2007) (“The detention facility at Guantánamo was built in just ninety hours in January of 2002 on the long-term naval base the United States maintains on the tip of Cuba.”).

2737. Docket Sheet, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Feb. 19, 2002); *Rasul v. Bush*, 542 U.S. 466, 472 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1136–37 (D.C. Cir. 2003); *Rasul*, 215 F. Supp. 2d at 57; see *Boumediene v. Bush*, 553 U.S. 723, 734 (2008); see also John Mintz, *Detention of 3 Men in Cuba Disputed*, Wash. Post, Feb. 20, 2002, at A10; Michael Ratner, *The First Habeas Cases: Rasul v. Bush*, in *The Guantánamo Lawyers* 32, 32 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009); Michael Ratner & Ellen Ray, *Guantánamo: What the World Should Know* 7–8, 80 (2004); Philip Shenon, *Suit to Be Filed on Behalf of Three Detainees in Cuba*, N.Y. Times, Feb. 19, 2002, at A11; Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 25 (2008); Clive Stafford Smith, *Eight O’Clock Ferry to the Windward Side* 23 (2007).

2738. See Shenon, *supra* note 2737; see also Michael Ratner, *Guantánamo: The Ninth Circle of Hell*, in *The Guantánamo Lawyers*, *supra* note 2737, at 15 (describing the decision by the Center for Constitutional Rights to participate in the case).

2739. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Feb. 25, 2002), D.E. 7.

On May 1, fathers and brothers of eleven Kuwaitis held at Guantánamo Bay filed a complaint against the government seeking the detainees' access to family, counsel, and the courts.²⁷⁴⁰ An amended complaint on July 8 added a twelfth plaintiff.²⁷⁴¹ The court assigned the case to Judge Kollar-Kotelly on the plaintiffs' representation that it was related to the habeas petition by Hicks, Rasul, and Iqbal.²⁷⁴² The plaintiffs claimed that they were in Afghanistan for charitable purposes and they were captured by bounty hunters.²⁷⁴³ Judge Kollar-Kotelly regarded the complaint as a habeas petition.²⁷⁴⁴

Judge Kollar-Kotelly determined, on July 30, that United States courts did not have jurisdiction over the habeas petitions, because the petitioners were aliens held outside sovereign territory.²⁷⁴⁵ The following week, Judge Kollar-Kotelly also dismissed a habeas petition filed on June 10 by the wife of Mamdouh Habib, another Australian held at Guantánamo Bay, which was assigned to her as related to the other two cases.²⁷⁴⁶ The court of appeals agreed that the court lacked jurisdiction over these three cases.²⁷⁴⁷

2740. *Rasul*, 542 U.S. at 472; *Al Odah*, 321 F.3d at 1136; *Rasul*, 215 F. Supp. 2d at 58 & n.3; Docket Sheet, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. May 1, 2002) [hereinafter *Al-Odah* Docket Sheet]; see Neil MacFarquhar, *Kuwaitis Press U.S. Over 12 Held at Guantánamo*, N.Y. Times, June 26, 2002, at A18; John Mintz, *Detainees Say They Were Charity Workers*, Wash. Post, May 26, 2002, at A12 (reporting that legal expenses would be paid by the Kuwaiti government and donated by the law firm to charity); Ratner & Ray, *supra* note 2737, at 8; Wax, *supra* note 2737, at 25–26 (reporting that the lawyers in this case were retained, unlike the vast majority of Guantánamo Bay habeas attorneys, who worked pro bono).

After receiving a letter from his son via the International Committee of the Red Cross, [Fawzi] al Odah's father, an American-trained pilot who had fought with the Kuwaiti Air Force in the First Gulf War, tracked down the families of eleven other Kuwaiti prisoners and hired a white-shoe American law firm to represent them.

Jonathan Mahler, *The Challenge* 66 (2008).

The law firm styled the filing as a complaint instead of a habeas corpus petition “[i]n an attempt to appear to the court more modest and less like [they] were demanding release.” Kristine A. Huskey, *The First Habeas Cases: Al Odah v. United States*, in *The Guantánamo Lawyers*, *supra* note 2737, at 29, 30. The firm named the United States as the lead defendant so as not to offend partners who did not want the firm to sue the President. *Id.*

2741. *Rasul*, 215 F. Supp. 2d at 58 n.3; *Al-Odah* Docket Sheet, *supra* note 2740.

2742. *Rasul*, 215 F. Supp. 2d at 58; *Al-Odah* Docket Sheet, *supra* note 2740; see Huskey, *supra* note 2740, at 30.

2743. *Rasul*, 215 F. Supp. 2d at 60–61; see Mintz, *supra* note 2740.

2744. *Rasul*, 215 F. Supp. 2d at 64; see Huskey, *supra* note 2740, at 30–31.

2745. *Rasul*, 215 F. Supp. 2d 55, *rev'd*, 542 U.S. 466; see *Boumediene v. Bush*, 553 U.S. 723, 734 (2008); see Bravin, *supra* note 2728, at 80; Mahler, *supra* note 2740, at 66–67; Ratner & Ray, *supra* note 2737, at 80–81; Neely Tucker, *Judge Denies Detainees in Cuba Access to U.S. Courts*, Wash. Post, Aug. 1, 2002, at A10.

2746. Opinion, *Habib v. Bush*, No. 1:02-cv-1130 (Aug. 8, 2002), D.E. 5; see *Al Odah v. United States*, 321 F.3d 1134, 1137 (D.C. Cir. 2003); see also Dana Priest, *Detainee Sent Home to Australia*, Wash. Post, Jan. 29, 2005, at A21 (reporting that Habib was born in Egypt and moved to Australia when he was eighteen).

Visiting New York, where his sisters lived, Habib reconnected with school chums from Egypt who had relocated to the city. He visited the Statue of Liberty but spent more time at-

Habeas Corpus: Guantánamo Bay

On June 28, 2004, the Supreme Court held, in *Rasul v. Bush*, that federal courts did have jurisdiction over habeas petitions by Guantánamo Bay detainees, because a 1903 lease and a 1934 treaty gave the United States indefinite “complete jurisdiction and control” over its Naval Base in Cuba and the courts unquestionably had jurisdiction over the petitioners’ custodians.²⁷⁴⁸

While the Supreme Court case was pending, Rasul and Iqbal were returned to freedom in the United Kingdom.²⁷⁴⁹ A subsequent suit for damages against the United States was unsuccessful,²⁷⁵⁰ but the British government agreed to settle a damages suit against it.²⁷⁵¹ On June 10, Hicks was formally charged in a military

tending the trial of El Sayyid Nosair, accused of assassinating Rabbi Meir Kahane, a right-wing Israeli politician. After returning to Australia, Habib’s Egyptian friends in New York asked him to raise funds for Omar Abdel Rahman, the terrorist leader known as the Blind Sheikh, who ultimately received life imprisonment for conspiring to blow up the United Nations headquarters, the Lincoln Tunnel, and other landmarks. Habib enthusiastically agreed, even organizing rallies for the cause.

Bravin, *supra* note 2728, at 226–27 (providing a summary biography for Habib).

2747. *Al Odah*, 321 F.3d at 1141 (opinion by Circuit Judge A. Raymond Randolph, joined by Circuit Judges Merrick B. Garland and Stephen F. Williams), *rev’d*, 542 U.S. 466; *Boumediene*, 553 U.S. at 734; *see* Huskey, *supra* note 2740, at 31; Mahler, *supra* note 2740, at 67; Ratner & Ray, *supra* note 2737, at 81.

2748. *Rasul*, 542 U.S. at 471, 473, 480, 483–84, 485 (opinion by Justice Stevens, joined by Justices O’Connor, Souter, Ginsburg, and Breyer; Justice Kennedy concurred in the judgment; Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented); *see Boumediene*, 553 U.S. at 734; *In re Guantánamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47 (D.D.C. 2013); *see also* Huskey, *supra* note 2740, at 32; Mahler, *supra* note 2740, at 122–23; Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1, 5–6; Kara Simard, *Innocent at Guantánamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 Suffolk Transnat’l L. Rev. 365, 371 (2007) (“The United States obtained the lease from an American citizen, Tomas Estrada Palma, who later became the first President of Cuba.”).

2749. *Rasul*, 542 U.S. at 471 n.1; *see* Order, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007), D.E. 230 (dismissing the habeas petition); *see also British Frees 5 Citizens Sent Home From U.S. Jail*, N.Y. Times, Mar. 11, 2004, at A3; Margulies, *supra* note 2732, at 145; John Mintz, *U.S. Faces Quandary in Freeing Detainees*, Wash. Post, Mar. 22, 2004, at A1; Albert Ruben, *The People’s Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantánamo* 15 (2011).

2750. *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (finding, among other things, qualified immunity for the defendants because, “No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights.”); *see* Docket Sheet, *Rasul v. Rumsfeld*, No. 1:04-cv-1864 (D.D.C. Oct. 27, 2004); *Ex-Guantánamo Inmates File Suit*, N.Y. Times, Oct. 28, 2004, at A10.

A former Guantánamo Bay prison guard found Rasul on Facebook, and the BBC filmed a reunion of the two in December 2009. *See Our World: Guantánamo Reunited* (BBC television broadcast Jan. 20, 2010); Brian Stelter, *Guantánamo Reunion, by Way of BBC*, N.Y. Times, Jan. 11, 2010, at B9.

2751. *See* Rebecca Omonira-Oyekanmi & Peter Finn, *Britain Settles with Detainees*, Wash. Post, Nov. 17, 2010, at A10 (listing fifteen of sixteen detainees to receive compensation).

tribunal with joining the Taliban.²⁷⁵² The government of Australia had agreed the previous November to such a proceeding for its citizen.²⁷⁵³

Hicks pleaded guilty; pursuant to a plea agreement, he was sentenced on March 30, 2007, to seven years of post-detention imprisonment, with all but nine months suspended, and returned to Australia in May to serve out the remaining months of his sentence.²⁷⁵⁴ Hicks was released from prison on December 29²⁷⁵⁵ and released from supervision on December 21, 2008.²⁷⁵⁶ His conviction was vacated in 2015 by the Court of Military Commission Review in light of intervening determinations by the U.S. Court of Appeals for the District of Columbia Circuit that ex post facto material support cannot be tried by a military commission.²⁷⁵⁷

2752. See Bradley Graham, *3 Charges Placed Against Detainee*, Wash. Post, June 11, 2004, at A3; Mahler, *supra* note 2740, at 66–67; Eric Schmitt & Kate Zernike, *U.S. Charges an Australian with Fighting for Taliban*, N.Y. Times, June 11, 2004, at A12; see also Joshua L. Dratel, *Navigating the New Military Commissions: The Case of David Hicks*, 10 N.Y. City L. Rev. 385, 385–86 (2007) (“David Hicks has been the only one thus far referred to a military commission”).

2753. See Neil A. Lewis, *U.S. Adds to Detained Australians’ Rights*, N.Y. Times, Nov. 26, 2003, at A22; see also Bravin, *supra* note 2728, at 171 (reporting that Australia objected to indefinite detention for its citizen).

As a result of the Australian government’s negotiations, Hicks was able to meet with his father and stepmother at Guantánamo Bay. See Neil A. Lewis, *Australian Pleads Not Guilty to Terrorism Conspiracy*, N.Y. Times, Aug. 26, 2004, at A14.

2754. Transcript at 81, 157, 243–45, *United States v. Hicks* (U.S. Mil. Comm. Mar. 30, 2007), available at www.mc.mil/CASES.aspx; see Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Aug. 23, 2007), D.E. 228; Bravin, *supra* note 2728, at 312–14; Gordon Cucullu, *Inside Gitmo 224* (2009); William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. Times, Mar. 31, 2007, at A10; Karen Greenberg, *The Least Worst Place: Guantanamo’s First 100 Days 220* (2009); Spencer S. Hsu, *Guantanamo Detainee Returns to Australia*, Wash. Post, May 21, 2007, at A10; Michael D. Mori, *Escape from Guantánamo*, in *The Guantánamo Lawyers*, *supra* note 2737, at 190, 192; Josh White, *Australian to Return Home to Serve Shortened Term*, Wash. Post, Mar. 31, 2007, at A12; see also Jonathan Hafetz, *Habeas Corpus After 9/11 212* (2011) (“The deal not only was negotiated without the prosecutors’ knowledge, but was the result of a request to Vice President Cheney from Australia’s prime minister John Howard, who was facing increasing demands at home to oppose Hicks’s prosecution by a military commission.”). See generally Michael Mori, *In the Company of Cowards* (2014) (reflections by Hick’s military commission defense attorney).

2755. See Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, N.Y. Times, Dec. 29, 2007, at A7; Rohan Sullivan, *Ex-Guantanamo Inmate Released*, Wash. Post, Dec. 29, 2007, at A14.

2756. See Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. Times, Dec. 21, 2008, at A12.

2757. Opinion, *Hicks v. United States*, No. 13-4 (Ct. Mil. Comm’n Rev. Feb. 18, 2015), available at [www.mc.mil/Portals/0/pdfs/hicks13-004/Hicks%20v.%20United%20States,%202013-004%20Decision%20\(Feb%2018%202015\).pdf](http://www.mc.mil/Portals/0/pdfs/hicks13-004/Hicks%20v.%20United%20States,%202013-004%20Decision%20(Feb%2018%202015).pdf); see Matt Apuzzo, *Guantánamo Conviction of Australian Is Overturned*, N.Y. Times, Feb. 19, 2015, at A14; *Court Annuls Guilty Plea of Ex-Guantánamo Detainee*, Miami Herald, Feb. 19, 2015, at 3A; see also Carol Rosenberg, *11 Original Gitmo Captives Remain*, Miami Herald, Jan. 13, 2014, at 1A (“He has written a book, married, works as an auto-body repairman . . .”).

Habib had been returned to freedom in Australia, without charges, in January 2005.²⁷⁵⁸

Coordination Before Judge Green

During the three weeks following the Supreme Court's *Rasul* decision, eight cases on behalf of thirty-two detainees were filed.²⁷⁵⁹ The government moved to consolidate these petitions with the ones already pending before Judge Kollar-Kotelly, but she ruled that the diversity of factual situations among the cases did not make them suitable for consolidation.²⁷⁶⁰

By early September, another three cases had been filed on behalf of another twenty-one detainees.²⁷⁶¹ On September 14, the district court's Executive Session decided that Senior Judge Joyce Hens Green²⁷⁶² would preside over preliminary coordination and management of all Guantánamo Bay habeas cases both already

2758. See Raymond Bonner, *Australian's Long Path in the U.S. Antiterrorism Maze*, N.Y. Times, Jan. 29, 2005, at A4; Priest, *supra* note 2746; see also Margulies, *supra* note 2732, at 2 (according to Habib's attorney, "I had flown with [Habib] from Guantánamo in a plane chartered by the Australian government, west from Cuba and across the Pacific Ocean, careful not to cross over into U.S. airspace. I am the only lawyer allowed by the U.S. government to accompany a prisoner home from the base, a courtesy I cannot explain.").

It was reported that no charges were filed against Habib so that his torture while detained in Egypt would not become a matter of court review. See Raymond Bonner, *Ex-Captive in Guantánamo Makes Run for Office in Australia*, N.Y. Times, Mar. 21, 2007, at A12; see also Mori, *supra* note 2754. The Australian government insisted that Habib either be tried or released. See Bravin, *supra* note 2728, at 225–38.

2759. Docket Sheet, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. July 15, 2004) [hereinafter *Anam* Docket Sheet] (fifteen detainees); Docket Sheet, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. July 12, 2004) [hereinafter *Boumediene* Docket Sheet] (six detainees); Docket Sheet, *Gherebi v. Bush*, No. 1:04-cv-1164 (D.D.C. July 12, 2004) [hereinafter *Gherebi* Docket Sheet] (one detainee); Docket Sheet, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, *Benchellali v. Bush*, No. 1:04-cv-1142 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, *Begg v. Bush*, No. 1:04-cv-1137 (D.D.C. July 2, 2004) (two detainees); Docket Sheet, *Khadr v. Bush*, No. 1:04-cv-1136 (July 2, 2004) [hereinafter *Khadr* Docket Sheet] (one detainee); Docket Sheet, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. July 2, 2004) (one detainee); see Margulies, *supra* note 2732, at 158 ("While we were waiting for the Supreme Court in *Rasul*, . . . Clive Stafford Smith had quietly been gathering authorizations to proceed on behalf of several dozen other prisoners at the base, and the Center for Constitutional Rights had recruited a score of prominent law firms to handle these new cases free of charge.").

While argument in the Supreme Court case was pending, an attorney filed a habeas petition on behalf of three of these detainees, Docket Sheet, *Sassi v. Bush*, No. 1:04-cv-547 (D.D.C. Apr. 5, 2004) (habeas petition by next friends of Nizar Sassi, Ridouane Khalid, and Omar Khadr), which the court dismissed on the parties' motion, Order, *id.* (Apr. 15, 2004), D.E. 7.

2760. Opinion, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. July 26, 2004), D.E. 50.

2761. Docket Sheet, *Hamdan v. Rumsfeld*, No. 1:04-cv-1519 (D.D.C. Sept. 2, 2004) [hereinafter *Hamdan* Docket Sheet] (one detainee); Docket Sheet, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. July 27, 2004) (fourteen detainees); Docket Sheet, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 22, 2004) (six detainees).

2762. For this report, Tim Reagan interviewed, at the Federal Judicial Center on September 21, 2011, Judge Green; Frank Kulbaski, her former law clerk who served as her attorney advisor; and Marcia Davidson, who served as her judicial assistant.

and subsequently filed, but assigned judges would retain their cases for merits purposes.²⁷⁶³

Judge Green assembled an informal meeting with petitioners' attorneys and representatives of the government, which included military personnel.²⁷⁶⁴ At the meeting, Judge Green said that she expected written justifications of detention for each petitioner, which the government asked to think about.²⁷⁶⁵ At a second informal meeting three days later, the government agreed to submit returns on a rolling basis.²⁷⁶⁶

It proved important to make sure that attorneys understood before whom motions and the like should be filed so that they did not think they could choose strategically between Judge Green and the merits judge.²⁷⁶⁷

Ninth Circuit Cases

Two of the eleven new cases were not filed originally in the District of Columbia; they were transferred from the Ninth Circuit.²⁷⁶⁸ Before these two cases were filed in Ninth Circuit districts, and before the parents of Hicks, Rasul, and Iqbal filed a petition in the District of Columbia, concerned citizens filed a habeas petition on

2763. *E.g.*, Coordination Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 20, 2004), D.E. 72; see *Gherebi v. Bush*, 338 F. Supp. 2d 91, 94 (D.D.C. 2004); Order, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 5, 2004), D.E. 23 (transfer by Judge Kennedy); Order, *Anam*, No. 1:04-cv-1194 (D.D.C. Oct. 5, 2004), D.E. 26 (transfer by Judge Kennedy); Order, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Sept. 30, 2004), D.E. 23 (transfer by Judge Leon); Order *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 29, 2004), D.E. 37 (transfer by Judge Roberts); Order, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004), D.E. 21 (transfer by Judge Leon); Order, *Khadr*, No. 1:04-cv-1136 (D.D.C. Sept. 21, 2004), D.E. 27 (transfer by Judge Bates); Order, *Begg*, No. 1:04-cv-1137 (D.D.C. Sept. 20, 2004), D.E. 14 (transfer by Judge Collyer); Order, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Sept. 20, 2004), D.E. 12 (transfer by Judge Huvelle); Order, *Almurbati*, No. 1:04-cv-1227 (D.D.C. Sept. 17, 2004), D.E. 14 (transfer by Judge Walton); Order, *Gherebi*, No. 1:04-cv-1164 (D.D.C. Sept. 17, 2004), D.E. 20 (transfer by Judge Walton); Order, *Habib v. Bush*, No. 1:02-cv-1130 (D.D.C. Sept. 17, 2004), D.E. 22 (transfer by Judge Kollar-Kotelly); Order, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 17, 2004), D.E. 83 (transfer by Judge Kollar-Kotelly); Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 17, 2004), D.E. 71 (transfer by Judge Kollar-Kotelly); *Hamdan* Docket Sheet, *supra* note 2761 (noting a transfer by Judge Robertson on September 14, 2004.); see also *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47–48 (D.D.C. 2013); *Al Odah v. United States*, 346 F. Supp. 2d 1, 4–5 n.5 (D.D.C. 2004); Daniel Freeman, *One Case, Two Decisions: Khalid v. Bush*, *In re Guantanamo Detainee Cases, and the Neutral Decisionmaker*, 24 *Yale L. & Pol'y Rev.* 241, 243 (2006); Mahler, *supra* note 2740, at 146–47; Margulies, *supra* note 2732, at 205.

The court commonly refers complex matters of general application to senior judges, who have more control over their dockets and time. Interview with Hon. Royce C. Lamberth, May 13, 2011; see Wax, *supra* note 2737, at 168.

2764. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2765. *Id.*

2766. *Id.*

2767. *Id.*

2768. *Hamdan* Docket Sheet, *supra* note 2761; D.D.C. *Gherebi* Docket Sheet, *supra* note 2759; see Docket Sheet, *Swift v. Rumsfeld*, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004) (petition on behalf of Salim Ahmed Hamdan); Docket Sheet, *Gheredi v. Bush*, No. 2:03-cv-1267 (C.D. Cal. Feb. 24, 2003) (petition on behalf of Falen Gherebi, spelling his last name as “Gheredi”).

behalf of Guantánamo Bay detainees, on January 20, 2002, under the name “Coalition of Clergy, Lawyers, and Professors,” in the Central District of California.²⁷⁶⁹ On February 21, Judge A. Howard Matz dismissed the petition, finding that the plaintiffs lacked standing and no federal court would have jurisdiction over the petition anyway.²⁷⁷⁰ On November 18, the court of appeals affirmed on standing and vacated the district court’s holding on jurisdiction, reasoning that if the plaintiffs lacked standing then the court lacked jurisdiction over the jurisdiction issue.²⁷⁷¹

On February 1, 2003, the brother of detainee Salim Ghorebi presented to the court of appeals for the Ninth Circuit a habeas petition,²⁷⁷² which the court transferred to the district court for the Central District of California, and the district court assigned the petition to Judge Matz.²⁷⁷³ Finding that this petitioner had standing, Judge Matz again ruled, on May 13, that no federal court had jurisdiction over Guantánamo Bay habeas petitions.²⁷⁷⁴ On December 18, the court of appeals reversed.²⁷⁷⁵ On June 30, 2004, the Supreme Court vacated the court of appeals’ decision and remanded the case for reconsideration in light of the holding in *Rumsfeld v. Padilla*²⁷⁷⁶ that José Padilla’s habeas petition filed in the Southern District of New York, where he had been in detention as a material witness, could not be heard in that district because he had been transferred to a naval brig in the District of South Carolina.²⁷⁷⁷ On July 8, the court of appeals transferred Ghorebi’s petition to the District of the District of Columbia.²⁷⁷⁸

2769. Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 2:02-cv-570 (C.D. Cal. Jan 20, 2002); see *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002); see also *Ghorebi v. Bush*, 338 F. Supp. 2d 91, 92 (D.D.C. 2004); Bravin, *supra* note 2728, at 80.

2770. *Coalition of Clergy*, 189 F. Supp. 2d 1036, *aff’d in part and rev’d in part*, 310 F.3d 1153 (9th Cir. 2002); see *Ghorebi*, 338 F. Supp. 2d at 92.

2771. *Coalition of Clergy*, 310 F.3d 1153; see *Ghorebi*, 338 F. Supp. 2d at 92.

On August 26, 2003, the coalition attempted to cure standing deficiencies, which Judge Matz observed would be relatively easy to do, *Ghorebi v. Bush*, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003), and filed a new complaint, Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 2:02-cv-9516 (C.D. Cal. Dec. 16, 2002). Judge Matz dismissed the complaint on August 5, 2003, before the court of appeals held that federal courts had jurisdiction over Guantánamo Bay habeas petitions. Order, *id.* (Aug. 5, 2003), D.E. 13. An appeal was dismissed on April 7, 2004, for lack of prosecution. Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 03-56484 (9th Cir. Aug. 26, 2003).

2772. Docket Sheet, *Ghorebi v. Bush*, No. 03-80012 (9th Cir. Feb. 5, 2003); *Ghorebi*, 338 F. Supp. 2d at 92.

2773. Order, *Ghorebi*, No. 2:03-cv-1267 (C.D. Cal. Mar. 27, 2003), D.E. 17.

2774. *Ghorebi*, 262 F. Supp. 2d 1064, *rev’d*, 374 F.3d 727 (9th Cir. 2004); see *Ghorebi*, 338 F. Supp. 2d at 92–93; Mahler, *supra* note 2740, at 98.

2775. *Ghorebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *modified*, 374 F.3d 727; see *Ghorebi*, 338 F. Supp. 2d at 93; Mahler, *supra* note 2740, at 98; John Mintz, *Hearing Ordered for Terrorism Detainee*, Wash. Post, Dec. 19, 2003, at A19.

2776. 542 U.S. 426, 451 (2004).

2777. *Bush v. Ghorebi*, 542 U.S. 952 (2004); see *Ghorebi*, 338 F. Supp. 2d at 93; see also *supra* “Dirty Bomber.”

2778. *Ghorebi*, 374 F.3d at 739; *Ghorebi*, 338 F. Supp. 2d at 93–94.

The second transferred action was filed by Salim Ahmed Hamdan's military lawyer, who was assigned to represent Hamdan before a military commission.²⁷⁷⁹ Hamdan, who was a driver for Osama Bin Laden, was captured in Afghanistan in November 2001 and transferred to Guantánamo Bay in mid-2002.²⁷⁸⁰ In 2003, he was one of the first six detainees that President Bush referred to a military commission for trial.²⁷⁸¹ On April 6, 2004, Lieutenant Commander Charles Swift filed a habeas corpus action on behalf of Hamdan in Swift's home district, the Ninth Circuit's Western District of Washington.²⁷⁸² On August 9, Judge Robert S. Lasnik transferred the petition, which challenged the validity of the military commission, to the District of Columbia.²⁷⁸³

Establishing Military Commissions

The District of Columbia district court assigned Hamdan's action to Judge James Robertson.²⁷⁸⁴ Although Hamdan's petition was included in the court's coordina-

2779. Petition, *Swift v. Rumsfeld*, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004), D.E. 1 [hereinafter *Swift* Petition]; see Neil A. Lewis, *Suit Contests Military Trials of Detainees at Cuba Base*, N.Y. Times, Apr. 8, 2004, at A25.

2780. *Hamdan v. United States*, 696 F.3d 1238, 1240, 1242–43 (D.C. Cir. 2012); *Hamdan v. Rumsfeld*, 565 F. Supp. 2d 130, 131 (D.D.C. 2008); *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 10 (D.D.C. 2006); see Neil A. Lewis, *Judge Sets Back Guantánamo Detainees*, N.Y. Times, Dec. 14, 2006, at A32; Mahler, *supra* note 2740, at 10–11; Ali H. Soufan, *The Black Banners* 449 (2011); see also Bravin, *supra* note 2728, at 4–6 (reporting, “Bin Laden’s family also came from Hadramout[, where Hamdan was born]—his father Mohammed was born there—which perhaps explains the austere ideologue’s affinity toward his barely literate driver.”).

In 2012, the government released a video showing an episode of Hamdan’s interrogation, and MSNBC posted the video on the Internet. Jim Miklaszewski, *Pentagon Releases Video of US Troops Interrogating Bin Laden’s Driver*, MSNBC.com Open Channel, May 5, 2012, now available at http://investigations.nbcnews.com/_news/2012/05/04/11543668-pentagon-releases-video-of-us-troops-interrogating-bin-ladens-driver.

2781. *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; see Lewis, *supra* note 2779; Soufan, *supra* note 2780, at 454–58 (describing how Hamdan’s referral for prosecution interrupted acquisition of intelligence from him).

2782. *Swift* Petition, *supra* note 2779; see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; Bravin, *supra* note 2728, at 213–14; Lewis, *supra* note 2779; Mahler, *supra* note 2740, at 99 (“American service members are considered legal residents of wherever they last lived before joining up. So even though Swift had lived in Puerto Rico, Florida, and now Virginia, his official place of residence hadn’t changed since he attended law school in Seattle.”).

Swift’s instructions from superior officers were to negotiate a deal, not to advocate zealously for his client, as JAG lawyers were bound and trained to do. The Bush administration had deliberately chosen for prosecution detainees who, it believed, would plead guilty and thereby give some legitimacy to the military commission process and the Guantánamo detention system generally.

Hafetz, *supra* note 2754, at 138.

2783. Order, *Swift*, No. 2:04-cv-777 (W.D. Wash. Aug. 9, 2004), D.E. 51; see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; Mahler, *supra* note 2740, at 141.

2784. *Hamdan* Docket Sheet, *supra* note 2761; see Mahler, *supra* note 2740, at 146.

Judge Robertson retired on June 1, 2010. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

tion of preliminary matters before Judge Green, Judge Robertson was able to resolve substantial issues in the case in an opinion issued on November 8, 2004.²⁷⁸⁵ Judge Robertson granted Hamdan's petition in part, holding that the military commission that was to try Hamdan could not do so lawfully, because its procedures allowed for conviction on secret evidence.²⁷⁸⁶ The ruling reached Cuba that day, which resulted in the indefinite recess of a pretrial proceeding.²⁷⁸⁷ The court of appeals reversed Judge Robertson, holding that "Congress authorized the military commission that will try Hamdan."²⁷⁸⁸ The Supreme Court decided *Hamdan v. Rumsfeld* on June 29, 2006, reversing the court of appeals because the procedures specified for the military commission violated the Uniform Code of Military Justice.²⁷⁸⁹

On remand, Judge Robertson decided that the Military Commissions Act, signed by President Bush on October 17, deprived Guantánamo Bay detainees of statutory habeas corpus²⁷⁹⁰ and that Hamdan's "connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."²⁷⁹¹ On July 18, 2008, Judge Robertson determined that the Military Commissions Act of 2006 established procedures much improved over those created earlier by executive order, and the provision for appeal to the U.S. Court of Appeals for the District of Columbia Circuit created an opportunity for adequate judicial review.²⁷⁹² On August 6, a military tribunal convicted Hamdan of providing material support for terrorism but not of terrorism conspiracy.²⁷⁹³ The jury recommended a sentence of five years and six months, and

2785. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005); see also Mahler, *supra* note 2740, at 148 (reporting that Judge Robertson decided to keep Hamdan's case on a letter request from Hamdan's attorneys).

2786. *Hamdan*, 344 F. Supp. 2d at 166–72, *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); see Hafetz, *supra* note 2754, at 139; Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. Times, Nov. 9, 2004, at A1.

2787. See Bravin, *supra* note 2728, at 219–20; Lewis, *supra* note 2786; Mahler, *supra* note 2740, at 164–65.

2788. *Hamdan*, 415 F.3d 33, *rev'd*, 548 U.S. 557; see Hafetz, *supra* note 2754, at 139; Neil A. Lewis, *Ruling Lets U.S. Restart Trials at Guantánamo*, N.Y. Times, July 16, 2005, at A1; Mahler, *supra* note 2740, at 191–92.

2789. 548 U.S. at 613; see *Hamdan v. United States*, 696 F.3d 1238, 1243 (D.C. Cir. 2012); see also Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. Times, June 30, 2006, at A1; Hafetz, *supra* note 2754, at 147–48; Mahler, *supra* note 2740, at 283–85.

Following the Supreme Court's *Hamdan* decision, Hamdan's military attorney Swift was forced out of the Navy. See Mahler, *supra* note 2740, at 296–98.

2790. *Hamdan*, 464 F. Supp. 2d at 11–12; see Robert Barnes, *Judge Rejects Detention Challenge of Bin Laden's Driver*, Wash. Post, Dec. 14, 2006, at A9; Lewis, *supra* note 2780; Mahler, *supra* note 2740, at 300–01.

2791. *Hamdan*, 464 F. Supp. 2d at 18; see Lewis, *supra* note 2780.

2792. *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008); see Scott Shane & William Glaberson, *Rulings Clear Military Trial of a Detainee*, N.Y. Times, July 18, 2008, at A1.

2793. *Hamdan*, 696 F.3d at 1240, 1244; Transfer Notice, *Hamdan v. Gates*, No. 1:04-cv-1519 (D.D.C. Jan. 30, 2009), D.E. 110 [hereinafter *Hamdan* Transfer Notice]; Transcript at 3939–42,

the judge gave Hamdan credit for time served of five years and one month.²⁷⁹⁴ The government released Hamdan to Yemen on November 25, 2008, to serve the last month of his sentence.²⁷⁹⁵ On January 8, 2009, Yemen released Hamdan to live with his family in Sana'a.²⁷⁹⁶

On June 24, 2011, the Court of Military Commission Review affirmed Hamdan's conviction and sentence.²⁷⁹⁷ The court of appeals for the District of Columbia Circuit, however, held on October 16, 2012, that because material support for terrorism was not at the time of Hamdan's actions (nor had it since become) a war crime according to the international law of war, Hamdan's conviction must be reversed.²⁷⁹⁸

United States v. Hamdan (U.S. Mil. Comm. Aug. 6, 2008), available at www.mc.mil/CASES.aspx; see Charges, *id.* (May 10, 2007); see Bravin, *supra* note 2728, at 327–34; William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008, at A1; Jerry Markon, *Hamdan Guilty of Terror Support*, Wash. Post, Aug. 7, 2008, at A1. See generally *The Oath* (Praxis Films 2010).

2794. *Hamdan*, 696 F.3d at 1240–41, 1244; Transcript at 4173–74, United States v. Hamdan (U.S. Mil. Comm. Aug. 7, 2008), available at www.mc.mil/CASES.aspx; see Bravin, *supra* note 2728, at 334–43 (noting that Hamdan received credit for detention following the filing of charges, but not for his previous indefinite detention as an enemy combatant); William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. Times, Aug. 8, 2008, at A1 (reporting on a credit of sixty-one months since Hamdan had been charged out of more than six years in all); Greenberg, *supra* note 2754, at 220 (“there was such scant evidence that his sentence was only five and a half years”); Jerry Markon & Josh White, *Bin Laden Driver Gets 5½ Years*; *U.S. Sought 30*, Wash. Post, Aug. 8, 2008, at A1; Soufan, *supra* note 2780, at 457.

2795. *Hamdan* Transfer Notice, *supra* note 2793; *Hamdan*, 696 F.3d at 1241, 1244; see Joe McMillan, *The United States on Trial*, in *The Guantánamo Lawyers*, *supra* note 2737, at 178, 183; Carol Rosenberg, *Bin Laden's Driver Will Finish Jail Time in Yemen*, Miami Herald, Nov. 26, 2008, at 5A.

2796. *Hamdan*, 696 F.3d at 1241, 1244; see McMillan, *supra* note 2795, at 183; Soufan, *supra* note 2780, at 457; *Yemen Releases Former Bin Laden Driver from Jail*, N.Y. Times, Jan. 12, 2009, at A9.

2797. Opinion, United States v. Hamdan, No. 09-2 (U.S. Ct. Mil. Comm. Rev. June 24, 2011), available at www.mc.mil/Portals/0/pdfs/Salim09-002/hamdan%20opinion%2024%20June%202011.pdf; *Hamdan*, 696 F.3d at 1244.

2798. *Hamdan*, 696 F.3d at 1241, 1248–53; see *id.* at 1241, 1246–48 (concluding, to avoid a possible conflict with the Constitution's Ex Post Facto Clause, that the Military Commissions Act of 2006 does not “authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred”); see also Bravin, *supra* note 2728, at 377–80; Charlie Savage, *In Setback for Military Tribunals, Bin Laden Driver's Conviction Is Reversed*, N.Y. Times, Oct. 17, 2012, at A20; Del Quentin Wilber & Ernesto Londoño, *Court Overturns Conviction of Bin Laden's Driver*, Wash. Post, Oct. 17, 2012, at A2; Lindsay Wise & Carol Rosenberg, *Bin Laden Driver's Conviction Tossed*, Miami Herald, Oct. 17, 2012, at 1A.

On July 14, 2014, the court of appeals overruled en banc the legal reasoning in Hamdan's case without disturbing the reversal of Hamdan's conviction or the legal conclusion that material support is not triable by a Guantánamo Bay military commission. *Al-Bahlul v. United States*, 767 F.3d 1, 11–17 (D.C. Cir. 2014); *id.* at 63 n.1 (Circuit Judge Kavanaugh, concurring and dissenting).

Decisions by Judges Leon and Green

On November 15, 2004, Judge Richard J. Leon took back assignment for all purposes the two cases originally assigned to him.²⁷⁹⁹ The court made sure that attorneys were promptly notified of the reassignment.²⁸⁰⁰ By this time, two of the nine detainees in these two cases were no longer at Guantánamo Bay.²⁸⁰¹ On January 19, 2005, Judge Leon dismissed the petitions, holding that there was nothing unlawful about “the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict.”²⁸⁰²

Eleven cases remained before Judge Green, who held on January 31 that the habeas petitions stated valid due process claims.²⁸⁰³ Nine days after the Supreme Court’s *Rasul* decision, the Defense Department created a Combatant Status Review Tribunal (CSRT) to establish whether each detainee is an enemy combatant.²⁸⁰⁴ The government used the results of CSRT proceedings as habeas returns.²⁸⁰⁵ Judge Green held that CSRT procedures did not meet constitutional standards for due process.²⁸⁰⁶ In addition, some petitioners stated valid claims under the Geneva Conventions.²⁸⁰⁷ While Judge Green’s decision was pending,

2799. Order, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Nov. 15, 2004), D.E. 61; Order, *Benchellali v. Bush*, No. 1:04-cv-1142 (D.D.C. Nov. 15, 2004), D.E. 56; see *O.K. v. Bush*, 377 F. Supp. 2d 102, 104 (D.D.C. 2005) (“Judge Richard Leon elected to retain the motions to dismiss in his two cases.”); Freeman, *supra* note 2763, at 243; Joe Palazzolo, *Judges Vow to Move Fast on Gitmo Cases*, *Legal Times*, July 14, 2008, at 6; Wax, *supra* note 2737, at 169.

2800. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2801. *Khalid v. Bush*, 355 F. Supp. 2d 311, 316 n.3 (D.D.C. 2005); Consent Motion, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 21, 2004), D.E. 19 (noting the transfers of Nizar Sassi and Mourad Benchellali); see Wax, *supra* note 2737, at 169.

2802. *Khalid*, 355 F. Supp. 2d at 314; see *Boumediene v. Bush*, 553 U.S. 723, 734–35 (2008); see also Freeman, *supra* note 2763, at 241; Hafetz, *supra* note 2754, at 135.

2803. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005); see Freeman, *supra* note 2763, at 241; Hafetz, *supra* note 2754, at 136–37; Wax, *supra* note 2737, at 169–70.

2804. *Boumediene*, 553 U.S. at 733; *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009); *Bismullah v. Gates*, 501 F.3d 178, 181 (D.C. Cir. 2007); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450; see Margulies, *supra* note 2732, at 159 (“Each tribunal would consist of three commissioned officers who would base their decision on information presented by the military and the prisoner.”); Meltzer, *supra* note 2748, at 6; Simard, *supra* note 2748, at 378; Thomas P. Sullivan, “*Due Process*” at *Guantánamo*, in *The Guantánamo Lawyers*, *supra* note 2737, at 148. See generally *Taxi to the Dark Side* (Discovery Channel 2007).

CSRT records are posted at www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/index.html (formerly posted at www.defense.gov/news/Combatant_Tribunals.html).

2805. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2806. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481; see *Boumediene*, 553 U.S. at 734–35; see also Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. City L. Rev. 393, 402 (2007); Hafetz, *supra* note 2754, at 136–37.

2807. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481.

the court received an additional eight cases on behalf of eleven additional detainees.²⁸⁰⁸

Ill-Fated Transfer Injunctions

On Tuesday, March 1, 2005, attorneys for several Yemeni detainees sought from Judge Henry H. Kennedy, Jr., to whom their case had been assigned, an order requiring the government to give the attorneys thirty days' notice before transferring their clients from Guantánamo Bay, in light of concerns that the government would deprive the court of jurisdiction over the detainees by transferring them to prisons in other countries.²⁸⁰⁹ On Friday of the following week, the *New York Times* reported on “a plan to cut by more than half the population at [the] detention facility in Guantánamo Bay, Cuba, in part by transferring hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen.”²⁸¹⁰ At 10:30 p.m. that night, the Yemenis' attorneys submitted to the court an emergency mo-

2808. Docket Sheet, *Abdullah v. Bush*, No. 1:05-cv-23 (D.D.C. Jan. 7, 2005) (two detainees); Docket Sheet, *Ben Mustapha v. Bush*, No. 1:05-cv-22 (D.D.C. Jan. 7, 2005) (one detainee); Docket Sheet, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004) (three detainees); Docket Sheet, *Zemiri v. Bush*, No. 1:04-cv-2046 (D.D.C. Nov. 19, 2004) (one detainee); Docket Sheet, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, *Paracha v. Bush*, No. 1:04-cv-2022 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, *Al-Qosi v. Bush*, No. 1:04-cv-1937 (D.D.C. Nov. 8, 2004) (one detainee); Docket Sheet, *Belmar v. Bush*, No. 1:04-cv-1897 (D.D.C. Nov. 1, 2004) [hereinafter *Belmar* Docket Sheet] (one detainee); see *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 452 & n.15; see also Charles H. Carpenter, *Playing Politics, in The Guantánamo Lawyers*, *supra* note 2737, at 301, 301 (reporting on the filing of the petition in No. 1:05-cv-23).

2809. Motion, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. Mar. 3, 2005), D.E. 115; see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 665–66 (2006) (“Since the spring of 2005, the docket of the district court in the District of Columbia has been flooded with motions by GTMO detainees seeking preliminary relief associated with the possibility of a transfer.”); Falkoff, *supra* note 2806, at 395–96 (“The prospect of an unnoticed, dead-of-night transfer for indefinite detention in another country, coupled with the very real prospect that our clients might just as easily be rendered to another country to be tortured, led us to file [the motion].” (footnote omitted)); see also Chesney, *supra*, at 658 (noting that the purpose of the notice motions was to preserve an opportunity to challenge transfers that would result in a risk of torture); Allison M. Lefrak, *You’re Going Home, in The Guantánamo Lawyers*, *supra* note 2737, at 341, 342 (“When a detainee is released, if [a thirty-day notice] order has been entered in his case, the government must give thirty days’ notice of the release, in order to allow attorneys to object if the detainee is being sent to a country where he is likely to be tortured or persecuted.”).

The petition was filed on behalf of fourteen detainees, but the government could not locate Aref Abd il-Rheem. Preliminary Injunction, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 29, 2005), D.E. 146 [hereinafter *Abdah* Preliminary Injunction], available at 2005 WL 711814; Status Report, *id.* (Oct. 22, 2004).

2810. Douglas Jehl, Neil A. Lewis & Tim Golden, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. Times, Mar. 11, 2005, at A1; see *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion at 1–2, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 12, 2005), D.E. 118 [hereinafter *Abdah* Temporary Restraining Order], available at 2005 WL 589812.

tion for a temporary restraining order preventing transfer until Judge Kennedy could rule on the injunction motion.²⁸¹¹

Judge Rosemary M. Collyer was on duty as the emergency motion judge that weekend.²⁸¹² On Saturday, Judge Collyer granted the temporary restraining order.²⁸¹³ On Sunday, several attorneys sought temporary restraining orders on behalf of their clients, but Judge Collyer declined to issue such orders en masse.²⁸¹⁴ On Monday, attorneys began to file thirty-day-notice motions in other cases.²⁸¹⁵

Judge Kennedy granted the Yemenis' motion²⁸¹⁶ and issued similar orders in other cases.²⁸¹⁷ Judges Ricardo M. Urbina,²⁸¹⁸ Paul L. Friedman,²⁸¹⁹ Gladys

2811. *Abdah* Temporary Restraining Order, *supra* note 2810, at 1 n.1.

2812. *Id.*

Tim Reagan interviewed Judge Collyer for this report in the judge's chambers on September 20, 2011.

2813. *Abdah* Temporary Restraining Order, *supra* note 2810.

2814. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

2815. *O.K. v. Bush*, 377 F. Supp. 2d 102, 105 (D.D.C. 2005); Motion, *Abdullah v. Bush*, No. 1:05-cv-23 (D.D.C. Mar. 14, 2005), D.E. 15.

2816. *Abdah* Preliminary Injunction, *supra* note 2809; see Marc D. Falkoff, *Without Law or Justice, in* The Guantánamo Lawyers, *supra* note 2737, at 155, 164 (“[W]e proved to the judge’s satisfaction that we had legitimate and well-founded fears that the United States might render our clients to other countries to be tortured. Our notice order would provide [the detainee] protection and enough time for us to get to the court in case the government tried anything like that.”).

2817. Order, *Al-Shubati v. Bush*, No. 1:07-cv-2338 (D.D.C. Jan. 11, 2008), D.E. 9; Order, *Al-Yazidi v. Bush*, No. 1:07-cv-2337 (D.D.C. Jan. 11, 2008), D.E. 9; Order, *Hentif v. Bush*, No. 1:06-cv-1766 (D.D.C. July 28, 2007), D.E. 29; Order, *Saleh v. Bush*, No. 1:06-cv-1765 (D.D.C. July 28, 2007), D.E. 32; Order, *Al-Harbi v. Bush*, No. 1:05-cv-2479 (D.D.C. Aug. 18, 2006), D.E. 30; Order, *Al-Asadi v. Bush*, No. 1:05-cv-2197 (D.D.C. Nov. 29, 2005), D.E. 5; Order, *Zakirjan v. Bush*, No. 1:05-cv-2053 (D.D.C. Nov. 21, 2005), D.E. 18; Order, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. May 9, 2005), D.E. 119; Order, *Al-Mohammed v. Bush*, No. 1:05-cv-247 (D.D.C. Mar. 30, 2005), D.E. 17.

2818. Order, *Al-Zarnouqi v. Bush*, No. 1:06-cv-1767 (D.D.C. Dec. 4, 2006), D.E. 15; Order, *Rabbani v. Bush*, No. 1:05-cv-1607 (D.D.C. June 16, 2006), D.E. 19; Order, *Alkhemisi v. Bush*, No. 1:05-cv-1983 (D.D.C. Nov. 21, 2005), D.E. 5; Order, *Al-Subaiy v. Bush*, No. 1:05-cv-1453 (D.D.C. Sept. 19, 2005), D.E. 14; Order, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. Sept. 13, 2005), D.E. 8; Order, *Sohail v. Bush*, No. 1:05-cv-993 (D.D.C. Sept. 13, 2005), D.E. 3; Order, *Faizullah v. Bush*, No. 1:05-cv-1489 (D.D.C. Aug. 22, 2005), D.E. 3; Order, *Hatim v. Bush*, No. 1:05-cv-1429 (D.D.C. Aug. 22, 2005), D.E. 16; Order, *El-Marqodi v. Bush*, No. 1:05-cv-1649 (D.D.C. Aug. 19, 2005), D.E. 5; Order, *Al-Karim v. Bush*, No. 1:05-cv-998 (D.D.C. Aug. 8, 2005), D.E. 3; Order, *Zalita v. Bush*, No. 1:05-cv-1220 (D.D.C. July 25, 2005), D.E. 3; Order, *Al-Hela v. Bush*, No. 1:05-cv-1048 (D.D.C. June 3, 2005), D.E. 12; Order, *Tumani v. Bush*, No. 1:05-cv-526 (D.D.C. Apr. 6, 2005), D.E. 5; Order, *Qayed v. Bush*, No. 1:05-cv-454 (D.D.C. Apr. 6, 2005), D.E. 4; Order, *Al-Oshan v. Bush*, No. 1:05-cv-520 (D.D.C. Mar. 31, 2005), D.E. 12.

Tim Reagan interviewed Judge Urbina for this report in the judge's chambers on August 15, 2011. Judge Urbina retired on May 31, 2012. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

2819. *Paracha v. Bush*, 374 F. Supp. 2d 118 (D.D.C. 2005); *Mokit v. Bush*, 374 F. Supp. 2d 106 (D.D.C. 2005); Minute Order, *Al-Salami v. Bush*, No. 1:05-cv-2452 (D.D.C. May 31, 2006); Order, *Akhtiar v. Bush*, No. 1:05-cv-1635 (D.D.C. Sept. 26, 2005), D.E. 10 [hereinafter *Akhtiar* Sept. 26, 2005, Order]; Order, *Almerfed v. Bush*, No. 1:05-cv-1645 (D.D.C. Sept. 23, 2005), D.E. 9; Order,

Kessler,²⁸²⁰ Richard W. Roberts,²⁸²¹ Kollar-Kotelly,²⁸²² Emmet G. Sullivan,²⁸²³ and Thomas F. Hogan²⁸²⁴ also issued similar orders. Judge Ellen Segal Huvelle ordered

Al-Shihry v. Bush, No. 1:05-cv-490 (D.D.C. Apr. 1, 2005), D.E. 17, *available at* 2005 WL 1384680; Order, Al-Wazan v. Bush, No. 1:05-cv-329 (D.D.C. Apr. 1, 2005), D.E. 19.

For this report, Tim Reagan interviewed Judge Friedman and his law clerk Albinas Prizgintas in the judge's chambers on October 12, 2011.

2820. Order, Mohammad v. Bush, No. 1:05-cv-885 (D.D.C. July 31, 2006), D.E. 29; Order, Rahman v. Bush, No. 1:05-cv-882 (D.D.C. July 31, 2006), D.E. 27; Order, Al-Aweda v. Bush, No. 1:05-cv-1668 (D.D.C. Dec. 28, 2005), D.E. 22; Order, Alhami v. Bush, No. 1:05-cv-359 (D.D.C. June 9, 2005), D.E. 19; Order, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. Apr. 28, 2005), D.E. 34; Opinion, Al-Joudi v. Bush, No. 1:05-cv-301 (D.D.C. Apr. 4, 2005), D.E. 20, *available at* 2005 WL 774847; Opinion, Al-Marri v. Bush, No. 34 (D.D.C. Apr. 4, 2005), *available at* 2005 WL 774843.

Tim Reagan interviewed Judge Kessler for this report in the judge's chambers on May 31, 2011.

2821. Order, Al-Shareef v. Bush, No. 1:05-cv-2458 (D.D.C. Dec. 8, 2006), D.E. 28, *available at* 2006 WL 3544736; Order, Feghoul v. Bush, No. 1:06-cv-618 (D.D.C. Oct. 31, 2006), D.E. 24, *available at* 2006 WL 3096856; Order, Alsa'aei v. Bush, No. 1:05-cv-2369 (D.D.C. Aug. 14, 2006), D.E. 22, *available at* 2006 WL 2367270; Order, Said v. Bush, No. 1:05-cv-2384 (D.D.C. July 25, 2006), D.E. 41; Order, Zadran v. Bush, No. 1:05-cv-2367 (D.D.C. July 19, 2006), D.E. 36; Order, Hamoud v. Bush, No. 1:05-cv-1894 (D.D.C. July 5, 2006), D.E. 23, *available at* 2006 WL 1876947; Opinion, Al-Rubaish v. Bush, No. 1:05-cv-1714 (D.D.C. Dec. 14, 2005), D.E. 16; Order, Mohammadi v. Bush, No. 1:05-cv-1246 (D.D.C. Sept. 22, 2005), D.E. 7; Order, Abdulzaher v. Bush, No. 1:05-cv-1236 (D.D.C. Sept. 22, 2005), D.E. 12; Order, Ahmed v. Bush, No. 1:05-cv-665 (D.D.C. July 8, 2005), D.E. 16, *available at* 2005 WL 1606912; Order, Chaman v. Bush, No. 1:05-cv-887 (D.D.C. June 16, 2005), D.E. 7; Order, Slahi v. Bush, No. 1:05-cv-881 (D.D.C. June 16, 2005), D.E. 5; Order, Adem v. Bush, No. 1:05-cv-723 (D.D.C. June 6, 2005), D.E. 13; Order, Al-Daini v. Bush, No. 1:05-cv-634 (D.D.C. June 6, 2005), D.E. 10; Order, Al-Shamri v. Bush, No. 1:05-cv-551 (D.D.C. May 11, 2005), D.E. 10; Order, Al-Rashaidan v. Bush, No. 1:05-cv-586 (D.D.C. Apr. 8, 2005), D.E. 10; Order, Abdullah v. Bush, No. 1:05-cv-23 (D.D.C. Apr. 8, 2005), D.E. 24; Order, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Apr. 8, 2005), D.E. 141; *see* Marjorie M. Smith, *The Other Man, in* The Guantanamo Lawyers, *supra* note 2737, at 147.

2822. Order, Abu Ghanem v. Bush, No. 1:05-cv-1638 (D.D.C. July 10, 2007), D.E. 53; Order, Rahmattullah v. Bush, No. 1:05-cv-878 (D.D.C. Jan. 23, 2007), D.E. 24; Order, Alsawam v. Bush, No. 1:05-cv-1244 (D.D.C. Oct. 4, 2006), D.E. 21; Order, Al-Baidany v. Bush, No. 1:05-cv-2380 (D.D.C. Oct. 4, 2006), D.E. 27; Order, Ghalib v. Bush, No. 1:05-cv-1238 (D.D.C. May 1, 2006), D.E. 22; Order, Shaaban v. Bush, No. 1:05-cv-892 (D.D.C. May 1, 2006), D.E. 33; Order, Gul v. Bush, No. 1:05-cv-888 (D.D.C. May 1, 2006), D.E. 26; Order, Al-Mithali v. Bush, No. 1:05-cv-2186 (D.D.C. Dec. 20, 2005), D.E. 22; Order, Al-Harbi v. Bush, No. 1:05-cv-1857 (D.D.C. Nov. 17, 2005), D.E. 12; Order, Sameur v. Bush, No. 1:05-cv-1806 (D.D.C. Nov. 17, 2005), D.E. 8; Order, Al-Badah v. Bush, No. 1:05-cv-1641 (D.D.C. Nov. 17, 2005), D.E. 17.

2823. Order, Zuhair v. Bush, No. 1:08-cv-864 (D.D.C. July 31, 2008), D.E. 27; Order, Al-Shibh v. Bush, No. 1:06-cv-1725 (D.D.C. July 31, 2008), D.E. 33; Order, Al-Habashi v. Bush, No. 1:05-cv-745 (D.D.C. July 31, 2008), D.E. 56; Order, Al-Sharbi v. Bush, No. 1:05-cv-2348 (D.D.C. July 31, 2008), D.E. 45; Order, Batarfi v. Bush, No. 1:05-cv-409 (D.D.C. July 31, 2008), D.E. 92; Order, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Aug. 17, 2006), D.E. 36; Order, Ahmed v. Bush, No. 1:05-cv-1234 (D.D.C. Aug. 17, 2006), D.E. 23; Order, Wahab v. Bush, No. 1:05-cv-886 (D.D.C. Aug. 17, 2006), D.E. 26.

2824. Order, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. July 10, 2008), D.E. 52.

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the United States Courts from

thirty-days' notice, unless the detainee was to be released to freedom.²⁸²⁵ Judge Robertson granted the government's motions to stay proceedings pending resolution of jurisdictional questions in higher courts and interpreted the stay to prohibit transfer of the detainees without notice.²⁸²⁶ Judges Reggie B. Walton,²⁸²⁷ John D. Bates,²⁸²⁸ Leon,²⁸²⁹ and Collyer²⁸³⁰ declined to order thirty-days' notice of detainee transfer.

October 2011 through June 2013. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; *New Administrative Office Director Named*, Third Branch, June 11, 2013, available at <http://news.uscourts.gov/new-administrative-office-director-named> (announcing the appointment of Judge John D. Bates as Judge Hogan's successor); *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, available at <http://news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary>.

2825. Order, *Basardh v. Bush*, No. 1:05-cv-889 (D.D.C. Sept. 25, 2006), D.E. 25; Order, *Al-Khatemi v. Bush*, No. 1:05-cv-2248 (D.D.C. Dec. 20, 2005), D.E. 7; Order, *Al-Bahooth v. Bush*, No. 1:05-cv-1666 (D.D.C. Dec. 20, 2005), D.E. 20; Order, *Kahn v. Bush*, No. 1:05-cv-1001 (D.D.C. Dec. 20, 2005), D.E. 12; Order, *Mamet v. Bush*, No. 1:05-cv-1602 (D.D.C. Sept. 30, 2005), D.E. 9; Order, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. Apr. 12, 2005), D.E. 96, available at 2005 WL 839542 (also applying to *Ameziane v. Bush*, No. 1:05-cv-392).

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

2826. Order, *Awad v. Bush*, No. 1:05-cv-2379 (D.D.C. Jan. 11, 2006), D.E. 9 ("the stay will apply to all proceedings applicable to the petitioners, including without limitation their release, repatriation, or rendition, and it will remain in effect until further order of the Court"); Order, *Khan v. Bush*, No. 1:05-cv-1491 (D.D.C. Dec. 6, 2005), D.E. 8; Order, *Khiali-Gul v. Bush*, No. 1:05-cv-877 (D.D.C. Dec. 6, 2005), D.E. 9; Order, *Al-Mudafari v. Bush*, No. 1:05-cv-2185 (D.D.C. Dec. 2, 2005), D.E. 16; Order, *Idris v. Bush*, No. 1:05-cv-1555 (D.D.C. Dec. 2, 2005), D.E. 27; Order, *Khalifh v. Bush*, No. 1:05-cv-1189 (D.D.C. Oct. 24, 2005), D.E. 9; Order, *Aziz v. Bush*, No. 1:05-cv-492 (D.D.C. Apr. 20, 2005), D.E. 16; Order, *Salahi v. Bush*, No. 1:05-cv-569 (D.D.C. Apr. 15, 2005), D.E. 8; Order, *Qassim v. Bush*, No. 1:05-cv-497 (D.D.C. Apr. 13, 2005), D.E. 14; Order, *El-Mashad v. Bush*, No. 1:05-cv-270 (D.D.C. Apr. 7, 2005), D.E. 29; see *Qassim v. Bush*, 382 F. Supp. 2d 126, 127 (D.D.C. 2005); see also Order, *Alladeen v. Bush*, No. 1:05-cv-833 (D.D.C. Oct. 27, 2005), D.E. 18 (temporary restraining order against removal from Guantánamo Bay).

In one of the cases before Judge Robertson, the petitioners filed a motion for an injunction against rendition on February 4, 2005, a month ahead of the motion presented to Judge Kennedy. Motion, *El-Mashad*, No. 1:05-cv-270 (D.D.C. Feb. 4, 2005), D.E. 3.

2827. *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005).

Tim Reagan interviewed Judge Walton for this report in the judge's chambers on May 23, 2011.

2828. *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005); *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion, *Al-Shabany v. Bush*, No. 1:05-cv-2029 (D.D.C. Nov. 17, 2005), D.E. 12, available at 2005 WL 3211407; Opinion, *Zaid v. Bush*, No. 1:05-cv-1646 (D.D.C. Oct. 25, 2005), D.E. 12.

Tim Reagan interviewed Judge Bates for this report in the judge's chambers on October 15, 2009. Judge Bates served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; *James C. Duff to Return as AO Director in January 2015*, Third Branch, Nov. 4, 2014, available at <http://news.uscourts.gov/james-c-duff-return-ao-director-january-2015>; *New Administrative Office Director Named*, Third Branch, June 11, 2013, available at <http://news.uscourts.gov/new-administrative-office-director-named>.

Pursuant to the notice orders in some cases, the government filed sealed stipulated notices that petitioners' attorneys consented to their clients' impending transfers without thirty-days' notice, and the notices were unsealed after the detainees were transferred.²⁸³¹ In other cases, the public record included notices of sealed submissions in advance of detainee transfers,²⁸³² but the submissions re-

2829. *Mammar v. Bush*, 407 F. Supp. 2d 77 (D.D.C. 2005); Minute Order, *Al-Ginco v. Bush*, No. 1:05-cv-1310 (D.D.C. May 30, 2006).

2830. Order, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. June 14, 2005), D.E. 18 (ordering, however, thirty-days' notice before transferring one detainee to Libya, where the detainee's father was allegedly assassinated by the Libyan government).

2831. Stipulation and Order, *Al-Habashi v. Bush*, No. 1:05-cv-765 (D.D.C. Jan. 27, 2009), D.E. 127, filed as Ex. 1, Notice, *id.* (Mar. 5, 2009), D.E. 136; Stipulation and Order, *Al-Joudi v. Bush*, No. 1:05-cv-301 (D.D.C. Feb. 20, 2007), D.E. 89; Stipulation and Order, *Mohammad v. Bush*, No. 1:05-cv-885 (D.D.C. Dec. 14, 2006), D.E. 38; Stipulation and Order, *Al-Badah v. Bush*, No. 1:05-cv-1641 (D.D.C. Dec. 4, 2006), D.E. 44; Stipulation and Order, *Alladeen*, No. 1:05-cv-833 (D.D.C. Nov. 15, 2006), D.E. 32; Stipulation and Order, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 14, 2006), D.E. 52.

2832. Filing Notice, *Ahmed v. Bush*, No. 1:05-cv-1234 (D.D.C. Oct. 9, 2008), D.E. 77 (notice thirty-two days in advance of transfer); Filing Notice, *Al-Karim v. Bush*, No. 1:05-cv-998 (D.D.C. Aug. 29, 2008), D.E. 55 (141 days); Filing Notice, *Wahab v. Bush*, No. 1:05-cv-886 (D.D.C. Aug. 21, 2008), D.E. 62 (eighteen days); Filing Notice, *Al-Qadir v. Bush*, No. 1:08-cv-1185 (D.D.C. July 23, 2008), D.E. 7 (thirty-three days); Filing Notice, *Feghoul v. Bush*, No. 1:06-cv-618 (D.D.C. July 23, 2008), D.E. 59 (thirty-three days); Filing Notice, *Al-Harbi v. Bush*, No. 1:05-cv-2479 (D.D.C. July 23, 2008), D.E. 101 (100 days); Filing Notice, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. June 6, 2008), D.E. 84 (fifty days); Filing Notice, *Rahmattullah v. Bush*, No. 1:05-cv-878 (D.D.C. Apr. 8, 2008), D.E. 36 (twenty-seven days); Filing Notice, *Kahn v. Bush*, No. 1:05-cv-1001 (D.D.C. Apr. 3, 2008), D.E. 33 (twenty-seven days); Filing Notice, *Al-Bahooth v. Bush*, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007), D.E. 49 (seven days); Filing Notice, *Al-Oshan v. Bush*, No. 1:05-cv-520 (D.D.C. Dec. 21, 2007), D.E. 110 (ten days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Dec. 21, 2007), D.E. 108 (seven days); Filing Notice, *Sameur v. Bush*, No. 1:05-cv-1806 (D.D.C. Dec. 12, 2007), D.E. 51 (seven days); Filing Notice, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Dec. 12, 2007), D.E. 204 (seven days); Filing Notice, *Zadran v. Bush*, No. 1:05-cv-2367 (D.D.C. Dec. 5, 2007), D.E. 81 (seven days); Filing Notice, *Chaman v. Bush*, No. 1:05-cv-887 (D.D.C. Dec. 5, 2007), D.E. 78 (seven days); Filing Notice, *Adem v. Bush*, No. 1:05-cv-723 (D.D.C. Nov. 23, 2007), D.E. 66 (twenty-one days); Filing Notice, *Rahman v. Bush*, No. 1:05-cv-882 (D.D.C. Oct. 26, 2007), D.E. 37 (seven days); Filing Notice, *Al-Shareef v. Bush*, No. 1:05-cv-2458 (D.D.C. Oct. 19, 2007), D.E. 46 (twenty-one days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Aug. 28, 2007), D.E. 95 (eight days); Filing Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 11, 2007), D.E. 73 (four days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 11, 2007), D.E. 89 (four days); Filing Notice, *Hamoud v. Bush*, No. 1:05-cv-1894 (D.D.C. June 5, 2007), D.E. 35 (thirteen days); Filing Notice, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. June 5, 2007), D.E. 208 (thirteen days); Filing Notice, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Mar. 27, 2007), D.E. 190 (three days); Filing Notice, *Gul v. Bush*, No. 1:05-cv-888 (D.D.C. Feb. 16, 2007), D.E. 63 (twelve days); Filing Notice, *Mokit v. Bush*, No. 1:05-cv-621 (D.D.C. Jan. 29, 2007), D.E. 27 (thirty days); Filing Notice, *Al-Subaiy v. Bush*, No. 1:05-cv-1453 (D.D.C. Jan. 19, 2007), D.E. 47 (thirty-two days); Filing Notice, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. Dec. 8, 2006), D.E. 167 (seven days); Filing Notice, *Ghalib v. Bush*, No. 1:05-cv-1238 (D.D.C. Dec. 5, 2006), D.E. 35 (eighty-five days); Filing Notice, *Said v. Bush*, No. 1:05-cv-2384 (D.D.C. Nov. 27, 2006), D.E. 59 (sixteen days); Filing Notice, *Alsaaei v. Bush*, No. 1:05-cv-2369 (D.D.C. Nov. 27, 2006), D.E. 30 (fourteen days); Filing Notice, *Al-Rubaish v. Bush*, No. 1:05-cv-1714 (D.D.C. Nov. 27, 2006), D.E. 33 (sixteen days); Filing Notice, *Akhtiar v. Bush*, No. 1:05-cv-1635 (D.D.C. Nov. 15, 2006), D.E. 25 (thirty days); Filing Notice, *Zakirjan v. Bush*, No. 1:05-cv-

mained sealed despite government notices that they could be unsealed.²⁸³³ In a few additional cases, transfer notices referred to sealed submissions that were not otherwise reflected on the public record.²⁸³⁴

2053 (D.D.C. Nov. 7, 2006), D.E. 73 (ten days); Filing Notice, *Khan v. Bush*, No. 1:05-cv-1491 (D.D.C. Oct. 2, 2006), D.E. 19 (nine days); Filing Notice, *Faizullah v. Bush*, No. 1:05-cv-1489 (D.D.C. Sept. 14, 2006), D.E. 27 (twenty-seven days); Filing Notice, *Mohammadi v. Bush*, No. 1:05-cv-1246 (D.D.C. Aug. 31, 2006), D.E. 22 (forty-one days); Filing Notice, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. Aug. 17, 2006), D.E. 110 (seven days); Filing Notice, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. June 15, 2006), D.E. 55 (nine days); Filing Notice, *Al-Aweda v. Bush*, No. 1:05-cv-1668 (D.D.C. Apr. 26, 2006), D.E. 34 (twenty-two days); Filing Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. Apr. 26, 2006), D.E. 22 (fifty-nine days); Filing Notice, *Al-Rashaidan v. Bush*, No. 1:05-cv-586 (D.D.C. Apr. 26, 2006), D.E. 22 (twenty-two days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Apr. 26, 2006), D.E. 63 (fifty-nine days); Filing Notice, *Al-Shihry v. Bush*, No. 1:05-cv-490 (D.D.C. Apr. 26, 2006), D.E. 24 (fifty-nine days); Filing Notice, *Qayed v. Bush*, No. 1:05-cv-454 (D.D.C. Apr. 26, 2006), D.E. 11 (fifty-nine days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Apr. 26, 2006), D.E. 63 (fifty-nine days); Filing Notice, *Al-Khatemi v. Bush*, No. 1:05-cv-2248 (D.D.C. Apr. 26, 2006), D.E. 20 (fifty-nine days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. June 17, 2005), D.E. 28 (thirty-two days).

2833. Transfer Notice, *Al-Karim*, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009), D.E. 100; Transfer Notice, *Ahmed*, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008), D.E. 84; Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008), D.E. 131; Transfer Notice, *Wahab*, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008), D.E. 67; Transfer Notice, *Al-Qadir*, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008), D.E. 23; Transfer Notice, *Feghoul*, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008), D.E. 69; Transfer Notice, *Al-Marri*, No. 1:04-cv-2035 (D.D.C. July 29, 2008), D.E. 102; Transfer Notice, *Kahn*, No. 1:05-cv-1001 (D.D.C. May 5, 2008), D.E. 36; Transfer Notice, *Rahmattullah*, No. 1:05-cv-878 (D.D.C. May 5, 2008), D.E. 38; Transfer Notice, *Sameur*, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007), D.E. 53; Transfer Notice, *Al-Bahooth*, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007), D.E. 49; Transfer Notices, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. June 27, 2006, and Dec. 31, 2007), D.E. 67, 108; Transfer Notices, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007), D.E. 47, 113; Transfer Notices, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007), D.E. 192, 206; Transfer Notice, *Zadran*, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007), D.E. 84; Transfer Notice, *Chaman*, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007), D.E. 81; Transfer Notice, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69; Transfer Notice, *Al-Shareef*, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007), D.E. 49; Transfer Notice, *Rahman*, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007), D.E. 40; Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 17, 2007), D.E. 76; Transfer Notice, *Hamoudh*, No. 1:05-cv-1894 (D.D.C. June 22, 2007), D.E. 37; Transfer Notice, *Abdah*, No. 1:04-cv-1254 (D.D.C. June 22, 2007), D.E. 212; Transfer Notice, *Ghalib*, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007), D.E. 42; Transfer Notice, *Gul*, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007), D.E. 65; Transfer Notice, *Mokit*, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007), D.E. 29; Transfer Notice, *Al-Subaiy*, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007), D.E. 51; Transfer Notice, *Said*, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006), D.E. 61; Transfer Notice, *Alsaaei*, No. 1:05-cv-2369 (D.D.C. Dec. 20, 2006), D.E. 32; Transfer Notice, *Al-Rubaish*, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006), D.E. 35; Transfer Notice, *Akhtiar*, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006), D.E. 28; Transfer Notice, *Anam*, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006), D.E. 170; Transfer Notice, *Zakirjan*, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006), D.E. 76; Transfer Notice, *Khan*, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006), D.E. 22; Transfer Notice, *Faizullah*, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006), D.E. 33; Transfer Notice, *Mohammadi*, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006), D.E. 29; Transfer Notice, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006), D.E. 112; Transfer Notice, *Al-Khatemi*, No. 1:05-cv-2248 (D.D.C. June 27, 2006), D.E. 25; Transfer Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 27, 2006), D.E. 29; Transfer Notice, *Kiyemba*, No. 1:05-cv-1509 (D.D.C. June 27, 2006), D.E. 59; Transfer Notice, *Qayed*, No. 1:05-cv-454 (D.D.C. June 27,

In 2009, the court of appeals vacated the thirty-day notice orders as beyond the courts' power.²⁸³⁵

On October 2, 2007, Judge Kessler enjoined the transfer of Mohammed Abdul Rahman to Tunisia, where he had been tried in absentia and sentenced to twenty years in prison, on representations of fragile health and the possibility of torture in Tunisia.²⁸³⁶ On December 17, 2010, the court of appeals vacated the injunction on the authority of an intervening case holding that the court may not enjoin a transfer if the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country.²⁸³⁷

On August 19, 2011, Judge Walton denied a motion for an order requiring thirty days' notice before a transfer affecting a habeas petition that would leave the detainee in United States custody.²⁸³⁸

Protective Order Coordination

On November 2, 2005, the district court's Calendar and Case Management Committee decided that all matters pertaining to interpretation of applicable protective orders or logistical issues, such as attorney communications and visits with detainees, would be referred to Magistrate Judge Alan Kay.²⁸³⁹

Although Judge Kay occasionally issued rulings resolving disputes, his primary role was to act as a mediator.²⁸⁴⁰ Judge Kay, an experienced mediator, considers mediation to be the legal equivalent of holistic medicine.²⁸⁴¹ Assignment of blame and the adversarial process are not essential components of mediation.²⁸⁴² Judge

2006), D.E. 17; Transfer Notice, *Al-Shihry*, No. 1:05-cv-490 (D.D.C. June 27, 2006), D.E. 25; Transfer Notice, *Al-Aweda*, No. 1:05-cv-1668 (D.D.C. May 23, 2006), D.E. 37; Transfer Notice, *Al-Rashaidan*, No. 1:05-cv-586 (D.D.C. May 23, 2006), D.E. 25.

2834. Transfer Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Nov. 13, 2007), D.E. 106.

2835. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010); Order, *Khadr v. Obama*, No. 08-5233 (D.C. Cir. Sept. 3, 2010) (applying the holding in *Kiyemba* to other appeals), *cert. denied*, 563 U.S. ___, 131 S. Ct. 2900 (2011) (noting that Justices Breyer and Sotomayor would have granted certiorari and that Justice Kagan did not participate in the consideration of the certiorari petition).

2836. Order, *Alhami v. Bush*, No. 1:05-cv-359 (D.D.C. Oct. 2, 2007), D.E. 58; see William Glaberson, *Judge Halts Plan to Transfer Guantánamo Detainee*, N.Y. Times, Oct. 10, 2007, at A16.

2837. Order, *Alhami v. Obama*, No. 07-5400 (D.C. Cir. Dec. 17, 2010) (citing Order, *Bin Mohammed v. Obama*, No. 10-5218 (D.C. Cir. July 8, 2010) (citing *Kiyemba*, 561 F.3d at 516)), *cert. dismissed*, 563 U.S. ___, 131 S. Ct. 2091 (2011).

2838. Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Aug. 19, 2011), D.E. 1889; see Motion, *id.* (May 13, 2011), D.E. 1841.

2839. Order, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Nov. 2, 2005), D.E. 193; see Murray Fogler, *The Next Friend Catch-22*, in *The Guantánamo Lawyers*, *supra* note 2737, at 115, 116; Wax, *supra* note 2737, at 178.

Tim Reagan interviewed Judge Kay for this report in the judge's chambers on June 21, 2011.

2840. Interview with Hon. Alan Kay, June 21, 2011; see Fogler, *supra* note 2839, at 116; Wax, *supra* note 2737, at 178–79.

2841. Interview with Hon. Alan Kay, June 21, 2011 (noting that successful mediation usually requires teaching, psychology, and humor).

2842. *Id.*

Kay assisted with such matters as last-minute refusals to let attorneys land, the amount of physical restraints during attorney–client meetings, and finding an interpreter to replace one whose security clearance had been suddenly revoked.²⁸⁴³

The Justice Department provided the government with attorney representation in the habeas cases, but it was the Defense Department that controlled Guantánamo Bay.²⁸⁴⁴ Careful negotiation and mediation were crucial in working out matters with one party so complex and powerful.²⁸⁴⁵

Unconstitutional Stripping of Habeas Jurisdiction

Reviewing in consolidated appeals both Judge Leon’s decision that the detainees did not have habeas rights and Judge Green’s decision that they did, the court of appeals, on February 20, 2007, determined that the October 17, 2006, Military Commissions Act stripped the federal courts of jurisdiction over Guantánamo Bay habeas petitions.²⁸⁴⁶ In *Boumediene v. Bush*, however, the Supreme Court held, on June 12, 2008, that the Military Commissions Act was an unconstitutional suspension of habeas corpus.²⁸⁴⁷

Establishing Procedures for Resolving Several Hundred Petitions

226 Petitions

The last detainee to arrive at Guantánamo Bay was Mohammed Rahim al-Afghani on March 14, 2008.²⁸⁴⁸

Between Judge Green’s January 31, 2005, decision that the CSRT was constitutionally infirm and the Supreme Court’s *Boumediene* decision, 226 habeas petitions were filed in the District of Columbia’s district court on behalf of 561 detainees,²⁸⁴⁹ of which at least eighty were duplicates.²⁸⁵⁰ Sixty of the petitions were

2843. *Id.*

2844. *Id.*

2845. *Id.*

2846. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008); see Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36; see also Falkoff, *supra* note 2806, at 402; Hafetz, *supra* note 2754, at 156–57; Meltzer, *supra* note 2748, at 7.

2847. *Boumediene*, 553 U.S. at 733, 792; see *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47 (D.D.C. 2013); see also Robert Barnes, *Justices Say Detainees Can Seek Release*, Wash. Post, June 13, 2008, at A1; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008, at A1; Hafetz, *supra* note 2754, at 158–65; Meltzer, *supra* note 2748, at 9.

2848. See Petition at 2, *Rahim v. Obama*, No. 1:09-cv-1385 (D.D.C. July 27, 2009), D.E. 1; see also Ben Fox, *Detainee Shows a Taste for Pop Culture*, Miami Herald, Jan. 1, 2013, at 4A.

2849. The cases were assigned the following docket numbers: 1:05-cv-247, 1:05-cv-270, 1:05-cv-280, 1:05-cv-301, 1:05-cv-329, 1:05-cv-345, 1:05-cv-359, 1:05-cv-392, 1:05-cv-409, 1:05-cv-429 through 1:05-cv-431, 1:05-cv-454, 1:05-cv-490, 1:05-cv-492, 1:05-cv-497, 1:05-cv-520, 1:05-cv-526, 1:05-cv-533, 1:05-cv-551, 1:05-cv-569, 1:05-cv-573, 1:05-cv-583, 1:05-cv-584, 1:05-cv-586, 1:05-cv-621, 1:05-cv-634, 1:05-cv-640, 1:05-cv-660, 1:05-cv-665, 1:05-cv-714, 1:05-cv-723, 1:05-cv-748, 1:05-cv-763 through 1:05-cv-766, 1:05-cv-795, 1:05-cv-833, 1:05-cv-877 through 1:05-cv-892, 1:05-cv-993 through 1:05-cv-1002, 1:05-cv-1008 through 1:05-cv-1013, 1:05-cv-1048, 1:05-cv-1124, 1:05-cv-1189, 1:05-cv-1220, 1:05-cv-1233 through 1:05-cv-1244, 1:05-cv-1246, 1:05-cv-1310 through 1:05-cv-1312, 1:05-cv-1347, 1:05-cv-1353, 1:05-cv-1429, 1:05-cv-1453, 1:05-cv-1457, 1:05-

cv-1458, 1:05-cv-1487, 1:05-cv-1489 through 1:05-cv-1493, 1:05-cv-1497, 1:05-cv-1504 through 1:05-cv-1506, 1:05-cv-1509, 1:05-cv-1555, 1:05-cv-1590, 1:05-cv-1592, 1:05-cv-1601, 1:05-cv-1602, 1:05-cv-1607, 1:05-cv-1623, 1:05-cv-1635, 1:05-cv-1638, 1:05-cv-1639, 1:05-cv-1641, 1:05-cv-1645, 1:05-cv-1646, 1:05-cv-1649, 1:05-cv-1666 through 1:05-cv-1669, 1:05-cv-1678, 1:05-cv-1679, 1:05-cv-1697, 1:05-cv-1704, 1:05-cv-1714, 1:05-cv-1724, 1:05-cv-1725, 1:05-cv-1779, 1:05-cv-1806, 1:05-cv-1857, 1:05-cv-1864, 1:05-cv-1886, 1:05-cv-1894, 1:05-cv-1971, 1:05-cv-1983, 1:05-cv-2010, 1:05-cv-2029, 1:05-cv-2053, 1:05-cv-2083, 1:05-cv-2087, 1:05-cv-2088, 1:05-cv-2104, 1:05-cv-2112, 1:05-cv-2185, 1:05-cv-2186, 1:05-cv-2197, 1:05-cv-2199, 1:05-cv-2200, 1:05-cv-2201, 1:05-cv-2216, 1:05-cv-2223, 1:05-cv-2248, 1:05-cv-2249, 1:05-cv-2265, 1:05-cv-2336, 1:05-cv-2348, 1:05-cv-2349, 1:05-cv-2367, 1:05-cv-2369 through 1:05-cv-2371, 1:05-cv-2376, 1:05-cv-2378 through 1:05-cv-2381, 1:05-cv-2384 through 1:05-cv-2387, 1:05-cv-2398, 1:05-cv-2399, 1:05-cv-2427, 1:05-cv-2444, 1:05-cv-2452, 1:05-cv-2458, 1:05-cv-2466, 1:05-cv-2467, 1:05-cv-2477, 1:05-cv-2479, 1:06-cv-618, 1:06-cv-619, 1:06-cv-1668, 1:06-cv-1674, 1:06-cv-1675 through 1:06-cv-1679, 1:06-cv-1681 through 1:06-cv-1691, 1:06-cv-1725, 1:06-cv-1752 through 1:06-cv-1754, 1:06-cv-1757 through 1:06-cv-1761, 1:06-cv-1763, 1:06-cv-1765 through 1:06-cv-1769, 1:07-cv-1710, 1:07-cv-2337, 1:07-cv-2338, 1:08-cv-864, and 1:08-cv-987.

An additional petition on behalf of Does 1 through 570 filed by the Center for Constitutional Rights was dismissed for lack of standing. Opinion, *Does v. Bush*, No. 1:05-cv-313 (D.D.C. Oct. 31, 2006), D.E. 31, *available at* 2006 WL 3096685.

2850. There were at least sixty-four detainees named in two cases each:

1. Omar Khadr in No. 1:04-cv-1136 was identified as Omar Ahmad in No. 1:05-cv-2386.
2. Riyad Atag Ali Abdoh al-Haj (Atag Ali Abdoh) in No. 1:04-cv-1194 was identified as Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399.
3. Mahmood Salim al-Mohammed in No. 1:05-cv-247 was identified as Mahmoud al-Soury in No. 1:05-cv-429.
4. Sherif el-Mashad and Adel Fattouh Aly Ahmed Algazzar in No. 1:05-cv-270 were identified as Ismail al-Mashad and Ahmed Abdul Rahman, respectively, in No. 1:05-cv-833.
5. Zahir Omar Khamis Bin Hamdoon in No. 1:05-cv-280 was identified as Zaher Omer Bin Hamdoon in No. 1:05-cv-2223.
6. Majid Abdulla al-Joudi and Yousif Mohammad Mubarak al-Shehri in No. 1:05-cv-301 were identified as Maged and Yusuf Asshihri, respectively, in No. 1:05-cv-2386.
7. Ahmed Abdullah al-Wazan in No. 1:05-cv-329 was identified as Younis Shakur in No. 1:05-cv-764.
8. Thani Faris al-Anazi in No. 1:05-cv-345 was identified as Abdulal al-Thani in No. 1:05-cv-2386.
9. Mohammed Abdul Rahman in No. 1:05-cv-359 was identified as Mohammed Abdur Rahman in No. 1:05-cv-2386.
10. Hassan al-Gassary, Muhammed Sidii, and Adel al-Hakeemy in No. 1:05-cv-429 were identified as Laheen Ikasrien in No. 1:05-cv-764, Mohammed al-Amin in No. 1:05-cv-2336, and Adel Ben Ahmad al-Hakeemy in No. 1:05-cv-2386, respectively.
11. Abu Bakker Qassim in No. 1:05-cv-497 was identified as Abu Baker in No. 1:05-cv-2386.
12. Muhammed Fahad al-Qahtany and Musa al-Madany in No. 1:05-cv-520 were identified as Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265 and Mishal al-Madany in No. 1:05-cv-2386, respectively.
13. Ahmed Errachidi in No. 1:05-cv-640 was identified as Ahmed Abu Imran in No. 1:05-cv-764.
14. Abdul Salam Zaef in No. 1:05-cv-660 was identified as Abdul Salam Deiff in No. 1:05-cv-2386.
15. Elham Battayav in No. 1:05-cv-714 was identified as Elham Bataif in No. 1:05-cv-2386.

16. Salim Muhood Adem in No. 1:05-cv-723 was identified as Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724.
17. Najeeb al-Husseini in No. 1:05-cv-764 was identified as Najeeb in No. 1:05-cv-2386.
18. Chaman in No. 1:05-cv-887 was identified as Chaman Gul Khialigol in No. 1:05-cv-2367.
19. Akhteyar Mohammad in No. 1:05-cv-996 was identified as Mohammad Akhtiar in No. 1:05-cv-1635.
20. Adel Hassan Hamad in No. 1:05-cv-1009 was identified as Adel Hassan in No. 1:05-cv-2386.
21. Haji Nasrat, Ali Shah Mousovi, Izaatullah Nusrat, and Sabar Lal in No. 1:05-cv-1124 were identified as Haji Nasrat in No. 1:05-cv-880, Syed Muhammad Ali Shah in No. 1:05-cv-1012, Ezatullah in No. 1:06-cv-1752, and Sabar Lal in No. 1:06-cv-1763, respectively.
22. Omar Mohammed Khalifh in No. 1:05-cv-1189 was identified as Omar Mohamad Khalifah in No. 1:05-cv-2386.
23. Ali Adel Motaleb Aweid al-Khaiy in No. 1:05-cv-1239 was identified as Abdul Zahir in No. 1:05-cv-1240.
24. Ghaleb Nassar al-Bihani in No. 1:05-cv-1312 was identified as Ghalib Fahani in No. 1:05-cv-2386.
25. Jawad Jabber Sadkhan in No. 1:05-cv-1487 was identified as Jawad Jabbar Sadkhan in No. 1:05-cv-1679.
26. Faraj Abdl al-Hadi Omar Mahmoud in No. 1:05-cv-1490 was identified as Abdul Hadi Omer Hamoud Faraj in No. 1:05-cv-1590.
27. Mohammed Amon in No. 1:05-cv-1493 was identified as Tooran Mohammad Amanullah in No. 1:05-cv-2367.
28. Shafiq in No. 1:05-cv-1506 was identified as Sofiane Mohammed Berhoumi in No. 1:05-cv-2386.
29. Ibrahim Osman Ibrahim Idris in No. 1:05-cv-1555 was identified as Abraham Othman Abraham Edries in No. 1:05-cv-1725.
30. Hassan Bin Attash in No. 1:05-cv-1592 was identified as Omier Ba Atash in No. 1:05-cv-2386.
31. Hamid al-Razak in No. 1:06-cv-1601 was identified as Qari Hamdullah in No. 1:06-cv-1691.
32. Ahmmed Ghulam Rabbani in No. 1:05-cv-1607 was identified as Ahmmed Ghulam Rabbani in No. 1:05-cv-2386.
33. Hussain Salem Hohammed Almerfedi in No. 1:05-cv-1645 was identified as Hussein Salem Mohammad Abdallah el-Marqodi in No. 1:05-cv-1649.
34. Abdannour Sameur in No. 1:05-cv-1806 was identified as Abdurrachman in No. 1:05-cv-2386.
35. Ravil Mingaza Gamil in No. 1:05-cv-2010 was identified as Ravil Mingazov in No. 1:05-cv-2479.
36. Dr. Abu Muhammed, also known as Fethi Boucetta, in No. 1:05-cv-2087 was identified as Abu Mohammed in No. 1:05-cv-2386.
37. Jabbarow Oybek Jamolovich in No. 1:05-cv-2112 was identified as Jabbarov Oybek Jamolovich in No. 1:05-cv-2386.
38. Abdu al-Qader Hussain al-Mudafari in No. 1:05-cv-2185 was identified as Abdualqader Hossin Ali al-Mothafri in No. 1:05-cv-2200.
39. Ahmed Ben Bacha in No. 1:05-cv-2349 was identified as Ahmed Ben Bacha in No. 1:05-cv-2386.
40. Abdullah Ali Saleh Gerab Alsaee in No. 1:05-cv-2369 was identified as Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452.

filed pro se. Most of the other petitions were filed by next friends, of which 26% were brothers, 9% were fathers, 4% were wives, 4% were cousins, 6% were other specified family members (seven uncles, three nephews, two brothers-in-law, one son, and one mother), 7% were family members of unspecified relationship, 34% were other detainees, and 11% were other friends.

Next Friend Validity

On April 1, 2005, the Center for Constitutional Rights filed a habeas petition for Hazi Ahmed, listing fellow detainee Mohammed Mohammed Hassen as his next friend.²⁸⁵¹ The Center had included Hassen as one of fourteen petitioners in a July

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41. Abdur Razakah in No. 1:05-cv-2370 was identified as Abdurazzak in No. 1:05-cv-2386.
 42. Abdul Hamid Abdul Salam al-Ghizzawi in No. 1:05-cv-2378 was identified as Abin Alhamed Abid Alsallam Alkesawi in No. 1:05-cv-2386.
 43. Saad al-Qahtaani in No. 1:05-cv-2384 was identified as Sad al-Gahtani in No. 1:05-cv-2386.
 44. Adel, Abdo Ali al-Haj, and Saif in No. 1:05-cv-2385 were identified as Adel, Shargowi, and Saif Ullah, respectively, in No. 1:05-cv-2386.
 45. Sultan al-Shareef in No. 1:05-cv-2385 was identified as Fahd Umar Abdulmajid al-Shareef in No. 1:05-cv-2458.
 46. Ali, Mohammed Rimi, Zein al-Abedein, Abdul Rahman Abdo Abulghaith Sulaiman, and Ali in No. 1:05-cv-2386 were identified as Ali in No. 1:05-cv-2398, Mohammad Rimi in No. 1:05-cv-2427, Zainulabidin Merozhev in No. 1:05-cv-2479, Abdullrahman Abdo Abo al-Ghith in No. 1:06-cv-1757, and Elisher in No. 1:06-cv-1759, respectively.
 47. Alkhadr Abdullah al-Yafie and Tofiq Nasser Awad al-Bihani in No. 1:05-cv-2399 were also petitioners in No. 1:05-cv-2386.
 48. Qari Saad Iqbal in No. 1:06-cv-1674 was also the petitioner in No. 1:06-cv-1688.
 49. Naseer in No. 1:06-cv-1676 was also the petitioner in No. 1:06-cv-1689.

At least eight detainees were named in three cases each:

1. Yousuf al-Karany in No. 1:05-cv-429 was identified as M.C. in No. 1:05-cv-430 and as Mohamad Ahmad al-Kara'any in No. 1:05-cv-2386.
2. Ibrahim Towkah in No. 1:05-cv-429 was identified as Ibrahim Mahdi Ahmed Zaidan in No. 1:05-cv-431 and as Ibraheem Zaidan in No. 1:05-cv-2386.
3. Abdul al-Hadi in No. 1:05-cv-429 was identified as Abdul Hadi Ibn el-Hathily al-Hamamy in No. 1:05-cv-766 and as Abdulhadi al-Hamami in No. 1:05-cv-2386.
4. Abdul Aziz al-Mossary in No. 1:05-cv-429 was identified as Abu Abdul Aziz in No. 1:05-cv-1864 and as Alla al-Mossary in No. 1:05-cv-2386.
5. Mohammedou Ould Salahi in No. 1:05-cv-569 was identified as Mohameduo Ould Slahi in No. 1:05-cv-881 and as Mohamedou Ould Slahi in No. 1:05-cv-995.
6. Ameer Mammam in No. 1:05-cv-573 and No. 1:05-cv-1233 was identified as Amer Mohammed in No. 1:05-cv-2386.
7. Abdulzاهر in No. 1:05-cv-1236 was identified as Abdul Zahir in No. 1:05-cv-1623 and as Abdulkadr Abdulkhalik Dad in No. 1:05-cv-2083.
8. Ahsanullah Pirzai in No. 1:05-cv-1242 was identified as Ihsan Ullah Peerzai in No. 1:05-cv-1243 and as Ehsan Ullah in No. 1:05-cv-1311.

2851. Petition, Ahmed v. Bush, No. 1:05-cv-665 (D.D.C. Apr. 1, 2005), D.E. 1.

The Center for Constitutional Rights “is the umbrella organization coordinating the Guantánamo pro bono project.” Candace Gorman, *My Experiences Representing a Guantánamo Detainee*, Litig., Spring 2009, at 10, 10 (reflections by a pro bono attorney who represented two Guantánamo Bay detainees). Originally called the Civil Rights Legal Defense Fund and then the Law Center for

27, 2004, petition.²⁸⁵² On May 24, 2005, Judge Roberts ordered briefing on whether the court should recognize Hassen as Ahmed’s next friend—specifically, whether Ahmed otherwise was without access to the court, noting that several detainees had filed pro se petitions, and whether Hassen was sufficiently dedicated to Ahmed’s interests.²⁸⁵³ The government took no position on the issue, but noted, “The Protective Order typically made applicable in the Guantánamo Bay habeas cases permits counsel two visits with a detainee before an authorization of representation by the detainee must be provided to respondents.”²⁸⁵⁴ On the day after the government’s response, Judge Roberts signed a protective order, unopposed approval of which had been pending since a week after the case was filed, and the protective order’s incorporated procedures for counsel access to detainees provided, “Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee.”²⁸⁵⁵ On August 8, the government filed a return²⁸⁵⁶ pursuant to an order issued by Judge Roberts on July 8.²⁸⁵⁷

On August 31, the government filed a consolidated motion challenging the validity of fellow-detainee next friends in eight cases on behalf of nine detainees.²⁸⁵⁸ Judge Friedman denied the motion in the case before him.²⁸⁵⁹ Judges Huvelle,²⁸⁶⁰ Collyer,²⁸⁶¹ and Robertson²⁸⁶² referred the matter, by agreement, to Sen-

Constitutional Rights, the Center was first incorporated in 1966. See Ruben, *supra* note 2749, at 26–27.

2852. Petition, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. July 27, 2004), D.E. 1 (identifying Hassen as Mohamed Mohamed Hassan Odaini and his brother Bashir Mohamed Hassan Odaini as Hassen’s next friend).

2853. Order, *Ahmed*, No. 1:05-cv-665 (D.D.C. May 24, 2005), D.E. 12, available at 2005 WL 6066070; see *Adem v. Bush*, 425 F. Supp. 2d 7, 13 n.13 (D.D.C. 2006) (noting the order).

2854. Government Response, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 23, 2005), D.E. 14; see *Adem*, 425 F. Supp. 2d at 13.

2855. Protective Order, Ex. A at ¶ III.C.2, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 24, 2005), D.E. 15.

2856. Return, *id.* (Aug. 8, 2005), D.E. 17.

2857. Order, *id.* (July 8, 2005), D.E. 16.

2858. Motion, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Aug. 31, 2005), D.E. 2 (also filed in Nos. 1:05-cv-1497, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1635, and 1:05-cv-1704).

2859. *Akhtiar* Sept. 26, 2005, Order, *supra* note 2819.

2860. Order, *Ahmed*, No. 1:05-cv-1458 (D.D.C. Oct. 13, 2005), D.E. 8.

2861. Order, *Shafiq v. Bush*, No. 1:05-cv-1506 (D.D.C. Oct. 25, 2005), D.E. 10; Order, *Al-Hawary v. Bush*, No. 1:05-cv-1505 (D.D.C. Oct. 25, 2005), D.E. 10; Order, *Nabil v. Bush*, No. 1:05-cv-1504 (D.D.C. Oct. 25, 2005), D.E. 8.

2862. Order, *Abu Kabir v. Bush*, No. 1:05-cv-1704 (D.D.C. Nov. 1, 2005), D.E. 18 (two detainees).

ior Judge Louis F. Oberdorfer.²⁸⁶³ The motion in another case was mooted by an amended petition naming the detainee's mother as his next friend.²⁸⁶⁴

On September 23, the government filed a motion with Judge Bates challenging the validity of a fellow-detainee next friend in a case filed earlier that month.²⁸⁶⁵ Approximately one week later, Judge Bates issued sua sponte an order in another fellow-detainee next friend case to show cause why that case should not be dismissed for lack of next-friend standing.²⁸⁶⁶ One week after that, the petitioner's attorneys submitted evidence of a meeting between counsel and the detainee petitioner, which was held after the petition was filed, so the action could become a direct petition without the need for a next friend.²⁸⁶⁷ Judge Bates referred the September 23 motion to Judge Oberdorfer.²⁸⁶⁸

Judge Oberdorfer issued the requested order to show cause on November 4.²⁸⁶⁹ Judge Kessler issued a similar order to show cause on October 11,²⁸⁷⁰ and the court granted the government's motion to consolidate her order with Judge Oberdorfer's.²⁸⁷¹

Judge Oberdorfer's order to show cause included an order that Petitioners and Respondents consult with Magistrate Judge Kay as soon as is practicable (but in any event before the [December 5, 2005,] hearing) to discuss how counsel for Petitioners may obtain access to the detainees who allegedly seek to be represented by next friends to determine if the detainees will authorize counsel to represent them directly.²⁸⁷²

2863. Judge Oberdorfer died on February 21, 2013. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

2864. Notice, *Al-Wirghi v. Bush*, No. 1:05-cv-1497 (D.D.C. Jan. 11, 2006), D.E. 12; Amended Petition, *id.* (Dec. 1, 2005), D.E. 10.

2865. Government Motion, *Qasim v. Bush*, No. 1:05-cv-1779 (D.D.C. Sept. 23, 2005), D.E. 2 (petition by detainee Isa Ali al-Murbati as next friend of detainee Muhammed Qasim); see Petition, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 22, 2004), D.E. 1 (petition on behalf of six detainees, including Isa Ali Abdulla Almurbati, represented by his brother Mohamad Ali Abdulla Almurbati as next friend).

2866. Order, *Hamlily v. Bush*, No. 1:05-cv-763 (D.D.C. Oct. 3, 2005), D.E. 16; see *Adem v. Bush*, 425 F. Supp. 2d 7, 13 (D.D.C. 2006) (discussing the order); Petition, *Hamlily*, No. 1:05-cv-763 (D.D.C. Apr. 15, 2005), D.E. 1 (petition by detainee Shaker Aamer as next friend of detainee Adel Hamlily); see also Petition, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004), D.E. 1 (petition on behalf of three detainees, including Shaker Abduraheem Aamer, by his father-in-law Saeed Ahmed Siddique as next friend).

2867. Response, *Hamlily*, No. 1:05-cv-763 (D.D.C. Oct. 11, 2005, filed Oct. 31, 2005), D.E. 20 (redacted); see *Adem*, 425 F. Supp. 2d at 13.

2868. Order, *Qasim*, No. 1:05-cv-1779 (D.D.C. Oct. 31, 2005), D.E. 4.

2869. Nov. 4, 2005, Oberdorfer Order, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Nov. 4, 2005), D.E. 10 (also filed in Nos. 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1704, and 1:05-cv-1779).

2870. Order, *Al-Razak v. Bush*, No. 1:05-cv-1601 (D.D.C. Oct. 11, 2005), D.E. 11.

2871. Order, *id.* (Nov. 22, 2005), D.E. 19.

2872. Nov. 4, 2005, Oberdorfer Order, *supra* note 2869.

Judge Kay ordered the government to comply with applicable protective orders and permit attorneys to meet with petitioners so that they could pursue petitions directly without next friends, and this process began to moot the fellow-detainee-as-next-friend issue for these cases.²⁸⁷³

On March 10, 2009, Judge Sullivan dismissed a petition upon determining that the detainee did not want to pursue his case because of his “lack of confidence in the United States judicial process.”²⁸⁷⁴ Ghassan Abdullah al-Sharbi has been at Guantánamo Bay since March 2002.²⁸⁷⁵ The government announced military-commission conspiracy charges against him on November 8, 2005.²⁸⁷⁶ On December 8, Abdullah al-Sharbi filed a habeas petition on behalf of his son.²⁸⁷⁷ The detainee refused to meet with the attorney that his father found for him, but the attorney endeavored to discover whether the refusal resulted from government interference, coercion, or mental illness.²⁸⁷⁸ On August 8, 2008, the detainee wrote a letter to the court explaining in clear English that he did not want to pursue a habeas action,²⁸⁷⁹ and the court received the letter on January 7, 2009.²⁸⁸⁰ The dismissal followed a closed ninety-minute hearing that Judge Sullivan held on March 6, at which al-Sharbi participated by video conference from Guantánamo Bay.²⁸⁸¹ Al-Sharbi has admitted to being a combatant against the United States.²⁸⁸²

Judges Bates,²⁸⁸³ Leon,²⁸⁸⁴ and Walton²⁸⁸⁵ dismissed petitions because they were not authorized by the detainees.

Coordination Before Judge Hogan

By the time of the 2008 *Boumediene* decision, at least 198 petitioners had been transferred to other countries, sometimes for release and sometimes for detention

2873. See Oct. 6, 2006, Report and Recommendation, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Oct. 6, 2006), D.E. 26 (also filed in Nos., Nos. 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1704, and 1:05-cv-1779).

2874. *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 319 (D.D.C. 2009).

2875. *Id.* at 318.

2876. See Neil A. Lewis, *Pentagon Charges 5 More in Guantánamo Bay Camp*, N.Y. Times, Nov. 8, 2005, at A22.

2877. Petition, *Al-Sharbi v. Bush*, No. 1:05-cv-2348 (D.D.C. Dec. 8, 2005), D.E. 1; *Al Sharbi*, 601 F. Supp. 2d at 318.

2878. *Al Sharbi*, 601 F. Supp. 2d at 318.

2879. Letter, *Al-Sharbi*, No. 1:05-cv-2348 (D.D.C. Jan. 7, 2009), D.E. 88.

2880. Docket Sheet, *id.* (Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

2881. *Al Sharbi*, 601 F. Supp. 2d at 318–19.

2882. See Tim Golden, *The Battle for Guantánamo*, N.Y. Times, Sept. 17, 2006, at 660.

2883. *Kuman v. Obama*, 725 F. Supp. 2d 72 (D.D.C. 2010) (dismissing Ahmed Yaslam Said Kuman’s petition).

2884. Order, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Aug. 25, 2010), D.E. 289, available at 2010 WL 3339182 (dismissing Adel al-Hakeemy’s petition).

2885. Docket Sheet, *Al-Jayfi v. Bush*, No. 1:05-cv-2104 (D.D.C. Oct. 27, 2005) [hereinafter *Al-Jayfi* Docket Sheet] (noting the dismissal of Khalid Mohammed al-Thabbi’s petition on February 29, 2012).

and possible prosecution there.²⁸⁸⁶ Three petitioners were voluntarily dismissed without prejudice.²⁸⁸⁷ Another two petitioners committed suicide.²⁸⁸⁸

(Since then, at least 137 additional petitioners have been transferred from Guantánamo Bay,²⁸⁸⁹ twenty-two have been dismissed without prejudice,²⁸⁹⁰ and

2886. Appendix Table 1 at the end of this chapter.

“Some have been released outright; more have been turned over to the custody of their home governments.” Cucullu, *supra* note 2754, at 53; see Inside Guantanamo (National Geographic DVD 2009); see also Fletcher & Stover, *supra* note 2736, at 93–115 (describing detainees’ experiences following their transfers). Compare Murat Kurnaz, *Five Years of My Life 218–19* (2008) (report by a detainee that he was told that his release was contingent upon his signing an admission that he belonged to a terrorist organization but that he was released to freedom despite his not signing the admission) with Fletcher & Stover, *supra* note 2736, at 89–90 (reporting that detainees were falsely told that their releases were contingent on signing a document, but the document was a promise not to join Al-Qaeda or the Taliban rather than an admission).

2887. Notice, No. 1:05-cv-2444 (D.D.C. Sept. 20, 2006), D.E. 12 (Talal Ahmed Mohammed Ali Almjrd; voluntary dismissal on the government’s representation that the person on whose behalf the petition was filed was not a detainee at Guantánamo Bay); Stipulation, No. 1:05-cv-1124 (D.D.C. Oct. 26, 2005), D.E. 20 (Abd al-Rahman and Abdul Rahman Aziz Khan).

2888. Notice, No. 1:05-cv-1857 (D.D.C. June 12, 2006), D.E. 21 (Mani Shaman Turki al-Habardi al-Utaybi); Notice, No. 1:05-cv-2452 (D.D.C. June 12, 2006), D.E. 16 (Saleh Ali Abdullah al-Salami); see George Daly, *Don’t Take It Personally*, in *The Guantánamo Lawyers*, *supra* note 2737, at 282 (reflections by his habeas attorney on al-Utaybe’s suicide); Jeffrey Davis, *Pending Release*, *id.* at 283 (same); see Mahvish Rukhsana Khan, *My Guantánamo Diary 153–65* (2008) (reflections by his legal interpreter on al-Salami’s suicide).

2889. Appendix Table 2 at the end of this chapter.

2890. Aamer Stipulated Dismissal, *Deghayes v. Obama*, No. 1:04-cv-2215 (Jan. 27, 2015), D.E. 274; Stipulated Dismissal, *Gherebi v. Obama*, No. 1:04-cv-1164 (Sept. 2, 2014), D.E. 285 [hereinafter *Gherebi* Stipulated Dismissal]; Ba Odah Voluntary Dismissal, *Odah v. Obama*, No. 1:06-cv-1668 (Mar. 11, 2014), D.E. 271; Stipulated Dismissal, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (Dec. 17, 2013) [hereinafter *Abdulrazzaq* Stipulated Dismissal]; Stipulated Dismissal, *Bin Attash v. Obama*, No. 1:05-cv-1592 (June 14, 2013), D.E. 271 [hereinafter *Bin Attash* Stipulated Dismissal]; Hidar Stipulated Dismissal, *Mohammon v. Obama*, No. 1:05-cv-2386 (May 20, 2013), D.E. 1994; Stipulated Dismissal, *Zaid v. Obama*, No. 1:05-cv-1646 (May 20, 2013), D.E. 341 [hereinafter *Zaid* Stipulated Dismissal]; Stipulated Dismissal, *Bin Lep v. Obama*, No. 1:09-cv-31 (Apr. 5, 2013), D.E. 91 [hereinafter *Bin Lep* Stipulated Dismissal]; Stipulated Dismissal, *Nasser v. Obama*, No. 1:07-cv-1710 (D.D.C. Mar. 13, 2013), D.E. 205 [hereinafter *Nasser* Stipulated Dismissal]; Stipulated Dismissal, *Al-Shubati v. Obama*, No. 1:07-cv-2338 (D.D.C. Mar. 12, 2013), D.E. 261 [hereinafter *Al-Shubati* Stipulated Dismissal]; Al-Marwalah Stipulated Dismissal, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Mar. 11, 2013), D.E. 973 (Bisheer al-Marwalah); Al-Swidi Stipulated Dismissal, *id.* (Mar. 11, 2013), D.E. 972 (Abdulaziz al-Swidi); Mahdi Stipulated Dismissal, *id.* (Mar. 11, 2013), D.E. 971 (Ali Yaha Mahdi); Stipulated Dismissal, *Al-Shimrani v. Obama*, No. 1:05-cv-2249 (D.D.C. Mar. 1, 2013), D.E. 255 [hereinafter *Al-Shimrani* Stipulated Dismissal]; Abdulayev Stipulated Dismissal, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Feb. 22, 2013), D.E. 1986 (Umar Hamazayevich Abdulayev); Al-Bakush Voluntary Dismissal, *Alkhemisi v. Obama*, No. 1:05-cv-1983 (D.D.C. Nov. 2, 2012), D.E. 220 (Ismael Ali Farag al-Bakush); Docket Sheet, *Al-Khalaqi v. Bush*, No. 1:05-cv-999 (D.D.C. May 18, 2005) (noting a dismissal on July 2, 2012); Order, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Oct. 28, 2011), D.E. 1595 (Sharqawi Abdu Ali al-Hajj, Abdo Ali al-Haj in No. 1:05-cv-2385 and Shargowi in No. 1:05-cv-2386); Notice, *Abdessalam v. Obama*, No. 1:06-cv-1761 (D.D.C. Oct. 4, 2011), D.E. 187; Bawazir Dismissal, *Al-Adahi v. Obama*, No. 1:05-cv-280 (D.D.C. Mar. 24,

four have died.²⁸⁹¹ Another 144 named petitioners may not have been at Guantánamo Bay, also turned out to be duplicates, or otherwise were not part of actively pursued petitions.²⁸⁹² Five current detainees never filed habeas petitions.²⁸⁹³)

Approximately three weeks after the Supreme Court's *Boumediene* decision, by which time another four petitions on behalf of four detainees had been filed,²⁸⁹⁴ the district court decided, in executive session, that Judge Hogan, who had recently assumed senior status, would handle "coordination and management" of all Guantánamo Bay habeas petitions,²⁸⁹⁵ with the exception of Hamdan's petition and nine cases assigned to Judge Leon, who opted out of the coordination plan.²⁸⁹⁶ The court assigned one miscellaneous case number to coordination of 121 cases pertaining to detainees, *In re Guantanamo Bay Detainee*

2010), D.E. 556; Order, *id.* (Dec. 22, 2009), D.E. 526, available at 2009 WL 5196155; Notice, Albkri v. Bush, No. 1:05-cv-1639 (D.D.C. July 18, 2008), D.E. 45.

2891. Notice, Nassim v. Obama, No. 1:09-cv-1332 (D.D.C. May 23, 2011), D.E. 49 [hereinafter *Nassim Death Notice*] (Hajji Nassim by apparent suicide); Notice, Gul v. Obama, No. 1:08-cv-1224 (D.D.C. Feb. 3, 2011), D.E. 136 (Awal Gul of natural causes); Al-Hanashi Death Notice, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. June 3, 2009), D.E. 265 (Mohammad Ahmed Abdullah Saleh al-Hanashi by apparent suicide); see Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. Times, Sept. 12, 2012, at A22 (Adnan Farhan Abdul Latif, a petitioner in No. 1:04-cv-1254, by apparent suicide on Sept. 9, 2012).

2892. Ahmed al-Delebany in No. 1:05-cv-2477; Talah Ahmed Mohammed Ali Almjrd in No. 1:05-cv-2444; eighty named petitioners in No. 1:05-cv-2386; forty-nine named petitioners in No. 1:05-cv-2385; Ismail Ali al-Rammi in No. 1:05-cv-2381; Fadi Ahmad Alimaqaleh in No. 1:05-cv-2223; Hasan Balgaid in No. 1:05-cv-1983; Ameen Mohammad Albkri in No. 1:05-cv-1639; Ahmed in No. 1:05-cv-1458; Abdul Rahman Aziz Khan, Abd al-Rahman, Abdul Razak Iktiar Mohammed, and Chaman Gul Khialigol in No. 1:05-cv-1124; Mohammed al-Nadour and Mohammed Fahreco in No. 1:05-cv-764; Aref Abd il-Rheem in No. 1:04-cv-1254; Fahmi Abdullah Ubad al-Tawlaqi in No. 1:04-cv-1194.

2893. See Carol Rosenberg, *Who's Still Being Held at Guantánamo*, Miami Herald, www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html (Harun al-Afghani, Mustafa Ahmad al-Hawsawi, Walid Bin Attash, Hassan Guleed, and Khalid Sheik Mohammad).

2894. The cases were assigned the following docket numbers: 1:08-cv-1085, 1:08-cv-1101, 1:08-cv-1104, and 1:08-cv-1153; see Josh White & Del Quentin Wilber, *Guantanamo Detainee to File Habeas Petition*, Wash. Post, June 26, 2008, at A14.

2895. The court gave Judge Hogan an extra law clerk for one year to help him with these cases. Interview with Hon. Royce C. Lamberth, May 13, 2011; Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

2896. *In re* Petitioners Seeking Habeas Corpus Relief, 567 F. Supp. 2d 83 (D.D.C. 2008); Order, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. July 2, 2008), D.E. 1; see Al-Adahi v. Obama, 613 F.3d 1102, 1104 (D.C. Cir. 2010); *In re* Guantanamo Bay Detainee Litig., 953 F. Supp. 2d 40, 48 & n.2 (D.D.C. 2013); see also Palazzolo, *supra* note 2799.

Judge Lamberth, who had been chief judge for one month when the Supreme Court issued its *Boumediene* decision, presided over regular meetings of judges hearing the habeas cases, including Judge Leon, who otherwise opted out of the coordination plan. Interview with Hon. Royce C. Lamberth, May 13, 2011.

Litigation,²⁸⁹⁷ and another case number to coordination of 103 cases pertaining to previous detainees, *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*.²⁸⁹⁸ Later, Judge Sullivan also opted out of the coordination plan.²⁸⁹⁹

On April 1, 2010, Judge Hogan determined that the court no longer had jurisdiction over previous detainees' cases.²⁹⁰⁰ By this time, another 38 petitions on behalf of 40 detainees had been filed,²⁹⁰¹ of which at least four were duplicates,²⁹⁰² and another three turned out to have already been transferred to Afghanistan.²⁹⁰³

The court of appeals, considering the petitions of two detainees who had been transferred without rescission of their designation as enemy combatants, agreed with Judge Hogan, on July 22, 2011, that their petitions were without Article III remedy.²⁹⁰⁴ The court of appeals expressly and summarily affirmed Judge Hogan's April 1, 2010, ruling on August 10, 2012.²⁹⁰⁵

2897. Docket Sheet, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 2, 2008).

2898. Docket Sheet, *In re Petitioners Seeking Habeas Corpus Relief*, No. 1:08-mc-444 (D.D.C. July 3, 2008) [hereinafter *Former Guantánamo Detainees Docket Sheet*].

2899. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 n.1 (D.D.C. 2008); see Palazzolo, *supra* note 2799.

2900. *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D.D.C. 2010).

2901. The cases were assigned the following docket numbers: 1:08-cv-1173, 1:08-cv-1185, 1:08-cv-1207, 1:08-cv-1221 through 1:08-cv-1224, 1:08-cv-1227 through 1:08-cv-1238, 1:08-cv-1310, 1:08-cv-1360, 1:08-cv-1440, 1:08-cv-1628, 1:08-cv-1789, 1:08-cv-1805, 1:08-cv-1828, 1:08-cv-1923, 1:08-cv-2019, 1:08-cv-2083, 1:09-cv-31, 1:09-cv-873, 1:09-cv-904, 1:09-cv-1332, 1:09-cv-1385, 1:09-cv-1460 through 1:09-cv-1462, and 1:10-cv-407.

2902. There were at least three detainees named in two cases each:

1. Houmad Warzly in No. 1:05-cv-2385 was identified as Hamoud Abdullah Hamoud Hassan al-Wady in No. 1:08-cv-1237.
2. Abdurahman in No. 1:05-cv-2386 was identified as Abdul Ghaffar in No. 1:08-cv-1310.
3. Abdul Rahim Hussein Muhamed Ali Nashir in No. 1:08-cv-1085 was identified as Abd al-Rahim Hussain Mohammed al-Nashiri in No. 1:08-cv-1207.

At least one detainee was named in three cases: Adel in Nos. 1:05-cv-2385 and 1:05-cv-2386 was identified as Adel Noori in No. 1:08-cv-1310.

2903. Notice, *Hafiz v. Obama*, No. 1:09-cv-1461 (D.D.C. Dec. 22, 2009), D.E. 16 (noting the transfer of Abdul Hafiz to Afghanistan); Notice, *Hashim v. Obama*, No. 1:09-cv-1460 (D.D.C. Dec. 22, 2009), D.E. 7 (noting the transfer of Mohammed Hashim to Afghanistan); Notice, *Hafizullah v. Bush*, No. 1:08-cv-1227 (D.D.C. Nov. 10, 2008), D.E. 35 (noting that the detainee had been transferred a year and a half before the petition was filed).

2904. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), *cert. denied*, 566 U.S. ___, 132 S. Ct. 1906 (2012).

2905. Opinion, *Chaman v. Obama*, No. 10-5130 (D.C. Cir. Aug. 10, 2012), *available at* 2012 WL 3797596.

Merits Rulings

Judge Leon

Proceeding with his retained cases, Judge Leon held a status conference on July 24, 2008, for a petition by six Algerians apprehended in Bosnia, where they held either dual citizenship or legal residence.²⁹⁰⁶ Judge Leon determined that to justify detention the government had to show by a preponderance of the evidence that the detainee was an enemy combatant:

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²⁹⁰⁷

From November 2008 through June 2009, Judge Leon granted seven habeas petitions, and the petitioners were transferred out of Guantánamo Bay, and he denied five petitions; three of the denied petitioners were transferred anyway, and two denials were affirmed by the court of appeals.

On November 20, 2008, Judge Leon ruled that classified evidence presented to the court established that Belkacem Bensayah was an Al-Qaeda facilitator.²⁹⁰⁸ Judge Leon ruled against the government with respect to the other five detainees and ordered them released.²⁹⁰⁹ As Judge Leon urged in court, the government did not appeal the release orders,²⁹¹⁰ but Bensayah appealed the decision against him.²⁹¹¹ On appeal, the government changed its contention from Bensayah's providing support to Al-Qaeda to Bensayah's being part of Al-Qaeda, and the court of appeals determined that the change necessitated a remand to the district court.²⁹¹² The parties, however, consented to an extension of time to request a

2906. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193–95 (D.D.C. 2008); see 6 *Tied to Terror Are Given to U.S. by Bosnia, Despite Court Ruling*, N.Y. Times, Jan. 19, 2002, at A8.

2907. *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008); see *Bensayah v. Obama*, 610 F.3d 718, 721 (D.C. Cir. 2010).

2908. *Bensayah*, 610 F.3d at 721–22; *Boumediene*, 579 F. Supp. 2d at 198, *vacated*, 610 F.3d 718; see William Glaberson & Bernie Becker, *Judge Declares Five Detainees Held Illegally*, N.Y. Times, Nov. 21, 2008, at A1 (“It was the first hearing on the government’s evidence for holding detainees at Guantánamo.”); Del Quentin Wilber, 5 *at Guantánamo Ordered Released*, Wash. Post, Nov. 21, 2008, at A2.

2909. *Bensayah*, 610 F.3d at 721; *Boumediene*, 579 F. Supp. 2d at 196–99; see Glaberson & Becker, *supra* note 2908; Hafetz, *supra* note 2754, at 244; Chisun Lee, *Their Own Private Guantánamo*, N.Y. Times, July 23, 2009, at A31; Wilber, *supra* note 2908; Paul M. Winke, *A Day in Court, in The Guantánamo Lawyers*, *supra* note 2737, at 350, 357.

2910. *Boumediene* Docket Sheet, *supra* note 2759; see Glaberson & Becker, *supra* note 2908; Hafetz, *supra* note 2754, at 244; Winke, *supra* note 2909, at 357.

2911. Docket Sheet, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Dec. 31, 2008); see Winke, *supra* note 2909, at 357.

2912. *Bensayah*, 610 F.3d at 720, 725–27; see Charlie Savage, *Appeals Court Sides with Guantánamo Detainee*, N.Y. Times, July 4, 2010, at A15.

rehearing of the appeal.²⁹¹³ The last of the successful Bosnian petitioners was released on November 30, 2009.²⁹¹⁴ Bensayah was transferred to Algeria on December 5, 2013.²⁹¹⁵ The court of appeals agreed to vacate as moot Judge Leon's denial of the writ to Bensayah.²⁹¹⁶

On December 30, 2008, Judge Leon denied two habeas petitions.²⁹¹⁷

Hisham Sliti, a native of Tunisia, was detained by Pakistani authorities in October 2000 while attempting to fly from Afghanistan to Europe on a false passport.²⁹¹⁸ He escaped but was again apprehended by Pakistani authorities while attempting to flee from Afghanistan in late 2001.²⁹¹⁹ Pakistan transferred him to U.S. custody, and the United States transferred him to Guantánamo Bay.²⁹²⁰ On March 2, 2005, attorneys filed a habeas petition on behalf of Sliti and fifteen other detainees.²⁹²¹ Treatment of Sliti at Guantánamo Bay, and mistreatment of his Quran, were reportedly related to a widespread hunger strike later that year.²⁹²² By the time of Sliti's December 2008 habeas hearing, eleven of Sliti's co-petitioners had been transferred to Albania, Egypt, Jordan, Maldives, Mauritania, Somaliland, Spain, Sudan, and Tunisia.²⁹²³ Judge Leon found that the evidence

2913. Order, *Bensayah*, No. 08-5537 (D.C. Cir. May 6, 2013) (setting the deadline for a petition for rehearing at August 19, 2013).

2914. Notice, *Boumediene v. Obama*, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009), D.E. 306 (noting the release of Saber Lahmar to France); see Steven Erlanger, *Ex-Detainee Describes His 7 Years at U.S. Site*, N.Y. Times, May 27, 2009, at A10 (reporting on Lakhdar Boumediene's release to France on May 15, 2009); Steven Erlanger, *France: Algerian Freed From Guantánamo Prison*, N.Y. Times, Dec. 2, 2009, at A10 (reporting on Lahmar's release); Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, Wash. Post, Dec. 16, 2008, at A2 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir to Bosnia and Herzegovina); Peter Finn & Julie Tate, *4 From Guantanamo Are Sent to Europe*, Wash. Post, Dec. 1, 2009, at A6 (reporting on Lahmar's release); Peter Finn & Julie Tate, *Freed Algerian Detainee Flown to France*, Wash. Post, May 16, 2009, at A1 (reporting on Lakhdar Boumediene's transfer to France); William Glaberson, *U.S. Is Set to Release 3 Detainees From Base*, N.Y. Times, Dec. 16, 2008, at A28 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir to Bosnia and Herzegovina).

2915. Transfer Notice, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Dec. 5, 2013), D.E. 321 [hereinafter *Bensayah Transfer Notice*]; see Carol Rosenberg, *U.S. Sends 2 Guantánamo Detainees to Algeria*, Miami Herald, Dec. 6, 2013, at 3A; Charlie Savage, *Two Detainees at Guantánamo Are Involuntarily Repatriated to Algeria*, N.Y. Times, Dec. 6, 2013, at A20.

2916. Order, *Bensayah*, No. 08-5537 (D.C. Cir. Jan. 9, 2014); see Petitioner's Unopposed Motion for Vacatur, *id.* (Dec. 20, 2013); Order, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Feb. 3, 2014), D.E. 323 (dismissing Bensayah's writ petition as moot).

2917. *Al-Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008); see William Glaberson, *Judge Agrees with Bush in Ruling on 2 Detainees' Status*, N.Y. Times, Dec. 31, 2008, at A15.

2918. *Sliti*, 592 F. Supp. 2d at 48.

2919. *Id.*

2920. *Id.*

2921. Docket Sheet, *Sliti v. Bush*, No. 1:05-cv-429 (D.D.C. Mar. 2, 2005); *Sliti*, 592 F. Supp. 2d at 48.

2922. See Neil A. Lewis, *Widespread Hunger Strike at Guantánamo*, N.Y. Times, Sept. 18, 2005, at 124.

2923. See *supra* notes 2886, 2889.

that Sliti's travels were financed by extremists with ties to Al-Qaeda implied that Sliti was an Al-Qaeda recruit.²⁹²⁴ While an appeal was pending,²⁹²⁵ Sliti was transferred on November 20, 2014, to Slovakia.²⁹²⁶

Judge Leon also found adequate proof that Moath Hamza Ahmed al-Alwi, a Yemeni apprehended in Pakistan in late 2001, stayed at a guesthouse and received military training at a camp, both of which were associated with the Taliban or Al-Qaeda.²⁹²⁷ The court of appeals affirmed on July 22, 2011.²⁹²⁸

On January 14, 2009, Judge Leon granted Mohammed el-Gharani's habeas petition.²⁹²⁹ El-Gharani was a native of Saudi Arabia and a citizen of Chad; he was apprehended in 2001 at the age of fourteen.²⁹³⁰

Unlike most of the other cases reviewed to date by this Court, the Government's evidence against el Gharani consists principally of the statements made by two other detainees while incarcerated at Guantanamo Bay. . . . [T]he credibility and reliability of the detainees being relied upon by the Government has either been directly called into question by Government personnel or has been characterized by Government personnel as undetermined.²⁹³¹

The government released el-Gharani to Chad on June 11.²⁹³²

On January 28, Judge Leon denied the petition of Ghaleb Nassar al-Bihani on evidence that he served with the 55th Arab Brigade in support of the Taliban against the Northern Alliance.²⁹³³ The court of appeals affirmed.²⁹³⁴

Yousuf al-Karany was transferred to Chad the following June. *See supra* note 2889.

2924. *Sliti*, 592 F. Supp. 2d at 50.

2925. Docket Sheet, *Sliti v. Obama*, No. 09-5104 (D.C. Cir. Mar. 31, 2009); *see* Status Report, *id.* (Nov. 11, 2014) (unopposed request to continue abeyance); *see also* Sept. 21, 2012, Transfer Approval List, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. Sept. 21, 2012), D.E. 1991 (noting approval for transfer once a transfer country could be identified).

2926. *See* Adam Goldman & Julie Tate, *Five Guantanamo Detainees Released, Resettled in Europe*, Wash. Post, Nov. 21, 2014, at A15; Carol Rosenberg, *5 Detainees Released to European Nations*, Miami Herald, Nov. 21, 2014, at 3A; Charlie Savage, *5 Guantánamo Inmates Are Sent to Eastern Europe*, N.Y. Times, Nov. 21, 2014, at A19.

2927. *Al-Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008).

2928. *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2739 (2012).

2929. *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009); *see* William Glaberson, *Rulings of Improper Detentions in Cuba as the Bush Era Closes*, N.Y. Times, Jan. 19, 2009, at A1; Del Quentin Wilber, *Citing Weak Evidence, Judge Orders Guantanamo Detainee Freed*, Wash. Post, Jan. 15, 2009, at A11.

2930. *El Gharani*, 593 F. Supp. 2d at 145, 147; *see* Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; Glaberson, *supra* note 2929; Stafford Smith, *supra* note 2737, at 146–50; *see also id.* at 147 (“People born in Saudi Arabia of foreign parents are not considered as Saudis.”).

2931. *El Gharani*, 593 F. Supp. 2d at 147.

2932. *El-Gharani Transfer Notice*, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. June 11, 2009), D.E. 301; *see* Finn & Somashekhar, *supra* note 2930.

2933. *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); *see* Lee, *supra*, note 2909.

Judge Leon denied Hedi Hammamy's petition on April 2.²⁹³⁵ Hammamy is a Tunisian arrested in Pakistan in April 2002, and Judge Leon found adequate proof that he fought in the battle of Tora Bora.²⁹³⁶ Hammamy had been charged with terrorism activity in Italy, and his identification papers were found at Tora Bora.²⁹³⁷ He was transferred to Georgia on March 23, 2010.²⁹³⁸

Judge Leon granted a petition on June 22.²⁹³⁹ Abdul Rahim Abdul Razak al-Janko, a Syrian citizen, admitted to staying at a Taliban guesthouse and attending the al-Farouq training camp, but he claimed that he did this involuntarily.²⁹⁴⁰ The government conceded that he was subsequently imprisoned by Al-Qaeda and tortured into a false confession that he was a U.S. spy,²⁹⁴¹ and Judge Leon concluded that after such treatment he could not have been part of Al-Qaeda or the Taliban when he was apprehended by the United States.²⁹⁴² Al-Janko was released from Guantánamo Bay,²⁹⁴³ and, on October 5, 2010, he filed a civil action against the government alleging torture.²⁹⁴⁴ On December 22, 2011, Judge Leon determined that because al-Janko was no longer a detainee, the court did not have jurisdiction over his complaint.²⁹⁴⁵ The court of appeals agreed on January 17, 2014.²⁹⁴⁶

2934. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 563 U.S. ___, 131 S. Ct. 1814 (2011); *see Justices Reject Appeals of Detainees at Guantanamo*, Wash. Post, Apr. 5, 2011, at A6 [hereinafter *Justices Reject Appeals*].

2935. *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009).

2936. *Id.*

2937. *Id.* at 243–44.

2938. *See* <http://projects.nytimes.com/guantanamo>.

2939. *Al Gincio v. Obama*, 634 F. Supp. 2d 109 (D.D.C. 2009); *Al-Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); *see* Del Quentin Wilber, *Judge Orders Guantanamo Detainee's Release*, Wash. Post, June 23, 2009, at A12.

2940. *Al-Ginco*, 626 F. Supp. 2d at 128.

2941. *Id.* at 127; *see* Hafetz, *supra* note 2754, at 246; *see* *Al-Janko v. Gates*, 831 F. Supp. 2d 272, 275 (D.D.C. 2011).

2942. *Al-Ginco*, 626 F. Supp. 2d at 129–30; *see* Hafetz, *supra* note 2754, at 246.

2943. “The United States did not appeal the ruling, and the plaintiff was finally released from Guantanamo on October 7, 2009.” *Al-Janko*, 831 F. Supp. 2d at 276

2944. Docket Sheet, *Al-Janko v. Gates*, No. 1:10-cv-1702 (D.D.C. Oct. 5, 2010); *see Al-Janko*, 831 F. Supp. 2d at 274; *see also* Spencer S. Hsu, *Ex-Detainee Sues the U.S., Saying Captors Tortured Him*, Wash. Post, Oct. 7, 2010, at A4 (“Janko says that he was urinated on by his American captors, slapped, threatened with loss of fingernails, and exposed to sleep deprivation, extreme cold and stress positions.”).

2945. *Al-Janko*, 831 F. Supp. 2d 272; *see Judge Dismisses Former Gitmo Detainee's Lawsuit*, Nat'l L.J., Jan. 2, 2012, at 8.

2946. *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), *cert. denied*, 575 U.S. ___, 135 S. Ct. 1530 (2015).

Uighurs

Twenty-two of the Guantánamo Bay detainees were ethnic Uighurs, and there are reports that the Chinese government used the international effort to combat terror as an opportunity to squelch Uighur separatism in China.²⁹⁴⁷

On March 10, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of two Uighurs: Abu Bakker Qassim and A'del Abdu al-Hakim.²⁹⁴⁸ The court assigned the petition to Judge Robertson.²⁹⁴⁹ On July 13 and 15, counsel met the petitioners for the first time and learned that at least two months previously the CSRT had determined that Qassim and al-Hakim were not enemy combatants.²⁹⁵⁰ The government provided neither the attorneys nor Judge Robertson with notice of the CSRT ruling.²⁹⁵¹ On July 22, the attorneys filed a motion for their clients' immediate release.²⁹⁵² Recognizing that returning the Uighurs to China could subject them to persecution and releasing them within the United States could have national security implications, Judge Robertson concluded, on December 22, that although the continued detention of the petitioners was unlawful the court could not provide a remedy.²⁹⁵³ On May 5, 2006, three days before oral argument on the petitioners' appeal, the government released Qassim, al-Hakim, and three other Uighurs to a United Nations refugee camp in Albania.²⁹⁵⁴

2947. Qassim v. Bush, 382 F. Supp. 2d 126, 128 n.4 (D.D.C. 2005); see Cucullu, *supra* note 2754, at 139–40; Charlie Savage, *Two Guantánamo Detainees Freed, the First in 15 Months*, N.Y. Times, Apr. 20, 2012, at A8; Simard, *supra* note 2748, at 369, 379.

2948. Petition, Qassim v. Bush, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005), D.E. 1; Qassim v. Bush, 407 F. Supp. 2d 198, 199 (D.D.C. 2005); see Simard, *supra* note 2748, at 382.

2949. Docket Sheet, Qassim, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005).

2950. Qassim, 407 F. Supp. 2d at 199; Qassim, 382 F. Supp. 2d at 127; Release Motion, Qassim, No. 1:05-cv-497 (D.D.C. July 20, 2005), D.E. 24 [hereinafter Qassim Release Motion].

2951. Qassim, 407 F. Supp. 2d at 199; Qassim, 382 F. Supp. 2d at 127.

2952. Qassim Release Motion, *supra* note 2950.

2953. Qassim, 407 F. Supp. 2d 198; see Neil A. Lewis, *Freed from Guantánamo but Stranded Far from Home*, N.Y. Times, Aug. 15, 2006, at A15; Simard, *supra* note 2748, at 382–84.

2954. Qassim v. Bush, 466 F.3d 1073, 1074 (D.C. Cir. 2006); Notice, Mamet v. Bush, No. 1:05-cv-1886 (D.D.C. May 5, 2006), D.E. 30 (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe); see Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. Times, June 10, 2007, at 11; Lewis, *supra* note 2953; Abu Bakker Qassim, *The View from Guantánamo*, N.Y. Times, Sept. 17, 2006, at 415; Savage, *supra* note 2947; Simard, *supra* note 2748, at 384–85; Stafford Smith, *supra* note 2737, at 264–65; P. Sabin Willett, *Exile, in The Guantánamo Lawyers*, *supra* note 2737, at 329.

These Uighurs now live in a refugee camp, monitored by armed guards, and surrounded by razor wire. Integration has been hard for them because there is no Uighur community in Albania, and they do not speak the language. Albania is not a highly sought country for asylum because of its economic situation and poverty.

Simard, *supra* note 2748, at 386.

It was reported that Albania refused to accept additional Uighurs because of pressure from China. Cucullu, *supra* note 2754, at 227.

From July 29 through December 14, 2005, six habeas petitions were filed on behalf of the other seventeen Uighur detainees.²⁹⁵⁵ The Center for Constitutional Rights filed a petition on behalf of 158 detainees in December 2005,²⁹⁵⁶ and two of these detainees were Uighurs; they were given a new case number so that their case could be consolidated before Judge Urbina with other Uighur cases.²⁹⁵⁷

One of the detained Uighurs was Huzaifa Parhat, who, on December 4, 2006, filed one of the first appeals from the CSRT.²⁹⁵⁸ On June 20, 2008, the court of appeals, in the only CSRT appeal to reach the merits, determined that the evidence presented to the CSRT was insufficient to support Parhat's designation as an enemy combatant.²⁹⁵⁹ "The government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the petitioners should be detained as enemy combatants."²⁹⁶⁰

Habeas proceedings concerning the Uighurs received considerable public attention and were attended by Uighurs from the extensive local Uighur community and by Uighurs from elsewhere in the United States and from other countries.²⁹⁶¹ On October 9, Judge Urbina ruled that the government had to release the seventeen Uighurs within the United States, because the government had taken too long to find somewhere else to send them.²⁹⁶²

2955. Petition, Thabid v. Bush, No. 1:05-cv-2398 (D.D.C. Dec. 14, 2005), D.E. 1 (two Uighur detainees); Petition, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Dec. 12, 2005), D.E. 1 (two Uighur detainees); Petition, Mamet, No. 1:05-cv-1886 (D.D.C. Sept. 23, 2005), D.E. 1 (two Uighur detainees); Petition, Abu Kabir v. Bush, No. 1:05-cv-1704 (D.D.C. Aug. 25, 2005), D.E. 1 (two Uighur detainees); Petition, Mamet v. Bush, No. 1:05-cv-1602 (D.D.C. Aug. 11, 2005), D.E. 1 (one Uighur detainee); Petition, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. July 29, 2005), D.E. 1 (eight Uighur detainees and one Saudi detainee).

2956. Petition, Mohammon v. Bush, No. 1:05-cv-2386 (D.D.C. Dec. 21, 2005), D.E. 1.

The petition appeared to be on behalf of 167 detainees, but some detainees were listed more than once. On July 29, 2008, Judge Hogan dismissed without prejudice all but twenty-nine of the petitioners from this case. Order, *id.* (July 29, 2008).

2957. Docket Sheet, Ghaffar v. Bush, No. 1:08-cv-1310 (D.D.C. July 30, 2008); see Order, Mohammon, No. 1:05-cv-2386 (D.D.C. July 30, 2008), filed as Order, Ghaffar, No. 1:08-cv-1310 (D.D.C. July 30, 2008), D.E. 1 (ordering a new case number).

2958. Docket Sheet, Parhat v. Rumsfeld, No. 06-1397 (D.C. Cir. Dec. 4, 2006) [hereinafter D.C. Cir. Parhat Docket Sheet].

The Detainee Treatment Act of 2005 gave the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over CSRT appeals. Pub. L. No. 109-163, § 1405(e), 119 Stat. 3364, 3477 (2006), 10 U.S.C. § 801 note (2013).

2959. Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008); see William Glaberson, *U.S. Court, in a First, Voids Finding by Tribunal*, N.Y. Times, June 24, 2008, at A15; Hafetz, *supra* note 2754, at 249; Josh White & Del Quentin Wilber, *Appeals Court Invalidates Detainee's "Enemy" Status*, Wash. Post, June 24, 2008, at A14.

2960. Kiyemba v. Obama, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

2961. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

2962. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008); see Kent Spriggs, *The Tallahassee Uighur Settlement Project*, in *The Guantánamo Lawyers*, *supra* note 2737, at 314, 315 ("The Lutheran refugee agency for the greater Washington, D.C., area was to take fourteen of the Uighurs, and Tallahassee was to take three. The plans of both groups were proffered to Judge

On February 18, 2009, the court of appeals vacated Judge Urbina's order.²⁹⁶³ Judges A. Raymond Randolph and Karen LeCraft Henderson held that the judicial branch did not have the authority to order admission of aliens.²⁹⁶⁴ Judge Judith W. Rogers would have remanded for consideration of whether immigration detention would be proper.²⁹⁶⁵ On June 11, the government released Parhat and three other Uighurs to Bermuda.²⁹⁶⁶

The Supreme Court granted a writ of certiorari on October 20.²⁹⁶⁷ The government transferred six Uighurs to Palau in November.²⁹⁶⁸ Palau offered to accept six of the remaining seven Uighurs, but they declined the offer.²⁹⁶⁹ One of the Uighurs who declined, Bahtiyar Mahnut, did so because the offer was not extended to his brother, Arkin Mahmud, because he suffered from mental illness.²⁹⁷⁰ Switzerland agreed to take the brothers.²⁹⁷¹ On May 1, 2010, the Supreme Court decided not to review the case after all, because all of the Uighurs had been offered places of resettlement outside China and the United States, and most of them had accepted the offers.²⁹⁷² The judges on the court of appeals reinstated their original

Urbina and became part of the record.”); *see also* Cucullu, *supra* note 2754, at 227; William Glaberson, *In Blow to President, Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. Times, Oct. 8, 2008, at A15; Hafetz, *supra* note 2754, at 249; Savage, *supra* note 2947; Del Quentin Wilber, *Chinese Muslims Ordered Released from Guantanamo*, Wash. Post, Oct. 8, 2008, at A1.

2963. *Kiyemba*, 555 F.3d 1022; *see* William Glaberson, *Appeals Court Stops Release of 17 Detainees in U.S.*, N.Y. Times, Feb. 19, 2009, at A18; Hafetz, *supra* note 2754, at 249–50; Del Quentin Wilber & Carrie Johnson, *Court Blocks Release of 17 Uighurs Into U.S.*, Wash. Post, Feb. 19, 2009, at A4.

2964. *Kiyemba*, 555 F.3d at 1023–32.

2965. *Id.* at 1032–39 (Judge Rogers, concurring in the judgment).

2966. Transfer Notice, *Kiyemba v. Obama*, No. 1:05-cv-1509 (D.D.C. June 11, 2009), D.E. 232 (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat); *see* Erik Eckholm, *Freed from Guantánamo, Uighur Muslims Bask in Bermuda*, N.Y. Times, June 15, 2009, at A4; Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; William Glaberson, *6 Guantánamo Detainees Are Released to Other Countries as Questions Linger*, N.Y. Times, June 12, 2009, at A6; Hafetz, *supra* note 2754, at 250; Savage, *supra* note 2947.

2967. *Kiyemba v. Obama*, 558 U.S. 969 (2009); *see* Robert Barnes, *Supreme Court to Hear Uighurs' Case*, Wash. Post, Oct. 21, 2009, at A1; Hafetz, *supra* note 2754, at 250; Adam Liptak, *Justices to Hear Appeal from Uighurs Held at Guantánamo*, N.Y. Times, Oct. 21, 2009, at A14.

2968. Transfer Notice, *Ghaffar v. Obama*, No. 1:08-cv-1310 (D.D.C. Nov. 2, 2009), D.E. 107 (Abdul Ghappar Abdul Rahman and Adel Noori); Transfer Notice, *Thabid v. Obama*, No. 1:05-cv-2398 (D.D.C. Nov. 2, 2009), D.E. 123 (Anwar Hassan and Dawut Abdurehim); Transfer Notice, *Razakah v. Obama*, No. 1:05-cv-2370 (D.D.C. Nov. 2, 2009), D.E. 153 (Ahmad Tourson); Transfer Notice, *Mamet v. Obama*, No. 1:05-cv-1602 (D.D.C. Nov. 2, 2009), D.E. 134 (Edham Mamet); *see* Hafetz, *supra* note 2754, at 250; David Johnston, *6 Uighurs Leave Guantánamo for Palau*, N.Y. Times, Nov. 1, 2009, at 14; Savage, *supra* note 2947.

2969. *See* Del Quentin Wilber & Peter Finn, *Uighur Brothers to Resettle in Switzerland*, Wash. Post, Feb. 4, 2010, at A10.

2970. *See* Carol Rosenberg, *Swiss Resettle 2 Uighurs from Guantánamo, Georgia Takes Libyans*, Miami Herald, Mar. 24, 2010; Wilber & Finn, *supra* note 2969.

2971. *See* Rosenberg, *supra* note 2970; Savage, *supra* note 2947; Wilber & Finn, *supra* note 2969.

2972. *Kiyemba v. Obama*, 559 U.S. 131 (2010); *see* Robert Barnes, *Court Declines to Rule on Resettlement of Guantanamo Detainees*, Wash. Post, Mar. 2, 2010, at A5; Hafetz, *supra* note 2754, at

opinions on August 9.²⁹⁷³ On April 18, 2011, the Supreme Court denied certiorari. Justice Kagan recused herself, and four justices observed that offers of resettlement from two countries “and the Government’s uncontested commitment to continue to work to resettle petitioners” made the case one that did not present “the important question whether a district court may order the release of an unlawfully held prisoner into the United States *where no other remedy is available*.”²⁹⁷⁴

El Salvador offered to accept the five remaining Uighurs; in 2012, Ahmed Mohamed and Abdul Razak accepted the offer.²⁹⁷⁵ In 2013, however, they left El Salvador.²⁹⁷⁶ The last three Uighur detainees were transferred to Slovakia on December 30, 2013.²⁹⁷⁷

Returns

For the cases assigned to him for coordination, Judge Hogan ordered the government to begin filing or amending factual returns at the rate of 50 per month, beginning August 29, 2008.²⁹⁷⁸ Just before midnight on August 29, after having filed ten returns, the government moved for a 30-day extension of all return deadlines, arguing that accommodating the classified information associated with the returns had been unexpectedly time-consuming.²⁹⁷⁹ Judge Hogan reluctantly

250; Adam Liptak, *Supreme Court Refuses Ruling on Chinese Uighurs Held at Guantánamo*, N.Y. Times, Mar. 2, 2010, at A16.

2973. *Kiyemba v. Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (“we reinstate our original opinion, as modified here to take account of new developments”); *id.* at 1048 (Judge Rogers, concurring in the judgment) (“my separate concurrence . . . must . . . also be reinstated, acknowledging certain new developments”).

2974. *Kiyemba v. Obama*, 563 U.S. ___, 131 S. Ct. 1631 (2011) (statement of Justice Breyer, joined by Justices Kennedy, Ginsburg, and Sotomayor); see Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. Times, Apr. 19, 2011, at A18.

It was reported that the five remaining Uighurs were offered transfer to Maldives or Palau. Savage, *supra* note 2947.

2975. See Carol Rosenberg, *U.S. Sends Captives to El Salvador*, Miami Herald, Apr. 20, 2012, at 3A; Savage, *supra* note 2947.

2976. See Tim Johnson, *Notable & Quotable*, Wall St. J., Sept. 28, 2013, at A11 (“Uighurs familiar with the case said it is likely the two men headed to Turkey.”); Carol Rosenberg, *Six U.S. Detainees Sent to New Lives in Uruguay*, Miami Herald, Dec. 8, 2014, at 1A (“The two men sent to Salvador left, probably to Turkey.”).

2977. Dec. 31, 2013, Transfer Notice, *Kiyemba v. Obama*, No. 1:05-cv-1509 (D.D.C. Dec. 31, 2013), D.E. 264 (Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper); see Adam Goldman, *Last 3 Uighurs at Guantánamo Are Freed*, Wash. Post, Jan. 1, 2014, at A4; Carol Rosenberg, *Last 3 Uighurs Leave Guantánamo*, Miami Herald, Jan. 1, 2014, at 1A; Charlie Savage, *U.S. Frees Last of the Chinese Uighur Detainees from Guantánamo Bay*, N.Y. Times, Jan. 1, 2014, at A13.

2978. *In re Guantanamo Bay Detainee Litig.*, 564 F. Supp. 2d 14, 16 (D.D.C. 2008).

2979. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 (D.D.C. 2008).

The Justice Department did not begin organizing evidence against the detainees until the Supreme Court’s *Boumediene* decision. Interview with Hon. Royce C. Lamberth, May 13, 2011.

granted the motion.²⁹⁸⁰ In November, Judge Hogan ordered that the public files include unclassified versions of the returns.²⁹⁸¹

Conditions of Confinement

On September 22, in response to motions for access to medical records and other relief, Judge Hogan ruled that although the Supreme Court had declared unconstitutional the Military Commissions Act of 2006's stripping of jurisdiction over core habeas corpus claims, the precedent did not apply to the act's stripping of jurisdiction over claims concerning conditions of confinement, so Judge Hogan denied the motions.²⁹⁸² Judge Roberts, the merits judge for one of the cases, decided on reconsideration that the motion concerned the detainee's ability to pursue his core habeas claims and granted relief on November 28.²⁹⁸³

Judges Urbina,²⁹⁸⁴ Bates,²⁹⁸⁵ and Kessler²⁹⁸⁶ agreed with Judge Hogan that the court had no jurisdiction over conditions of confinement.

Zayn al-Abidin Muhammad Husayn,²⁹⁸⁷ a Palestinian also known as Abu Zubaydah, was identified in early 2000 as a suspected key lieutenant of Osama Bin Laden's.²⁹⁸⁸ In March 2002, he was captured in Faisalabad, Pakistan.²⁹⁸⁹ He

2980. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 310.

2981. Case Management Order, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Nov. 6, 2008), D.E. 940, available at 2008 WL 4858241.

2982. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 314 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 312 (D.D.C. 2008).

As Congress considered stripping Guantánamo Bay detainees of habeas corpus rights, habeas attorneys contemplated urging a compromise in which only jurisdiction over conditions of confinement would be stripped. See Gary A. Isaac, *The Great Writ Gets Political: Defending Habeas Corpus in Court, in Congress, and on the Campaign Trail*, in *The Guantánamo Lawyers*, *supra* note 2737, at 200, 205, 212–13.

2983. *Husayn v. Gates*, 588 F. Supp. 2d 7 (D.D.C. 2008).

2984. *Tumani v. Obama*, 598 F. Supp. 2d 67, 69 (D.D.C. 2008) (denying a motion for less restrictive detention); *In re Guantanamo Bay Detainee Litig.*, 570 F. Supp. 2d 13, 19 (D.D.C. 2008) (same).

2985. *Khadr v. Bush*, 587 F. Supp. 2d 225, 234–37 (D.D.C. 2008) (overruling a challenge to confinement as an adult).

2986. *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 117–20 (D.D.C. 2009) (denying an injunction against the government's methods of force-feeding two hunger-striking detainees).

2987. Docket Sheet, *Husayn v. Gates*, No. 1:08-cv-1360 (D.D.C. Aug. 6, 2008) [hereinafter *Husayn* Docket Sheet].

2988. See Judith Miller, *Dissecting a Terror Plot From Boston to Amman*, N.Y. Times, Jan. 15, 2001, at A1; James Risen, *Foiled Terror Plot on Tourists Linked to Bin Laden Aide*, N.Y. Times, Feb. 29, 2000, at A1; Soufan, *supra* note 2780, at 380–81; see also Hafetz, *supra* note 2754, at 232 (“Interrogators later realized that Zubaydah was merely a low-level personnel clerk who helped facilitate travel to training camps in Afghanistan.”); Soufan, *supra* note 2780, at 381 (“It was not until the Obama administration was in office that U.S. officials stopped calling him a senior al-Qaeda member.”).

2989. Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, at 21 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], available at www.intelligence.senate.gov/study2014/sscistudy1.pdf; see Michael

was the first prisoner subjected to post-September 11 enhanced interrogation.²⁹⁹⁰ Information derived from Abu Zubaydah helped to identify José Padilla as a terrorism suspect.²⁹⁹¹ Destruction of videotapes of Abu Zubaydah and other detainees' harsh interrogations led to a high-profile criminal investigation that ultimately resulted in no criminal charges.²⁹⁹² On September 6, 2006, President Bush announced that Abu Zubaydah and thirteen other terrorism suspects, including Khalid Sheikh Mohammed, who is understood to be the mastermind of the September 11, 2001, attacks, had been transferred from secret CIA prisons to Guantánamo Bay.²⁹⁹³ On July 24, 2014, the European Court of Human Rights issued a

R. Gordon, *A Top Qaeda Commander Believed Seized in Pakistan*, N.Y. Times, Mar. 31, 2002, at 112; Soufan, *supra* note 2780, at 373–74.

2990. See Mark Mazzetti, *Failure of Oversight Is Outlined—Agency Defends Program*, N.Y. Times, Dec. 10, 2014, at A1 (reporting that Abu Zubaydah was first transported to a CIA facility in Thailand); Greg Miller, Adam Goldman & Julie Tate, *Report Details Vicious Acts, Cites a Pattern of Deception*, Wash. Post, Dec. 10, 2014, at A1; see also Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. Times, Apr. 20, 2009, at A1 (reporting that Abu Zubaydah was waterboarded at least several dozen times in August 2002).

2991. See Hafetz, *supra* note 2754, at 46, 232; Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive, the White House Says*, N.Y. Times, Mar. 4, 2003, at A13; Terry McDermott & Josh Meyer, *The Hunt for KSM 218–19* (2012); Soufan, *supra* note 2780, at 354, 427; see also *supra* “Dirty Bomber.”

The Senate Select Committee on Intelligence concluded that Abu Zubaydah provided information about Padilla before Abu Zubaydah received enhanced interrogation and after a foreign government provided information about Padilla. SSCI Executive Summary, *supra* note 2989, at 225–37.

2992. See Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal Inquiry Into C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, at A1; Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12; Larry Siems, *The Torture Report 59–97* (2011); Soufan, *supra* note 2780, at 434 (“Declassified internal CIA e-mails show senior CIA officials stating the urgency and importance of destroying the tapes.”).

Pending is an action under the Freedom of Information Act by the *New York Times* for a copy of the criminal investigation’s report. Complaint, N.Y. Times Co. v. U.S. Dep’t of Justice, No. 1:14-cv-3777 (S.D.N.Y. May 28, 2014), D.E. 2.

The investigation of destroyed videotapes led to the Senate Select Committee on Intelligence’s 2014 “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program.” Forward at 1, SSCI Executive Summary, *supra* note 2989; Executive Summary at 8, *id.*

2993. SSCI Executive Summary, *supra* note 2989, at 159–60 (“As all other detainees in the CIA’s custody had been transferred to other nations, the CIA had no detainees in its custody at the time of the speech.”); see Cucullu, *supra* note 2754, at 5; Hafetz, *supra* note 2754, at 48; Sheryl Gay Stolberg, David Johnston & Mark Mazzetti, *President Moves 14 Held in Secret to Guantánamo*, N.Y. Times, Sept. 7, 2006, at A1.

In September 2006, Mr. Bush ordered all of the detainees in C.I.A. custody to be transferred to the prison at Guantánamo Bay, Cuba, and after that the C.I.A. held a small number of detainees in secret at a different facility for several months at a time, before they were also moved to Guantánamo Bay.

Mazzetti, *supra* note 2990.

€130,000 judgment against Poland for Poland's complicity in the torture and other mistreatment of Abu Zubaydah by extraordinary rendition.²⁹⁹⁴

At Guantánamo Bay, Abu Zubaydah suffered from frequent and severe seizures.²⁹⁹⁵ He claimed that side effects from treatment provided at Guantánamo Bay "rendered him incoherent, interfered with his ability to write and speak, and made him acutely psychotic."²⁹⁹⁶ Judge Roberts granted Abu Zubaydah's attorneys access to his medical records and gave them permission to share them with an independent physician.²⁹⁹⁷ Judge Urbina also granted a habeas petitioner's attorneys access to the client's medical records.²⁹⁹⁸ Judge Sullivan appointed the court's "own medical/mental health expert to examine the Petitioner and provide the Court with a report and any recommendations" in response to representations that forcefeeding the detainee with a corn-based solution to which he might have been allergic was causing vomiting so extensive that it was interfering with attorney-client visits.²⁹⁹⁹ A court-appointed doctor visited the detainee the following month.³⁰⁰⁰

Five detainees in CIA custody at Guantánamo Bay were transferred to another country in 2004 to avoid possible habeas jurisdiction over them should the government not prevail in *Rasul v. Bush*, which it did not. SSCI Executive Summary, *supra* note 2989, at 140–41; *see Rasul v. Bush*, 542 U.S. 466 (2004); *see also* Carol Rosenberg, *Senate Report Confirms CIA Had "Black Site" at Guantánamo Base*, Miami Herald, Dec. 12, 2014, at 1A.

2994. Judgment, *Husayn v. Poland*, No. 7511/13 (Eur. Ct. H.R. July 24, 2014, final Feb. 16, 2015), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047>; *see* Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, N.Y. Times, July 25, 2014, at A9; Adam Goldman, *European Court Finds Poland Facilitated CIA Torture of Terrorism Suspects*, Wash. Post, July 25, 2014, at A22; Gabriele Steinhauser & Jess Bravin, *Court Assails Poland on CIA Rendition*, Wall St. J., July 25, 2014, at A9; *see also* Judgment, *Al-Nashiri v. Poland*, No. 28761/11 (Eur. Ct. H.R. July 24, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044> (a €100,000 judgment against Poland for Poland's assistance with the extraordinary rendition of Guantánamo detainee Abd al-Rahim al-Nashiri, who is being prosecuted by military commission for the 2000 bombing of the USS *Cole*).

2995. *Husayn v. Gates*, 588 F. Supp. 2d 7, 9 (D.D.C. 2008); *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 314, 315 (D.D.C. 2008); *see also* Soufan, *supra* note 2780, at 381–84 (describing Abu Zubaydah's precarious health soon after his capture).

2996. *Husayn*, 588 F. Supp. 2d at 9.

2997. *Id.* at 12.

Judge Roberts overruled the government's redactions from the medical records of "certain, limited information based on a determination that Petitioner's counsel does not have the requisite need-to-know the information," reasoning that "[t]he petitioner's counsel has a security clearance and is presumed to have a need to know the information that he is requesting." Order, *Husayn v. Gates*, No. 1:08-cv-1360 (D.D.C. Mar. 4, 2009), D.E. 113, available at 2009 WL 544492. The government complied with the order, reserving the right to rebut need to know in appropriate cases. Government Response, *id.* (Mar. 6, 2009).

2998. *Tumani v. Obama*, 598 F. Supp. 2d 67, 70–71 (D.D.C. 2008).

2999. *Zuhair v. Bush*, 592 F. Supp. 2d 16 (D.D.C. 2008); *see id.* at 17 ("in order to ensure that Petitioner has meaningful access to counsel, that his counsel are able to adequately communicate with him in order to represent his claims to this Court, and to preserve this Court's jurisdiction over Petitioner's habeas petition"); *see* Order, *Zuhair v. Bush*, No. 1:08-cv-864 (D.D.C. Jan. 16, 2009), D.E. 134, available at 2009 WL 111690 ("The report shall not be filed on the public docket,

In response to a June 18, 2009, motion by attorneys for Muhammad Ahmad Abdallah al-Ansi for medical records to determine “whether Mr. al Ansi has a serious or life-threatening medical condition and whether he is receiving adequate medical treatment that will keep him alive and competent to participate in these proceedings,”³⁰⁰¹ Judge Kessler ruled that “counsel is entitled to the medical records in order to provide Petitioner effective access to his counsel”³⁰⁰² and that the order “does not pertain to the conditions of Petitioner’s confinement.”³⁰⁰³

On February 11, 2014, in a case concerning the force-feeding of hunger strikers, a panel of the court of appeals held by a vote of two to one that the courts retained jurisdiction over conditions-of-confinement challenges pursued in habeas actions; what they lacked for Guantánamo detainees was jurisdiction over *Bivens* actions.³⁰⁰⁴

Abstention

One of the cases assigned to Judge Hogan for coordination was a petition by Omar Khadr, a Canadian citizen whose family moved to Afghanistan in 1997, who was fifteen when he was captured in Kabul in July 2002, and who was sixteen when he arrived at Guantánamo Bay.³⁰⁰⁵ He was seventeen when his grandmother filed a habeas petition on his behalf.³⁰⁰⁶ The government brought war charges against Khadr in a military commission, alleging, among other things, murder of a U.S. soldier by throwing a hand grenade at U.S. forces and attempted murder by converting land mines to improvised explosive devices.³⁰⁰⁷ The merits judge for

however, the Court will provide copies to counsel for the parties.”).

3000. Docket Sheet, *Zuhair*, No. 1:08-cv-864 (D.D.C. May 19, 2008) (noting a January 2009 visit); see Report, *id.* (Aug. 24, 2009), D.E. 214.

In 2012, it was reported that attorneys for Abu Zubaydah requested his prosecution by military commission. See Ben Fox, *Trial Sought for Longtime Guantánamo Inmate*, Miami Herald, May 11, 2012, at 11A.

3001. Emergency Motion at 3, *Al-Ansi v. Obama*, No. 1:08-cv-1923 (D.D.C. June 18, 2009), D.E. 93.

3002. Order, *id.* (July 9, 2009), D.E. 104, available at 2009 WL 2020774.

3003. *Id.* at 1 n.1.

3004. *Aamer v. Obama*, 742 F.3d 1023, 1026, 1028–38 (D.C. Cir. 2014) (opinion by Circuit Judge Tatel, joined by Circuit Judge Griffith); see *id.* at 1044–50 (dissenting opinion by Circuit Judge Williams); see Frederic J. Frommer, *Detainees Can File Force-Feeding Cases*, Miami Herald, Feb. 12, 2014, at 3A; Charlie Savage, *Appeals Court Allows Challenges by Detainees at Guantánamo Prison*, N.Y. Times, Feb. 12, 2014, at A15.

3005. *Khadr v. Bush*, 724 F. Supp. 2d 61, 62 (D.D.C. 2010); *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K. v. Bush*, 344 F. Supp. 2d 44, 49 (D.D.C. 2004).

“Born in Toronto, Khadr was a Canadian citizen. But his father, Ahmed Said Khadr, was a confidant of Osama bin Laden, and Omar spent much of his youth in Pakistan and Afghanistan, where he and his brothers attended al Qaeda camps and played with bin Laden’s children.” Bravin, *supra* note 2728, at 287.

3006. *Khadr*, 587 F. Supp. 2d at 228; *O.K.*, 344 F. Supp. 2d at 52; *Khadr* Docket Sheet, *supra* note 2759.

3007. *Khadr v. United States*, 529 F.3d 1112, 1114 (D.C. Cir. 2008).

the habeas case was Judge Bates, who determined that the habeas action should be stayed pending military commission proceedings, because the commission result was subject to Article III review.³⁰⁰⁸ Khadr pleaded guilty on October 25, 2010, pursuant to an agreement that he serve no more than eight years.³⁰⁰⁹ He was returned to Canada on September 29, 2012, to serve the remainder of his sentence.³⁰¹⁰ In light of Hamdan's successful appeal, Khadr appealed his conviction to the U.S. Court of Military Commissions Review on November 14, 2013.³⁰¹¹ In July 2014, a Canadian court ruled that because Khadr was a juvenile at the time he committed the acts for which he was convicted he should be transferred from a federal prison to a provincial jail.³⁰¹²

On January 6, 2009, Judge Kollar-Kotelly, concerning the habeas petitions of Kuwaitis Fouad Mahmoud al-Rabiah and Fayiz Mohammed Ahmen al-Kandari, agreed that habeas cases should be stayed during military commission proceedings, but a stay was not warranted until a military commission was actually convened against the petitioner.³⁰¹³ Each petitioner had been charged with violating the laws of war, but the Convening Authority, who is appointed by the Secretary of Defense to review such charges, had not yet decided whether to dismiss the charges or refer them to a military commission.³⁰¹⁴

Judge Kollar-Kotelly held a merits hearing for al-Rabiah in August 2009.³⁰¹⁵ Al-Rabiah, who had studied in Perth, Scotland, and Daytona Beach, Florida, was

The Defense Department posts on the Internet docket information about military commission cases. www.mc.mil/CASES.aspx.

3008. *Khadr*, 724 F. Supp. 2d 61; *O.K.*, 344 F. Supp. 2d 44.

3009. See Carol Rosenberg, *Teen Terrorist Gets 40 Years, But Will Serve Only 8*, Miami Herald, Oct. 31, 2010, at 5A; Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. Times, Nov. 2, 2010, at A13; Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. Times, Oct. 26, 2010, at A12.

3010. See Ian Austen, *Canadian Held at Guantánamo Bay Is Repatriated*, N.Y. Times, Sept. 30, 2012, at 27; Ernesto Londoño, *Youngest Detainee Leaves Guantanamo*, Wash. Post, Sept. 30, 2012, at A3; Kent Roach, *The Law Working Itself Pure? The Canadian Experience with Exceptional Courts and Guantánamo*, in *Guantánamo and Beyond 201, 202–03, 217–22* (Fionnuala Ní Aoláin & Oren Gross eds., 2013); Carol Rosenberg, *Khadr Back in Canada from Guantánamo*, Miami Herald, Sept. 30, 2012, at 3A; see also Editorial, *Omar Khadr's Untold Story*, N.Y. Times, Aug. 4, 2014, at A20 (“[Khadr] has recanted his admission of guilt, saying he tendered it only to win release from Guantánamo and return to Canada.”).

Pending in the District of Utah is a civil action against Khadr for injuries and death arising from “a terrorist ambush in Afghanistan.” Amended Complaint, *Morris v. Khadr*, No. 2:14-cv-391 (D. Utah Aug. 8, 2014), D.E. 7; Complaint, *id.* (May 23, 2014), D.E. 2.

3011. Appeal, *Khadr v. United States*, No. 13-5 (Ct. Mil. Comm'n Rev. Nov. 14, 2013); see Carol Rosenberg, *Khadr Appeals Guantánamo Conviction*, Miami Herald, Nov. 9, 2013, at 3A.

3012. See Sheila Pratt, *Khadr Eligible for Parole Board Hearing*, Edmonton J., July 10, 2014, at A10.

3013. *Al Odah v. Bush*, 593 F. Supp. 2d 53, 61 (D.D.C. 2009); see Charge Sheet, *United States v. Al-Rabia* (U.S. Mil. Comm. Oct. 21, 2008), available at www.mc.mil/CASES.aspx; Charge Sheet, *United States v. Al-Kandari*, *id.*

3014. *Al Odah.*, 593 F. Supp. 2d at 54–55, 60–61.

3015. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 (D.D.C. 2009).

an aviation engineer for Kuwait Airways.³⁰¹⁶ He periodically took approved leave from his job to do charitable work in stressed locations such as Bosnia, Kosovo, and Bangladesh.³⁰¹⁷ Al-Rabiah took two weeks' leave for a trip to Afghanistan in October 2001, but he was unable to return because the border was closed as a result of the military actions by the United States there that month.³⁰¹⁸ Al-Rabiah was captured near the end of the year.³⁰¹⁹ Judge Kollar-Kotelly found the government's evidence that al-Rabiah was in Afghanistan for other than charitable purposes to be very inconsistent and ultimately not credible, so, on September 17, 2009, she ordered his release.³⁰²⁰ Al-Rabiah was released to Kuwait on December 9.³⁰²¹

On the other hand,

Al-Kandari was in the mountains near Tora Bora, during the height of the [December 2001] Battle of Tora Bora, armed with a Kalishnikov rifle, and in the company of several members and high-level leaders of al Qaeda, the Taliban, or associated enemy forces, who were actively engaged in fighting the United States and its Coalition allies.³⁰²²

Judge Kollar-Kotelly denied al-Kandari's petition on September 15, 2010, following an October 2009 merits hearing,³⁰²³ and the court of appeals affirmed.³⁰²⁴ In 2012, the government decided not to prosecute al-Kandari.³⁰²⁵

Authority passed from President Bush to President Obama on January 20, 2009.³⁰²⁶ Four days in advance of that, the government moved to stay habeas proceedings for Ahmad Mohammad al-Darbi because he had been referred to a military commission the previous February.³⁰²⁷ Because military commissions were

3016. *Id.* at 20.

3017. *Id.* at 20–21.

3018. *Id.* at 21; see *United States v. Passaro*, 577 F.3d 207, 211 (4th Cir. 2009) (“After the September 11, 2001, terrorist attacks, the United States conducted a military operation in Afghanistan in an effort to topple the Taliban regime.”).

3019. *Al Rabiah*, 658 F. Supp. 2d at 21–22.

3020. *Id.* at 42; see Hafetz, *supra* note 2754, at 247; *Kuwaiti Ordered Released from Guantánamo Bay*, N.Y. Times, Sept. 26, 2009, at A15 (“Mr. Rabiah, 50, is the 30th Guantánamo detainee to be ordered released by a federal judge who has reviewed evidence justifying detention.”); Carol Rosenberg, *Guantánamo Detainees Sent to Kuwait, Belgium*, Miami Herald, Oct. 9, 2009.

3021. Transfer Notice, *Al-Odah v. Obama*, No. 1:02-cv-828 (D.D.C. Dec. 14, 2009), D.E. 676; see Carol Rosenberg, *Cleared Guantánamo Detainee Sent to Kuwait*, Miami Herald, Dec. 9, 2009.

3022. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

3023. *Id.*

3024. *Al-Kandari v. Obama*, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2741 (2012).

3025. See Carol Rosenberg, *Kuwaiti's War-Crimes Charges Are Dropped*, Miami Herald, June 30, 2012, at 4A.

3026. See Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. Times, Jan. 21, 2009, at A1.

3027. Government Motion, *Al-Darbi v. Bush*, No. 1:05-cv-2371 (D.D.C. Jan. 16, 2009), D.E. 108.

suspended two days after President Obama's inauguration,³⁰²⁸ Judge Royce C. Lamberth denied the government's motion.³⁰²⁹ Judges Kollar-Kotelly³⁰³⁰ and Huvelle³⁰³¹ ruled similarly in cases before them. Military commission proceedings against al-Darbi resumed in 2012.³⁰³² He pleaded guilty in February 2014 and agreed to testify against Abd al-Rahim al-Nashiri, who was being prosecuted for the 2000 USS *Cole* bombing.³⁰³³ Al-Darbi was to be sentenced three and one-half years after the plea and possibly repatriated to Saudi Arabia some time after that to serve out his sentence, which could be capped at fifteen years.³⁰³⁴ His habeas petition was voluntarily dismissed without prejudice.³⁰³⁵

Combatant Status Review Tribunal Appeals

In July 2004, the Defense Department created Combatant Status Review Tribunals (CSRTs) to determine whether each Guantánamo Bay detainee is an enemy combatant.³⁰³⁶ The Department also created Administrative Review Boards (ARBs) to periodically review the status of detained enemy combatants to determine whether the detainee still poses a threat justifying detention.³⁰³⁷

The Detainee Treatment Act of 2005 was attached to the 2006 appropriation act for the Defense Department, enacted on December 30, 2005.³⁰³⁸ The act speci-

3028. Exec. Order No. 13,492, § 7, 74 Fed. Reg. 4897 (Jan. 27, 2009).

3029. Order, *Al-Darbi*, No. 1:05-cv-2371 (D.D.C. Apr. 7, 2009), D.E. 135, available at 2009 WL 949088.

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

3030. Order, *Alsawam v. Obama*, No. 1:05-cv-1244 (D.D.C. Apr. 15, 2009), D.E. 150 (Tariq Mahmoud Alsawam).

3031. Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Apr. 22, 2009), D.E. 234, available at 2009 WL 1078660 (Mohammed Jawad and Mohammed Kameen).

Mohammed Jawad's petition was ultimately successful, Jawad Writ, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 30, 2009), D.E. 323, available at 2009 WL 2365846, and he was released to Afghanistan, *Guantánamo Detainee Released*, N.Y. Times, Aug. 25, 2009, at A8.

3032. www.mc.mil/CASES.aspx (military commission case records); see Carol Rosenberg, *Pentagon Charges Al-Qaida Suspect*, Miami Herald, Aug. 30, 2012, at 3A.

3033. Pretrial Agreement, *United States v. Al-Darbi* (U.S. Mil. Comm'n, Dec. 20, 2013, filed Feb. 20, 2014), available at [www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20\(AE010\).pdf](http://www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20(AE010).pdf).

3034. *Id.*; see Jess Bravin, *Detainee Offers Plea in Deal for Testimony*, Wall St. J., Feb. 21, 2014, at A4; Adam Goldman, *Relative of Sept. 11 Hijacker to Plead Guilty*, Wash. Post, Feb. 20, 2014, at A8; Pauline Jelinek, *Guantanamo Bay Detainee Pleads Guilty to War Crimes*, Bos. Globe, Feb. 21, 2014, at A7; Carol Rosenberg, *Saudi Pleads Guilty, Could Get Out in 2018*, Miami Herald, Feb. 21, 2014, at 3A.

3035. Order, *Al-Darbi v. Obama*, No. 1:05-cv-2371 (D.D.C. May 15, 2014), D.E. 262.

3036. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008); *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009); *Bismullah v. Gates*, 501 F.3d 178, 181 (D.C. Cir. 2007); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450 (D.D.C. 2005); see Lewis, *supra* note 2788; Meltzer, *supra* note 2748, at 6.

Former detainee Moazzam Begg reported that he received a notice of CSRT proceedings about a week after the CSRTs were established. Moazzam Begg, *Enemy Combatant* 261–62 (2006).

3037. See Lewis, *supra* note 2788.

3038. Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005).

fied that the Defense Department would submit to Congress reports on CSRT and ARB proceedings.³⁰³⁹ It also conferred on the District of Columbia Circuit's court of appeals "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."³⁰⁴⁰

The court of appeals' docket shows 177 CSRT appeals.³⁰⁴¹ The first was filed on behalf of Saifullah Paracha on January 24, 2006.³⁰⁴² The second was also filed on behalf of Paracha, on March 30,³⁰⁴³ and the court of appeals determined that the second appeal was from the ARB, over which the court was not given review jurisdiction.³⁰⁴⁴

The third CSRT appeal was filed on June 9 on behalf of Haji Bismullah,³⁰⁴⁵ and the fourth was filed on December 4 on behalf of seven Uighurs.³⁰⁴⁶ In these two cases, the court made a significant preliminary ruling that the court's review is not limited to the CSRT record, but "the court must have access to all the information available to the Tribunal."³⁰⁴⁷ The court granted relief to the Uighur Parhat,³⁰⁴⁸ but nearly one year later the court determined that had Congress known that the Supreme Court would nullify Congress's stripping of the detain-

3039. *Id.* § 1005.

3040. *Id.* § 1005(e); 28 U.S.C. § 2241(e)(2)(A) (2013); see Meltzer, *supra* note 2748, at 6–7.

3041. The cases were assigned the following docket numbers: 06-1038, 06-1117, 06-1197, 06-1397, 07-1031, 07-1066, 07-1083, 07-1089, 07-1090, 07-1095, 07-1096, 07-1098 through 07-1101, 07-1104 through 07-1114, 07-1116 through 07-1119, 07-1122, 07-1125 through 07-1127, 07-1131, 07-1132, 07-1134 through 07-1137, 07-1149, 07-1150, 07-1154 through 07-1161, 07-1165 through 07-1167, 07-1169 through 07-1171, 07-1176, 07-1181 through 07-1186, 07-1188, 07-1189, 07-1191, 07-1192, 07-1195 through 07-1197, 07-1199, 07-1202 through 07-1204, 07-1213 through 07-1215, 07-1221, 07-1224, 07-1225, 07-1234, 07-1236, 07-1237, 07-1243 through 07-1246, 07-1249 through 07-1254, 07-1263, 07-1266, 07-1267, 07-1269, 07-1274, 07-1295, 07-1302, 07-1303, 07-1307, 07-1308, 07-1316, 07-1317, 07-1320, 07-1322, 07-1324, 07-1325, 07-1330, 07-1331, 07-1340 through 07-1342, 07-1349, 07-1350, 07-1357, 07-1358, 07-1365, 07-1368, 07-1373, 07-1374, 07-1384, 07-1393 through 07-1396, 07-1399, 07-1402, 07-1405, 07-1413, 07-1420, 07-1442, 07-1476, 07-1485, 07-1508 through 07-1512, 07-1519, 07-1520 through 07-1523, 07-1526, 07-1527, 08-1007, 08-1011, 08-1027 through 08-1029, 08-1033, 08-1042, 08-1043, 08-1049, 08-1053 through 08-1055, 08-1058, 08-1060, 08-1064, 08-1084, 08-1104, 08-1112, 08-1113, 08-1130, 08-1183, 08-1198, 08-1207, 08-1209, 08-1236, 09-1238, 09-1244, 09-1274, 09-1294, and 10-1067.

3042. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1038 (D.C. Cir. Jan. 24, 2006).

3043. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1117 (D.C. Cir. Mar. 30, 2006).

3044. Order, *id.* (Apr. 9, 2007).

3045. Docket Sheet, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir. June 9, 2006).

Bismullah was transferred to Afghanistan on January 17, 2009. See <http://projects.nytimes.com/guantanamo>.

3046. D.C. Cir. *Parhat* Docket Sheet, *supra* note 2958.

Later, the court ordered separate actions on behalf of each detainee. *Bismullah v. Gates*, 501 F.3d 178, 192 (D.C. Cir. 2007) (resulting in the assignment of docket numbers 07-1508 through 07-1512 and 07-1523).

3047. *Bismullah*, 501 F.3d at 180; see William Glaberson, *Court Tells U.S. to Reveal Data on Guantánamo*, N.Y. Times, July 21, 2007, at A1; Meltzer, *supra* note 2748, at 53; Josh White, *Government Must Share All Evidence on Detainees*, Wash. Post, July 21, 2007, at A2.

3048. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

ees' habeas corpus rights, Congress would not have given the court of appeals review jurisdiction over CSRT decisions.³⁰⁴⁹

Contempt

On March 13, 2009, Judge Sullivan issued an “order to show cause why the government and the attorneys for the government in this case should not be held in contempt for failure to . . . produce exculpatory information.”³⁰⁵⁰ The government was obliged, including by orders dated September 22, 2008,³⁰⁵¹ and January 16, 2009,³⁰⁵² to provide habeas counsel with exculpatory information about their client, Aymen Saeed Batarfi.³⁰⁵³ The government was also obliged to produce Batarfi's medical records.³⁰⁵⁴ Among these records, the government inadvertently included medical information about another detainee, who was a witness against Batarfi.³⁰⁵⁵ The identity of the witness is protected in the record, but it appears to be the case that the medical information about him is that he suffered from antisocial personality disorder, of which deceit is a common symptom.³⁰⁵⁶ Judge Sullivan viewed this information as “highly exculpatory” and called the government to task for not producing it advertently.³⁰⁵⁷ In the end, Judge Sullivan did not issue an order of contempt,³⁰⁵⁸ and Batarfi was released to Yemen on December 19, 2009.³⁰⁵⁹

Detainability

On March 13, 2009, the government filed the new administration's understanding of whom it could detain at Guantánamo Bay:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forc-

3049. *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

3050. *Batarfi v. Bush*, 602 F. Supp. 2d 118, 119 (D.D.C. 2009).

3051. See Government Contempt Response, *Batarfi v. Bush*, No. 1:05-cv-409 (D.D.C. Apr. 3, 2009), D.E. 183.

3052. Order, *id.* (Jan. 29, 2009), D.E. 162 [hereinafter *Batarfi* Discovery Order] (order issued orally on January 16, reduced to writing and signed on January 29, and filed on February 10).

3053. *Batarfi*, 602 F. Supp. 2d at 119.

3054. *Batarfi* Discovery Order, *supra* note 3052.

3055. Government Response at 8, *Batarfi*, No. 1:05-cv-409 (D.D.C. Feb. 20, 2009), *as redacted, id.* (Mar. 17, 2009), D.E. 174-2 [hereinafter *Batarfi* Government Response]; see Marisa Taylor, *Judge Blasts Government's Conduct*, Miami Herald, Apr. 7, 2009, at 3A.

3056. *Batarfi* Government Response, *supra* note 3055, at 8–9; see Taylor, *supra* note 3055.

3057. Transcript at 2–9, *Batarfi*, No. 1:05-cv-409 (D.D.C. Apr. 1, 2009, filed Apr. 1, 2009), D.E. 179.

3058. Docket Sheet, *id.* (Mar. 1, 2005).

3059. Transfer Notice, *id.* (Dec. 22, 2009); see <http://projects.nytimes.com/guantanamo>; William Glaberson, *U.S. Decides to Release Detainee at Guantánamo*, N.Y. Times, Mar. 31, 2009, at A17.

es that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.³⁰⁶⁰

The modification of support with the adverb “substantially” was a change from the previous administration’s position.³⁰⁶¹

On April 22, Judge Walton announced the standard of detainability he would apply to his cases.³⁰⁶² He agreed to adopt the government’s basic framework,³⁰⁶³ “provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”³⁰⁶⁴

Judge Kessler decided to adopt Judge Walton’s framework.³⁰⁶⁵

On May 19, Judge Bates announced his standard of detainability:

Specifically, the Court rejects the concept of “substantial support” as an independent basis for detention. Likewise, the Court finds that “directly supporting hostilities” is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of “support” as a valid ground for detention. . . .

With the exception of these two “support”-based elements, however, the Court will adopt the government’s proposed framework.³⁰⁶⁶

Judges Lamberth,³⁰⁶⁷ Kollar-Kotelly,³⁰⁶⁸ Robertson,³⁰⁶⁹ Hogan,³⁰⁷⁰ and Urbina³⁰⁷¹ decided to adopt Judge Bates’s framework. The court of appeals, however, held that detention could be justified by support, because the government’s detention power was not constrained by international laws of war.³⁰⁷²

3060. Government Brief at 2, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Mar. 13, 2009), D. E. 1689.

3061. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009).

3062. *Id.* at 54–71.

3063. *Id.* at 54, 70.

3064. *Id.* at 71; see Hafetz, *supra* note 2754, at 243.

3065. *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38, 42 (D.D.C. 2009); Opinion at 6, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Aug. 21, 2009), D.E. 459 [hereinafter *Al-Adahi Habeas Grant*], available at 2009 WL 2584685.

3066. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009); see Hafetz, *supra* note 2754, at 243.

3067. *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

3068. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 19 (D.D.C. 2009); *Al Odah v. United States*, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009).

3069. *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009).

3070. *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009).

3071. *Hatim v. Obama*, 677 F. Supp. 2d 1, 7 (D.D.C. 2009).

3072. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *cert. denied*, 563 U.S. ___, 131 S. Ct. 1814 (2011); see Hafetz, *supra* note 2754, at 243.

Unreliable Cooperation

On March 31, 2009, Judge Huvelle ordered a detainee released³⁰⁷³ on a finding that he could “no longer constitute a threat to the United States.”³⁰⁷⁴ The detainee, whose association with Al-Qaeda appears to have been more mercenary than ideological, apparently suffered serious reprisals for his heavy cooperation with the government.³⁰⁷⁵

The possible unreliability of his cooperation, however, was a factor in Judge Leon’s granting Mohammed el-Gharani’s petition,³⁰⁷⁶ Judge Kessler’s granting a petition by Alla Ali Bin Ali Ahmed,³⁰⁷⁷ and Judge Urbina’s granting a petition by Saeed Mohammed Saleh Hatim.³⁰⁷⁸

The cooperating detainee was transferred to Spain in May 2010.³⁰⁷⁹

Product of Torture

Judge Huvelle agreed, on July 17, 2009, to suppress “every statement made by [Mohammed Jawad] since his arrest as a product of torture.”³⁰⁸⁰ The government

3073. Final Judgment, *Basardh v. Bush*, No. 1:05-cv-889 (D.D.C. Mar. 31, 2009), D.E. 131, available at 2009 WL 856345; see *Detainee to Be Released*, L.A. Times, Apr. 1, 2009, at 15.

3074. *Basardh v. Bush*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

3075. *Id.* at 32; see Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, Wash. Post, Feb. 3, 2009, at A1 [hereinafter *Quandary*]; see also Del Quentin Wilber, ‘08 *Habeas Ruling May Snag Obama Plans*, Wash. Post, Feb. 13, 2010, at A2 [hereinafter *Snag*] (“The Yemeni has serious psychological problems that include suicide attempts, hallucinations, a severe personality disorder and depression . . .”).

The detainee signed a pro se petition on March 3, 2005. Petition, *Basardh*, No. 1:05-cv-889 (D.D.C. May 3, 2005), D.E. 1 (“Please look at my case, and also send a lawyer to look at my request for asylum because my life has been threatened by Saudis and Yemenis.”).

3076. *El Gharani v. Bush*, 593 F. Supp. 2d 144, 147–49 (D.D.C. 2009); see Wilber, *Quandary*, *supra* note 3075.

The government released el-Gharani to Chad. El-Gharani Transfer Notice, *supra* note 2932.

3077. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56–57 (D.D.C. 2009); see Hafetz, *supra* note 2754, at 244–45; Dafna Linzer, *In Gitmo Case, a Reality Check*, Nat’l L.J., Oct. 11, 2010, at 1; Scott Shane & Benjamin Weiser, *Judging Detainees’ Risk, Often with Flawed Evidence*, N.Y. Times, Apr. 25, 2011, at A1; Del Quentin Wilber, *Release of Yemeni Held at Guantánamo Ordered*, Wash. Post, May 13, 2009, at A5.

The government returned Ahmed to Yemen. Transfer Notice, *Ahmed v. Obama*, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009), D.E. 246; see Scott Shane, *Detainee’s Case Illustrates Bind of Prison’s Fate*, N.Y. Times, Oct. 4, 2009, at A1; Shane & Weiser, *supra*.

3078. *Hatim v. Obama*, 677 F. Supp. 2d 1, 16–18 (D.D.C. 2009); *id.* at 17 (the witness’s “symptoms were consistent with a ‘depressive disorder, psychosis, post traumatic stress, and a severe personality disorder’”); see Chisun Lee, *Judges Reject Evidence in Gitmo Cases*, Nat’l L.J., Aug. 16, 2010, at 1; Carol Rosenberg, *Federal Judge Orders 32nd Detainee Freed from Guantánamo*, Miami Herald, Dec. 16, 2009; Wilber, *Snag*, *supra* note 3075.

Hatim’s writ was vacated and the case remanded for reevaluation in light of subsequent case law. *Hatim v. Obama*, 632 F.3d 720 (D.C. Cir. 2011); see *In re Guantánamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 45 (D.D.C. 2013); see also *Court Orders Detainee Held*, N.Y. Times, Feb. 16, 2011, at A18.

3079. See Mónica Ceberio Belaza, “*Al Qaeda Will Kill Me if I Go Home*,” El País, June 29, 2010, at 3; Shane & Weiser, *supra* note 3077.

had declined to contest the motion to suppress³⁰⁸¹ and determined after the motion was granted that it “will no longer treat petitioner as detainable under the Authorization for Use of Military Force.”³⁰⁸² The government noted, however, that “the Attorney General has directed that the criminal investigation of petitioner in connection with the allegation that petitioner threw a grenade at U.S. military personnel continue.”³⁰⁸³

Jawad may have been as young as twelve years old when he was captured in Kabul in December 2002.³⁰⁸⁴ On October 9, 2007, military commission charges were filed against Jawad for the alleged throwing of a grenade.³⁰⁸⁵ It was reported that a military prosecutor returned to civilian status after concluding that Jawad might not be guilty.³⁰⁸⁶ On July 30, 2009, Judge Huvelle granted Jawad’s writ petition.³⁰⁸⁷ Jawad was flown home on August 24 to Kabul, where he met with President Hamid Karzai.³⁰⁸⁸

Weak Evidence

Judge Kollar-Kotelly granted Khalid Abdullah Mishal al-Mutairi’s writ on July 29, 2009.³⁰⁸⁹ Al-Mutairi, born in Kuwait City in 1975, traveled to Afghanistan a few days after the September 11, 2001, attacks with \$15,000 in United States currency.³⁰⁹⁰ He was one of the detainees named in the 2002 petition filed by fathers and

3080. Jawad Suppression Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. July 17, 2009), D.E. 303, available at 2009 WL 2149949; see William Glaberson, *U.S. Judge Challenges Evidence on a Detainee*, N.Y. Times, July 23, 2009, at A22 (reporting that a military judge “wrote last year that Afghan officials had threatened to kill Mr. Jawad and his family if he did not confess to the grenade attack”).

3081. Government Response, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 15, 2009), D.E. 302; see Glaberson, *supra* note 3080.

3082. Jawad Nondetainability Notice at 1, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 24, 2009), D.E. 311.

3083. *Id.* at 2; see William Glaberson, *Government Might Allow Trial in U.S. for Detainee*, N.Y. Times, July 25, 2009, at A14 (“In a statement accompanying Friday’s court filing, the Justice Department said that an administration task force reviewing the cases of Guantanamo detainees had previously made the decision to refer Mr. Jawad’s case for possible prosecution.”).

3084. See *Detainee Released*, *supra* note 3031 (“Relatives say he was about 12 when he was arrested. The Pentagon said a bone scan showed that he was about 17 at the time.”).

3085. Charge Sheet, *United States v. Jawad* (U.S. Mil. Comm. Oct. 9, 2007), available at www.mc.mil/CASES.aspx; see William Glaberson, *Guantanamo Detainee Is Charged in '02 Attack*, N.Y. Times, Oct. 12, 2007, at A19; Glaberson, *supra* note 3080; Hafetz, *supra* note 2754, at 246.

3086. Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, Wash. Post, Sept. 25, 2008, at A6; William Glaberson, *Guantanamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. Times, Sept. 25, 2008, at A18.

3087. Jawad Writ, *supra* note 3031; see William Glaberson, *Judge Orders a Detainee to Be Freed in August*, N.Y. Times, July 31, 2009, at A14; Hafetz, *supra* note 2754, at 247.

Military Commission proceedings against Jawad were dismissed on July 31, 2009. Direction, *Jawad* (U.S. Mil. Comm. July 31, 2009), available at www.mc.mil/CASES.aspx.

3088. See *Detainee Released*, *supra* note 3084.

3089. *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009).

3090. *Id.* at 86.

brothers of Kuwaiti detainees.³⁰⁹¹ The government claimed that al-Mutairi was part of Al-Wafa, an Islamic foundation accused of supporting terrorism,³⁰⁹² but al-Mutairi claimed that he was in Afghanistan to fund the creation of a mosque and to support Al-Wafa's charitable projects.³⁰⁹³ Judge Kollar-Kotelly found al-Mutairi's story about charitable intents and his explanation of how he lost his passport of dubious credibility,³⁰⁹⁴ but she also found the government's evidence justifying his detention weak.³⁰⁹⁵ The government released al-Mutairi to Kuwait.³⁰⁹⁶

Three Writs Denied; One Writ Reversed

From August through September 2009, Judges Robertson,³⁰⁹⁷ Kollar-Kotelly,³⁰⁹⁸ and Collyer³⁰⁹⁹ each denied a habeas petition. The court of appeals affirmed.³¹⁰⁰

On July 13, 2010, the court of appeals reversed a writ of habeas corpus granted to Mohammed al-Adahi by Judge Kessler on August 17, 2009.³¹⁰¹ Al-Adahi, a citizen of Yemen, arranged a marriage between his sister and Riyadh Abd al-Aziz Almujaheed, a Yemini living in Kandahar, Afghanistan.³¹⁰² In July 2001, al-Adahi took a six-month leave of absence from his security job in Yemen and delivered his sister to Almujaheed, and Osama Bin Laden hosted a celebration of the marriage.³¹⁰³ In addition to meeting with Bin Laden while away from home, al-Adahi

3091. *Al-Odah* Docket Sheet, *supra* note 2740.

3092. See Thom Shanker & James Dao, *U.S. Planes Bomb Taliban Compound in Kandahar*, N.Y. Times, Nov. 28, 2001, at A1.

3093. *Al Mutairi*, 644 F. Supp. 2d at 86–87.

3094. *Id.* at 87–89.

3095. *Id.* at 89–96.

3096. Transfer Notice, *Al-Odah v. Obama*, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009), D.E. 660; see Rosenberg, *supra* note 3020.

3097. *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (finding that Adham Mohammed al-Awad was an Al-Qaeda fighter, but acknowledging that “[t]he case against Awad is gossamer thin” and “[i]t seems ludicrous to believe that he[—marginally literate who has spent more than seven of his 26 years in American custody—]poses a security threat now”).

3098. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009) (finding that Fawzi Khalid Abdullah Fahad al-Odah became a part of the forces of the Taliban and Al-Qaeda).

3099. Barhoumi Order, *Shafiq v. Obama*, No. 1:05-cv-1506 (D.D.C. Sept. 3, 2009), D.E. 219 (denying the writ to Sufyan Barhoumi “[f]or the reasons stated on the record in a closed hearing”); Barhoumi Transcript, *id.* (Sept. 3, 2009, filed Jan. 4, 2010), D.E. 225; see *Shafiq v. Obama*, 951 F. Supp. 2d 13 (D.D.C. 2013) (denying a motion for reconsideration in light of new evidence).

3100. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 563 U.S. ___, 131 S. Ct. 1812 (2011); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 563 U.S. ___, 131 S. Ct. 1814 (2011); see *Justices Reject Appeals*, *supra* note 2934.

3101. *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1194 (2011); see Charlie Savage, *Reversal Upholds Detention of Yemeni at Guantánamo*, N.Y. Times, July 14, 2010, at A19 (“Courts have now upheld the detention of 15 Guantánamo prisoners, while ordering 36 freed.”).

3102. *Al-Adahi*, 613 F.3d at 1106; *Al-Adahi Habeas Grant*, *supra* note 3065, at 14.

3103. *Al-Adahi*, 613 F.3d at 1102, 1106; *Al-Adahi Habeas Grant*, *supra* note 3065, at 14–15, 17 & n.9.

attended the al-Farouq training camp, but he was expelled from the camp—for smoking tobacco, he claimed.³¹⁰⁴ Judge Kessler saw the evidence as showing al-Adahi’s brother-in-law as a close associate of Bin Laden’s but not al-Adahi;³¹⁰⁵ the court of appeals saw the evidence as more inculpatory of al-Adahi.³¹⁰⁶

Reluctant Algerians

On November 19, 2009, Judge Kessler granted a writ to Farhi Saeed Bin Mohammed, an Algerian who lived in Europe under false names with false documents and traveled to Afghanistan along a “terrorist pipeline.”³¹⁰⁷ “The Government has failed to provide reliable evidence that Petitioner received any training in weaponry or fighting, or that he engaged in actual fighting of any kind on behalf of al-Qaida and/or the Taliban.”³¹⁰⁸

On May 27, 2010, Bin Mohammed sought an injunction against his return to Algeria, because he feared he would be harmed there.³¹⁰⁹

Petitioner asks to enjoin that transfer because of his great fear that he will be caught in a “no win” situation: either the Government of Algeria will arrest him as a terrorist because of his detention at Guantanamo Bay, and then torture, try, and possibly execute him, or he will be targeted for recruitment and retribution by Islamic extremist groups who have been terrorizing the Algerian population for close to 20 years and who will kill him if he refuses to join their ranks. Petitioner stated that he no longer has family ties, friends, or prospects in Algeria. He has declared that he would rather stay at Guantanamo Bay for the rest of his life than be returned to Algeria.³¹¹⁰

On June 29, Judge Kessler enjoined Bin Mohammed’s transfer to Algeria.³¹¹¹ On July 8, the court of appeals summarily reversed and dissolved the injunction.³¹¹²

3104. *Al-Adahi*, 613 F.3d at 1102, 1106–09; *Al-Adahi Habeas Grant*, *supra* note 3065, at 17, 20–31.

3105. *Al-Adahi Habeas Grant*, *supra* note 3065, at 40–41.

3106. *Al-Adahi*, 613 F.3d 1102.

3107. *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38, 39, 45–46 (D.D.C. 2009), *reprinted at* 704 F. Supp. 2d 1; *see* Carol Rosenberg, *Fearful Detainee Sent Home to Algeria*, *Miami Herald*, Jan. 7, 2011, at 4A; Siems, *supra* note 2992, at 16–17.

3108. *Bin Mohammed*, 689 F. Supp. 2d at 67.

3109. Opinion at 4, *Bin Mohammed v. Obama*, No. 1:05-cv-1347 (D.D.C. June 29, 2010) [hereinafter *Bin Mohammed Injunction*], *filed as* Ex. 1, Public (Redacted) Motion, *Bin Mohammed v. Obama*, No. 10-5218 (D.C. Cir. Sept. 21, 2010); Order, *Bin Mohammed*, No. 1:05-cv-1347 (D.D.C. June 3, 2010), D.E. 292; Notice of Filing, *id.* (May 26, 2010), D.E. 286; *see* Rosenberg, *supra* note 3107.

3110. *Bin Mohammed Injunction*, *supra* note 3109, at 4.

3111. *Id.* at 12.

3112. Order, *Bin Mohammed*, No. 10-5218 (D.C. Cir. July 8, 2010) [hereinafter *Bin Mohammed Injunction Reversal*]; *see* Peter Finn, *Six Algerians Say They Prefer Guantanamo Over Repatriation*, *Wash. Post*, July 10, 2010, at A3.

Judge David S. Tatel dissented in part from the decision by Judges Thomas B. Griffith and Brett M. Kavanaugh. Judge Tatel would have remanded for a determination of whether the government had taken into account danger to Bin Mohammed from entities other than the Algerian government. *Bin Mohammed Injunction Reversal*, *supra* (Circuit Judge Tatel, dissenting).

On July 16, the Supreme Court denied Bin Mohammed's application for a stay of the appellate decision, with Justices Ginsburg, Breyer, and Sotomayor dissenting.³¹¹³ The government transported Bin Mohammed to Algeria on January 6, 2011.³¹¹⁴

Five other Algerians preferred staying at Guantánamo Bay to a return to Algeria.³¹¹⁵ Judge Walton denied Abdul Aziz Naji's application for an injunction against transfer on June 7, 2010.³¹¹⁶ On July 16, the court of appeals determined that its decision in Bin Mohammed's case governed Naji's case.³¹¹⁷ On the same day, the Supreme Court denied Naji's application for a stay pending a certiorari petition.³¹¹⁸ On July 19, the government filed a notice that Naji had been sent to Algeria.³¹¹⁹

One of the other four Algerians remained at Guantánamo Bay until March 2014. On February 22, 2007, the government notified Ahmed Belbacha that he was cleared for release.³¹²⁰ In July, Judge Collyer denied Belbacha an injunction against transfer to Algeria.³¹²¹ The court of appeals remanded the case back to Judge Collyer to preserve jurisdiction over the matter pending the Supreme Court's resolution of *Boumediene*.³¹²² A day after the Supreme Court's *Boumediene* decision, Judge Collyer enjoined Belbacha's transfer "pending briefing and resolution of the issues left unresolved in *Boumediene*."³¹²³ On November 4, 2009, in a possibly merely symbolic gesture, the town of Amherst, Massachu-

3113. Bin Mohammed v. Obama, 561 U.S. 1042 (2010); see Peter Finn, *Guantanamo Bay Detainee Is First to Be Sent Home Unwillingly*, Wash. Post, July 20, 2010, at A4; *Justices Decide U.S. May Send Two Detainees Back to Algeria*, N.Y. Times, July 18, 2010, at 15 [hereinafter *Back to Algeria*].

3114. Transfer Notice, *Mohammed*, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011), D.E. 330; see Rosenberg, *supra* note 3107.

3115. See Notice of Filing, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 31, 2009), D.E. 1836 (filing by Djamel Ameziane, No. 1:05-cv-392; Farhi Saeed Bin Mohammed, No. 1:05-cv-1347; Motai Saib, No. 1:05-cv-1353; Nabil Hadjarab, No. 1:05-cv-1504; Ahmed Belbacha, No. 1:05-cv-2349; and Abdul Aziz Naji, No. 1:05-cv-2386); Finn, *supra* note 3113; *Back to Algeria*, *supra* note 3113.

3116. Sealed Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. June 7, 2010), filed as Ex. 8, Public (Redacted) Response, *Naji v. Obama*, No. 10-5191 (D.C. Cir. July 29, 2010) [hereinafter *Naji Government Response*].

3117. Order, *Naji*, No. 10-5191 (D.C. Cir. July 16, 2010).

3118. *Naji v. Obama*, 561 U.S. 1042 (2010).

3119. Transfer Notice, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 19, 2010), D.E. 1724; see Finn, *supra* note 3113; *Back to Algeria*, *supra* note 3113.

3120. See Craig Whitlock, *82 Inmates Cleared but Still Held at Guantanamo*, Wash. Post, Apr. 29, 2007, at A1.

3121. Order, *Ben Bacha v. Bush*, No. 1:05-cv-2349 (D.D.C. July 27, 2007), D.E. 27, available at 2007 WL 2422031.

3122. *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008); see Joby Warrick, *U.S. Transfers Bin Laden Aide*, Wash. Post, Mar. 15, 2008, at A3.

3123. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. June 13, 2008), D.E. 44; see *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120, 121–22 (D.D.C. 2010).

setts voted to accept Belbacha.³¹²⁴ In light of the court of appeals' decision in *Kiyemba v. Obama*³¹²⁵ that the courts did not have the power to enjoin detainee transfers, Judge Hogan dissolved Judge Collyer's injunction on February 4, 2010, by sealed order,³¹²⁶ and denied reconsideration on April 19.³¹²⁷

By sealed order, on June 17, 2010, Judge Collyer denied Motai Saib's sealed May 24 injunction motion.³¹²⁸ On July 13, Nabil Hadjarab sought an injunction against his transfer to Algeria.³¹²⁹ On August 20, Belbacha and Hadjarab moved that their cases proceed to merits hearings.³¹³⁰ On January 14, 2011, Judge Collyer granted Belbacha's motion but denied Hadjarab's.³¹³¹ Hadjarab's motion for reconsideration was granted on March 30.³¹³² Belbacha and Hadjarab's proceedings were stayed by agreement of the parties.³¹³³ On August 29, 2013, Saib and Hadjarab were willingly transferred to Algeria.³¹³⁴ Belbacha consented to a March 13, 2014, transfer to Algeria so that he could see his elderly parents.³¹³⁵

While Hadjarab's transfer was in the works, novelist John Grisham championed Hadjarab's interests in an August 11, 2013, *New York Times* contribution;

3124. See Carol Rosenberg, *U.S. Court Orders Russian Detainee Freed from Guantánamo*, Miami Herald, May 14, 2010, at 6A.

3125. 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010); see Hafetz, *supra* note 2754, at 170.

3126. Docket Sheet, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Dec. 8, 2005) [hereinafter *Ben Bacha* Docket Sheet]; *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d at 122.

3127. *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120.

3128. Notice, *Saib v. Obama*, No. 1:05-cv-1353 (D.D.C. May 26, 2010), D.E. 287 (noting the motion); Docket Sheet, *id.* (July 5, 2005) (noting the order).

3129. Notice of Filing, *Nabil v. Obama*, No. 1:05-cv-1504 (D.D.C. July 15, 2010), D.E. 332.

3130. Notice, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Aug. 20, 2010), D.E. 201; Notice, *Nabil*, No. 1:05-cv-1504 (D.D.C. Aug. 20, 2010), D.E. 242.

3131. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Jan. 14, 2011), D.E. 215; Order, *Nabil*, No. 1:05-cv-1504 (D.D.C. Jan. 14, 2011), D.E. 256.

3132. Docket Sheet, *Nabil*, No. 1:05-cv-1504 (D.D.C. July 28, 2005) [hereinafter *Nabil* Docket Sheet].

3133. *Ben Bacha* Docket Sheet, *supra* note 3126 (noting a stay order on May 6, 2013); *Nabil* Docket Sheet, *supra* note 3132 (same).

3134. Transfer Notice, *Saib v. Obama*, No. 1:05-cv-1353 (D.D.C. Aug. 30, 2013), D.E. 334 [hereinafter *Saib* Transfer Notice]; Transfer Notice, *Nabil*, No. 1:05-cv-1504 (D.D.C. Aug. 29, 2013), D.E. 313 [hereinafter *Nabil* Transfer Notice]; see David Nakamura & Billy Kenber, *Two Detainees Held at Guantanamo Will Be Transferred to Algeria*, Wash. Post, July 27, 2013, at A9; Carol Rosenberg, *U.S. Sends Two Detainees Home to Algeria*, Miami Herald, Aug. 30, 2013, at 3A; Charlie Savage, *U.S. to Send 2 at Guantánamo Back to Algeria, Saying Security Concerns Are Met*, N.Y. Times, July 27, 2013, at A10; Scott Shane, *2 Guantánamo Detainees Transferred to Algeria*, N.Y. Times, Aug. 30, 2013, at A12; Craig Whitlock, *Algerians Leave Guantanamo Bay Prison*, Wash. Post, Aug. 30, 2013, at A2.

3135. Belbacha Transfer Notice, *Ben Bacha v. Obama*, No. 1:05-cv-2349 (D.D.C. Mar. 13, 2014), D.E. 272; see Carol Rosenberg, *Once Resistant, Detainee Returns to Algeria*, Miami Herald, Mar. 14, 2014, at 3A; Charlie Savage, *Military Repatriates Algerian Held for Years at Guantánamo*, N.Y. Times, Mar. 14, 2014, at A14.

Grisham became interested in Hadjarab's cause after learning that the author's novels were considered unsuitable for detainees to read.³¹³⁶

On March 21, 2011, the Supreme Court denied Djamel Ameziane's sealed petition for certiorari.³¹³⁷ He was involuntarily transferred to Algeria on December 5, 2013.³¹³⁸ Bensayah, the unsuccessful Bosnian petitioner among the first petitioners to have their cases heard by Judge Leon, was involuntarily transferred to Algeria at the same time.³¹³⁹

On July 21, 2014, Judge Huvelle denied Ameziane's petition for return of "740 British pounds, 429,000 Afghanis, and 2300 Pakistani rupees" that were taken from him when he was captured, because the habeas case had become moot.³¹⁴⁰

Ten Writs Denied and Another Writ Terminated; Two Writs Reversed and Two Writs Vacated; One Writ Granted and One Writ Still on Appeal

From December 2009 through October 2010, Judges Hogan,³¹⁴¹ Kessler,³¹⁴² Lamberth,³¹⁴³ Kennedy,³¹⁴⁴ Robertson,³¹⁴⁵ Bates,³¹⁴⁶ Walton,³¹⁴⁷ and Leon³¹⁴⁸ denied ha-

3136. John Grisham, Op-Ed, *After Guantánamo, Another Injustice*, N.Y. Times, Aug. 11, 2013, at 4.

3137. *Ameziane v. Obama*, 562 U.S. 1302 (2011).

3138. Transfer Notice, *Ameziane v. Obama*, No. 1:05-cv-392 (D.D.C. Dec. 5, 2013), D.E. 345 [hereinafter *Ameziane* Transfer Notice]; see Rosenberg, *supra* note 2915; Savage, *supra* note 2915.

"In a joint statement issued from Geneva, the U.N. Special Rapporteurs on torture, and on human rights and counterterrorism, Juan E. Méndez and Ben Emmerson, respectively, warned that former detainee Djamel Ameziane, 46, may be at risk after his involuntary transfer from Guantánamo Bay to Algeria." Carol Rosenberg, *Detainees' Move to Algeria Draws U.N. Criticism*, Miami Herald, Dec. 11, 2013, at 3A.

3139. Bensayah Transfer Notice, *supra* note 2915; see Rosenberg, *supra* note 2915; Savage, *supra* note 2915.

3140. *Ameziane v. Obama*, 58 F. Supp. 3d 99 (D.D.C. 2014); see *id.* at 101 ("The [Department of Defense] justifies its policy to retain all money associated with detainees 'based on a strong national security interest in preventing these funds from being used in a manner that would adversely impact the safety and security of the United States'—*i.e.*, to finance terrorist activities.").

3141. *Anam v. Obama*, 696 F. Supp. 2d 1 (D.D.C. 2010) (finding that Musa'ab Omar al-Madhwani trained, traveled, and associated with Al-Qaeda members); Order, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010), D.E. 697; *Anam* Docket Sheet, *supra* note 2759 (noting an oral ruling on December 14, 2009); see Rosenberg, *supra* note 3078; Del Quentin Wilber, *U.S. Can Continue to Detain Yemeni*, Wash. Post, Dec. 15, 2009, at A12.

The court of appeals affirmed. *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2739 (2012).

3142. *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010) (finding that Fahmi Salem al-Assani received military training from Al-Qaeda); *Al-Adahi v. Obama*, 692 F. Supp. 2d 85 (D.D.C. 2010) (finding that Suleiman Awadh Bin Agil al-Nahdi received military training from Al-Qaeda and performed guard duties for Al-Qaeda at Tora Bora); Orders, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Feb. 24, 2010), D.E. 548, 551; Docket Sheet, *id.* (Feb. 7, 2005) [hereinafter *Al-Adahi* Docket Sheet]; see Carol Rosenberg & Mark Seibel, *Judge OKs Detention of 2 Men Bush Panel Cleared*, Miami Herald, Feb. 24, 2010.

Appeals were dismissed voluntarily. Order, *Al-Nahdi v. Obama*, No. 10-5127 (D.C. Cir. June 21, 2011); Order, *Al-Assani v. Obama*, No. 10-5126 (D.C. Cir. June 21, 2011). The government has

announced that al-Assani and al-Nahdi are approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2925.

Another petitioner, Muhammad Ali Abdullah Bawazir, elected not to proceed with his scheduled January 2010 merits hearing, so Judge Kessler dismissed his petition without prejudice on December 22, 2009. Bawazir Dismissal, *supra* note 2890; *see Al-Adahi*, 698 F. Supp. 2d at 50 n.1, 51; *Al-Adahi*, 692 F. Supp. 2d at 86 n.1, 88.

3143. *Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (finding that Mukhtar Yahia Naji al-Warafi assisted with medical care to Taliban fighters as part of the Taliban).

The court of appeals affirmed Judge Lamberth's finding that al-Warafi acted as part of the Taliban but remanded the case for a more specific determination whether he satisfied the Geneva Conventions' criteria for protected medical personnel. *Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011). On August 31, 2011, Judge Lamberth concluded that al-Warafi could not prove permanent medical personnel status because he lacked required identification. *Al Warafi v. Obama*, 821 F. Supp. 2d 47, 55–56 (D.D.C. 2011). The court of appeals agreed. *Al-Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), *cert. denied*, 572 U.S. ___, 134 S. Ct. 2134 (2014).

3144. *Abdah v. Obama*, 709 F. Supp. 2d 25 (D.D.C. 2010) (finding that Yasein Khasem Mohammad Esmail fought on behalf of Al-Qaeda); *see* Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. June 23, 2010), D.E. 877, *available at* 2010 WL 2521431 (denying a motion for reconsideration); *see also* Lee, *supra* note 3078.

The court of appeals affirmed. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *see* Shane & Weiser, *supra* note 3077.

3145. Opinion, *Khalifh v. Obama*, No. 1:05-cv-1189 (D.D.C. June 14, 2010), D.E. 168 [hereinafter *Khalifh* Opinion], *available at* 2010 WL 2382925 (finding that Omar Mohammed Khalifh was part of Al-Qaeda).

An appeal was voluntarily dismissed. Order, *Khalifh v. Obama*, No. 10-5241 (D.C. Cir. Jan. 28, 2011).

3146. *Khan v. Obama*, 741 F. Supp. 2d 1 (D.D.C. 2010) (finding that Shawali Khan was a member of Hezb-i-Islami Gulbuddin, a terrorist organization affiliated with the Taliban and Al-Qaeda); Order, *Khan v. Obama*, No. 1:08-cv-1101 (D.D.C. Sept. 3, 2010), D.E. 229; *see* *Khan v. Obama*, 646 F. Supp. 2d 6 (D.D.C. 2009) (denying Khan's motion for judgment on the preliminary record).

The court of appeals affirmed on September 6, 2011. *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011). On September 23, the detainee filed a sealed motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60. Petitioner Notice, *Khan*, No. 1:08-cv-1101 (D.D.C. Sept. 26, 2011), D.E. 248. In advance of its response to this motion, the government announced that it would no longer rely "on statements made by Petitioner Shawali Khan during custodial interrogations, or during his Administrative Review Board ('ARB') proceedings, to justify his detention. . . . The sole statements by Petitioner upon which Respondents continue to rely are those made during his merits hearing testimony on May 17, 2010." Government Notice, *id.* (Oct. 12, 2011), D.E. 251. The government has announced that Khan is approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2925.

3147. *Sulayman v. Obama*, 729 F. Supp. 2d 26 (D.D.C. 2010) (finding that Abd al-Rahman Abdu Abu al-Ghayth Sulayman was part of the Taliban); Opinion, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Oct. 7, 2010), D.E. 1773 (finding that Toffiq Nasser Awad al-Bihani was part of Al-Qaeda); *see* Carol Rosenberg, *Yemeni Captive Loses Ruling*, Miami Herald, Oct. 16, 2010 (concerning al-Bihani); Carol Rosenberg, *Yemeni Psych Patient Ordered Freed*, Miami Herald, July 21, 2010 [hereinafter *Psych Patient*] (concerning Sulayman).

The court of appeals affirmed denial of the writ to Sulayman. *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir.), *cert. denied*, 568 U.S. ___, 133 S. Ct. 184 (2012). Agreeing that the denial of his petition was compelled by circuit law, al-Bihani moved for summary affirmance so that a petition for certiorari could be filed with the Supreme Court, and the Supreme Court denied certiorari. Or-

beas petitions. In December 2014, however, Shawali Khan was transferred to Afghanistan.³¹⁴⁹

Judge Huvelle’s August 3, 2010, denial of Sabry Mohammad Ebrahim al-Qurashi’s motion to suppress his testimony³¹⁵⁰ had the practical effect of terminating his habeas petition.³¹⁵¹ Judge Huvelle found evidence of voluntariness to be credible and claims of coercion to be exaggerated.³¹⁵² Al-Qurashi was transferred to Kazakhstan on December 30, 2014.³¹⁵³

On March 29, 2011, the court of appeals reversed a writ granted to Uthman Abdul Rahim Mohammed Uthman.³¹⁵⁴ Using a command structure test to determine whether Uthman was part of Al-Qaeda, Judge Kennedy found that evidence Uthman was a bodyguard for Osama Bin Laden largely derived from torture-induced statements by other detainees.³¹⁵⁵ The court of appeals determined that the command structure test had been rejected by subsequent appellate decisions³¹⁵⁶ and Uthman’s capture near Tora Bora in December 2001 “with a small group of men, two of whom were al Qaeda members and bodyguards for Osama Bin Laden and one of whom was a Taliban fighter,”³¹⁵⁷ among other facts, made it more likely than not that Uthman was part of Al-Qaeda.³¹⁵⁸

The court of appeals, on June 10, 2011, also reversed³¹⁵⁹ a writ granted by Judge Friedman the previous July.³¹⁶⁰ In 2009, the government obtained a stay in

der, *Al-Bihani v. Obama*, No. 10-5352 (D.C. Cir. Feb. 10), *available at* 2011 WL 611708, *cert. denied*, 567 U.S. ___, 132 S. Ct. 2739 (2012).

3148. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010) (finding that Obaydullah was part of an Al-Qaeda bomb cell); *see* Charlie Savage, *New Questions Raised in Afghan Detainee Case*, N.Y. Times, Feb. 9, 2012, at A10 (reporting in 2012, “Of 220 Afghans sent to Guantánamo Bay, Cuba, he is among the 18 who remain.”).

The court of appeals affirmed. *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012), *cert. denied*, 570 U.S. ___, 133 S. Ct. 2855 (2013); *see* *Obaydullah v. Obama*, 554 F. App’x 12 (D.C. Cir. 2014) (affirming the denial of reconsideration on the presentation of new evidence).

3149. Notice of Transfer, *Khan v. Obama*, No. 1:08-cv-1101 (D.D.C. Dec. 22, 2014), D.E. 282 [hereinafter *Khan* Transfer Notice].

3150. *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010).

3151. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3152. *Al-Qurashi*, 733 F. Supp. 2d at 81.

The government has announced that al-Qurashi is approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2925.

3153. Notice of Transfer, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Dec. 31, 2014), D.E. 549 [hereinafter *Al-Qurashi* Transfer Notice].

3154. *Uthman v. Obama*, 637 F.3d 400, 402, 408 (D.C. Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2739 (2012).

3155. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010); *see* Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. May 19, 2010), D.E. 852 (denying a motion for reconsideration); *see also* *Judge Orders Release of Guantánamo Detainee*, Seattle Times, Feb. 26, 2010, at A5.

3156. *Uthman*, 637 F.3d at 402.

3157. *Id.* at 404.

3158. *Id.* at 402, 403–07.

3159. *Almerfeddi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2739 (2012).

the case because it had approved Hussain Salem Mohammad Almerfedi's transfer from Guantánamo Bay, but the government was unable to accomplish the transfer, so the case proceeded to the merits.³¹⁶¹ Almerfedi was transferred to Slovakia on November 20, 2014.³¹⁶²

On November 5, 2010, the court of appeals vacated a writ³¹⁶³ granted to Mohammedou Ould Salahi by Judge Robertson on March 22.³¹⁶⁴ Salahi, a Mauritanian, swore bayat, an oath of loyalty, to Al-Qaeda in 1991, a time in which the United States and Al-Qaeda both opposed Afghanistan's communist government.³¹⁶⁵ The courts determined that the question was whether Salahi was still part of Al-Qaeda when he was captured in 2001.³¹⁶⁶ The court of appeals remanded the case for reevaluation in light of guidance provided by intervening appellate decisions.³¹⁶⁷ Because of Judge Robertson's June 1 retirement,³¹⁶⁸ Salahi's petition was reassigned to Judge Lamberth.³¹⁶⁹ (The district court decided that new judges—those joining the bench in 2010 or later—would not receive Guantánamo Bay habeas petitions.³¹⁷⁰) In January 2015, while he was still detained, Salahi's Guantánamo Bay memoir was published by Little, Brown and Company.³¹⁷¹

On October 14, 2011, the court of appeals vacated a writ³¹⁷² granted on July 21, 2010, by Judge Kennedy to Adnan Farhan Abdul Latif.³¹⁷³ Latif was born in

3160. *Almerfedi v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (finding that the government's claim that Hussain Salem Mohammad Almerfedi was an Al-Qaeda facilitator was not supported by sufficient evidence); see Charlie Savage, *Rulings Raise Doubts on Policy on Transfer of Yemenis*, N.Y. Times, July 9, 2010, at A9.

3161. *Almerfedi*, 725 F. Supp. 2d at 21; see *Almerfedi*, 654 F.3d at 4 n.3 ("whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully").

3162. See Goldman & Tate, *supra* note 2926, at A15; Rosenberg, *supra* note 2926, at 3A; Savage, *supra* note 2926, at A19.

3163. *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); see Bravin, *supra* note 2728, at 377.

3164. *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010); Docket Sheet, *Salahi v. Bush*, No. 1:05-cv-569 (D.D.C. Mar. 18, 2005); see Bravin, *supra* note 2728, at 377.

3165. *Salahi*, 625 F.3d at 748, 751; *Salahi*, 710 F. Supp. 2d at 3–4, 9–10.

3166. *Salahi*, 625 F.3d at 751; *Salahi*, 710 F. Supp. 2d at 6.

3167. *Salahi*, 625 F.3d at 746–47.

3168. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

3169. Reassignment Notice, *Salahi*, No. 1:05-cv-569 (D.D.C. Oct. 11, 2011), D.E. 380.

3170. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3171. Mohamedou Ould Slahi and Larry Siems, *Guantánamo Diary* (2015); see Helene Cooper, *Family Seeks Release of a Detainee Turned Author*, N.Y. Times, Jan. 21, 2015, at A3; *Inside the U.S. Torture Chambers: Prisoner's Guantánamo Diary Details 12 Years of Abuse, Terror*, Democracy Now! (webcast Jan. 22, 2015), www.democracynow.org/2015/1/22/inside_the_us_torture_chambers_prisoners.

3172. *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir.) (reissuing, with fewer redactions, a 2011 opinion), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2741 (2012); see Adam Liptak, *The "Fill In the Blanks" Court Game of Indefinite Detention*, N.Y. Times, Dec. 13, 2011, at A21.

3173. Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. Aug. 16, 2010), D.E. 907 [hereinafter *D.D.C. Latif Opinion*], available at 2010 WL 3270761; see Liptak, *supra* note 3172; Rosenberg, *Psych Patient*, *supra* note 3147.

Udayn, Yemen, and he traveled to Pakistan and Afghanistan in 2001.³¹⁷⁴ He claimed that he was traveling for medical care, and Judge Kennedy determined that the government did not prove its contention that he was an Al-Qaeda recruit was more probable.³¹⁷⁵ The court of appeals determined that Judge Kennedy failed to give the government's report on evidence against Latif a sufficient presumption of regularity.³¹⁷⁶ Latif died of an apparent suicidal overdose of hoarded antipsychotic drugs on September 8, 2012.³¹⁷⁷

Judge Kennedy granted habeas corpus relief to Mohamed Mohamed Hassan Odaini on May 26, 2010,³¹⁷⁸ and the government transferred him to Yemen the following July.³¹⁷⁹ Odaini was born in Taiz, Yemen, and his father worked for the Yemeni Security Service.³¹⁸⁰ On March 28, 2002, he was a student at Salafia University in Pakistan spending the night at a nearby guesthouse “after spending the evening talking to other Yemeni, Salafia University students who lived there about religion as well as ‘their past and where they lived in Yemen.’”³¹⁸¹ “At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants.”³¹⁸² Odaini was transferred to Guantánamo Bay in June.³¹⁸³ Judge Kennedy concluded, “There is no evidence that Odaini has any connection to Al Qaeda.”³¹⁸⁴

The government appealed a May 13, 2010, writ of habeas corpus granted by Judge Kennedy to a Russian, Ravil Mingazov, who left Russia in 2000 to raise his child in a Muslim country and was captured in Pakistan in 2002.³¹⁸⁵ Judge

3174. D.D.C. Latif Opinion, *supra* note 3173, at 5–6.

3175. *Id.* at 25–28; see Liptak, *supra* note 3172.

3176. *Latif*, 677 F.3d at 1176, 1178–89; see Liptak, *supra* note 3172.

3177. See Carol Rosenberg, *Report: Military Faults Guards in Captive's Suicide*, Miami Herald, June 29, 2013, at 3A (reporting that guards failed to check on the detainee's well-being as often as required); Carol Rosenberg, *Yemeni's Death in Detention Still Under Investigation*, Miami Herald, Dec. 19, 2012, at 3A; Charlie Savage, *Guantánamo Detainee, a Former Hunger Striker, Dies*, N.Y. Times, Sept. 11, 2012, at A13; Savage, *supra* note 2891; Julie Tate, *Detainee Found Dead Had Gone on a Hunger Strike*, Wash. Post, Sept. 12, 2012, at A2; see also Falkoff, *supra* note 2806, at 394–95 (description by Latif's attorney at a March 23, 2007, symposium of Latif's psychological problems and suicidality).

3178. *Abdah v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010); see Peter Finn, *U.S. Revisits Transfers to Yemen*, Wash. Post, June 19, 2010, at A3; Carol Rosenberg, *U.S. Sends Yemeni Detainee Home*, Miami Herald, July 14, 2010, at 4A; Savage, *supra* note 3160.

3179. Transfer Notice, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. July 13, 2010), D.E. 888; see Peter Finn, *U.S. Will Repatriate Detainee to Yemen*, Wash. Post, June 26, 2010, at A8; Rosenberg, *supra* note 3178; Savage, *supra* note 3160.

3180. *Abdah*, 717 F. Supp. 2d at 25; see Finn, *supra* note 3179.

3181. *Abdah*, 717 F. Supp. 2d at 26; see Finn, *supra* note 3178.

3182. *Abdah*, 717 F. Supp. 2d at 26.

3183. *Id.* at 23.

3184. *Id.* at 36; see Savage, *supra* note 3160 (reporting on “a scathing opinion denouncing the effort to keep imprisoning him despite ‘overwhelming’ evidence that he was innocent of Qaeda ties”).

3185. *Mingazov Opinion*, *Al-Harbi v. Obama*, No. 1:05-cv-2479 (D.D.C. June 1, 2010), D.E. 342, available at 2010 WL 2398883; see Rosenberg, *supra* note 3124.

Kennedy found that his claims in captivity of support of the Taliban were motivated by his desire not to be returned to Russia.³¹⁸⁶ While an appeal was pending, the government sought to present additional evidence to Judge Kennedy,³¹⁸⁷ and the court of appeals agreed to hold the appeal in abeyance until the district court resolved the government's request.³¹⁸⁸ A motion considered by Berkeley, California's city council to accept Mingazov was defeated.³¹⁸⁹

Guantánamo Review Task Force

Four cabinet departments, the Director of National Intelligence, and the joint chiefs of staff collaborated on a January 22, 2010, report on 240 Guantánamo Bay detainees "subject to review."³¹⁹⁰ A total of 779 men had been detainees at Guantánamo Bay.³¹⁹¹ Of the 240 remaining detainees covered in the report, forty-four had already been transferred out.³¹⁹² The Guantánamo Review Task Force determined that 126 detainees could be transferred, including the forty-four already transferred, forty-four should be prosecuted, forty-eight could not be prosecuted because of tainted evidence but were too dangerous to transfer, and thirty were Yemenis who could be transferred once a stable and suitable location was found for each.³¹⁹³

In 2013, pursuant to a freedom-of-information action by *Miami Herald* reporter Carol Rosenberg, the government released the names of the forty-eight persons designated for indefinite detention.³¹⁹⁴

Mingazov is the last Russian detainee at Guantánamo Bay. See Begg, *supra* note 3036, at 332 n.*.

3186. Mingazov Opinion, *supra* note 3185.

3187. Opposition Brief, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. Dec. 27, 2010) [hereinafter D.C. Cir. *Mingazov* Opposition Brief].

3188. Order, *id.* (Apr. 19, 2011) [hereinafter *Mingazov* Abeyance Order]; Order, *id.* (Aug. 15, 2012) (remanding record).

3189. See Doug Oakley, *Berkeley Council Rejects Proposal to Invite Guantanamo Detainees to Live in City*, Oakland Trib., Feb. 16, 2011.

3190. Guantanamo Review Task Force Final Report (Jan. 22, 2010), available at www.justice.gov/ag/guantanamo-review-final-report.pdf; see Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, Wash. Post, Jan. 22, 2010, at A1; Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. Times, Jan. 22, 2010, at A14.

3191. Guantanamo Review Task Force Final Report, *supra* note 3190, at 1; see Omonira-Oyekanmi & Finn, *supra* note 2751; see also Fletcher & Stover, *supra* note 2736, at 42 ("The camp population peaked at 660 in July 2003 and began to decline in November of that year (Figure 3)."); see also *id.*, Fig. 3 (charting the size of the detainee population from January 2002 through July 2008).

3192. Guantanamo Review Task Force Final Report, *supra* note 3190, at ii.

3193. *Id.* at ii, 9–13.

3194. See Carol Rosenberg, *Herald Suit Yields Names of "Indefinite Detainees,"* Miami Herald, June 18, 2013, at 3A.

The reporter filed a federal complaint in the District of Columbia on March 15, 2013, to pursue a Freedom of Information Act request submitted to the Department of Defense in December 2012. Complaint, *Rosenberg v. U.S. Dep't of Def.*, No. 1:13-cv-342 (D.D.C. Mar. 15, 2013), D.E. 1. The government produced the document on June 17. See Rosenberg, *supra*.

Military Commission Guilty Plea

The first conviction before a Guantánamo Bay military commission in the Obama administration resulted from a guilty plea by Ibrahim Ahmed Mahmoud al-Qosi to conspiracy and material support charges.³¹⁹⁵

Al-Qosi “was captured by Pakistani forces in the Tora Bora mountains in December 2001.”³¹⁹⁶ He “acknowledged following the Qaeda leader, Osama Bin Laden, from Sudan to Afghanistan in 1996 and serving variously as a quartermaster, cook, bodyguard and driver at Qaeda compounds.”³¹⁹⁷ On August 11, 2010, a military jury returned a sentence verdict of fourteen years, but the plea agreement provided for a sentence cap of two years.³¹⁹⁸

Al-Qosi’s habeas petition was dismissed by stipulation on August 23.³¹⁹⁹ He was returned to Sudan on July 10, 2012.³²⁰⁰

Recusal

On April 22, 2009, the court transferred eight detainees in the 158-detainee case filed by the Center for Constitutional Rights in December 2005 to a new case, which the court assigned to Judge Lamberth.³²⁰¹ On January 29, 2010, one of the

3195. Trial Report, United States v. Al-Qosi (U.S. Mil. Comm. Aug. 11, 2010), available at www.mc.mil/CASES.aspx; see *Guantanamo Detainee Pleads Guilty*, Wash. Post, July 8, 2010, at A3 (“Qosi is only the fourth prisoner convicted in the controversial military tribunals since the Guantanamo Bay detention camp opened in January 2002.”); Frances Robles, *Bin Laden Driver to War-Court Convict*, Miami Herald, July 8, 2010, at 1A; Carol Rosenberg, *Al Qaeda Cook Could Leave Guantánamo in 2012*, Miami Herald, Feb. 9, 2011; Charlie Savage, *Guantánamo Detainee Pleads Guilty in Terrorism Case*, N.Y. Times, July 8, 2010, at A15; see also www.mc.mil/CASES.aspx (military commission case records).

3196. Savage, *supra* note 3195.

3197. *Id.*

3198. Final Action, United States v. Al-Qosi (U.S. Mil. Comm. Feb. 3, 2011), available at www.mc.mil/CASES.aspx; see Peter Finn, *U.S. Lacks Policy on Housing Military Commission Convicts*, Wash. Post, Aug. 12, 2010, at A2; Robles, *supra* note 3195; Carol Rosenberg, *Canadian Terror Trial Deal Would Test Obama Pledge*, Miami Herald, Oct. 24, 2010, at 3A; Carol J. Williams, *Guilty Plea at Guantanamo Tribunal*, Chi. Trib., Oct. 26, 2010, News, at 9.

In the military commission of Ibrahim Ahmed Mahmoud al Qosi, the sentence of 14 years confinement is approved and will be executed, but the execution of that part of the sentence extending to confinement in excess of two (2) years from July 2, 2010, is suspended until such time as the United States Government determines that the accused has complied with the terms of the pretrial agreement of June 9, 2010, or for a period of five (5) years from the date sentence was announced (August 11, 2010), whichever is sooner.

Final Action, *supra*.

3199. Order, Al-Qosi v. Obama, No. 1:04-cv-1937 (D.D.C. Aug. 23, 2010), D.E. 171.

3200. See *Guantanamo Inmate Home After 10 Years*, Wash. Post, July 12, 2012, at A8 [hereinafter *Inmate Home*]; Mohamed Osman & Ben Fox, *Guantánamo Prisoner Returns Home*, Miami Herald, July 12, 2012, at 11A; Carol Rosenberg, *Convicted Al-Qaida Operative Back in Sudan*, Miami Herald, July 11, 2012, at 1A; Charlie Savage, *Guantánamo Prisoner Is Repatriated to Sudan*, N.Y. Times, July 12, 2012, at A9.

3201. Docket Sheet, Mattan v. Obama, No. 1:09-cv-745 (D.D.C. Apr. 22, 2009) [hereinafter *Mattan Docket Sheet*].

detainee's attorneys filed a motion for Judge Lamberth's recusal.³²⁰² The attorney objected to a thought question attributed to Judge Lamberth in a reported interview by ProPublica: "How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?"³²⁰³ Although the thought question appears to pose a matter of general concern to all judges in all Guantánamo Bay habeas cases, the motion claimed that Judge Lamberth's observation created a question about a specific petitioner, Abdal Razak Ali: "will this Court be willing to enter the great writ in his case if the Government does not meet its burden or will this Court hold Petitioner indefinitely in fear that it might make a mistake?"³²⁰⁴

Rejecting "the notion that its publicly expressed views provide any basis for recusal," Judge Lamberth nevertheless recused himself "[b]ecause this is much ado about nothing, and petitioner's counsel has preferred to delay disposition of the merits of the petition to address this sideshow."³²⁰⁵

The court randomly assigned Ali's case to Judge Leon,³²⁰⁶ who denied Ali's petition on February 25, 2011.³²⁰⁷ Rejecting on July 23, 2013, a motion for Circuit Judge Brett Kavanaugh's recusal,³²⁰⁸ the court of appeals affirmed Judge Leon's decision on December 3.³²⁰⁹

Five More Writs and a Preliminary Injunction Denied

In 2011, Judge Urbina denied petitions for writs of habeas corpus by Mashour Abdullah Muqbel Alsabri³²¹⁰ and Khirulla Said Wali Khairkhwa.³²¹¹ The court of appeals affirmed.³²¹²

3202. Recusal Motion, *id.* (Jan. 29, 2010), D.E. 1361.

3203. *Id.* at 3, 10.

3204. *Id.* at 3.

3205. Order, *id.* (June 16, 2010).

3206. *Mattan* Docket Sheet, *supra* note 3201.

3207. *Ali v. Obama*, 770 F. Supp. 2d 1 (D.D.C. 2011); *see* Order, *Ali v. Obama*, No. 1:10-cv-1020 (D.D.C. June 12, 2012), D.E. 1500 (denying a motion for rehearing); Order, *id.* (May 17, 2011), D.E. 1496 (same); Docket Sheet, *id.* (June 17, 2010) (March 11, 2011, minute order, same); *see also* *Judge Upholds Algerian's Detention at Guantánamo*, Miami Herald, Jan. 11, 2011.

3208. Order, *Ali v. Obama*, No. 11-5102 (D.C. Cir. June 26, 2013); *see* Motion, *id.* (July 22, 2013).

The Supreme Court had denied a mandamus petition on January 9, 2012. *In re Bankhouche*, 565 U.S. ___, 132 S. Ct. 1036 (2012).

3209. *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), *cert. denied*, 574 U.S. ___, 135 S. Ct. 118 (2014).

3210. *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011) (finding that the petitioner served as part of Taliban or Al-Qaeda forces); *see* Carol Rosenberg, *Court OKs Yemeni's Detention*, Miami Herald, Feb. 5, 2011, at 5A.

3211. *Khairkhwa v. Obama*, 793 F. Supp. 2d 1 (D.D.C. 2011) (finding that the petitioner "was, without question, a senior member of the Taliban").

3212. *Khairkhwa v. Obama*, 703 F.3d 547 (D.C. Cir. 2012); *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012); *see* *Court Upholds Detention of Guantánamo Prisoner*, Miami Herald, Dec. 15, 2012, at 3A (Khairkhwa).

To resolve Guantánamo Bay habeas petitions, Judge Urbina required both parties to submit proposed findings of fact and conclusions of law.³²¹³ He found that this not only focused the judge's attention on key issues, but it helped illuminate the credibility of the parties' positions.³²¹⁴ Judge Urbina noticed that over the years the government's presentation of its cases improved substantially and the petitioners' presentations also improved.³²¹⁵

Judges Kennedy³²¹⁶ and Walton³²¹⁷ also denied writ petitions in 2011. (In 2015, the detainees were transferred to Oman³²¹⁸ and Estonia,³²¹⁹ respectively.)

Meanwhile, a sealed habeas petition on behalf of high-value detainee Mohd Farik Bin Amin, also known as Zubair, was filed on May 16, 2011.³²²⁰

On May 21, 2013, Judge Roberts denied Hani Saleh Rashid Abdullah's preliminary injunction motion seeking relief from indefinite detention pursuant to a friendship agreement between the United States and the Abdullah's home country, Yemen.³²²¹ Judge Roberts reasoned that pre-adjudicative release posed excessive risks to the government should the habeas petition later be determined to be without merit.³²²² On April 4, 2014, the court of appeals affirmed.³²²³

3213. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

3214. *Id.*

3215. *Id.*

3216. *Hentif v. Obama*, 810 F. Supp. 2d 33 (D.D.C. 2011) (finding that Fadhel Hussein Saleh Hentif was more likely than not part of Al-Qaeda or the Taliban); *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 44 (D.D.C. 2013).

Following Judge Kennedy's retirement, Judge Lamberth denied Hentif's motion for reconsideration. *Hentif v. Obama*, 883 F. Supp. 2d 97 (D.D.C. 2012), *appeal dismissed*, 733 F.3d 1243 (D.C. Cir. 2013).

3217. *Bostan v. Obama*, 821 F. Supp. 2d 80 (D.D.C. 2011) (finding that Karim Bostan's admitted membership in Jamaat al-Tablighi and other evidence implied affiliation with Al-Qaeda); *Hussein v. Obama*, 821 F. Supp. 2d 67 (D.D.C. 2011) (finding that Abdul Qader Ahmed Hussein's travels and activities in Afghanistan and Pakistan were consistent with his being part of Al-Qaeda or the Taliban).

The court of appeals affirmed the denial of a writ to Hussein. *Hussein v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), *cert. denied*, 572 U.S. ___, 134 S. Ct. 1621 (2014). *But see Hussain*, 572 U.S. at ___, 134 S. Ct. at 1622 (Justice Breyer, concurring in the denial of certiorari) ("The Court has not directly addressed whether . . . either the [2001 Authorization for Use of Military Force] or the Constitution limits the duration of detention"); *Hussein*, 718 F.3d at 971 (Judge Edwards, concurring in the judgment) ("The result in this case is unsurprising because, in my view, it fits the mold of a number of the decisions of this court that have recited the 'preponderance of the evidence' standard while in fact requiring nothing more than substantial evidence to deny habeas petitions."); Greg Stohr, *High Court Rejects Yemeni's Appeal*, Miami Herald, Apr. 22, 2014, at 9A.

3218. Notice of Transfer, *Hentif v. Obama*, No. 1:06-cv-1766 (D.D.C. Jan. 15, 2015), D.E. 317 [hereinafter *Hentif* Notice of Transfer].

3219. Hussein Notice of Transfer, *Al-Jayfi v. Obama*, No. 1:05-cv-2104 (D.D.C. Jan. 15, 2015), D.E. 420.

3220. Docket Sheet, *Bin Amin v. Obama*, No. 1:11-cv-923 (D.D.C. May 16, 2011).

3221. *Abdullah v. Bush*, 945 F. Supp. 2d 64 (D.D.C. 2013).

3222. *Id.* at 67.

3223. *Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014).

Another Military Commission Guilty Plea

Majid Khan's 2012 guilty plea before a military commission³²²⁴ resulted in the voluntary dismissal of his habeas petition.³²²⁵

Congressional Restrictions on Transfers

Transfers Interrupted

After Farhi Saeed Bin Mohammed was transferred to Algeria over his objection in January 2011, no detainee was transferred out of Guantánamo Bay until two Uighurs accepted transfer to El Salvador in April 2012.³²²⁶ After Khadr was returned to Canada in September 2012 to serve out his military commission sentence, the next transfers were four detainees transferred to Algeria: two in August 2013³²²⁷ and another two the following December.³²²⁸

The defense appropriation act for 2011 prohibited the transfer of Guantánamo Bay detainees except by court order or upon certification by the Secretary of Defense and the Secretary of State that the transferee country can ensure that the detainee “cannot engage or re-engage in terrorist activity.”³²²⁹ The 2012 appropriation extended the prohibition for another year,³²³⁰ but it also provided for a waiver by the Secretary of Defense “with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence” upon a determination that the transfer furthers national security and the risk of future terrorist

3224. Plea Agreement, United States v. Khan (U.S. Mil. Comm. Feb. 29, 2012), available at www.mc.mil/CASES.aspx; see Peter Finn, *High-Value Detainee Agrees to Cooperate in Exchange for 19-Year Sentence*, Wash. Post, Mar. 1, 2012, at A3; Peter Finn, *Plea Agreement for Terror Suspect Sparks a Debate*, Wash. Post, Mar. 2, 2012, at A3; Carol Rosenberg, *Terrorist's Deal: Testimony for a Hope of Release*, Miami Herald, Mar. 1, 2012, at 1A; Scott Shane, *Testimony on Al Qaeda Is Required in Plea Deal*, N.Y. Times, Mar. 1, 2012, at A17. See generally McDermott & Meyer, *supra* note 2991, at 187–88 (describing Khan's affiliation with Khalid Sheikh Mohammed).

3225. Docket Sheet, Khan v. Obama, No. 1:06-cv-1690 (D.D.C. Sept. 29, 2006) [hereinafter Khan Docket Sheet].

3226. See Peter Finn, *Detainees Cleared for Release Are Still Waiting*, Wash. Post, Nov. 9, 2011, at A16; Rosenberg, *supra* note 2867; Savage, *supra* note 2947; Jane Sutton, *Two Uighur Detainees Sent to El Salvador*, Wash. Post, Apr. 20, 2012, at A9.

3227. Saib Transfer Notice, *supra* note 3134; Nibal Transfer Notice, *supra* note 3134.

The *Miami Herald* maintains a roster of remaining detainees. Carol Rosenberg, *Who's Still Being Held at Guantánamo*, Miami Herald, www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html.

3228. Ameziane Transfer Notice, *supra* note 3138; Bensayah Transfer Notice, *supra* note 2915; see Jess Bravin, *Prisoners Fight U.S. Over Exit from Gitmo*, Wall St. J., Nov. 29, 2013, at A1; Rosenberg, *supra* note 2915; Savage, *supra* note 2915.

3229. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351–52 (2011); see Finn, *supra* note 3226. See generally Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 Cardozo L. Rev. 625 (2014) (describing congressional restrictions on the transfer of Guantánamo Bay detainees as “without identifiable precedent”).

3230. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(b)(1)(E), 125 Stat. 1298, 1567 (2011).

activity by the detainee is mitigated.³²³¹ The government relied on Judge Urbina's 2008 court order for the Uighurs' transfer.³²³²

The 2013 appropriation continued transfer restrictions.³²³³ On signing the appropriation bill, President Obama issued a signing statement reserving his right to preserve the constitutional separation of powers:

My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.³²³⁴

On September 21, 2012, the government released a list of fifty-five petitioners who had been approved for transfer once a suitable transfer location could be identified, and a fifty-sixth petitioner was also approved for transfer, but his name was sealed pursuant to orders by the court of appeals.³²³⁵

Judge Lamberth denied, on March 21, 2014, Ahmed Adnan Ahjam's challenge to the constitutionality of Congress's tying the President's hands on detainee relocation.³²³⁶ Because "the Constitution confers no right to be free upon enemy belligerents detained at Guantanamo," the detainee did not have standing to challenge the congressional action in court.³²³⁷ Nor were the transfer restrictions bills of attainder, because military detention is not punishment.³²³⁸ Relying on that decision, Judge Lamberth denied, on July 3, a motion for release by Adil Bin Muhammed al-Wirghi, who had been cleared for release by the Guantánamo Re-

3231. *Id.*, § 1028(d)(1).

3232. See Rosenberg, *supra* note 2867; Savage, *supra* note 2947.

3233. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1027–1028, 126 Stat. 1632, 1914–17 (2013); Ahjam v. Obama, 37 F. Supp. 3d 273, 276 (D.D.C. 2014).

3234. Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, Daily Comp. Pres. Docs., 2013 DCPD No. 00004; see White House Press Release, Jan. 3, 2013, available at www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310; see also Peter Finn, *Activists Blast Obama for Signing Defense Bill*, Wash. Post, Jan. 4, 2013, at A2; Carol Rosenberg, *Obama: Guantánamo a Waste of Resources*, Miami Herald, Jan. 4, 2012, at 1A; Charlie Savage, *Obama Disputes Limits on Detainee Transfers Imposed in Defense Bill*, N.Y. Times, Jan. 4, 2013, at A1.

3235. Sept. 21, 2012, Transfer Approval List, *supra* note 2925; see Carol Rosenberg, *U.S. Names 55 Guantánamo Captives Cleared for Release*, Miami Herald, Sept. 22, 2012, at 3A; *U.S. Names 55 Set for Transfer from Guantánamo*, N.Y. Times, Sept. 22, 2012, at A6; see also Emma Kantrowitz, *No New Closing Date Given for Guantánamo*, Miami Herald, Mar. 14, 2013, at 4A (reporting that 86 detainees have been cleared for release).

The three remaining Uighurs were on this list. Transfer Approval List, *supra*.

3236. Ahjam, 37 F. Supp. 3d 273.

3237. *Id.* at 277–80.

3238. *Id.* at 280–81.

view Task Force.³²³⁹ Their appeals were mooted by their transfers to Uruguay in December.³²⁴⁰

Many of the detainees approved for transfer are from Yemen, and President Obama announced on May 23, 2013, that he was lifting a moratorium on transfers to Yemen that was put in place because of instability there.³²⁴¹

Transfers Resumed

On October 2, 2013, the government notified Judge Lamberth that it would no longer oppose a writ of habeas corpus for Ibrahimj Osman Ibrahim Idris, who was suffering from severe mental and physical illnesses.³²⁴² Judge Lamberth granted the writ two days later.³²⁴³

In addition to the two detainees transferred to Algeria in December, seven other detainees were transferred that month: two to Saudi Arabia,³²⁴⁴ two to Sudan, including Idris,³²⁴⁵ and the last three Uighurs to Slovakia,³²⁴⁶ bringing the detention population down to 155.³²⁴⁷

Signing the National Defense Authorization Act for Fiscal Year 2014 on December 26, 2013, President Obama praised Congress for giving his “Administration additional flexibility to transfer detainees abroad by easing rigid restrictions that have hindered negotiations with foreign countries and interfered with executive branch determinations about how and where to transfer detainees.”³²⁴⁸ Presi-

3239. *Al-Wirghi v. Obama*, 54 F. Supp. 3d 44 (D.D.C. 2014).

3240. Order, *Ahjam v. Butler*, No. 14-5116 (D.C. Cir. Jan. 16, 2015); Order, *Al-Wirghi v. Obama*, No. 14-5176 (D.C. Cir. Dec. 16, 2014).

3241. See Charlie Savage, *Obama Lifts Moratorium on Transfer of Detainees*, N.Y. Times, May 24, 2013, at A10; Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. Times, May 23, 2013, at A1.

3242. Response, *Idris v. Obama*, No. 1:05-cv-1555 (D.D.C. Oct. 2, 2013), D.E. 278; see Ben Fox, *U.S. Won't Contest Release of Ill Inmate*, Miami Herald, Oct. 4, 2013, at 3A.

3243. Order, *Idris*, No. 1:05-cv-1555 (D.D.C. Oct. 4, 2013), D.E. 279.

3244. Transfer Notice, *Al-Wady v. Obama*, No. 1:08-cv-1237 (D.D.C. Dec. 16, 2013), D.E. 267 [hereinafter *Al-Wady* Transfer Notice] (Hamoud Abdullah Hamoud Hassan al-Wady); Transfer Notice, *Said v. Obama*, No. 1:05-cv-2384 (D.D.C. Dec. 16, 2013), D.E. 325 (Saad al-Qahtani); see Carol Rosenberg, *2 Saudi Detainees Sent Home*, Miami Herald, Dec. 17, 2013, at 3A; *Two Guantanamo Detainees Sent Home to Saudi Arabia*, Wash. Post, Dec. 17, 2013, at A3.

3245. See Carol Rosenberg, *U.S. Repatriates Two War-on-Terror Prisoners*, Miami Herald, Dec. 19, 2013, at 4A; see also Mohamed Osman, *Detainee Contends US Tortured Him*, Bos. Globe, Dec. 20, 2013, at A7 (reporting that Idris “said his jailers had ‘systematically tortured’ him, with punishment ‘doubled’ for those who attempted hunger strikes”).

3246. Dec. 31, 2013, Transfer Notice, *supra* note 2977; see Goldman, *supra* note 2977; Rosenberg, *supra* note 2977; Savage, *supra* note 2977.

3247. See Carol Rosenberg, *Gitmo Prisoner Releases Hastened in 2013*, Miami Herald, Jan. 2, 2014, at 1A. See generally Reporter Reflects on Obama's Stalled Effort to Close Guantanamo, Fresh Air (NPR radio broadcast Sept. 4, 2014), available at www.npr.org/2014/09/04/345788141/reporter-reflects-on-obamas-stalled-effort-to-close-guantanamo (interview with Charlie Savage).

3248. Statement by the President on H.R. 3304, available at www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304; see Pub. L. No. 113-66, § 1035, 127 Stat. 672, 851

dent Obama also criticized the continuation of “unwise funding restrictions” prohibiting the relocation of detainees to the States for detention or trial.³²⁴⁹

Section 1039 of the 2014 appropriations act required a report from the Attorney General on what legal rights would be conferred on Guantánamo detainees if they were moved to a facility within the United States proper.³²⁵⁰ On May 14, 2014, the Justice Department provided Congress with a report promising that “existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.”³²⁵¹

Belbacha’s transfer to Algeria in March 2014 left 154 detainees at Guantánamo Bay. At the end of May, five Afghan detainees were transferred to Qatar as part of a deal with the Taliban in exchange for Bowe Bergdahl, the only American held prisoner by the Taliban in Afghanistan.³²⁵² Four of the detainees—Abdul Haq Wasiq, Mohammed Habi, Khairullah Khairkhwa, and Mullah Norullah Noori—were habeas petitioners;³²⁵³ Mohammed Fazl was not. Relying on superior authority, President Obama did not inform Congress of the transfer thirty days

(2013); *see also* Philip Rucker, *Obama Signs Measure Easing Detainee Transfers*, Wash. Post, Dec. 27, 2013, at A4.

3249. Statement by the President on H.R. 3304, *supra* note 3248; *see* Pub. L. No. 113-66, §§ 1033, 1034, 127 Stat. at 850–51.

3250. Pub. L. No. 113-66, § 1039, 127 Stat. at 855–56.

3251. Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (May 14, 2014), *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/1160074/5-14-14-kadzik-to-pjl-re-fy14-ndaa.pdf>; *see* Charlie Savage, *U.S. Report Addresses Concern Over Obama’s Plan to Close Guantánamo*, N.Y. Times, May 16, 2014, at A17.

3252. *See* Adam Entous & Julian E. Barnes, *Secret Deal Freed U.S. Soldier*, Wall St. J., June 2, 2014, at A1; Ernesto Londoño, *U.S. Swaps 5 Taliban Detainees for Captive Soldier*, Wash. Post, June 1, 2014, at A1; Carol Rosenberg & Mark Seibel, *Prisoner Exchange Has U.S. P.O.W. on Way Home*, Miami Herald, June 1, 2014, at 1A; Eric Schmitt & Charlie Savage, *American Soldier Freed by Taliban in Prisoner Trade*, N.Y. Times, June 1, 2014, at A1; Adam Taylor & Kevin Sieff, *Case Files Describe the 5 Taliban Commanders*, Wash. Post, June 3, 2014, at A9; *see also* Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Deal*, N.Y. Times, May 10, 2012, at A1; Karen DeYoung, *Parents of U.S. Prisoner Appeal for Release*, Wash. Post, May 10, 2012, at A20; Anne Gearan & Ernesto Londoño, *Taliban Prisoner Swap Possible*, Wash. Post, Feb. 18, 2014, at A1; Ernesto Londoño, *Taliban Suggests Peace Talks with U.S.*, Wash. Post, Jan. 4, 2012, at A1; Charlie Savage, *Taliban Talks Could Depend on Detainees*, N.Y. Times, June 21, 2013, at A1.

Charges that Bergdahl’s capture resulted from his desertion were filed in military court in March 2015. *See* Michael Ames, *The Walkabout Lie*, Newsweek, Apr. 17, 2015, at 24 (reporting that Bergdahl is “working a desk job at Fort Sam Houston in San Antonio” pending criminal proceedings); Helene Cooper & Richard A. Opiel, Jr., *Soldier Released by Taliban Is Charged by U.S. as Deserter*, N.Y. Times, Mar. 26, 2015, at A1; Dan Lamothe, *Desertion Charge for Onetime POW*, Wash. Post, Mar. 26, 2015, at A1; Dion Nissenbaum & Julian E. Barnes, *Ex-POW to Face Desertion Charges*, Wall St. J., Mar. 26, 2015, at A1; Richard A. Opiel, Jr. & Helene Cooper, *In Bergdahl Case, the Rare Charge of Misbehavior*, N.Y. Times, Mar. 27, 2015, at A3.

3253. Transfer Notice, *Noori v. Obama*, No. 1:08-cv-1828 (D.D.C. June 5, 2014), D.E. 115; Transfer Notice, *Zadran v. Obama*, No. 1:05-cv-2367 (D.D.C. June 5, 2014), D.E. 426 (Wasiq and Nabi); Transfer Notice, *Khairkhwa v. Obama*, No. 1:08-cv-1805 (D.D.C. June 4, 2014), D.E. 225.

in advance, as required by 2014 defense appropriations.³²⁵⁴ Reflecting the delicacy of the negotiations, neither did President Obama inform the President of Afghanistan in advance.³²⁵⁵ The deal required Qatar to hold the five men within its borders for one year.³²⁵⁶

News media reported in March that the president of Uruguay had agreed to the possibility of taking some detainees.³²⁵⁷ By the time a thirty days' notice to Congress had elapsed, in August, Uruguay's president decided that pending October elections were too close in time to make the transfer politically feasible at that time.³²⁵⁸

The detainee population dropped to 127 in December.

Fawzi al-Odah was transferred to Kuwait on November 5; he was the lead petitioner in the second Guantánamo habeas case, which was filed on May 1, 2002.³²⁵⁹ Four Yemenis and a Tunisian were transferred on November 20, 2014. Tunisian Hisham Sliti³²⁶⁰ was transferred to Slovakia, as was Yemeni Hussain Saleem Mohammed Almerfedi;³²⁶¹ Yemenis Saleh Mohammed Seleh al-Thabbii,³²⁶²

3254. See Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013); Statement by the President on H.R. 3304, *supra* note 3248 (concluding that the funding statute, “in certain circumstances, would violate constitutional separation of powers principles”); see also Jess Bravin, *Exchange Took Place in a Legal Gray Area*, Wall St. J., June 5, 2014, at A8; Karen Tumulty, *Obama Criticized Over “Signing Statements,”* Wash. Post, June 3, 2014, at A8; James Rosen, *Bergdahl Swap Broke Law, Watchdog Says*, Miami Herald, Aug. 22, 2014, at 1A; Charlie Savage & David E. Sanger, *Prisoner Deal Puts President on Defensive*, N.Y. Times, June 4, 2014, at A1.

3255. See Maria Abi-Habib, *Kabul Objects to Conditions for Freed Taliban*, Wall St. J., June 2, 2014.

3256. See Abi-Habib, *supra* note 3255; Londoño, *supra* note 3252.

3257. Mujica: *Detainees Would Be Free to Leave Uruguay*, Miami Herald, Mar. 25, 2014, at 3A; *Uruguay Is Open to Taking Detainees*, S.F. Chron., Mar. 21, 2014, at A5; see Charlie Savage, *U.S. Is Said to Plan to Send 6 Detainees to Uruguay*, N.Y. Times, July 17, 2014, at A3; Mary Beth Sheridan, *Uruguay's President Says He Is Willing to Accept Six Guantanamo Detainees*, Wash. Post, May 16, 2014, at A6; *Six Gitmo Men Set to Be Sent to Uruguay*, Wall St. J., July 17, 2014, at A4; see also Joshua Partlow, *Men Are Out of Guantanamo but Not Yet Free*, Wash. Post, Mar. 22, 2015, at A1 (reporting that negotiations began in December 2013 between the U.S. ambassador to Uruguay and Uruguay's president).

3258. See Leonardo Haberkorn, *Guantánamo Prisoner Transfer Faces Delay*, Miami Herald, Sept. 2, 2014, at 3A; Partlow, *supra* note 3257; Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. Times, Sept. 1, 2014, at A1; Felicia Schwartz & Taos Turner, *Six Gitmo Prisoners Transferred to Uruguay*, Wall St. J., Dec. 8, 2014, at A4.

3259. Notice of Transfer, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Nov. 5, 2014), D.E. 773; see Carol Rosenberg, *Former “Forever Prisoner” Goes Home*, Miami Herald, Nov. 6, 2014, at 1A; Charlie Savage, *Kuwaiti Released from Guantánamo Under New Review System*, N.Y. Times, Nov. 6, 2014, at A16.

3260. Notice of Transfer, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Nov. 21, 2014), D.E. 317; see Order, *Sliti v. Obama*, No. 09-5104 (D.C. Cir. Jan. 21, 2015) (dismissing the appeal as moot);

3261. Notice of Transfer, *Almerfedi v. Obama*, No. 1:05-cv-1645 (D.D.C. Nov. 21, 2014), D.E. 315.

3262. Notice of Transfer, *Al-Jayfi v. Obama*, No. 1:05-cv-2104 (D.D.C. Nov. 21, 2014), D.E. 419.

Habeas Corpus: Guantánamo Bay

Abdel Ghalib Hakim, and Abdulkhaliq Ahmed al-Baidhani³²⁶³ were transferred to Georgia.³²⁶⁴ Saudi Muhammed Zahrani was transferred to Saudi Arabia on November 21.³²⁶⁵

On December 7, six detainees arrived in Uruguay, following the November 30 runoff victory of an ally of Uruguay's president to become his successor:³²⁶⁶ Syrians Ali Hussian Mohammad Muety Shaaban,³²⁶⁷ Abu Wa'el Jihad Dhiab,³²⁶⁸ Abdul Hadi Omar Mahmoud Faraj,³²⁶⁹ and Ahmed Adnan Mohammad Ahjam;³²⁷⁰ Tunisian Adil Bin Muhammed al-Wirghi;³²⁷¹ and Palestinian Mohammed Abdullah Taha Mattan.³²⁷²

The number of Afghanis at Guantánamo Bay was reduced from twelve to eight in December as a result of an agreement with Afghanistan's new president to return four detainees:³²⁷³ Khiali Gul,³²⁷⁴ Mohammed Zahir,³²⁷⁵ Shawali Khan,³²⁷⁶ and Abdul Ghani.³²⁷⁷

3263. Notice of Transfer, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Nov. 21, 2014), D.E. 1072.

3264. See Goldman & Tate, *supra* note 2926, at A15; Rosenberg, *supra* note 2926, at 3A; Savage, *supra* note 2926, at A19.

3265. Notice of Transfer, *Zahrani v. Obama*, No. 1:05-cv-2384 (D.D.C. Nov. 24, 2015), D.E. 332; see Carol Rosenberg, *Another Detainee Is Released*, Miami Herald, Nov. 23, 2014, at 3A; *Saudi Detainee Is Released from Guantánamo Bay After 12 Years*, N.Y. Times, Nov. 23, 2014, at 33; see also Carol Rosenberg, *Security Panel: Saudi Captive Can Go Home*, Miami Herald, Oct. 21, 2014, at 3A; Charlie Savage, *Board Says Saudi Detainee Should Be Repatriated*, N.Y. Times, Oct. 21, 2014, at A18.

3266. See Adam Goldman, *6 Guantanamo Detainees Turned Over to Uruguay*, Wash. Post, Dec. 8, 2014, at A3; Rosenberg, *supra* note 2976 (noting that this transfer included the last of the Syrian detainees); Charlie Savage, *Uruguay Accepts 6 Detainees Held at Guantánamo*, N.Y. Times, Dec. 8, 2014, at A1; Schwartz & Turner, *supra* note 3258; Taos Turner, *Deal for Ex-Guantanamo Inmates in Uruguay Increasingly Strained*, Wall St. J., May 2, 2015, at A8 ("When the ex-detainees arrived, Uruguay's labor confederation lent them a house they share and gave them job training, while Montevideo gave them a \$600 month stipend."); see also *Detainee Wants Asylum for Others*, Miami Herald, Feb. 13, 2015, at 2A (reporting that Abu Wa'el Dhiab appeared in Argentina to lobby for asylum for other detainees); *Ex-Guantanamo Prisoners Stroll Streets*, Miami Herald, Dec. 13, 2014, at 6A ("The men . . . are staying at a house in a middle class neighborhood as guests of a major labor union, which has been asked to help by President Jose Mujica."); Leonardo Haberkorn, *Controversy Erupts About Ex-Guantánamo Captives*, Miami Herald, Feb. 20, 2015, at 3A ("A labor union that has been helping the men says . . . that they have turned down job offers.").

3267. Notice of Transfer, *Shaaban v. Obama*, No. 1:05-cv-892 (D.D.C. Dec. 8, 2014), D.E. 267.

3268. *Dhiab Notice of Transfer*, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. Dec. 8, 2014), D.E. 381.

3269. Notice of Transfer, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Dec. 8, 2014), D.E. 319 [hereinafter *Faraj Notice of Transfer*].

3270. Notice of Transfer, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Dec. 8, 2014), D.E. 1851.

3271. Notice of Transfer, *Al-Wirghi v. Obama*, No. 1:05-cv-1497 (D.D.C. Dec. 8, 2014), D.E. 218.

3272. Notice of Transfer, *Mattan*, No. 1:09-cv-745 (D.D.C. Dec. 8, 2014), D.E. 1852.

3273. See Helene Cooper, *Four Afghans Released from Guantánamo Bay*, N.Y. Times, Dec. 21, 2014, at 16; Carol E. Lee & Jess Bravin, *More Gitmo Transfers Set for Coming Weeks*, Wall St. J., Dec. 22, 2014, at A4; Carol Rosenberg, *Four Afghans Returned Home from Guantánamo*, Miami Herald, Dec. 21, 2014, at 3A.

Three Yemenis—Asim Ben Thabit al-Khalaqi,³²⁷⁸ Mohammed Ali Hussain Khanina,³²⁷⁹ and Sabry Mohammed Ebrahim al-Qurashi³²⁸⁰—and two Tunisians—Mohammed Abdul Rahman³²⁸¹ and Adel al-Hakeemy³²⁸²—were transferred to Kazakhstan on December 30.³²⁸³

In April 2015, the detainee population is 122.³²⁸⁴

Five Yemenis were transferred on January 14.³²⁸⁵ Four were transferred to Oman—Alkhadr Abdullah al-Yafie,³²⁸⁶ Fadhel Hussein Saleh Hentif,³²⁸⁷ Abdurrahman Abdallah Ali Mahmoud al-Shubati,³²⁸⁸ and Mohammed Ahmed Salam³²⁸⁹—and one was transferred to Estonia—Abdul Qader Ahmed Hussein.³²⁹⁰

Recent Challenges to Military Commissions

A habeas petition on behalf of Abd al-Rahim Hussain Mohammed al-Nashiri was filed on July 15, 2008.³²⁹¹ On June 30, 2008,³²⁹² and again on April 20, 2011,³²⁹³ he

3274. Notice of Transfer, *Khiali-Gul v. Obama*, No. 1:04-cv-877 (D.D.C. Dec. 22, 2014), D.E. 201.

3275. Notice of Transfer, *Zadran v. Obama*, No. 1:05-cv-2367 (D.D.C. Dec. 22, 2014), D.E. 435.

3276. *Khan* Transfer Notice, *supra* note 3149.

3277. Notice of Transfer, *Ghani v. Obama*, No. 1:09-cv-904 (D.D.C. Dec. 22, 2014), D.E. 122.

3278. Notice of Transfer, *Al-Khalaqi v. Obama*, No. 1:05-cv-999 (D.D.C. Dec. 31, 2014), D.E. 269.

3279. Notice of Transfer, *Ghazy v. Obama*, No. 1:05-cv-2223 (D.D.C. Dec. 31, 2014), D.E. 149.

3280. *Al-Qurashi* Transfer Notice, *supra* note 3153.

3281. Notice of Transfer, *Alhami v. Obama*, No. 1:05-cv-359 (D.D.C. Dec. 31, 2014), D.E. 279.

3282. Notice of Transfer, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Dec. 31, 2014), D.E. 318.

3283. See Helene Cooper, *127 Prisoners Remain at Guantánamo as U.S. Sends 5 to Kazakhstan*, N.Y. Times, Jan. 1, 2015, at A10; Carol Rosenberg, *5 Released to Kazakhstan After Glitch*, Miami Herald, Jan. 1, 2015, at 1A (reporting that transportation of the detainees was delayed one day because of mechanical problems with the airplane after takeoff).

3284. See Missy Ryan & Adam Goldman, *Race to Resettle Military Inmates*, Wash. Post, Apr. 23, 2015, at A1 (“In all, the Pentagon hopes that 57 inmates who are approved for transfer will be resettled by the end of 2015.”); see also Carol Rosenberg, *Stage Not Yet Set for Resumption of Guantánamo Detainee Releases*, Miami Herald, Apr. 24, 2015, at 4A.

3285. See Helene Cooper, *Guantanamo Releases 5, Angering Senators*, N.Y. Times, Jan. 15, 2015, at A13; Carol Rosenberg, *Five Yemeni Detainees Go to Oman, Estonia*, Miami Herald, Jan. 15, 2015, at 4A; Missy Ryan & Adam Goldman, *Five More Yemeni Detainees Released*, Wash. Post, Jan. 15, 2015, at A9.

3286. Notice of Transfer, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Jan. 16, 2015), D.E. 2029.

3287. *Hentif* Notice of Transfer, *supra* note 3218.

3288. Notice of Transfer, *Al-Shubati v. Obama*, No. 1:07-cv-2338 (D.D.C. Jan. 16, 2015), D.E. 281.

3289. Notice of Transfer, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Jan. 19, 2015), D.E. 1853.

3290. Hussein Notice of Transfer, *supra* note 3219.

3291. Petition, *Al-Nashiri v. Bush*, No. 1:08-cv-1207 (D.D.C. July 15, 2008), D.E. 1.

3292. See William Glaberson, *Guantánamo Detainee Faces War Crimes Charges in Attack on Destroyer*, N.Y. Times, July 1, 2008, at A19; Josh White, *Charges Are Filed in Cole Bombing*, Wash. Post, July 1, 2008, at A3.

was referred to a military commission for trial on charges that he was one of the persons responsible for the October 2000 bombing of the USS *Cole*.³²⁹⁴ As capital proceedings against him were underway, he filed a motion on April 21, 2014, in his habeas case to enjoin his military commission proceedings, arguing that the *Cole* bombing did not occur on a battlefield.³²⁹⁵ Judge Roberts decided, on December 29, to abstain from consideration of al-Nashiri's challenge, pending proceedings in the congressionally established military commission.³²⁹⁶ An appeal is pending.³²⁹⁷ Also pending is a petition to the court of appeals for a writ of mandamus and prohibition to the military commission.³²⁹⁸

On July 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit reversed en banc, as ex post facto violations, the military commission convictions of Ali Hamza Ahmad Suliman al-Bahlul for material support of terrorism and solicitation of others to commit war crimes.³²⁹⁹ Reviewing al-Bahlul's conviction for conspiracy, a majority of the court held that because al-Bahlul's pro se defense did not include an ex post facto challenge, plain error review applied, and the Supreme Court's four-to-three analysis of the issue in its 2006 decision in *Hamdan v. Rumsfeld* left doubt about whether conspiracy is triable by military commission.³³⁰⁰

A de novo review would require a more careful analysis of whether conspiracy is a crime triable by Guantánamo Bay military commission: "Bahlul contends that 'law of war' means the *international* law of war, full stop. The Government contends that we must look not only to international precedent but also 'the common law of war developed in U.S. military tribunals.'"³³⁰¹

3293. See *New Charges Filed Against Suspect in U.S.S. Cole Bombing*, N.Y. Times, Apr. 21, 2011, at A8.

3294. www.mc.mil/CASES.aspx.

3295. Preliminary Injunction Motion, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Apr. 21, 2014, filed May 1, 2014), D.E. 228; see Order, *In re Al-Nashiri*, No. 14-5229 (D.C. Cir. Nov. 18, 2014) (denying a mandamus order that the district court rule promptly on al-Nashiri's military commission injunction motion); see also Mandamus Petition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014, filed Nov. 3, 2014) (challenging the composition of a panel of the Court of Military Commission Review hearing an interlocutory appeal by the government in al-Nashiri's case).

3296. *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218 (D.D.C. 2014).

3297. Docket Sheet, *Al-Nashiri v. Obama*, No. 15-5020 (D.C. Cir. Jan. 26, 2015).

3298. Docket Sheet, *In re Al-Nashiri*, No. 15-1023 (D.C. Cir. Jan. 28, 2015).

3299. *Al-Bahlul v. United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014); see Michael Doyle, *Ex-Aide to Bin Laden Has Two Convictions Overturned*, Miami Herald, July 15, 2014, at 3A; Charlie Savage, *Court Sidesteps How to Prosecute Detainees*, N.Y. Times, July 15, 2014, at A15.

3300. *Al-Bahlul*, 767 F.3d at 18–27 (observing that Justices Stevens, Souter, Ginsburg, and Breyer concluded that conspiracy is not triable by military commission; Justices Thomas, Scalia, and Alito concluded that conspiracy is; Justice Kennedy declined to reach a conclusion on the issue; and Chief Justice Roberts was recused); see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

3301. *Al-Bahlul*, 767 F.3d at 22–23; see *id.* at 37 (Circuit Judge Rogers concurring and dissenting) ("For more than seventy years, the Supreme Court has interpreted the 'law of war' to mean the international law of war."); *id.* at 52 (Circuit Judge Brown concurring and dissenting) (concluding that the military commissions have jurisdiction to try offenses that "were recognized by

The en banc court remanded additional challenges to the conspiracy conviction to a three-judge panel,³³⁰² who heard arguments on October 22.³³⁰³

Challenge: Attorney–Client Contacts

Right to Counsel

After the Supreme Court decided in *Rasul v. Bush*³³⁰⁴ that the courts have jurisdiction over Guantánamo Bay detainees’ habeas petitions, the Solicitor General’s office convened a meeting with attorneys from the Justice Department’s civil division, representatives from the Department of Defense, and members of the Justice Department’s Litigation Security Group.³³⁰⁵ The Litigation Security Group is a unit of the Justice Department that works independently of the attorneys representing the government in court, and it provides the courts with classified information security officers.³³⁰⁶ Among the services that classified information security officers provide the courts is facilitation of security clearances for attorneys.

In October 2004, Judge Kollar-Kotelly determined that the detainees had rights to counsel.³³⁰⁷ Soon thereafter the clerk’s office issued to all detainees notices of their rights to counsel in habeas proceedings.³³⁰⁸

Attorneys had to obtain security clearances to meet with the detainees.³³⁰⁹ All of the petitioners were provided with cleared counsel.³³¹⁰

the international law of war” or “were, according to domestic tradition and practice, triable by military commission”); *id.* at 68 (Circuit Judge Kavanaugh concurring and dissenting) (“U.S. military commission precedents have treated conspiracy as an offense triable by military commission.”); *see also* Bravin, *supra* note 2728, at 128 (“Because armed conflict involves organized and hierarchical forces, conspiracy could be used to make any soldier culpable for the war crimes of another.”).

3302. *Al-Bahlul*, 767 F.3d at 31.

3303. Docket Sheet, *Al-Bahlul v. United States*, No. 11-1324 (D.C. Cir. Sept. 14, 2011).

3304. 542 U.S. 466 (2004).

3305. Interview with Dep’t of Justice Litig. Sec. Group Staff, July 28, 2011.

3306. *See* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

3307. *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004); *see* Hafetz, *supra* note 2754, 134.

3308. Interview with Hon. Alan Kay, June 21, 2011.

3309. *Al Odah*, 346 F. Supp. 2d at 14; *see* Ruben, *supra* note 2749, at 15; Thomas P. Sullivan, *Imagine*, in *The Guantánamo Lawyers*, *supra* note 2737, at 42, 43–44 (“Before being permitted to write or visit your clients, you must first obtain a ‘secret’ security clearance, a process which involves the FBI and usually consumes months.”).

Initially, the government proposed that attorneys be permitted to meet with their clients one and only one time, but that could have been malpractice. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3310. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Royce C. Lamberth, May 13, 2011.

Travel to Guantánamo Bay

Reflections by habeas attorneys illuminate some logistical issues pertaining to client visits:

To get to Guantánamo, you fly to Fort Lauderdale and then continue on to the base on one of two small prop-plane carriers, Air Sunshine or Lynx Air. The planes have a dozen or so seats but no toilet on board. When you check in for the three-and-a-half-hour flight, you're weighed along with your luggage to determine if the plane will be too heavy to fly all the way to the base without a stop to refuel at Exuma in the Bahamas. The plane may not enter Cuban air space, so you fly to the easternmost end of the island, make a right turn, and descend to the airport on the leeward side of the base. There is no prison on that side of the bay, and unsupervised movements are permitted, but amenities such as restaurants or grocery stores are scarce. You stay at the former "CBQ"—Combined Bachelors' Quarters—at an attractive government room rate of approximately \$20 per night. A kitchenette and four twin beds furnish each two-room "suite."³³¹¹

. . . The morning routine for counsel is to take the 7:40 bus from the CBQ to a ferry, and then the 8:00 ferry to the windward side of the base where the prison camp is located and where we lawyers are met by a military escort. While the leeward side is ramshackle and barren, the windward side is surreal. There is a Starbucks, a McDonald's, a combined Subway-Pizza Hut, a Wal-Mart-like big-box store called the Nex, and a gift shop.³³¹²

. . . At every jail and prison at which I had previously visited a client, a lawyer was forbidden to bring the prisoner anything but legal papers. The rules at Guantánamo, though, permit lawyers to bring all manner of food and drink to client meetings. The only limitation seems to be that the prisoner may consume it only during the meeting. . . .

I had been alerted that my client would feel free to eat only if we lawyers ate. Always ready to go the extra mile for a client, I had prepared by eating nothing before boarding the ferry.³³¹³

Monitoring Communication

The government sought to perform a classification review of all documents, including attorney notes, taken out of a meeting with a detained client and to monitor all attorney conversations with selected detainees.³³¹⁴ Judge Kollar-Kotelly rejected this infringement on the attorney–client privilege.³³¹⁵ She identi-

3311. Sullivan, *supra* note 3309, at 43; *see also* Khan, *supra* note 2888, at 31 ("With the exception of one corporate law firm that always makes a grand entrance in a chartered private jet, the attorneys doing habeas work at Gitmo fly one of two commercial airlines, Air Lynx or Air Sunshine.")

Military personnel have other options for getting to the base. Wax, *supra* note 2737, at 23.

3312. Gorman, *supra* note 2851, at 12. *See generally* Inside Guantanamo, *supra* note 2886.

The Nex is the Navy Exchange. *See* Greenberg, *supra* note 2754, at 9.

3313. David Marshall, *Escort Required*, in *The Guantánamo Lawyers*, *supra* note 2737, at 47, 48.

3314. *Al Odah v. United States*, 346 F. Supp. 2d 1, 3–4 (D.D.C. 2004).

3315. *Id.* at 8–15.

fied alternative procedures as more appropriate: Only one attorney would meet with a detainee; a classification review would only be required of any communications about the meeting to another person, including the attorney's legal colleagues and staff.³³¹⁶

Judge Green later specified a slightly more relaxed standard of sharing for attorneys for other detainees: "counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients."³³¹⁷

Meetings with Clients for Petition Authorizations

When the government began to challenge the validity of fellow detainees as habeas petitioners' next friends, the district court observed that applicable protective orders granted detainees a right to meet directly with counsel, which would moot the need for next friends.³³¹⁸

One of Salim Muhood Adem's co-detainees was represented by counsel and suggested that Adem should obtain counsel as well.³³¹⁹ With the help of the co-detainee's attorney, volunteer counsel was found for Adem.³³²⁰ But the government prevented attorneys from meeting with Adem until Adem provided written authorization for the representation (by attorneys he had been unable to meet yet).³³²¹

On December 9, 2005, the attorneys filed a motion for contempt, arguing that the government was preventing them from meeting with Adem in order to thwart Adem's habeas petition.³³²² Judge Roberts referred the matter to Magistrate Judge Kay, who ordered the government to comply with the applicable protective order and permit counsel to visit Adem.³³²³ Judge Roberts affirmed Judge Kay's order,³³²⁴ and other judges affirmed similar orders by Judge Kay in their cases.³³²⁵ Adem was transferred to Sudan in 2007.³³²⁶

3316. *Id.* at 13–15.

3317. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004).

3318. *E.g.*, Oct. 6, 2006, Report and Recommendation, *supra* note 2873.

3319. Interview with Hon. Alan Kay, June 21, 2011.

3320. *Id.*

3321. *Id.*

3322. Contempt Motion, *Adem v. Bush*, No. 1:05-cv-723 (D.D.C. Dec. 9, 2005), D.E. 23.

3323. *Adem v. Bush*, 425 F. Supp. 2d 7, 26 (D.D.C. 2006); *see Fogler, supra* note 2839, at 116.

3324. Opinion, *Adem*, No. 1:05-cv-723 (D.D.C. Apr. 28, 2006), D.E. 42, *available at* 2006 WL 1193853; *see Fogler, supra* note 2839, at 116.

3325. Order, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. Aug. 7, 2006), D.E. 82 (Urbina), *available at* 2006 WL 2255736; Order, *Razakah v. Bush*, No. 1:05-cv-2370 (D.D.C. May 18, 2006), D.E. 23 (Sullivan); Docket Sheet, *Said v. Bush*, No. 1:05-cv-2384 (D.D.C. Dec. 13, 2005) (May 26, 2006, minute order by Judge Roberts).

3326. Transfer Notice, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69.

Habeas Corpus: Guantánamo Bay

On December 13, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of sixty-three detainees.³³²⁷ According to the Center's deputy legal director, "Having conducted as complete a factual inquiry as the circumstances have permitted to date, it is my good faith belief that, although they have been unable to provide *written* authorization, the following Petitioners in fact desire that the legal remedies available to them be pursued."³³²⁸ Among the sixty-three detainees listed was Houmad Warzly.³³²⁹

On December 13, 2006, a Sami al-Hajj of Guantánamo Bay signed a statement that he wished to act as next friend on behalf of apparently twenty-two detainees.³³³⁰ One of the detainees listed was Hamoud Abdullah Hamoud Hassan al-Wady.³³³¹ The signed statement bears a fax date of January 15, 2007, and it was filed as a pro se habeas petition on July 17, 2008, with the other twenty-one names redacted.³³³²

On August 1, the government notified the court that Warzly and al-Wady were the same detainee.³³³³ Judge Urbina, therefore, dismissed the action under the Warzly name.³³³⁴ In December 2008, appointed counsel traveled to Guantánamo Bay to meet with the detainee, but authorities there said that he did not

3327. Petition, *Al-Halmandy v. Bush*, No. 1:05-cv-2385 (D.D.C. Dec. 13, 2005), D.E. 1 [hereinafter *Al-Halmandy* Petition].

On July 29, 2008, Judge Hogan dismissed without prejudice all but seven of the petitioners from this case. Order, *id.* (July 29, 2008), D.E. 50.

3328. *Al-Halmandy* Petition, *supra* note 3327, Ex. A ¶ 15.

3329. *Id.*

3330. Petition, *Al-Wady v. Bush*, No. 1:08-cv-1237 (D.D.C. July 17, 2008), D.E. 1.

3331. *Id.*

3332. *Id.*; see *Al Wady v. Obama*, 623 F. Supp. 2d 20, 21 (D.D.C. 2009).

Filed the same day were five other pro se petitions that appear to be on behalf of detainees on the same list. Petition, *Balzuhair v. Bush*, No. 1:08-cv-1238 (D.D.C. July 17, 2008), D.E. 1; Petition, *Kuman v. Bush*, No. 1:08-cv-1235 (D.D.C. July 17, 2008), D.E. 2; Petition, *Salih v. Bush*, No. 1:08-cv-1234 (D.D.C. July 17, 2008), D.E. 1; Petition, *Bin Atef v. Bush*, No. 1:08-cv-1232 (D.D.C. July 17, 2008), D.E. 1; Petition, *Hadi v. Bush*, No. 1:08-cv-1228 (D.D.C. July 17, 2008), D.E. 1.

Also filed the same day were seven other pro se petitions that appear to be on behalf of detainees on three other lists also signed by al-Hajj on December 13, 2006, and faxed on January 15, 2007, apparently in the same fax. Petition, *Al-Sattar v. Bush*, No. 1:08-cv-1236 (D.D.C. July 17, 2008), D.E. 1 [hereinafter *Al-Sattar* Petition] (p.7 of fax apparently listing two detainees); Petition, *Al-Hamiri v. Bush*, No. 1:08-cv-1231 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Qattaa v. Bush*, No. 1:08-cv-1233 (D.D.C. July 17, 2008), D.E. 1 (p.16 of fax apparently listing thirty-six detainees); Petition, *Mohammed v. Bush*, No. 1:08-cv-1230 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Yakubi v. Bush*, No. 1:08-cv-1229 (D.D.C. July 17, 2008), D.E. 1 (p.14 of fax apparently listing thirty-four detainees); Petition, *Gul v. Bush*, No. 1:08-cv-1224 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Hafizullah v. Bush*, No. 1:08-cv-1227 (D.D.C. July 17, 2008), D.E. 1 (same).

A petition filed ten days earlier showed one of the faxed lists unredacted. Petition, *Obaydullah v. Bush*, No. 1:08-cv-1173 (D.D.C. July 7, 2008), D.E. 1 (p.14 of fax listing thirty-four detainees).

3333. Status Report, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 1, 2008), D.E. 7; see *Al Wady*, 623 F. Supp. 2d at 21 n.2.

3334. Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Feb. 23, 2009), D.E. 202; see *Al Wady*, 623 F. Supp. 2d at 21 n.2.

want to meet with them.³³³⁵ Magistrate Judge Kay granted the attorneys' motion that the government be required to arrange a meeting between the detainee and the attorneys with an interpreter.³³³⁶ Judge Walton issued a similar order in a case before him.³³³⁷

"[I]t is to the trial court's benefit that a non-governmental attorney provide confirmation beyond the assurances of guard personnel that a detainee's decision to refuse legal assistance and abandon a *habeas* petition filed on his behalf is voluntary and fully informed."³³³⁸

On May 14, 2009, appointed counsel—from the federal defender's office in the Central District of California—met with the detainee.³³³⁹ They came to understand that his correct name was Hamoud Abdullah Hamoud Hasan al-Waeli.³³⁴⁰ According to the attorneys, "During that visit, Mr. Al Waeli told us unequivocally that he authorized our continued representation of him in this case and that he wanted us to continue pursuing his release through habeas corpus relief or through any other means."³³⁴¹ But the attorneys

did not feel it was appropriate to ask Mr. Al Waeli to provide written authorization. Mr. Al Waeli has been incarcerated for more than seven years without meeting with anyone other than interrogators. Moreover, Mr. Al Waeli described a recent encounter during which interrogators falsely portrayed themselves as representatives of the Interagency Review Task Force. Given his experience, we were concerned about creating mistrust by demanding that he sign a form.³³⁴²

On September 9, 2010, Judge Urbina ordered the attorneys to submit a written authorization from the detainee for the action.³³⁴³ Al-Waeli refused to meet with his attorneys in August 2010 and January 2011, so the attorneys suggested that new counsel be appointed.³³⁴⁴ Efforts by the federal defender's office to provide al-Waeli with an attorney in whom al-Waeli had confidence continued until al-Waeli's transfer to Saudi Arabia in December 2013.³³⁴⁵

3335. *Al Wady*, 623 F. Supp. 2d at 22; Status Report at 2 n.1, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 27, 2010), D.E. 188 [hereinafter Aug. 27, 2010 *Al-Wady* Status Report].

3336. *Al Wady*, 623 F. Supp. 2d at 22.

3337. Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. May 12, 2009), D.E. 1206, available at 2009 WL 1312537 (denying reconsideration of the order pertaining to Jamil Ahmad Saeed); Order, *id.* (May 1, 2009), D.E. 1177 (granting an *ore tenus* motion for an expeditious, unobstructed, face-to-face visit).

3338. *Al Wady*, 623 F. Supp. 2d at 22.

3339. Notice of Authorization, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. May 22, 2009), D.E. 126 [hereinafter *Al-Wady* Notice of Authorization]; Aug. 27, 2010 *Al-Wady* Status Report, *supra* note 3335, at 2 n.1.

3340. *Al-Wady* Notice of Authorization, *supra* note 3339.

3341. *Id.*

3342. *Id.*

3343. Docket Sheet, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

3344. Response, *id.* (Jan. 11, 2011), D.E. 200.

3345. *Al-Wady* Transfer Notice, *supra* note 3244; Joint Status Report, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Sept. 27, 2013), D.E. 263.

Al-Hajj also submitted a next-friend petition on behalf of Muieen Adeen Jamal Adeen Abd al-Fusal Abd al-Sattar.³³⁴⁶ Judge Bates granted al-Sattar's attorney an order that she be permitted a face-to-face meeting with her client: the government "may transfer him to the designated meeting place without informing him of the purpose of the transfer."³³⁴⁷ As the date of the planned meeting approached, Judge Bates refined his order: "respondents shall inform petitioner of the following: 'You have a meeting with Ms. Cleary and [name of translator].'"³³⁴⁸ The effort to induce al-Sattar to attend the meeting by not telling him it would be a meeting with his attorney failed.³³⁴⁹ After five refusals by al-Sattar to meet with his attorney, Judge Bates dismissed the petition.³³⁵⁰

Judge Lamberth dismissed Idris Ahmad Abdu Qadir Idris's petition, originally filed with al-Hajj as next friend, on October 6, 2009, for failure to file a signed authorization.³³⁵¹ "By refusing to meet with counsel on at least five occasions, petitioner has unequivocally refused to authorize counsel to go forward with his case."³³⁵² Idris was included among the 158 detainees in the Center for Constitutional Rights' December 2005 petition, and Idris was among the eight detainees transferred from that case by Judge Walton to Judge Lamberth on April 21, 2009.³³⁵³ Judge Lamberth ruled further, "Without some evidence that petitioner suffers from a mental incapacity, the Court will not compel discovery into petitioner's competence, knowledge, and voluntariness."³³⁵⁴

Judge Lamberth stayed the habeas petition of Nadir Omar Abdullah Bin Sa'adoun Alsa'ary on representations that habeas counsel was making progress in establishing rapport with the detainee.³³⁵⁵

On October 22, 2009, Judge Urbina gave attorneys one last chance to get authorization from their putative client.³³⁵⁶ Judge Urbina observed that it was often difficult to determine whether a detainee did not want to pursue a petition, was too sick to meet with counsel to discuss it, or was just still undecided.³³⁵⁷ Rhode Island attorneys, in cooperation with the Center for Constitutional Rights, filed a

3346. *Al-Sattar* Petition, *supra* note 3332.

3347. Order, *Al-Sattar v. Obama*, No. 1:08-cv-1236 (D.D.C. Sept. 2, 2009), D.E. 140, *available at* 2009 WL 2899907.

3348. Order, *id.* (Sept. 18, 2009), D.E. 141 (quotation alteration in original), *available at* 2009 WL 3060319.

3349. Status Report, *id.* (Oct. 15, 2009), D.E. 142.

3350. Order, *id.* (Oct. 21, 2009), D.E. 146, *available at* 2009 WL 3416195.

3351. *Idris v. Obama*, 667 F. Supp. 2d 25 (2009).

3352. *Id.* at 28 (noting attempted visits by counsel in Guantánamo Bay in February, March, April, May, and June of 2009).

3353. *Id.* at 27 n.1; Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Apr. 21, 2009), D.E. 1153.

3354. *Idris*, 667 F. Supp. 2d at 28.

3355. Order, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Apr. 11, 2013), D.E. 1704; Order, *id.* (Jan. 17, 2013), D.E. 1681; Status Report, *id.* (June 16, 2013), D.E. 1733.

3356. *Noori v. Obama*, 664 F. Supp. 2d 116 (D.D.C. 2009).

3357. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

petition on behalf of Mullah Norullah Noori on October 24, 2008, with al-Hajj listed as next friend.³³⁵⁸ Noori, a Taliban official, was captured in Afghanistan in 2001.³³⁵⁹ On March 16, 2009, the attorneys attempted to meet with Noori in Guantánamo Bay, but he refused to see them.³³⁶⁰ By the time of Judge Urbina's order, the attorneys had not attempted a second visit, but they had attempted to send Noori letters and they had dispatched an investigator to Afghanistan to attempt to locate family members.³³⁶¹ Judge Urbina gave the attorneys thirty days to secure authorization for the petition.³³⁶² The attorneys met with Noori on November 23, 2009, and Noori declined to authorize the representation,³³⁶³ so Judge Urbina dismissed the action on February 18, 2010.³³⁶⁴ Noori was transferred to Qatar on May 31, 2014, as part of a deal to free an American soldier from the Taliban.³³⁶⁵

In 2011, Judges Walton³³⁶⁶ and Collyer³³⁶⁷ granted motions to dismiss without prejudice petitions on behalf of detainees whose attorneys were never successful in meeting them. Judge Walton's detainee was transferred to Yemen in 2006.³³⁶⁸

Suicides' Notes

On June 10, 2006, three detainees were found dead in their cells, having apparently bound and hanged themselves with torn bed sheets and clothes.³³⁶⁹ These were

3358. *Noori*, 664 F. Supp. 2d at 117; Petition, *Noori v. Bush*, No. 1:08-cv-1828 (D.D.C. Oct. 24, 2008), D.E. 1; see Katie Mulvaney, *Their Reluctant Defendant Is a Detainee*, Providence J. Bull., June 3, 2009, at 1.

3359. See Mulvaney, *supra* note 3358.

3360. *Noori*, 664 F. Supp. 2d at 117 n.3; Petitioner's Response, *Noori*, No. 1:08-cv-1828 (D.D.C. Mar. 31, 2009), D.E. 42.

3361. *Noori*, 664 F. Supp. 2d at 118 n.4; see Mulvaney, *supra* note 3358.

3362. *Noori*, 664 F. Supp. 2d at 117, 120.

3363. Status Report, *Noori*, No. 1:08-cv-1828 (D.D.C. Nov. 24, 2009), D.E. 85.

3364. Order, *id.* (Feb. 18, 2010), D.E. 88.

3365. See Entous & Barnes, *supra* note 3252; Londoño, *supra* note 3252; Rosenberg & Seibel, *supra* note 3252; Schmitt & Savage, *supra* note 3252.

3366. *Al-Jayfi* Docket Sheet, *supra* note 2885 (noting a dismissal on September 1, 2011); see Motion, *Al-Jayfi v. Bush*, No. 1:05-cv-2104 (D.D.C. July 7, 2011), D.E. 383.

3367. Docket Sheet, *Suleiman v. Obama*, No. 1:10-cv-1411 (D.D.C. Aug. 19, 2010) (noting a dismissal on September 16, 2011); see Joint Notice, *id.* (July 5, 2011), D.E. 24 ("Petitioner's counsel was unable to learn anything regarding Petitioner's wishes with respect to this case during counsel's visit to Guantánamo Bay on June 22 and 23, 2011, because Petitioner declined to meet with counsel.").

3368. Notice, *Al-Jayfi*, No. 1:05-cv-2104 (D.D.C. Dec. 20, 2006), D.E. 35 (Issam Hamid Ali Bin Ali al-Jayfi).

3369. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 105–07 (D.D.C. 2010); *Hicks v. Bush*, 452 F. Supp. 2d 88, 94–95 (D.D.C. 2006); *Boumediene v. Bush*, 450 F. Supp. 2d 25, 28 (D.D.C. 2006); see James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantánamo*, N.Y. Times, June 11, 2006, at 11; Charlie Savage, *As Acts of War or Despair, Suicides Rattle a Prison*, N.Y. Times, Apr. 25, 2011, at A13; Josh White, *Signs of Detainees' Planning Alleged*, Wash. Post, July 8, 2006, at A1. But see Scott Horton, *The Guantánamo "Suicides"*, Harper's, Mar. 2010, at 27 (reporting on "evidence that suggests the current administration failed to investigate seriously—and may even have continued—a cover-up of the possible homicides of three prisoners at Guantánamo in 2006"); Scott

the first Guantánamo Bay detainee deaths.³³⁷⁰ The Naval Criminal Investigative Service discovered in the cells of the deceased detainees, and others on the same block, notes related to the suicides that were marked as attorney–client privileged material.³³⁷¹ Although the government maintained that the courts had no jurisdiction over detainees’ habeas petitions, it asked the court to issue orders authorizing review of the potentially privileged material.³³⁷²

Judge Leon, whose decision that the court did not have jurisdiction over the habeas petitions was on appeal, decided that he did not have jurisdiction to offer the government the protection it sought.³³⁷³ “[T]here is nothing about the circumstances of this situation that would or will prevent this, or another court at a later time, from ensuring that any information learned by the Government’s reviewers is never used by the Government against any detainee in the future.”³³⁷⁴

Judge Robertson, to whom the matter had been referred by nine other judges,³³⁷⁵ decided, “my idea of prudence is to give the government the guidance it seeks. If jurisdiction has been improperly asserted, the Court of Appeals will correct the error. If I do have jurisdiction, both sides will be better off having received judicial guidance sooner rather than later.”³³⁷⁶ Judge Robertson approved a plan calling “for the use of a ‘Filter Team,’ walled off from government investiga-

Horton, *The Guantánamo “Suicides,” Revisited*, Harper’s, June 2014, at 66 (reporting that new evidence supported the author’s theory that the deaths resulted from harsh interrogation techniques); Khan, *supra* note 2888, at 160–63, 230, 234, 297 (reporting that one deceased detainee’s repatriated body was missing organs, including organs in the throat, that would have provided evidence of the cause of his death); Alexander Nazaryan, *You’re Doing It Wrong If They Die*, Newsweek, Jan. 23, 2015, at 22. (suggesting that the deaths followed failed informant agreements).

The court of appeals affirmed Judge Huvelle’s dismissal of a tort action by two of the detainees’ survivors as beyond the court’s jurisdiction. *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012) (action by survivors of Yasser al-Zahrani and Salah Ali Abdullah Ahmed al-Salami), *affirming Al-Zahrani*, 684 F. Supp. 2d 103; *see Guantánamo Suicide Suit Disallowed*, N.Y. Times, Feb. 22, 2012, at A16.

3370. *See Savage*, *supra* note 3369.

3371. *Boumediene v. Bush*, 450 F. Supp. 2d 25, 29 (D.D.C. 2006); *see Kamins*, *supra* note 2736, at 320; *White*, *supra* note 3369.

3372. *Hicks v. Bush*, 452 F. Supp. 2d 88, 98 (D.D.C. 2006); *Boumediene*, 450 F. Supp. 2d at 27–28.

A habeas attorney reported that the military was “looking for evidence, in part, that lawyers had something to do with facilitating the suicides.” Falkoff, *supra* note 2816, at 163. *Compare* Cucullu, *supra* note 2754, at 101 (speculating that “the attorneys apparently began to coach detainees in hunger strike techniques”), *and id.* at 180–86, 200, *with* Patricia M. Wald, *Forward* to Fletcher & Stover, *supra* note 2736, at xi, xii–xiv (2009) (“Hunger strikes and suicide attempts (labeled ‘manipulative self-injurious behavior’) became the only recourse of detainees until lawyers finally appeared on the scene and courts intervened.”).

3373. *Boumediene*, 450 F. Supp. 2d at 28, 31–34 (resolving the motion in thirteen cases).

3374. *Id.* at 33.

3375. *Hicks*, 452 F. Supp. 2d at 94 n.2 (noting referrals by Judges Bates, Collyer, Friedman, Kennedy, Kollar-Kotelly, Roberts, Sullivan, Urbina, and Walton).

3376. *Id.* at 99.

tors and prosecutors, that would review the seized materials and set aside anything arguably protected by the attorney–client privilege.”³³⁷⁷

Classified Detainee Statements and the Privilege Review Team

When Judge Hogan accepted coordination and management of the habeas petitions in 2008, he issued a protective order specifying that the detainees’ attorneys must regard any information they received from their clients as classified until a privilege review team determined otherwise.³³⁷⁸

“Privilege team” means a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.³³⁷⁹

Attorneys are prohibited from sharing classified information with their clients (1) unless the information was provided by the detainee or (2) they receive permission from the government.³³⁸⁰ The privilege review team reviews attorney–client communications and work product to determine if they include classified information.³³⁸¹

An attorney for Tariq Mahmoud Alswam, who filed his petition on June 22, 2005,³³⁸² submitted statements made by the detainee included in the government’s classified return to the privilege review team to determine what she could share with her client on her next visit.³³⁸³ The privilege team determined which statements clearly originated from the detainee and gave the attorney permission to discuss those statements with her client.³³⁸⁴ The government, however, asserted that according to the protective order, “while counsel may discuss with a petitioner–detainee information provided by that petitioner–detainee in communications with counsel, counsel may not disclose classified information that originated in classified Government documents to the petitioner–detainee, even if those classified documents contain petitioner–detainee’s own statements.”³³⁸⁵

Judge Hogan ruled against the government and granted the attorney permission to “review [the petitioner’s statements] with Petitioner, provided that the

3377. *Id.* at 94 (resolving the motion in 100 cases).

3378. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 163 (D.D.C. 2008) (¶ II.I.29).

3379. *Id.* at 156 (¶ II.B.6); see Cucullu, *supra* note 2754, at 198.

3380. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 150 (¶ I.D.29).

3381. Interview with Dep’t of Justice Litig. Sec. Group Staff, July 28, 2011; see Gorman, *supra* note 2851, at 11; David H. Remes, *Negotiating the Protective Order*, in *The Guantánamo Lawyers*, *supra* note 2737, at 109, 110 (noting that the privilege review team was bound to keep the communications confidential).

3382. *Petition, Alswam v. Bush*, No. 1:05-cv-1244 (June 22, 2005), D.E. 1.

3383. Motion at 2–3, *id.* (Jan. 6, 2009), D.E. 100.

3384. *Id.* at 3.

3385. Government Opposition at 6, *id.* (Jan. 13, 2009), D.E. 105.

Privilege Review Team determines that [the statements] contain[] only statements made by Petitioner to agents of the United States government, and contain[] no information other than Petitioner's statements, Petitioner's name, and the date the statements were made."³³⁸⁶

In one of the cases before her, Judge Kessler determined that "any classified statements that the Government relies on and alleges were made by the Petitioner may be shared with the Petitioner by counsel, provided that the Privilege Review Team determines that such statements were made by Petitioner to agents of the United States Government."³³⁸⁷

Shortly after the detainee had been released to the United Kingdom,³³⁸⁸ the Privilege Review Team brought to the attention of the court allegedly unprofessional actions by habeas attorneys for Benjamin Mohammed al-Habashi after the *Guardian* reported that Defense Department officials were withholding from President Obama evidence that Binyam Mohamed—apparently a more common version of al-Habashi's name—had been tortured.³³⁸⁹ The *Guardian* article was apparently based, in part, on a letter the attorneys wrote to the President concerning the alleged torture, attached to which was an apparent memo concerning the matter from one of the attorneys.³³⁹⁰ The intended recipient of the memo and all of its contents were redacted.³³⁹¹ The letter states that it and the attached memo were also submitted to the review team with a request that the team either declassify the redacted material or forward the redacted material to the President under secure conditions.³³⁹² It is not clear whether the review team ever had access to the information redacted from the memo, but the team objected to the implication that it was withholding information from the President.³³⁹³ The review team argued that its purview did not include screening letters to the President or declassifying information classified by other entities; it was created "for

3386. Order, *id.* (Jan. 15, 2009), D.E. 109.

3387. Order, *Ahmed v. Obama*, No. 1:05-cv-1678 (D.D.C. Feb. 12, 2009), D.E. 151, *available at* 2009 WL 377065.

3388. Transfer Notice, *Al-Habashi v. Obama*, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009), D.E. 134; *see Lee, supra* note 3078 ("He's now free in Britain, where he has mounted a public campaign to have the British officers he claims were complicit in his torture held accountable.").

3389. Privilege Review Team's Report, *Ben Bacha v. Obama*, No. 1:05-cv-2349 (Feb. 26, 2009), D.E. 115 (filed initially in the wrong case, where Binyam Mohammed had been identified as a next friend), *also filed in Al-Habashi*, No. 1:05-cv-765 (D.D.C. Mar. 5, 2009), D.E. 137; *see Bin Mohammed v. Obama*, 689 F. Supp. 2d 38, 57–61 (D.D.C. 2009) (describing Mohamed's accounts of torture as a basis for excluding evidence obtained from him against another detainee); *see also Omonira-Oyekanmi & Finn, supra* note 2751 (reporting on a British damages settlement paid to Mohamed); *infra* "Torture Flights" (discussing a civil action by Mohamed against a company that allegedly provided transportation services for extraordinary rendition).

3390. Privilege Review Team's Report, *supra* note 3389, Ex. A; *see also* Stafford Smith, *supra* note 2737, at 49–80 (account by Mohamed's attorney of Mohamed's detention experiences).

3391. Privilege Review Team's Report, *supra* note 3389, Ex. A.

3392. *Id.*

3393. Privilege Review Team's Report, *supra* note 3389.

the limited purpose of reviewing privileged communications between detainees and their counsel.”³³⁹⁴ Judge Sullivan addressed the matter in sealed filings.³³⁹⁵

An attorney for Ismail Mohamed, detained at Guantánamo Bay since 2007, identified twenty-one statements by the detainee that the government was relying on in its factual return to justify his detention.³³⁹⁶ The attorney sought declassification of the statements so that she could discuss them with her client during a planned June 12, 2009, meeting, but as the meeting date approached the government had provided her with only seven.³³⁹⁷ Judge Roberts declined to order that all statements be provided to the detainee for the scheduled meeting, because the attorney “did not follow [procedures] establishing the method to request access for a petitioner to material before a visit from counsel”³³⁹⁸ and because the seven statements already provided ensured that the planned meeting would not be fruitless.³³⁹⁹ Judge Roberts noted, however, that

the respondent may not justify Mohamed’s detention with statements of Mohamed’s that he has not had a meaningful opportunity to discuss with his counsel. If the respondent were to choose not to divulge these statements to Mohamed, the respondent presumably would have to seek leave to file a new amended factual return that does not rely upon the undisclosed statements.³⁴⁰⁰

Judge Roberts also determined that, despite the government’s wishes to the contrary, the detainee would be entitled to have copies of the statements available to review after the meeting with the attorney.³⁴⁰¹ Mohamed was released to Somaliland by December 22, 2009.³⁴⁰²

Coordination with Military Defense Attorneys

Judge Kollar-Kotelly was presented with a request by habeas attorneys to share what they knew with military defense attorneys for two detainees who had been referred to military commissions.³⁴⁰³ The government denied the defense attorneys access to classified information that it had shared with habeas attorneys.³⁴⁰⁴ Judge Kollar-Kotelly determined that she did not have jurisdiction over the matters concerning the defense attorneys unless they made appearances in the habeas

3394. *Id.* at 3.

3395. Docket Sheet, *Al-Habashi v. Bush*, No. 1:05-cv-765 (Apr. 15, 2005).

3396. *Mohamed v. Gates*, 624 F. Supp. 2d 40, 42 (D.D.C. 2009).

3397. *Id.*

3398. *Id.* at 41.

3399. *Id.* at 43–44.

3400. *Id.* at 44.

3401. *Id.* (“the respondent’s assertion that national security interests would not be imperiled if petitioner and counsel discuss petitioner’s statements, yet would somehow be jeopardized if petitioner keeps paper copies of his own statements, is unpersuasive”).

3402. Transfer Notice, *Mohamed v. Gates*, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009), D.E. 92.

3403. *Al Odah v. United States*, 608 F. Supp. 2d 46, 48 (D.D.C. 2009).

3404. *Id.*

cases, and her response to representations that they were not sure that they were authorized to do so was that they should try first.³⁴⁰⁵

Attorney Contacts After Voluntary Habeas Dismissals

In 2012, the government adopted a policy respecting detainees' ability to voluntarily dismiss their habeas petitions while retaining access to counsel: The government decided that it would permit post-dismissal contacts as a matter of discretion, but it would oppose court-ordered contacts.³⁴⁰⁶ On September 6, 2012, Judge Lamberth overruled the government's position that only detainees with pending or imminent habeas petitions had a right to counsel:

The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme.³⁴⁰⁷

Appeals were dismissed voluntarily on December 14.³⁴⁰⁸

The government withheld petitioners' legal mail pending resolution of the counsel access issue "without notifying the Court or petitioners' counsel or moving for a stay pending appeal after [Judge Lamberth's] decision."³⁴⁰⁹ After the government withdrew its appeal, it apparently mistakenly withheld a piece of one detainee's legal mail a few weeks too long.³⁴¹⁰ Judge Lamberth declined to order a

3405. *Id.* at 48–50.

3406. Government Opposition Brief at 8–9, *Al-Mithali v. Obama*, No. 1:05-cv-2186 (D.D.C. Apr. 30, 2012), D.E. 281; Government Opposition Brief at 7–9, *Al-Mudafari v. Obama*, No. 1:05-cv-2185 (D.D.C. Apr. 30, 2012), D.E. 280; Status Report at 2–3 & n.1, *Abu Ghanem v. Obama*, No. 1:05-cv-1638 (D.D.C. Apr. 30, 2012), D.E. 260; see Mike Scarcella, *Justices' Gitmo Gamble*, *Legal Times*, Aug. 6, 2012, at 23.

3407. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 28 (D.D.C. 2012); see Michael Doyle, *Judge Rejects New Limits on Attorneys*, *Miami Herald*, Sept. 7, 2012, at 3A; Charlie Savage, *Judge Rejects New Rules on Access to Prisoners*, *N.Y. Times*, Sept. 7, 2012, at A20; Mike Scarcella, *Slapped Down*, *Nat'l L.J.*, Sept. 10, 2012, at 23; Del Quentin Wilber, *Judge Says U.S. Can't Block Lawyer Access to Detainees*, *Wash. Post*, Sept. 7, 2012, at A3.

3408. Voluntary Dismissals, Nos. 12-5350, 12-5351, 12-5353, 12-5354, and 12-5356 (D.C. Cir. Jan. 11, 2013); *Al-Zarnouqi v. Obama*, 964 F. Supp. 3d 1, 2 (D.D.C. 2013).

3409. *Al-Zarnouqi*, 964 F. Supp. 3d at 3 (emphasis omitted).

3410. *Id.* at 2.

sanction hearing, but he did order a complete accounting of how all unsuccessful detainees' legal mail had been handled.³⁴¹¹

Following Judge Lamberth's assurances that petitioners' access to counsel could be preserved, fifteen habeas petitions were voluntarily dismissed without prejudice from 2012 through 2015.³⁴¹²

Arduous Visits with Counsel

On July 11, 2013, Judge Lamberth ruled that the government was improperly interfering with detainees' access to counsel by making counsel visits, and even telephone calls to counsel, excessively arduous.³⁴¹³ (1) Judge Lamberth found that it was not necessary for the government to always transport detainees to another camp for counsel visits, and Judge Lamberth ordered the government to work with counsel to develop a protocol for allocating local visits fairly, giving priority to hunger strikers and other detainees with medical needs.³⁴¹⁴ (2) In order to provide detainees with air-conditioned transport, the government had brought in new transportation vans, but the vans' overhead air-conditioning equipment prevented detainees from sitting upright during the trip, resulting in a forced stress position.³⁴¹⁵ Judge Lamberth ordered use of the old vans while the new vans were being modified to afford sitting transportation.³⁴¹⁶ (3) Judge Lamberth ordered the government to replace new, invasive search procedures, which typically occur four times during transportation to and from meetings with counsel, and in which "the guard will search the detainee's groin area by placing the guard's hand as a wedge between the detainee's scrotum and thigh and using a flat hand to press against the groin to detect anything foreign attached to the body," in addition to frisking the detainee's buttocks, with a customary "modified search procedure whereby a guard would grasp the waistband of a detainee's trousers and shake the detainee's pants in order to dislodge any contraband."³⁴¹⁷

3411. *Id.* at 3–4; see Mike Scarcella, *Government Credibility Threatened*, Nat'l L.J., May 13, 2013, at 20.

3412. Aamer Stipulated Dismissal, *Gherebi* Stipulated Dismissal, Ba Odah Voluntary Dismissal, *Abdulrazzaq* Stipulated Dismissal, Hidar Stipulated Dismissal, *Bin Attash* Stipulated Dismissal, Hidar Stipulated Dismissal, *Zaid* Stipulated Dismissal, *Bin Lep* Stipulated Dismissal, *Nasser* Stipulated Dismissal, *Al-Shubati* Stipulated Dismissal, *Al-Marwalah* Stipulated Dismissal, *Al-Swidi* Stipulated Dismissal, *Mahdi* Stipulated Dismissal, *Al-Shimrani* Stipulated Dismissal, *Abdulayev* Stipulated Dismissal, and *Al-Bakush* Voluntary Dismissal, *supra* note 2890.

3413. *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40 (D.D.C. 2013); Order, *In re Guantanamo Bay Detainee Continued Access to Counsel*, No. 1:12-mc-398 (D.D.C. July 11, 2013), D.E. 46; see Charlie Savage, *Judge Orders Halt to Groin Searches at Guantánamo, Citing Offense to Muslims*, N.Y. Times, July 12, 2013, at A13; Julie Tate, *Judge Forbids Genital Searches of Guantanamo Inmates Before Legal Meetings*, Wash. Post, July 12, 2013, at A5.

3414. *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d at 59–61.

3415. *Id.* at 46–47.

3416. *Id.* at 61–62.

3417. *Id.* at 46, 53–59 (quotation marks omitted).

On July 17, the court of appeals stayed Judge Lamberth's order.³⁴¹⁸ A little over one year later, on August 1, 2014, the court of appeals concluded that the search procedures were reasonable security precautions.³⁴¹⁹ Noting that "[s]tandard protocol in military prisons calls for a non-invasive search of the genital area of a prisoner," the court observed that security concerns at Guantánamo Bay "escalated with the suicide of a detainee who took an overdose of medication that he had smuggled into his cell and the discovery of shanks, a wrench, and other weapons in the housing camps that had evaded . . . searches."³⁴²⁰ The court concluded that the search procedures "promote the safety of the guards and inmates by more effectively preventing the hoarding of medication and the smuggling of dangerous contraband."³⁴²¹

Challenge: Classified Evidence

Because of the extensive amount of classified information in these cases, Chief Judge Lamberth worked with the Justice Department to double the number of classified information security officers in the Department's Litigation Security Group.³⁴²² The court decided to apply to these cases the security principles of the Classified Information Procedures Act (CIPA),³⁴²³ which technically applies only to criminal cases.³⁴²⁴

The Secure Facility

The Litigation Security Group's classified information security officers set up a secure facility in Crystal City, which is in Arlington, Virginia, for habeas attorneys to view, discuss, and work on classified information concerning their clients' cases.³⁴²⁵ The suite of rooms includes office space, cubicle space, and safes for storing classified information.³⁴²⁶ With the exception of a few cases involving high-value detainees, all of the classified information to which the petitioners' attorneys were given access is classified as secret.³⁴²⁷

Attorneys are not permitted to bring back to their offices notes taken during their meetings with their clients, because the notes are presumptively classified

3418. Order, *Hatim v. Obama*, No. 13-5218 (D.C. Cir. July 17, 2013); *Hatim v. Obama*, 760 F.3d 54, 57 (D.C. Cir. 2014).

3419. *Hatim*, 760 F.3d 54.

3420. *Id.* at 56.

3421. *Id.* at 61.

3422. Interview with Hon. Royce C. Lamberth, May 13, 2011; see Reagan, *supra* note 3306, at 21–22 (describing the Litigation Security Group).

3423. 18 U.S.C. app. 3 (2013).

3424. Interview with Hon. Royce C. Lamberth, May 13, 2011; see Reagan, *supra* note 3306 (discussing CIPA).

3425. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; see Gorman, *supra* note 2851, at 11, 15; Remes, *supra* note 3381, at 110; Ruben, *supra* note 2749, at 15; Sullivan, *supra* note 3309, at 43; Wax, *supra* note 2737, at 118.

3426. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3427. *Id.*

until they have been reviewed.³⁴²⁸ Attorneys find reviewed notes waiting for them at the secure facility.³⁴²⁹ Documents containing no classified information and unclassified redacted versions of documents can be faxed to the attorneys' remote offices.³⁴³⁰

The secure facility is staffed by cleared contract personnel under the supervision of the Litigation Security Group.³⁴³¹ Originally, the facility operated according to business hours, but when litigation became heavy, it began to operate twenty-four hours a day.³⁴³² Cleared habeas attorneys wishing to work on classified materials in their cases could show up at will, and office space was available on a first-come, first-served basis.³⁴³³ Computers are available for their use; separate hard drives for each case are stored in the safes.³⁴³⁴ Now that Guantánamo Bay habeas litigation is not as heavy, the secure facility's hours are business hours again, including weekend hours, and earlier or later on request.³⁴³⁵

Some information pertaining to high-value detainees is designated sensitive compartmented information (SCI).³⁴³⁶ Access to SCI requires a higher security clearance, and storage requirements for SCI are more stringent. SCI must be stored in a sensitive compartmented information facility (SCIF).³⁴³⁷ The secure facility now includes a SCIF.³⁴³⁸

Factual Returns

Following the Supreme Court's decision in *Rasul v. Bush*³⁴³⁹ that the courts have jurisdiction over Guantánamo Bay detainees' habeas petitions, the government began to submit factual returns based on CSRT designations of the detainees as enemy combatants.³⁴⁴⁰ The government designated some return information for

3428. *Id.*; see Joshua Colangelo-Bryan, *Habeas on the Gate, Part I*, in *The Guantánamo Lawyers*, *supra* note 2737, at 59, 63; Remes, *supra* note 3381, at 110.

3429. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; see Colangelo-Bryan, *supra* note 3428, at 63; Matthew O'Hara, *I Love Cowboys*, in *The Guantánamo Lawyers*, *supra* note 2737, at 119, 123; Remes, *supra* note 3381, at 110.

3430. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; see Patricia A. Bron-
te, *Classified Art*, in *The Guantánamo Lawyers*, *supra* note 2737, at 111, 111.

3431. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3432. *Id.*

3433. *Id.*

3434. *Id.*

3435. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 21, 2015 (noting that hours returned to business hours in October 2013).

3436. *Id.*, July 28, 2011; see Reagan, *supra* note 3306, at 3 (describing sensitive compartmented information).

3437. See Reagan, *supra* note 3306, at 22–23 (describing SCIFs).

3438. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3439. 542 U.S. 466 (2004).

3440. Returns, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. Oct. 13 to Nov. 3, 2004), D.E. 27 to 30, 41, 42 (six detainees); Returns, *Begg v. Bush*, No. 1:04-cv-1137 (D.D.C. Oct. 25 and Nov. 3, 2004), D.E. 34, 46 (two detainees); Returns, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Oct. 21 and Nov. 3, 2004), D.E. 53, 54, 67 (three detainees); Returns, *Al-Odah v. Bush*, No. 1:02-cv-828 (D.D.C. Sept. 17 to Nov. 3, 2004), D.E. 85, 86, 92, 94, 104, 108 to 111, 113, 124, 133 (twelve detain-

the court's eyes only and some information as for attorney and court eyes only.³⁴⁴¹ Habeas attorneys were permitted to see some classified information, but they were not permitted to share it with their clients, and some classified information was shared only with the court.³⁴⁴²

On November 8, 2004, at which time eleven cases were pending before her, Judge Green issued a protective order specifying how habeas attorneys who had obtained security clearances would be given access to classified information.³⁴⁴³ At the end of the following January, Judge Green ruled that attorneys with security clearance must be given access to all classified information in the returns, overruling the government's designation of some of it as for the court's eyes only.³⁴⁴⁴

The court of appeals, on March 6, 2009, determined that the government could be required to disclose to habeas counsel only classified information that was helpful to the petitioners' cases,³⁴⁴⁵ and that the government must be permitted to suggest unclassified substitutions for the classified information.³⁴⁴⁶ The district judges reviewed the original classified evidence and proposed substitutions—either unclassified or classified at a lower level—and decided individually whether the substitutions were adequate and what to do about the evidence if the substitutions were not.³⁴⁴⁷

Judge Green's January 31, 2005, order also approved of the government's designation of some of the unclassified information in the returns as protected,

ees); Returns, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Oct. 12 to Nov. 1, 2004), D.E. 31, 32, 38, 39, 41, 45 (six detainees); Returns, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. Oct. 1 to 21, 2004), D.E. 19, 20, 24, 30 to 35, 38, 42, 45 (thirteen detainees; an additional detainee could not be found at Guantánamo Bay by the government); Return, *Khalid v. Bush*, No. 1:04-cv-1142 (D.D.C. Oct. 18, 2004), D.E. 31 (one detainee); Return, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. Oct. 18, 2004), D.E. 25 (one detainee); Returns, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. Sept. 17 to Oct. 14, 2004), D.E. 15, 23, 27 to 34, 39 to 42 (fourteen detainees, additional detainee omitted from amended petition); Return, *Gherebi v. Bush*, No. 1:04-cv-1164 (D.D.C. Oct. 6, 2004), D.E. 30 (one detainee); Return, *Khadr v. Bush*, No. 1:04-cv-1136 (D.D.C. Sept. 15, 2004), D.E. 22 (one detainee); Return, *Habib v. Bush*, No. 1:02-cv-1130 (D.D.C. Oct. 6, 2004), D.E. 32 (one detainee); Return, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Oct. 6, 2004), D.E. 83 (return for Hicks only, because *Rasul* and *Iqbal* had already been released); see Status Report, *id.* (Oct. 22, 2004), D.E. 94 [hereinafter Oct. 22, 2004, Status Report]; Order, *Khalid*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004), D.E. 21 (dismissing two petitioners who had been sent to France for prosecution); see also *Al Odah v. United States*, 559 F.3d 539, 542 (D.C. Cir. 2009).

3441. *Al Odah*, 559 F.3d at 543; Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Oct. 29, 2004), D.E. 99 (ordering the government to present complete returns to the court for examination by the judge and her cleared staff); Oct. 22, 2004, Status Report, *supra* note 3440.

3442. Notice, *Rasul*, No. 1:02-cv-299 (D.D.C. Nov. 5, 2004), D.E. 109.

3443. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

An additional case had been filed the previous week. *Belmar* Docket Sheet, *supra* note 2808.

3444. Jan. 31, 2005, Attorney Access Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Jan. 31, 2005), D.E. 155.

3445. *Al Odah*, 559 F.3d at 544.

3446. *Id.* at 547.

3447. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

which meant that it was shared with habeas attorneys under seal.³⁴⁴⁸ The habeas attorneys did not object to this designation.³⁴⁴⁹

In one of Judge Kollar-Kotelly's cases, counsel for the petitioners asked her to order the government to either declassify the classified portions of the returns or provide adequate summaries that the attorneys could share with their clients.³⁴⁵⁰ Because the government failed to respond to the motion, Judge Kollar-Kotelly dismissed one of its attorneys.³⁴⁵¹ She deferred consideration of whether the government should be able to rely on any information in the returns that the attorneys could not share with their clients.³⁴⁵²

In 2009, the government sought to designate all of the unclassified information in a large number of factual returns as protected, in part because the versions of the returns designated unclassified had inadvertently included classified information in some cases.³⁴⁵³ Judge Hogan determined that this would violate the public's First Amendment and common-law right of access to the court's files, and he gave the government four weeks to designate with precision what information in the returns had to be protected.³⁴⁵⁴

Judge Friedman observed that returns and traverses were only the beginning of documentary evidence relating to the merits; they were typically supplemented with substantial subsequent filings.³⁴⁵⁵

For the habeas petition by Wali Mohammed Morafa, the government submitted to Judge Collyer *ex parte* evidence relating to recently identified documents.³⁴⁵⁶ The government provided Morafa's attorneys with what the government characterized as "robust substitutes for substantial portions of the *ex parte* information at issue" and argued that "those substitutes provide counsel with sufficient information to ensure Petitioner receives meaningful habeas review."³⁴⁵⁷ The new evidence was classified as top secret, but Morafa's attorneys were cleared

3448. Jan. 31, 2005, Attorney Access Order, *supra* note 3444.

3449. *Id.* at 2.

3450. *Al Odah v. United States*, 608 F. Supp. 2d 42, 43 (D.D.C. 2009).

3451. *Id.*; Order at 7–8, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Feb. 13, 2009), D.E. 474, available at 2009 WL 382098 ("The Court has lost confidence in Respondents' current counsel, and the Court does not view his representations as credible.")

The government's motion to reconsider the attorney's dismissal was denied. *Al Odah v. United States*, 606 F. Supp. 2d 141 (D.D.C. 2009) ("Respondents' Motion is based on a shockingly revisionist version of the events that transpired . . .").

3452. *Al Odah*, 608 F. Supp. 2d at 44–46.

3453. *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 3–4 (D.D.C. 2009); *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 29–30 (D.D.C. 2009).

3454. *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d at 7–8; *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d at 34.

3455. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3456. *Mousovi v. Obama*, 916 F. Supp. 2d 67, 69 (D.D.C. 2013); Morafa Order at 1, *Mousovi v. Obama*, No. 1:05-cv-1124 (D.D.C. Sept. 28, 2011), D.E. 343; Government Morafa Response at 1–3, *id.* (Jan. 21, 2011), D.E. 320; Notice, *id.* (Oct. 22, 2010), D.E. 317.

3457. Government Morafa Response, *supra* note 3456, at 2; see Morafa Order, *supra* note 3456, at 6.

only to see secret information.³⁴⁵⁸ Judge Collyer determined that the ex parte evidence was inculpatory.³⁴⁵⁹ She ordered the government to establish the adequacy of its substitutions.³⁴⁶⁰

On January 9, 2013, Judge Collyer determined that the secret substitution withheld from the detainee's attorneys top secret source information imposed a minor detrimental impact on Mr. Morafa's ability to contest the basis for his detention. However, the Court concludes that the incremental value to the Court of considering that evidence, in tandem with the exceptionally grave damage to the national security that could result from the unauthorized disclosure of Top Secret information outweighs the marginal impact of withholding the information in question.³⁴⁶¹

The government, therefore, could "rely on Top Secret source-identifying information for which there is no adequate substitute and that cannot be released to Petitioner's counsel, even if it might assist his petition."³⁴⁶²

CSRT Appeals

In 2006, detainees began to file appeals of their CSRT enemy combatant designations. Although they were not permitted access to counsel in the CSRT proceedings, and they were not granted access to classified evidence against them, their appellate attorneys were given access to complete CSRT records, including the classified evidence.³⁴⁶³

Internment Serial Numbers

The government assigned to each detainee an internment serial number (ISN).³⁴⁶⁴ For example, David Hicks was 002, Huzaifa Parhat was 320, and Omar Khadr was 766.³⁴⁶⁵ Originally, ISNs were classified as secret.³⁴⁶⁶ After a time, they became regarded as protected, which meant that they were afforded confidentiality approximately equivalent to Social Security numbers, but they are no longer classified or protected.³⁴⁶⁷

3458. *Mousovi*, 916 F. Supp. 2d at 70.

3459. Morafa Order, *supra* note 3456, at 6.

3460. *Id.* at 7–8.

3461. *Mousovi*, 916 F. Supp. 2d at 74 (citation, footnote, and quotation marks omitted).

3462. *Id.* at 68–69.

3463. *Parhat v. Gates*, 532 F.3d 834, 840 (D.C. Cir. 2008).

3464. *Abdah v. Obama*, 709 F. Supp. 2d 25, 27–28 n.2 (D.D.C. 2010).

3465. *E.g.*, Government Motion to Dismiss, Ex. A, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Apr. 19, 2007), D.E. 224.

John Walker Lindh was ISN 001. See Bravin, *supra* note 2728, at 116; Cucullu, *supra* note 2754, at 67; David Leigh, *What Are These Files?*, Guardian (London), Apr. 25, 2011, at 2; Jesselyn Radack, *Traitor: The Whistleblower and the "American Taliban"* 37 (2012).

3466. *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010); Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3467. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; see *Assoc. Press v. Dep't of Def.*, 462 F. Supp. 2d 573, 574 (S.D.N.Y. 2006) (noting the release of ISNs); *Assoc. Press v. Dep't of Def.*, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006) (noting, in an action under the Freedom of

In 2005, while the ISNs were still classified, a Navy lawyer sent the Center for Constitutional Rights a list of detainees' names and ISNs in a Valentine's Day card addressed to an attorney who had been seeking a list of names.³⁴⁶⁸ Realizing that she should not have received this information that way, the attorney contacted the district court, and then classified information security officers retrieved the list.³⁴⁶⁹ The leaker was convicted of removing classified material, communicating classified information, violating a lawful general order, and conduct unbecoming an officer and a gentleman.³⁴⁷⁰ He was sentenced to six months in prison and dismissed from the Navy.³⁴⁷¹

Petitioner Statements

Judge Hogan ruled that the government could not easily withhold from the detainee petitioners themselves records of their own statements even if the records were classified.³⁴⁷² Judge Hogan observed that it would be difficult for the government to "deny the materiality of statements that it has chosen to rely upon to justify a petitioner's detention."³⁴⁷³ Also, "the security risk from providing petitioners access to their own statements is not comparable to the risk from disclosing other classified information."³⁴⁷⁴ "At a minimum, the government cannot rely on a petitioner's statement if it does not timely provide the petitioner with a sufficient alternative to that statement."³⁴⁷⁵

WikiLeaks

On April 24, 2011, news media posted on their websites information derived from several hundred classified files on Guantánamo Bay detainees.³⁴⁷⁶ Newspapers and National Public Radio's news programs ran stories on the documents, beginning the following morning.³⁴⁷⁷ The documents were leaked to WikiLeaks in

Information Act, that ISNs were redacted to protect detainees' privacy rather than to protect national security).

3468. *Diaz*, 69 M.J. at 130; see Tim Golden, *Naming Names at Gitmo*, N.Y. Times, Oct. 21, 2007, at 678; Wax, *supra* note 2737, at 169.

3469. *Diaz*, 69 M.J. at 131; see Golden, *supra* note 3468.

3470. *Diaz*, 69 M.J. at 129.

3471. *Id.*; see Golden, *supra* note 3468.

3472. *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d 17 (D.D.C. 2009).

3473. *Id.* at 25.

3474. *Id.* at 23.

3475. *Id.* at 25.

3476. See Motion at 2, *Alhag v. Obama*, No. 1:05-cv-2199 (D.D.C. May 3, 2011), D.E. 341 [hereinafter *Alhag* WikiLeaks Motion]; Motion at 1–2 & n.2, *Paracha v. Obama*, No. 1:04-cv-2022 (D.D.C. Apr. 27, 2011), D.E. 362 [hereinafter *Paracha* WikiLeaks Motion].

3477. E.g., Peter Finn, *New Revelations on al-Qaeda's 9/11 Movements*, Wash. Post, Apr. 25, 2011, at A1; "High-Risk" *Detainees Released from Guantanamo*, Morning Edition (NPR radio broadcast Apr. 25, 2011) [hereinafter "High-Risk" *Detainees*], available at www.npr.org/2011/04/25/135697167/detainee-assessments-included-in-classified-documents; *Military Documents Detail Life at Guantanamo*, Morning Edition (NPR radio broadcast Apr. 25, 2011) [hereinafter *Military Documents*], available at www.npr.org/2011/04/25/135690218/military-documents-detail-life-at-guantanamo;

2010, and another source shared them with some news media, who in turn shared them with other news media.³⁴⁷⁸

The documents were mostly risk-assessment reports on detainees written from February 2002 through January 2009, and the classified information was classified as secret.³⁴⁷⁹ The *New York Times* and National Public Radio collaborated on an Internet database that includes leaked information about Guantánamo Bay detainees.³⁴⁸⁰

On December 3, 2010, and on April 25, 2011, classified information security officers notified the detainees' attorneys that because a leak of classified information does not render the information declassified the attorneys should continue to handle classified information on their clients in appropriate ways.³⁴⁸¹

On April 27, 2011, Saifullah Paracha's attorney filed an emergency motion with Judge Friedman seeking assurance that he could view Internet information on his client without repercussion, such as loss of his security clearance.³⁴⁸² Judge Friedman denied the motion's emergency status.³⁴⁸³ Four days later, Abd al-Hakim Ghalib Ahmad Alhag's attorney filed a motion similar to the Paracha motion with Judge Kennedy, noting that a merits hearing in the case was scheduled for less than three weeks later.³⁴⁸⁴ Judge Kennedy canceled the merits hearing while he considered the motion.³⁴⁸⁵

On June 10, classified information security officers informed counsel that they could view on home and office computers classified information about their clients posted on WikiLeaks, but they could not "download, save, print, disseminate, or otherwise reproduce, maintain, or transport potentially classified information" derived from the Internet.³⁴⁸⁶ They could, however, prepare unclassified discovery requests for purported government documents referred to by Wik-

Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1.

3478. See, e.g., *Military Documents*, *supra* note 3477 ("The Guantanamo files were leaked last year to the website WikiLeaks. An anonymous source obtained the documents from WikiLeaks and then passed them to the New York Times, and the newspaper shared them with us.")

3479. See "*High-Risk*" *Detainees*, *supra* note 3477; Savage et al., *supra* note 3477.

3480. See "*High-Risk*" *Detainees*, *supra* note 3477; *A Note to Readers*, N.Y. Times, Apr. 25, 2011, at A1.

3481. See Motion at 1, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Apr. 18, 2012), D.E. 279 [hereinafter *Faraj WikiLeaks Motion*]; *id.*, Ex. A; *Alhag WikiLeaks Motion*, *supra* note 3476, at 2–3; *Paracha WikiLeaks Motion*, *supra* note 3476, at 3; Scott Shane, *Detainees' Lawyers Can't Click on Leaked Documents*, N.Y. Times, Apr. 27, 2011, at A1.

3482. *Paracha WikiLeaks Motion*, *supra* note 3476; see Scott Shane, *Guantánamo Detainee's Lawyer Seeks a Voice on WikiLeaks Documents*, N.Y. Times, Apr. 28, 2011, at A16.

3483. Opinion, *Paracha v. Obama*, No. 1:04-cv-2022 (D.D.C. Apr. 29, 2011), D.E. 364, available at 2011 WL 1639259.

3484. *Alhag WikiLeaks Motion*, *supra* note 3476.

3485. Docket Sheet, *Alhag v. Obama*, No. 1:05-cv-2199 (D.D.C. Nov. 10, 2005).

3486. Government Brief, Ex. A, *Paracha*, No. 1:04-cv-2022 (D.D.C. June 15, 2011) [hereinafter *WikiLeaks Guidelines*]; Government Motion at 1–2 & Ex. A, *id.* (June 10, 2011); see Charlie Savage, *Lawyers for Detainees Allowed to See Leaked Files*, N.Y. Times, June 11, 2011, at A8.

iLeaks so long as the requests identified the documents sought with particularity without revealing their contents.³⁴⁸⁷ The government provided counsel with “purported detainee assessments posted on the WikiLeaks website” at the Crystal City facility.³⁴⁸⁸

The restrictions on access to WikiLeaks information did not apply to “secondary reporting such as news articles, blogs, transcripts of broadcasts, and the like. You may download, print, copy, or otherwise access, maintain, disseminate, and transport secondary reporting that discusses or refers to potentially classified information.”³⁴⁸⁹ “You may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified status of the information or disclosing that you had personal access to classified information confirming, contradicting, or otherwise relating to the information already in the public domain.”³⁴⁹⁰ “Although the U.S. Government has confirmed that purported detainee assessments were leaked to WikiLeaks, it has neither confirmed nor denied that individual reports are official government documents.”³⁴⁹¹

On April 18, 2012, Abdulhadi Omer Mahmoud Faraj’s attorney filed a motion with Judge Friedman for release from some restrictions on the use of classified information about Faraj on WikiLeaks.³⁴⁹² Because some of the WikiLeaks information about Faraj cast Faraj in a bad light, the attorney wanted to be able to discuss the information with Faraj and possibly rebut the information in public for the sake of Faraj’s family in Syria and Faraj’s possible transfer from Guantánamo Bay.³⁴⁹³ Faraj was transferred to Uruguay in December 2014.³⁴⁹⁴

Videotapes of Force-Feeding

In a challenge to the force-feeding of a hunger striking detainee, the government produced as discovery twenty-eight videotapes of the procedure, and the detainee’s attorneys filed the videotapes in the court record, under seal, to support the challenge.³⁴⁹⁵ Judge Kessler granted the news media’s motion to unseal the videotapes once the identities of persons other than the detainee had been redacted.³⁴⁹⁶ Judge Kessler rejected the government’s argument that courts have no dis-

3487. WikiLeaks Guidelines, *supra* note 3486.

3488. *Id.*; Interview with Dep’t of Justice Litig. Sec. Group Staff, Sept. 26, 2011; *see* Savage, *supra* note 3486.

3489. WikiLeaks Guidelines, *supra* note 3486.

3490. *Id.*

3491. *Id.*

3492. *Faraj* WikiLeaks Motion, *supra* note 3481; *see* Notice of Classified Reply Brief, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Aug. 6, 2012), D.E. 289.

3493. *Faraj* WikiLeaks Motion, *supra* note 3481, at 2, 4–7.

3494. *Faraj* Notice of Transfer, *supra* note 3269.

3495. *Dhiab v. Obama*, 70 F. Supp. 3d 486, 490–492 (D.D.C. 2014); *see* Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. June 20, 2014), D.E. 262 (granting permission to file the videotapes).

3496. *Dhiab*, 70 F. Supp. 3d 486; Order, *Dhiab*, No. 1:05-cv-1457 (D.D.C. Oct. 3, 2014), D.E. 348; *see* Carol Rosenberg, *Judge Orders Release of Videos Showing Detainee’s Tube Feedings*, Miami

cretion over or review of public access to parts of court records that the government has designated to be classified.³⁴⁹⁷ The government's appeal will be heard on May 8, 2015.³⁴⁹⁸

Reviewing Classified Materials

All judges reviewing Guantánamo Bay habeas cases have special safes to store classified materials.³⁴⁹⁹ Although cleared petitioners' attorneys were granted access only to secret information, the government presented to judges additional top secret information.³⁵⁰⁰ In general, judges were permitted to keep secret information in their chambers' safes, but some top secret information was delivered to them for private review as needed.³⁵⁰¹

Many judges are concerned about surrendering control of classified materials they review. Judge Hogan, for example, dates and initials all classified documents that he reviews.³⁵⁰²

Challenge: Sensitive Unclassified Information

Although the Executive Branch determines what information is classified, the courts determine what part of a judicial record is otherwise protected or sealed.³⁵⁰³

Judge Hogan's 2008 protective order provided for the government's designation of unclassified information in returns and other court documents as protected:

Should government counsel in these consolidated cases wish to have the Court deem any document or information "protected," government counsel shall disclose the information to qualified counsel for petitioners—i.e., counsel who have satisfied the necessary prerequisites of this Protective Order for the viewing of protected information—and attempt to reach an agreement about the designation of the information prior to filing a motion with the Court. Petitioners' counsel shall treat such disclosed information as protected unless and until the Court rules that the information should not be designated as protected.³⁵⁰⁴

Herald, Oct. 4, 2014, at 3A; Charlie Savage, *Judge Rules on Disclosing Guantánamo Video*, N.Y. Times, Oct. 4, 2014, at A10.

3497. *Dhiab*, 70 F. Supp. 3d at 494.

3498. Docket Sheet, *Dhiab v. Obama*, No. 14-5299 (D.C. Cir. Dec. 5, 2014) (noting that oral argument is scheduled for May 8, 2015); see Zoe Tillman, *Press Is On for Gitmo Tapes*, Nat'l L.J., Apr. 6, 2015, at 17.

3499. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

3500. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3501. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3502. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

3503. *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007); see Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* (Federal Judicial Center 2010).

3504. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 151 (D.D.C. 2008) (¶ 34).

On June 30, 2009, Judge Huvelle overruled the government's designation of some information as protected.³⁵⁰⁵ Judge Huvelle ruled by sealed order after a closed proceeding.³⁵⁰⁶ In a heavily redacted published opinion, the court of appeals reversed,³⁵⁰⁷ but it was very difficult to determine from the public record why the government should or should not have been entitled to designate the information as protected. The Supreme Court denied a sealed petition for certiorari.³⁵⁰⁸

The matter became clear in 2012 when the government informed the court of appeals that its opinion could be released unredacted.³⁵⁰⁹ Djamel Ameziane had moved to unseal his approval for transfer so that he could negotiate directly with countries of his choice for transfer.³⁵¹⁰ In order to prevent detainees from interfering with the government's negotiations, the government sought to keep transfer approvals secret.³⁵¹¹ In 2012, "the [potential] diplomatic and national security harms [were] no longer as acute."³⁵¹²

On September 4, 2009, Judge Huvelle again overruled the government's designation of some information as protected, and her ruling did not receive appellate review.³⁵¹³ Respecting the government's statement of material facts in Jawad's case, the government sought to designate as protected the dates of interrogations so that a reader could not induce the identities of interrogators. Judge Huvelle, noting that the government did not regard this information as classified, determined that dates for Jawad's interrogations were already public so those dates could not be regarded as protected and only dates of the month, but not month and year, needed to be protected for interrogations of others.³⁵¹⁴ "The public has a legitimate interest in gaining access to the month and year of the reports containing inculpatory statements to determine whether those statements are reliable (*i.e.*, whether the interrogation occurred a substantial time after the event in question)."³⁵¹⁵

3505. *Ameziane v. Obama*, 620 F.3d 1, 3 (D.C. Cir. 2010); Docket Sheet, *Ameziane v. Bush*, No. 1:05-cv-392 (D.D.C. Feb. 24, 2005) [hereinafter *Ameziane* Docket Sheet].

3506. *Ameziane* Docket Sheet, *supra* note 3505.

3507. *Ameziane*, 620 F.3d 1; see *Appeals Court Upholds Secrecy in Algerian's Case*, Miami Herald, Oct. 8, 2010; *Guantanamo Detainee Loses Bid to Have US Release Information to the Public*, Bos. Globe, Oct. 9, 2010, at 2 (reporting that the detainee had been waterboarded).

3508. *Ameziane v. Obama*, 562 U.S. 1302 (2011).

3509. Motion to Unseal, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. Sept. 21, 2012) [hereinafter *Ameziane* Motion to Unseal].

Judge Huvelle's two-page order is unsealed in the appellate record. Appendix at 86–87, *id.* (Aug. 6, 2009) ("The government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected, or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries.").

3510. *Ameziane v. Obama*, 699 F.3d 488, 490 (D.C. Cir. 2010).

3511. *Id.*

3512. *Ameziane* Motion to Unseal, *supra* note 3509, at 3–4.

3513. *Bacha v. Obama*, 653 F. Supp. 2d 32 (D.D.C. 2009).

3514. *Id.* at 34.

3515. *Id.* at 35.

Between the government's sealed motion to designate the dates protected and Jawad's sealed opposition to that motion, Judge Huvelle issued an order suppressing Jawad's out-of-court statements as the products of torture.³⁵¹⁶ Before she issued her ruling on whether the dates could be protected, the government decided to no longer regard Jawad detainable,³⁵¹⁷ Judge Huvelle granted the writ,³⁵¹⁸ and Jawad was released.³⁵¹⁹ On December 30, 2010, Judge Huvelle approved redactions in the public filing of Jawad's return,³⁵²⁰ which was filed on March 15, 2011.³⁵²¹

On May 12, 2011, Judge Hogan further clarified under what circumstances the government could designate unclassified information as protected from public disclosure:

Pursuant to [the] first step, the government must identify the categories of information it seeks to protect and provide a valid basis for withholding information in those categories. To satisfy this step, the government must proffer a specific, tailored rationale for protecting a general category of information. To be clear, the rationale must be tailored to the category for which protection is sought but need not necessarily be tailored to a particular case. It will not suffice for the government to identify broad categories for which the rationale for protection is brief, spare and generic. On the other hand, the government's rationale need not be so specific that it precludes any generalized categorization. Furthermore, the narrower the category for which the government seeks protection, the more likely the government's rationale will be sufficiently tailored.

With respect to [the] second step, the Court must determine whether the specific information the government has designated for protection properly falls within the category identified in the first step. . . . [D]etermining whether the information falls within the protected category requires evaluating whether the rationale for protection asserted in the first step is implicated by the specific information the government has designated for protection in the second step. . . . Thus, determining whether designated information falls within a protected category requires the Court to evaluate whether the rationale for the category applies to the designated information.

. . . [I]f the government satisfies [this] two-step test . . . , the district court is required to defer to the government's assessment of the harm to foreign relations and national security that would result from disclosure of the information the government seeks to protect.³⁵²²

3516. Jawad Suppression Order, *supra* note 3080; Docket Sheet, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. July 17, 2009).

3517. Jawad Nondetainability Notice, *supra* note 3082.

3518. Jawad Writ, *supra* note 3031.

3519. *See Detainee Released*, *supra* note 3084.

3520. Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. Dec. 30, 2010), D.E. 498.

3521. Order, *id.* (Mar. 15, 2011), D.E. 504.

3522. *In re Guantanamo Bay Detainee Litig.*, 787 F. Supp. 2d 5, 13–14 (D.D.C. 2011) (citations and quotation marks omitted).

Challenge: Classified Arguments

Judge Green's November 2004 protective order specified that documents that might contain classified information were to be filed with the classified information security officers, at which time they would be deemed filed with the court; the security officers would arrange for a classification review, and redacted versions of the documents, if redaction was necessary, would be filed on the public record.³⁵²³ A protective order issued by Judge Hogan in 2008, two months after he accepted pretrial consolidation of the habeas petitions, provided for similar procedures.³⁵²⁴

Sometimes inferences about classified filings can be drawn from unclassified filings. To ask Judge Kennedy to accept new evidence following the judge's grant of habeas corpus relief to the Russian detainee Mingazov, the government filed a classified motion.³⁵²⁵ Mingazov's attorneys filed a classified opposition.³⁵²⁶ The government filed a classified motion with the court of appeals seeking abeyance pending resolution of the motion before Judge Kennedy.³⁵²⁷ Mingazov's attorneys filed an unclassified—and unsuccessful—opposition, which disclosed that the motion before Judge Kennedy was a request to present additional evidence, without disclosing what the evidence was.³⁵²⁸ The government's reply brief on the abeyance motion was also unclassified.³⁵²⁹

In March 2011, the government filed notices of top secret ex parte filings in ten habeas cases for high-value detainees,³⁵³⁰ a category used for central figures in terrorism planning.³⁵³¹ Judges Kollar-Kotelly,³⁵³² Walton,³⁵³³ Bates,³⁵³⁴ Fried-

3523. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 182 (D.D.C. 2004); see Gorman, *supra* note 2851, at 14.

3524. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. 2008).

3525. Notice of Filing, *Al-Harbi v. Obama*, No. 1:05-cv-2479 (D.D.C. Dec. 15, 2010), D.E. 358.

3526. Notice of Filing, *id.* (Jan. 31, 2011), D.E. 360.

3527. Docket Sheet, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. June 28, 2010).

3528. D.C. Cir. *Mingazov* Opposition Brief, *supra* note 3187; see *Mingazov* Abeyance Order, *supra* note 3188 (granting abeyance).

3529. Reply Brief, *Mingazov*, No. 10-5217 (D.C. Cir. Jan. 3, 2011).

3530. Notice of Filing, *Bin Lep v. Obama*, No. 1:09-cv-31 (D.D.C. Apr. 8, 2011), D.E. 69; Notice of Filing, *Hambali v. Obama*, No. 1:10-cv-407 (D.D.C. Mar. 24, 2011), D.E. 28; Notice of Filing, *Al-Baluchi v. Obama*, No. 1:08-cv-2083 (D.D.C. Mar. 24, 2011), D.E. 112; Notice of Filing, *Al-Nashiri v. Obama*, No. 1:08-cv-1207 (D.D.C. Mar. 24, 2011), D.E. 185; Notice of Filing, *Bin al-Shibh v. Obama*, No. 1:06-cv-1725 (D.D.C. Mar. 24, 2011), D.E. 134; Notice of Filing, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (D.D.C. Mar. 23, 2011), D.E. 33; Notice of Filing, *Rahim v. Obama*, No. 1:09-cv-1385 (D.D.C. Mar. 23, 2011), D.E. 83; Notice of Filing, *Mohammad v. Obama*, No. 1:09-cv-873 (D.D.C. Mar. 23, 2011), D.E. 82; Notice of Filing, *Husayn v. Obama*, No. 1:08-cv-1360 (D.D.C. Mar. 23, 2011), D.E. 272; Notice of Filing, *Khan v. Obama*, No. 1:06-cv-1690 (D.D.C. Mar. 23, 2011), D.E. 270.

3531. See Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. Times, Jan. 20, 2011, at A1 (defining high-value detainee as “a senior terrorism suspect who was held for a time in secret C.I.A. prisons and subjected to what the Bush administration called ‘enhanced interrogation techniques’”); see also Fox, *supra* note 2848 (reporting that high-value detainees are so designated “because of their previous CIA detention”).

man,³⁵³⁵ and Roberts³⁵³⁶ referred the matter to Judge Sullivan, to whom two of the cases had been assigned.³⁵³⁷ The briefing on this matter was classified, but the filings of papers were noted on the public record.³⁵³⁸ On May 9, 2012, Judge Sulli-

On September 11, 2014, Judge Beryl A. Howell denied a request under the Freedom of Information Act for cost information on the housing of high-value detainees. Rosenberg v. U.S. Dep't of Def., 67 F. Supp. 3d 219 (D.D.C. 2014); see Mark Seibel, *Judge: U.S. Doesn't Have to Give Cost*, Miami Herald, Sept. 12, 2014, at 3A.

3532. Order, *Mohammad*, No. 1:09-cv-873 (D.D.C. Apr. 15, 2011), D.E. 84.

3533. Order, *Khan*, No. 1:06-cv-1690 (D.D.C. Apr. 15, 2011), D.E. 272.

3534. Order, *Hambali*, No. 1:10-cv-407 (D.D.C. Apr. 18, 2011), D.E. 31; Order, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Apr. 18, 2011), D.E. 71.

3535. Order, *Rahim*, No. 1:09-cv-1385 (D.D.C. Apr. 18, 2011), D.E. 87; Order, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Apr. 18, 2011), D.E. 113.

3536. Order, *Husayn v. Obama*, No. 1:08-cv-1360 (D.D.C. Apr. 18, 2011), D.E. 279; Order, *Al-Nashiri v. Obama*, No. 1:08-cv-1207 (D.D.C. Apr. 18, 2011), D.E. 188.

3537. Docket Sheet, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (D.D.C. Aug. 3, 2009) [hereinafter *Abdulrazzaq* Docket Sheet]; Docket Sheet, *Bin al-Shibh v. Obama*, No. 1:06-cv-1725 (D.D.C. Aug. 30, 2005) [hereinafter *Bin al-Shibh* Docket Sheet]; see Opinion at 2, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Nov. 1, 2012), D.E. 199, available at 2012 WL 5382730 [hereinafter *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion].

3538. The briefing concluded with government replies filed on June 15 and 16, 2011.

1. Majid Khan: Government Reply Notice, *Khan*, No. 1:06-cv-1690 (D.D.C. June 16, 2011), D.E. 276; Petitioner's Response Notice, *id.* (June 2, 2011), D.E. 275; Strike Reply Notice, *id.* (Apr. 29, 2011), D.E. 274; Strike Opposition Notice, *id.* (Apr. 20, 2011), D.E. 273; Petitioner's Motion to Strike, *id.* (Apr. 8, 2011), D.E. 271.
2. Ramzi Bin al-Shibh: Government Reply Notice, *Bin al-Shibh*, No. 1:06-cv-1725 (D.D.C. June 15, 2011), D.E. 139; Petitioner's Response Notice, *id.* (June 7, 2011), D.E. 138; Extension Opposition Notice, *id.* (Apr. 8, 2011), D.E. 136; Extension Motion, *id.* (Apr. 1, 2011), D.E. 135.
3. Abd al-Rahim Hussain Mohammed al-Nashiri: Government Reply Notice, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. June 15, 2011), D.E. 191; Petitioner's Joinder, *id.* (May 31, 2011), D.E. 190; Petitioner's Response Notice, *id.* (May 31, 2011), D.E. 189; Extension Motion, *id.* (Apr. 8, 2011), D.E. 187.
4. Zayn al-Abidin Muhammad Husayn (Abu Zubaydah): Government Reply, *Husayn*, No. 1:08-cv-1360 (D.D.C. June 15, 2011), D.E. 282; Strike Opposition Notice, *id.* (Apr. 12, 2011), D.E. 278; Petitioner's Motion to Strike, *id.* (Apr. 12, 2011), D.E. 277. Note that the petitioner's response to the original filing does not appear to be docketed.
5. Ammar al-Baluchi: Government Reply Notice, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. June 15, 2011), D.E. 114.
6. Mohammed Nazir Bin Lep: Government Reply Notice, *Bin Lep*, No. 1:09-cv-31 (D.D.C. June 16, 2011), D.E. 74; Petitioner's Response Notice, *id.* (June 2, 2011), D.E. 73; Extension Opposition, *id.* (Apr. 8, 2011), D.E. 70; Extension Motion, *id.* (Apr. 6, 2011), D.E. 67.
7. Mustafa Frarj Mohammad: Government Reply Notice, *Mohammad v. Obama*, No. 1:09-cv-873 (D.D.C. June 15, 2011), D.E. 92; Petitioner's Response Notice, *id.* (May 31, 2011), D.E. 91; Extension Opposition Notice, *id.* (Apr. 20, 2011), D.E. 85; Extension Motion, *id.* (Apr. 8, 2011), D.E. 83.
8. Muhammed Rahim: Government Reply Notice, *Rahim*, No. 1:09-cv-1385 (D.D.C. June 15, 2011), D.E. 96; Petitioner's Joinder Notice, *id.* (May 31, 2011), D.E. 93; Petitioner's Response Notice, *id.* (May 31, 2011), D.E. 93; Disclosure Opposition Notice, *id.* (May 5,

van entered a notice in each case that he had issued a classified opinion on the matter.³⁵³⁹ A November 1, 2012, denial of one detainee's motion to reconsider discloses that the classified opinion was issued on May 7 and that the opinion granted a government motion with additional conditions.³⁵⁴⁰

Both habeas counsel³⁵⁴¹ and the government³⁵⁴² filed classified briefs in a motion to reconsider Judge Lamberth's order denying leave to depose Ali H. Soufan, who interrogated the petitioner when Soufan worked for the FBI and who published a book that discussed the interrogation.³⁵⁴³ The book was published in September 2011, and counsel moved on October 21 for leave to depose Soufan.³⁵⁴⁴ Judge Lamberth, to whom the case had been assigned after Judge Kennedy's disability retirement,³⁵⁴⁵ ordered the discovery motion untimely on January 23, 2012.³⁵⁴⁶

Classification reviews of habeas filings, so that cleared or redacted versions could appear on the public record, have required a considerable amount of effort. In 2013, Judge Lamberth informed the government in an order concerning one

2011), D.E. 91; Motion to Disclose Notice, *id.* (May 2, 2011), D.E. 90; Extension Notice, *id.* (Apr. 20, 2011), D.E. 89; Extension Motion, *id.* (Apr. 18, 2011), D.E. 88; Opposition Notice, *id.* (Apr. 8, 2011), D.E. 86; Extension Notice, *id.* (Apr. 8, 2011), D.E. 85; Extension Motion, *id.* (Mar. 30, 2011), D.E. 84.

9. Nashwana al-Ramer Abdulrazzaq: Government Reply Notice, *Abdulrazzaq*, No. 1:09-cv-1462 (D.D.C. June 15, 2011), D.E. 37; Extension Reconsideration Motion Notice, *id.* (Apr. 13, 2011), D.E. 36; Extension Motion, *id.* (Apr. 5, 2011), D.E. 35.

10. Riduan Bin Isomuddin Hambali: Government Filing Notice, *Hambali*, No. 1:10-cv-407 (D.D.C. June 15, 2011), D.E. 33; Government Notice of Opposition to Motion to Enlarge Time, *id.* (Apr. 12, 2011), D.E. 30; Motion to Enlarge Time, *id.* (Apr. 11, 2011), D.E. 29 (motion for an extension of time to consult with the detainee and counsel for other detainees).

3539. Docket Sheet, *Hambali*, No. 1:10-cv-407 (D.D.C. Mar. 11, 2010); *Abdulrazzaq* Docket Sheet, *supra* note 3537; Docket Sheet, *Rahim*, No. 1:09-cv-1385 (D.D.C. July 27, 2009); Docket Sheet, *Mohammad*, No. 1:09-cv-873 (D.D.C. May 11, 2009); Docket Sheet, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Jan. 8, 2009); Docket Sheet, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Dec. 2, 2008); *Husayn* Docket Sheet, *supra* note 2987; Docket Sheet, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. July 15, 2008); *Bin al-Shibh* Docket Sheet, *supra* note 3537; *Khan* Docket Sheet, *supra* note 3225.

3540. *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion, *supra* note 3537.

3541. Notice of Filing, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. Mar. 30, 2012), D.E. 999 (reply brief); Notice of Filing, *id.* (Mar. 7, 2012), D.E. 995 (motion brief).

3542. Notice of Filing, *id.* (Mar. 26, 2012), D.E. 998 (opposition brief).

3543. Order at 1, *id.* (Jan. 23, 2012), D.E. 993 [hereinafter *Abdah* Deposition Order]; Soufan, *supra* note 2780, at 470–71, 536 (referring to the petitioner as detainee number 37 and al-Batar); Government Opposition to Deposition at 2, *Abdah*, No. 1:04-cv-1254 (D.D.C. Nov. 7, 2011), D.E. 989.

3544. Deposition Motion, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 21, 2011), D.E. 985; *Abdah* Deposition Order, *supra* note 3543, at 1.

3545. Reassignment, *Abdah*, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2011), D.E. 991; Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting that Judge Kennedy “[a]ssumed senior status due to certified disability on November 18, 2011”).

3546. *Abdah* Deposition Order, *supra* note 3543.

case that the amount of effort was not an excuse for excessive delays in providing the public with records of the court's proceedings.

The Court is troubled by the government's apparent lack of urgency in issuing public versions of classified materials filed in Guantanamo proceedings. In this case in particular, the government has failed to produce public versions of the petitioner's traverse and hearsay briefs, which were filed on July 31, 2009. The government argues that because petitioner's habeas petition was dismissed and he has been released from the Guantanamo Bay Detention Facility, there is no urgent need to produce these documents. However, this ignores the inherent public interest in Guantanamo litigation generally, and in the facts related to the release of this detainee in particular. Moreover, the practice of publicly disclosing court documents is deeply rooted in our system of government. See *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978). The public interest served by releasing court filings includes allowing "citizens . . . to keep a watchful eye on the workings of public agencies." *Id.* (citations omitted). More importantly, it is the judiciary and not the executive that determines whether the public can access and inspect court records. See *Bismullah [v. Gates]*, 501 F.3d [178,] 188 [(D.C. Cir. 2007)] (citations omitted). Here, petitioner's documents have remained essentially under seal for approximately 42 months, and the Court sees no reason to write the government a blank check and allow them to produce the documents at some unknown point in the future.³⁵⁴⁷

To help judges with classified materials, chambers staff persons must have security clearances. Some judges permit some staff members to forgo the clearance process and the special responsibility that comes with handling classified material. Also, not all of the court's court reporters have agreed to seek security clearances.

When classified materials are not in use, they must be stored in combination safes, and the combinations must be memorized.

Challenge: Closed Proceedings and Remote Participation

A very important part of managing a Guantánamo Bay habeas case was determining when to close proceedings for purposes of national security.³⁵⁴⁸

Judges often tried to conduct as much of the proceeding as possible in open session. An important challenge during an open session was keeping track of what information was classified and therefore not something to be discussed openly. Especially difficult to remember as classified were details, such as the date the detainee was arrested, that had a classified status not intuitively obvious.³⁵⁴⁹ Complicating the burden for judges was the fact that sometimes their unredacted

3547. *Barre v. Obama*, 932 F. Supp. 2d 5, 13–14 (D.D.C. 2013) (retaining original citation convention).

3548. Interview with Hon. John D. Bates, Oct. 15, 2009.

3549. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

copies of documents, such as factual returns, did not clearly show what parts of the documents were classified.³⁵⁵⁰

Transitioning from an open session to a closed session always took several minutes, in part because the reporter had to set up special equipment to transcribe classified proceedings.³⁵⁵¹

All persons present at classified proceedings must have security clearances. If a judge's courtroom clerk is not cleared, then a cleared law clerk can act as courtroom clerk.³⁵⁵² Classified materials used by habeas attorneys in court must be transported by cleared couriers from the secure facility in Crystal City to the courthouse.³⁵⁵³

In cooperation with Attorney General Mukasey, the court established a direct satellite connection with Guantánamo Bay.³⁵⁵⁴ The court identified one courtroom to fit with a secure connection to the satellite for Guantánamo Bay hearings.³⁵⁵⁵

Obtaining detainees' participation from Guantánamo Bay presented the court with one of its most substantial logistical challenges.³⁵⁵⁶ Timing of the proceeding had to be coordinated with, among other things, the timing of flights to Guantánamo Bay.³⁵⁵⁷

If the detainee did not testify, then classified information would not be transmitted between the courtroom and Guantánamo Bay, because the detainee was not permitted access to classified information.³⁵⁵⁸ If, however, a detainee testified, either as the petitioner or as a witness, then the detainee's testimony was presumptively classified.³⁵⁵⁹ The testimony was transmitted by secure audiovisual link, which required FBI security specialists at both locations.³⁵⁶⁰

3550. Transcript at 3–4, *Al-Halmandy v. Bush*, No. 1:05-cv-2385 (D.D.C. June 19, 2009, filed Aug. 27, 2009), D.E. 346; Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3551. Interview with Hon. Gladys Kessler, May 31, 2011.

3552. Interview with Hon. Reggie B. Walton, May 23, 2011.

3553. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3554. Interview with Hon. Royce C. Lamberth, May 13, 2011.

Detainees were not brought to court for proceedings so that they would not be able to pursue asylum rights. *Id.* Proceedings were not held at Guantánamo Bay, because the judges did not believe that they could hear cases outside of the United States. *Id.*

3555. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011; Interview with Hon. Reggie B. Walton, May 23, 2011; Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3556. Interview with Hon. Gladys Kessler, May 31, 2011.

3557. *Id.*

3558. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3559. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011; Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Winke, *supra* note 2909, at 356.

3560. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

The video link between the courthouse and Guantánamo Bay was established pursuant to a letter request by Chief Judge Lamberth on September 18, 2008, to the FBI's Technical Response Unit. *Id.*, Sept. 26, 2011.

Judge Collyer observed that because the video presentation of the detainee's testimony did not include a close-up, she could not observe the detainee's facial demeanor nearly as well as she could

The first few habeas hearings set the mold for how future hearings were conducted. By the time of the hearing, the government had identified a specific number of issues, and it needed to prevail on any one issue to justify detention, so the structure of the hearing usually tracked the enumerated case-specific issues.³⁵⁶¹

On November 6, 2008, Judge Leon began the first evidentiary hearing on the government's evidence supporting a Guantánamo Bay detention.³⁵⁶² Attorneys for both sides made opening statements in open court.³⁵⁶³ The detainees were to listen to proceedings by a live audio feed, but because of technical difficulties they were only able to listen to an audio recording of the proceeding the next day.³⁵⁶⁴ They received a written Arabic translation soon afterward.³⁵⁶⁵

On the afternoon of the same day, Judge Leon continued the proceeding in closed session because classified evidence would be presented and discussed.³⁵⁶⁶ During the next few days of the proceeding, two detainees testified by audiovisual feed from Guantánamo Bay.³⁵⁶⁷ Their attorneys provided them with shirts and ties; one was able to testify in English.³⁵⁶⁸ Closing arguments on November 14 were also held in closed session, from which the detainees were excluded, because much of the argument was classified.³⁵⁶⁹ Judge Leon arranged for the detainees to listen as he delivered his decisions from the bench.³⁵⁷⁰

The 2008 and 2009 hearings for al-Alwi, Sliti, al-Bihani, and Hammamy, whose habeas petitions were denied, and for el-Gharani and al-Janko, whose petitions were granted, were conducted similarly.³⁵⁷¹ Judge Leon began with public opening statements.³⁵⁷² The hearings continued in closed session because classi-

that of a witness testifying in the courtroom. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3561. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3562. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008); see William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantánamo Detainees*, N.Y. Times, Nov. 7, 2008, at A21; Glaberson & Becker, *supra* note 2908.

3563. *Boumediene*, 579 F. Supp. 2d at 193; see Glaberson, *supra* note 3562.

3564. *Boumediene*, 579 F. Supp. 2d at 193; see Glaberson, *supra* note 3562; Winke, *supra* note 2909, at 353–55 (describing the petitioners' reactions to the recording).

3565. *Boumediene*, 579 F. Supp. 2d at 193.

3566. *Id.*

3567. *Id.*; see Winke, *supra* note 2909, at 356–57.

3568. See Winke, *supra* note 2909, at 355.

3569. *Boumediene*, 579 F. Supp. 2d at 193.

3570. See Sheryl Gay Stolberg, "Passionate" Judge Has Record of Wrestling with Thorny Issues, and the U.S. Government, N.Y. Times, Dec. 17, 2013, at A17.

3571. *Al-Ginco v. Obama*, 626 F. Supp. 2d 123, 125 (D.D.C. 2009) (hearing May 28–29, 2009); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 241 (D.D.C. 2009) (March 12, 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 36 (D.D.C. 2009) (January 15–16, 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 145 (D.D.C. 2009) (December 17–18, 2008); *Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008) (December 16–17, 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46, 47 (D.D.C. 2008) (December 18, 2008).

3572. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47.

fied information would be discussed.³⁵⁷³ Sliti elected not to participate,³⁵⁷⁴ but al-Alwi, el-Gharani, al-Bihani, Hammamy, and al-Janko listened to live translations of the public opening statements by telephone from Guantánamo Bay.³⁵⁷⁵

Fawzi Khalid Abdullah Fahad al-Odah,³⁵⁷⁶ al-Rabiah,³⁵⁷⁷ and al-Kandari³⁵⁷⁸ also listened to the public opening statements in their habeas merits proceedings.

At a March 31, 2009, habeas hearing, Judge Huvelle began with a closed session on classified and other evidence and then held a closed session that did not include classified information but was sealed at the request of the petitioner, who expressed fear of reprisals for his cooperation with the government.³⁵⁷⁹ He listened to the unclassified session by telephone from Guantánamo Bay.³⁵⁸⁰

On June 18, 2009, Judge Kessler ruled that al-Adahi's testimony from Guantánamo Bay at his merits hearing would be in open court.³⁵⁸¹ "Petitioner will not be giving any classified testimony on direct or re-direct because he has access to none, and the Government will not be able to cross-examine him on any classified testimony."³⁵⁸² On the following day, however, Judge Kessler rescinded the order, but she did order the government to preserve a videotape of al-Adahi's testimony.³⁵⁸³ A four-day hearing began on June 22, 2009.³⁵⁸⁴ Al-Adahi testified on June 23 and 24.³⁵⁸⁵ A redacted transcript was filed publicly on June 26.³⁵⁸⁶ Redacted were the identities of the interpreter and an informant detainee.³⁵⁸⁷ On July 23, the government filed a notice that it did not videotape al-Adahi's testimony as ordered,³⁵⁸⁸ and Judge Kessler found the government in contempt on December 10.³⁵⁸⁹ On January 8, 2010, the government promised more reliable videotaping procedures.³⁵⁹⁰

3573. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47; see Glaberson, *supra* note 3562.

3574. *Sliti*, 592 F. Supp. 2d at 47.

3575. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25.

3576. *Al Odah v. United States*, 648 F. Supp. 2d 1, 3 (D.D.C. 2009).

3577. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 n.1 (D.D.C. 2009).

3578. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

3579. *Basardh v. Bush*, 612 F. Supp. 2d 30, 31 (D.D.C. 2009).

3580. *Id.*

3581. Order, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. June 18, 2009), D.E. 420, available at 2009 WL 1743758.

3582. *Id.*

3583. Order, *id.* (June 19, 2009), D.E. 423, available at 2009 WL 1764540.

3584. *Al-Adahi Habeas Grant*, *supra* note 3065, at 4; *Al-Adahi Docket Sheet*, *supra* note 3142.

3585. Transcript, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. June 23 and 24, 2009, filed June 26, 2009), D.E. 431.

3586. *Id.*

3587. *Id.*

3588. Notice, *id.* (July 23, 2009), D.E. 446.

3589. Order, *id.* (Dec. 10, 2009), D.E. 509.

3590. Government Brief, *id.* (Jan. 8, 2010), D.E. 535.

Judge Kessler's hearing on September 3, 2009, on Bin Mohammed's successful writ petition began with unclassified opening arguments and continued in closed session.³⁵⁹¹ Bin Mohammed chose not to listen to the opening arguments or testify.³⁵⁹²

Judge Walton began Abd al-Rahman Abdu Abu al-Ghayth Sulayman's unsuccessful merits hearing on May 3, 2010.³⁵⁹³ The detainee elected to testify and to listen to the unclassified portions of the hearing.³⁵⁹⁴ One of Sulayman's attorneys and an interpreter were in Guantánamo Bay; another Sulayman attorney was in the courtroom.³⁵⁹⁵ Overcoming a few difficulties with the transmission feed, the four-day hearing concluded successfully.³⁵⁹⁶

Proceedings on Bin Mohammed's ill-fated injunction against his transfer to Algeria were largely under seal.³⁵⁹⁷ On the day it decided the case, the court of appeals issued an order to show cause why its reversal of Judge Kessler's injunction should not be released publicly.³⁵⁹⁸ One week later, the order was unsealed.³⁵⁹⁹ Eleven weeks later, the government filed redacted copies of its appellate briefs, including a redacted copy of Judge Kessler's injunction opinion,³⁶⁰⁰ but the opinion remains sealed in the district court file.³⁶⁰¹ Redactions appear to be protected but not classified.

Proceedings on Naji's efforts to avoid transfer to Algeria also were sealed; sealed district court filings appear unsealed in the court of appeals' case file.³⁶⁰²

Judge Kessler denied the government's motion to close a hearing on a challenge to the force-feeding of a hunger striker.³⁶⁰³ She concluded that the government's concern about the hearing's involving classified and other protected information could be addressed by bifurcating the hearing.³⁶⁰⁴ In addition to open-

3591. Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 40 (D.D.C. 2009); Docket Sheet, Bin Mohammed v. Bush, No. 1:05-cv-1347 (D.D.C. July 6, 2005) [hereinafter D.D.C. *Bin Mohammed* Docket Sheet].

3592. *Bin Mohammed*, 689 F. Supp. 2d at 40.

3593. Sulayman v. Obama, 729 F. Supp. 2d 26, 29 (D.D.C. 2010).

3594. Notice, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Feb. 26, 2010), D.E. 1585.

3595. Interview with Hon. Reggie B. Walton, May 23, 2011.

3596. *Id.*

3597. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 3591.

3598. Order, Bin Mohammed v. Obama, No. 10-5218 (D.C. Cir. July 8, 2010).

3599. *Bin Mohammed* Injunction Reversal, *supra* note 3112.

3600. Docket Sheet, *Bin Mohammed*, No. 10-5218 (D.C. Cir. June 30, 2010).

3601. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 3591.

3602. *Naji* Government Response, *supra* note 3116.

3603. *Dhiab v. Obama*, 70 F. Supp. 3d 465 (D.D.C. 2014); see Carol Rosenberg, *U.S. Attorney Defends Forced-Feedings*, Miami Herald, Oct. 7, 2014, at 3A; Matt Zapotosky, *Detainee at Guantánamo Bay Seeks Changes in Force-Feeding*, Wash. Post, Oct. 7, 2014, at A7.

3604. *Dhiab*, 70 F. Supp. 3d at 467–68.

court evidence and arguments, Judge Kessler used another courtroom for closed-session portions of the three-day proceeding.³⁶⁰⁵

Classified information security officers typically attend open proceedings at which there is a possibility that someone will inadvertently say something that is classified. The security officers will interrupt if it looks like someone is about to say something improper for an open session. If something slips out, it is common to redact it from the transcript.

Challenge: Classified Orders and Opinions

If an order or opinion might contain classified information, it ordinarily should be submitted to a classified information security officer, who will forward it to members of the intelligence community for a walled-off classification review.³⁶⁰⁶ The court can either issue a potentially classified opinion and serve it on cleared attorneys for the parties, with a classification review to follow, or the court can submit the opinion to a classification review before it is issued.³⁶⁰⁷ Persons reviewing an opinion before it has been issued must be walled off from persons working with those representing the government in court.³⁶⁰⁸

Habeas attorneys generally must travel to the secure facility in Crystal City to review unredacted classified opinions and other classified filings.³⁶⁰⁹

3605. Transcript at 66–67, *Dhiab v. Obama*, 1:05-cv-1457 (D.D.C. Oct. 8, 2014, filed Nov. 14, 2014), D.E. 372; Transcript at 81–83, *id.* (Oct. 7, 2014, filed Nov. 14, 2014), D.E. 371; Transcript at 5–8, 95–96, 199–203, *id.* (Oct. 6, 2014, filed Nov. 14, 2014), D.E. 370.

3606. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

The intelligence community is understood to have sixteen members. www.dni.gov/index.php/intelligence-community/members-of-the-ic.

The U.S. intelligence community, or IC, consists of sixteen agencies and organizations within the Executive Branch: Air Force Intelligence, Army Intelligence, the Central Intelligence Agency, Coast Guard Intelligence, the Defense Intelligence Agency, the Department of Energy's intelligence arm, the Department of Homeland Security's intelligence arm, the Department of State's Bureau of Intelligence and Research, the Department of the Treasury's intelligence arm, the Drug Enforcement Administration, the Federal Bureau of Investigation, Marine Corps Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the National Security Agency, and Navy Intelligence. The Office of the Director of National Intelligence is the seventeenth member of the intelligence community; and some consider the Department of Defense another member; but by executive order, the IC consists of sixteen agencies.

Dana Priest & William M. Arkin, *Top Secret America* xx n.3 (2011); see 1 David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* 19–28 (2d ed. 2012) (listing the Office of the Director of National Intelligence as one of the sixteen intelligence agencies and counting the intelligence arms of the Coast Guard and the Department of Homeland Security as a single agency on the list); see also Peter Lance, *Triple Cross* 69 & n.* (2006) (identifying as the big five the FBI, the CIA, the DIA, the NSA, and the U.S. State Department's Bureau of Intelligence and Research).

3607. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3608. *Id.*

3609. *Id.*

District Court

Each judge presiding over a Guantánamo Bay habeas petition was provided with a safe for storing classified materials and a secure laptop computer, which was stored in the safe.³⁶¹⁰ It was determined to be too expensive to provide each judge with a classified printer, so one was established on each floor of the district court.³⁶¹¹ Most of the judges' law clerks did not have security clearances before these cases were filed, but law clerks for all of the judges hearing these cases obtained clearances.³⁶¹²

Some law clerks were cleared to work with SCI, but access to SCI requires an Executive Branch decision that the person can be read into the specific SCI program.³⁶¹³ Judge Friedman, for example, had one law clerk read into SCI for Guantánamo Bay cases and another law clerk read into SCI for another case.³⁶¹⁴

Judge Green's January 31, 2005, opinion resolving the government's motion to dismiss the coordinated cases included some classified information.³⁶¹⁵ An unredacted opinion was served on the attorneys for both sides and preserved for the court of appeals, and a redacted version was filed on the public record.³⁶¹⁶ In cooperation with classified information security officers, Judge Green and her staff blacked out redactions electronically, printed the opinion on a secure printer, and then filed a scanned image of the opinion in the court's electronic case file.³⁶¹⁷ This procedure prevented persons from unredacting the electronic redactions.³⁶¹⁸ Judge Green denied a government attorney's request for an advance copy so that government attorneys could tell her what to redact.³⁶¹⁹

Judge Leon's denials of Sliti, al-Alwi, al-Bihani, and Hammamy's habeas petitions and his granting of el-Gharani and al-Janko's habeas petitions were memorialized in both published opinions and more complete classified opinions.³⁶²⁰ In granting Ahmed's habeas corpus petition, Judge Kessler cited Judge Leon's classified *El-Gharani* opinion.³⁶²¹

3610. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3611. *Id.*

3612. *Id.*

3613. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3614. *Id.*

3615. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (noting in the public version, "Material redacted by court"); Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3616. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3617. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 26, 2011.

3618. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3619. *Id.*

3620. *Al-Ginco v. Obama*, 626 F. Supp. 2d 123, 125 (D.D.C. 2009); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 241 (D.D.C. 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 145 (D.D.C. 2009); *Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46, 47 (D.D.C. 2008).

3621. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56 (D.D.C. 2009).

Six months after Judge Leon ruled that the government had presented sufficient evidence to detain Belkacem Bensayah at Guantánamo Bay, Bensayah filed a motion under Rule 60(b)(2) of the Federal Rules of Civil Procedure for relief from the judgment based on newly discovered evidence.³⁶²² The parties filed their briefing on this motion with the classified information security officer and filed public notices of the filings with the clerk.³⁶²³ Within three months, Judge Leon denied the motion in a classified memorandum order filed with the classified information security officer.³⁶²⁴ The case became moot when Bensayah was transferred to Algeria.³⁶²⁵

Judge Kollar-Kotelly's opinion ordering al-Rabiah's release was issued on September 17, 2009, but it contained classified information so it was not released publicly.³⁶²⁶ A redacted version, containing 519 redactions in sixty-five pages, was released on September 25.³⁶²⁷ The redacted version of her opinion denying al-Kandari's petition, containing eighty-two redactions in sixty-four pages, was released on September 29, 2010, two weeks after the full classified opinion was issued.³⁶²⁸ Her other opinions resolving habeas petitions were also put on the public record in redacted form.³⁶²⁹

Judges Huvelle,³⁶³⁰ Kessler,³⁶³¹ Robertson,³⁶³² Urbina,³⁶³³ Kennedy,³⁶³⁴ Bates,³⁶³⁵ Leon,³⁶³⁶ Friedman,³⁶³⁷ Walton,³⁶³⁸ and Lamberth³⁶³⁹ also resolved habeas petitions

3622. Notice, *Boumediene v. Obama*, No. 1:04-cv-1166 (D.D.C. May 26, 2009), D.E. 291.

3623. *Boumediene* Docket Sheet, *supra* note 2759.

3624. *Id.*

3625. Bensayah Transfer Notice, *supra* note 2915; Voluntary Dismissal, *Bensayah v. Obama*, No. 09-5376 (D.C. Cir. Mar. 20, 2014).

3626. *Al-Odah* Docket Sheet, *supra* note 2740.

3627. Redacted Opinion, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 25, 2009), D.E. 645.

3628. Redacted Opinion, *id.* (Sept. 29, 2010), D.E. 707.

3629. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009) (redacted opinion filed seven days after the classified opinion); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009) (six days).

3630. *Basardh v. Bush*, 612 F. Supp. 2d 30 (D.D.C. 2009) (redacted opinion filed two days after the classified opinion); *see also Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010) (denying a motion to suppress a confession; redacted opinion filed sixteen days after the classified opinion).

3631. *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010) (redacted opinion filed fourteen days after the classified opinion); *Al-Adahi v. Obama*, 692 F. Supp. 2d 85 (D.D.C. 2010) (fourteen days); *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38 (D.D.C. 2009) (twenty-seven days); *Al-Adahi Habeas Grant*, *supra* note 3065 (four days; redactions included the names of co-petitioners and the detainee's brother-in-law, whose identities were otherwise public); *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009) (one day).

3632. *Khalifh* Opinion, *supra* note 3145 (redacted opinion filed seventeen days after the classified opinion); *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010) (eighteen days); *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (seven days).

3633. *Khairkhwa v. Obama*, 793 F. Supp. 2d 1 (D.D.C. 2011) (redacted opinion filed twenty-three days after the classified opinion); *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011) (fifteen days); *Hatim v. Obama*, 677 F. Supp. 2d 1 (D.D.C. 2009) (twenty days).

with opinions containing classified information, so the opinions were filed with a classified information security officer and redacted versions were filed in the public record later.

Judge Collyer denied Sufyian Barhoumi's petition from the bench without a written opinion.³⁶⁴⁰ A redacted transcript of her ruling was filed four months later.³⁶⁴¹ Judge Collyer often issued rulings in the Guantánamo cases from the bench because of the many logistical hurdles required when an opinion is written later.³⁶⁴² All of the work must be done on a special laptop computer, which must be stored with all classified documents in a safe, and none of the work can be done at home.³⁶⁴³ Her 2014 opinion denying Shaker Aamer's release for medical reasons was submitted for classification review before it was released publicly.³⁶⁴⁴

Judge Hogan denied al-Madhwani's petition with an oral ruling on December 14, 2009.³⁶⁴⁵ On January 6, 2010, Judge Hogan filed an unclassified opinion supporting his ruling, "part of which was classified."³⁶⁴⁶ On April 28, Judge Hogan denied al-Madhwani's motion for reconsideration,³⁶⁴⁷ filing a classified opinion with classified information security officers.³⁶⁴⁸ Although the docket sheet promises a later filing of a redacted opinion, it does not appear to reflect such a filing.

3634. *Hentif v. Obama*, 810 F. Supp. 2d 33 (D.D.C. 2011) (redacted opinion filed fourteen days after the classified opinion); *Mingazov Opinion*, *supra* note 3185 (eighty days); *D.D.C. Latif Opinion*, *supra* note 3173 (twenty-six days); *Abdah v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010) (fifteen days); *Abdah v. Obama*, 709 F. Supp. 2d 25 (D.D.C. 2010) (twenty-six days).

3635. *Khan v. Obama*, 741 F. Supp. 2d 1 (D.D.C. 2010) (redacted opinion filed thirty-two days after the classified opinion).

3636. *Ali v. Obama*, 770 F. Supp. 2d 1 (D.D.C. 2011) (redacted opinion filed seventeen days after the classified opinion was issued).

3637. *Almerfed v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (redacted opinion filed fifteen days after the classified opinion).

3638. *Bostan v. Obama*, 821 F. Supp. 2d 80 (D.D.C. 2011) (redacted opinion filed nineteen days after the classified opinion); *Hussein v. Obama*, 821 F. Supp. 2d 67 (D.D.C. 2011) (fifteen days); *Opinion, Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Oct. 7, 2010), D.E. 1773 (fifteen days); *Sulayman v. Obama*, 729 F. Supp. 2d 26 (D.D.C. 2010) (fifteen days).

3639. *Hentif v. Obama*, 883 F. Supp. 2d 97 (D.D.C. 2012) (denying a motion for reconsideration, redacted opinion filed fourteen days after the classified opinion); *Al Warafi v. Obama*, 821 F. Supp. 2d 47 (D.D.C. 2011) (fifty-three days).

3640. *Barhoumi Order*, *supra* note 3099; *see Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010). *Barhoumi Transcript*, *supra* note 3099.

3641. *Barhoumi Transcript*, *supra* note 3099 (transcribing a September 3, 2009, proceeding); *Docket Sheet, Shafiq v. Bush*, No. 1:05-cv-1506 (D.D.C. July 28, 2005) (noting the filing on January 4, 2010).

3642. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3643. *Id.*

3644. *Aamer v. Obama*, 58 F. Supp. 3d 16 (D.D.C. 2014) (redacted opinion filed twenty-three days after the classified opinion was issued).

3645. *Anam Docket Sheet*, *supra* note 2759.

3646. *Anam v. Obama*, 696 F. Supp. 2d 1, 3 (D.D.C. 2010).

3647. *Order, Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010), D.E. 822.

3648. *Anam Docket Sheet*, *supra* note 2759.

On February 24, 2010, Judge Kennedy resolved a habeas petition with an opinion filed with a security officer, and an opinion without apparent redactions was filed nearly two months later.³⁶⁴⁹ A redacted opinion had been filed on March 16, but it had to be withdrawn because it was insufficiently redacted:

A day after his March 16 order was filed on the court's electronic docket, Kennedy's opinion vanished. Weeks later, a new ruling appeared in its place. While it reached the same conclusion, eight pages of material had been removed, including key passages in which Kennedy dismantled the government's case against Uthman.

...

The creation of the additional opinion stemmed from a mishap inside the Justice Department: Kennedy's first opinion was accidentally cleared for public release before government agencies had blacked out all the classified information it cited.³⁶⁵⁰

Judge Lamberth resolved a habeas petition with an opinion that was marked secret and filed with a security officer, but it appears that no redactions were necessary.³⁶⁵¹ Judges commonly strive to craft opinions that require as few redactions as possible.³⁶⁵²

Judge Leon denied Obaydullah's petition on October 19, 2010, filing a public opinion³⁶⁵³ and promising a more complete classified opinion in the coming weeks.³⁶⁵⁴ On November 24, Judge Leon filed a classified opinion with the court security officers; a redacted version was filed in the public record on March 23, 2011.³⁶⁵⁵

Court of Appeals

Many of the opinions resolving appeals in these cases contained classified information, so redacted opinions were filed in the public record, sometimes on the same day and sometimes a few days later.³⁶⁵⁶ Sometimes, a classification review determined that the opinion could be publicly released in full.³⁶⁵⁷

3649. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010) (public opinion filed fifty-six days after the original opinion), *rev'd sub nom.* *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011).

3650. Linzer, *supra* note 3077.

3651. *Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (public opinion filed fifteen days after the classified opinion).

Judge Lamberth tries to tell the public as much as he can about high-visibility cases and tries to avoid the speculation that results from redactions. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3652. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3653. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010).

3654. *Id.* at 346.

3655. Opinion, *Obaydullah v. Obama*, No. 1:08-cv-1173 (D.D.C. Mar. 23, 2011), D.E. 117.

3656. *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012) (redacted opinion filed seven days after the classified opinion); *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir. 2012) (eleven days); *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) (twenty-six days), *reissued*, 677 F.3d 1175 (D.C. Cir. 2012) (reissued in less redacted form after some material had been declassified while a petition for Supreme Court certiorari was pending); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (same

One of these opinions was released in redacted form twenty-six days after the classified opinion was issued³⁶⁵⁸ and then reissued in less redacted form nearly six months later,³⁶⁵⁹ upon the government's motion³⁶⁶⁰ with the detainee's support,³⁶⁶¹ because some of the originally redacted information had been declassified "in connection with ongoing proceedings" in the detainee's petition for a Supreme Court writ of certiorari.³⁶⁶²

On July 22, 2011, the court of appeals filed a sealed opinion reviewing an April 9, 2010, sealed order by Judge Hogan concerning former detainees.³⁶⁶³ After sealed briefing, the Supreme Court denied certiorari.³⁶⁶⁴

Redactions from appellate opinions usually are blacked out in the public opinion and represented by "[redacted]" in West's publication of the opinions. This means that although the published opinion does not show how much material was redacted, the version of the opinion in the case file shows whether each redaction is the size of a word, a phrase, a paragraph, or a page. On September 6, 2011, an opinion by Judge Merrick B. Garland indicated redactions a different way.³⁶⁶⁵ Redactions in this opinion are indicated similarly to how they are indicated in West's published opinions, except that the redactions are numbered from "[Redaction 1]" to "[Redaction 11]."³⁶⁶⁶ A separate classified appendix, filed under seal, specifies what is redacted.³⁶⁶⁷

day); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (seven days); *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (three days); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (eleven days); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010) (same day); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (same day).

3657. *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012) (opinion issued under seal on April 27, 2012, and publicly on May 3, 2012); see Government Response, *Alsabri v. Obama*, No. 11-5081 (D.C. Cir. May 2, 2012) (confirming that the opinion contains no classified information).

In another case, an order was initially filed under seal with an order to show cause why it should not be unsealed, and the order was unsealed seven days later. *Bin Mohammed* Injunction Reversal, *supra* note 3112.

3658. *Latif*, 666 F.3d 746.

3659. *Latif*, 677 F.3d 1175 (unredacting references to an interrogation report).

3660. Government Motion, *Latif v. Obama*, No. 10-5319 (D.C. Cir. Apr. 24, 2012) [hereinafter D.C. Cir. *Latif* Government Motion].

3661. Petitioner Support, *id.* (Apr. 25, 2012) ("In supporting the government's motion, *Latif* does not concede that any of the retained redactions are proper.").

3662. D.C. Cir. *Latif* Government Motion, *supra* note 3660; see Docket Sheet, *Latif v. Obama*, No. 11-1027 (U.S. Oct. 14, 2011).

3663. Docket Sheet, *El-Falesteny v. Obama*, No. 10-5180 (D.C. Cir. June 3, 2010); see Former Guantánamo Detainees Docket Sheet, *supra* note 2898; Docket Sheet, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Dec. 13, 2005).

3664. *El-Falesteny v. Obama*, 567 U.S. ___, 132 S. Ct. 2773 (2012); Docket Sheet, *El-Falesteny v. Obama*, No. 11-9344 (U.S. Mar. 19, 2010).

3665. *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011) (affirming the denial of habeas corpus relief).

3666. *Id.* at 22–23, 25, 30, 32 & nn.2–3.

3667. *Id.* at 21 n.1.

A 2010 opinion affirming denial of habeas corpus relief contained classified information.³⁶⁶⁸ The court shaded the material it thought was classified and ordered the government to show cause why any other parts of the opinion should also be redacted.³⁶⁶⁹ The government identified four additional parts of the opinion for redaction.³⁶⁷⁰ The show-cause order also stated, “no person may disclose, receive, or use the opinion, or this order and attached judgment, for any purpose other than that of responding to this order.”³⁶⁷¹

The government asked the court to modify its order so that it could cite the court’s new precedent in a draft brief in another case.³⁶⁷² The government also asked the court to adopt a protective order: “this Court should order the Government to provide a public, unclassified version of the opinion within a specific time period, but the handling and distribution of the classified opinion will otherwise be controlled by the governing protective order.”³⁶⁷³

The panel granted the government’s request as to the case before the panel and referred the general request to the full court.³⁶⁷⁴ The full court decided not to adopt a general policy:

ORDERED that the practices suggested by the government remain in the discretion of the merits panel assigned to each case. The court denies the government’s requests to adopt a court-wide policy against certain restrictions on the government’s use of classified opinions and a court-wide policy regarding classification review and preparation of redacted opinions and judgments in all Guantanamo habeas appeals.³⁶⁷⁵

On November 5, 2013, the court of appeals held that the time it took to prepare an unclassified redacted version of an opinion resolving the writ petition did not toll the time deadline for a notice of appeal.³⁶⁷⁶ The court recognized that “counsel cannot determine until a redacted version is released what may be discussed with the client, who does not have a security clearance to examine classified materials,” but the court observed that that was not the case in the appeal it heard.³⁶⁷⁷ The event triggering the time to notice an appeal was the July 27, 2012, docketing of Judge Lamberth’s denial of a motion to reconsider Judge Kennedy’s August 1, 2011, denial of the writ.³⁶⁷⁸ Although a redacted version of Judge Lam-

3668. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010).

3669. Order, *Barhoumi v. Obama*, No. 09-5383 (D.C. Cir. June 11, 2010) [hereinafter *Barhoumi Show-Cause Order*].

The court followed a similar procedure for a 2011 petition. Order, *Latif v. Obama*, No. 10-5319 (D.C. Cir. Nov. 9, 2011), available at 2011 WL 5508892.

3670. Government Response at 2, *id.* (June 17, 2010).

3671. *Barhoumi Show-Cause Order*, *supra* note 3669.

3672. Government Motion, *Barhoumi*, No. 09-5383 (D.C. Cir. June 22, 2010).

3673. *Id.* at 4.

3674. Order, *id.* (June 22, 2010).

3675. Order, *id.* (Nov. 17, 2010).

3676. *Hentif v. Obama*, 733 F.3d 1243 (D.C. Cir. 2013).

3677. *Id.* at 1249.

3678. *Id.* at 1245, 1250.

berth's opinion was not docketed until October 8, 2012, a redacted version of Judge Kennedy's opinion had been available since September 15, 2011.³⁶⁷⁹ The court also observed that the detainee could have sought an extension of time for up to thirty days for good cause or could have filed a protective notice of appeal.³⁶⁸⁰

Challenge: Interpreters

To communicate with their clients, the detainees' attorneys typically needed to find interpreters who had or could obtain security clearances.

... The vast majority of prisoners at Guantánamo do not speak English. They speak Pashto, Dari, Russian, Farsi, Arabic, and other languages. Therefore, in order to communicate with clients, lawyers must bring interpreters with them to Guantánamo.

These interpreters are nothing short of courageous. ... They submitted themselves to thorough background checks in order to obtain the necessary security clearances to travel to Guantánamo. They asked employers for permission to take off work, days at a time, for trips to Guantánamo. They explained to loved ones, including small children, why they would be away from home. In fact, because there is such a shortage of security-cleared interpreters, they devote even more time to Guantánamo trips than the attorneys do.³⁶⁸¹

Interpreters were also needed for court proceedings in which the detainees participated. An effective proceeding required one of the detainee's attorneys to be in Cuba, with an interpreter, and another of the detainee's attorneys to be in court.³⁶⁸² Often, the detainee's attorneys and the government also had interpreters in court.³⁶⁸³ Attempting a proceeding with only an interpreter in court worked very badly, because it was difficult for participants to stop talking while the interpreter told the detainee what was said.³⁶⁸⁴

Challenge: Mental and Physical Health During Detention

The court's jurisdiction over detainees' medical conditions depends on the nexus between medical issues and the pursuit of habeas relief.

Detainees' health can become an issue in a variety of ways. Some detainees had health issues before they arrived at Guantánamo Bay. Some detainees developed health issues at Guantánamo Bay. Some detainees recovered from health

3679. *Id.* at 1245.

3680. *Id.* at 1250.

3681. Carolyn M. Welshhans, *Heroes in Any Language*, in *The Guantánamo Lawyers*, *supra* note 2737, at 103, 103–04.

3682. Interview with Hon. Gladys Kessler, May 31, 2011.

3683. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

If the proceeding included more than one interpreter, occasionally an interpreter would object to another interpreter's translation. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011 (noting that, in her experience, the interpreters were always able to finally agree on a translation).

3684. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

issues at Guantánamo Bay and argued that earlier statements by them were compromised by earlier ill health.³⁶⁸⁵ As the detainees age, the military has been enhancing resources for medical care, because Congress has forbidden transfer of the detainees out of Guantánamo Bay, even for medical care.³⁶⁸⁶ An action under the Freedom of Information Act (FOIA) by the *New York Times*, which sought legal analyses of how health care that is unavailable at Guantánamo Bay would be given to detainees who could not be transferred for medical care elsewhere, settled with the production of a document and payment of \$1,400 in attorney fees to the *Times*.³⁶⁸⁷

In 2012, Mohammed al-Qahtani was declared “incompetent and unable to assist effectively in [his] case.”³⁶⁸⁸ His interrogation experience during detention had been one of the harshest.³⁶⁸⁹ Attorneys for Tariq Ali Abdullah Ahmed Ba Odah asked the court to hold petition proceedings in abeyance during the detainee’s hunger strike, because the strike interfered with the detainee’s ability to communicate with counsel.³⁶⁹⁰

3685. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3686. See Carol Rosenberg, *For Aging Captives, Cardiac Healthcare Will Come to Them*, Miami Herald, Sept. 29, 2012, at 1A; Savage, *supra* note 3258.

3687. Stipulated Order, *N.Y. Times Co. v. U.S. Dep’t of Def.*, No. 1:14-cv-3593 (S.D.N.Y. Sept. 8, 2014), D.E. 9; see Complaint, *id.* (May 20, 2014), D.E. 2.

3688. Docket Sheet, *Al-Qahtani v. Bush*, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) (April 20, 2012, minute order).

3689. See Mark Bowden, *The Finish* 113 (2012); Philippe Sands, *Torture Team* (2008); Siems, *supra* note 2992, at 219–47; Soufan, *supra* note 2780, at 464–72, 483, 564. “As with other detainees, [al-Qahtani’s interrogation] program focused on sexual and excretory humiliations, including forced enemas. . . . [Pentagon] lawyers jokingly referred to Qahtani as an ‘enema combatant.’” Bravin, *supra* note 2728, at 257.

Mohammed al-Qahtani [was] a baby-faced young Saudi who had pledged himself to al Qaeda and had planned to join the 9/11 hijackers as “muscle”—one of the enforcers trained to seize the plane and keep the passengers under control on the way to impact. He had arrived in Orlando about a month before the attacks—Mohammed Atta was waiting there to pick him up—but was turned away by an immigration officer, whose suspicions, even in that relatively unwary time, were aroused by the fact that Qahtani had a one-way ticket and could not speak English. When Qahtani grew indignant, he earned himself a return flight to Afghanistan.

Bowden, *supra* note 3689, at 113.

On September 2, 2014, the Second Circuit’s court of appeals affirmed a decision by Southern District of New York District Judge Naomi Reice Buchwald that photographs and videos of al-Qahtani’s treatment were properly withheld from a Freedom of Information Act request because they “could logically and plausibly harm national security because these images are uniquely susceptible to use by anti-American extremists as propaganda to incite violence against United States interests domestically and abroad.” *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 163 (2d Cir. 2014), *affg* *Ctr. for Constitutional Rights v. Dep’t of Def.*, 968 F. Supp. 2d 623 (S.D.N.Y. 2013), *cert. denied*, 575 U.S. ___, 135 S. Ct. 1530 (2015); see Tom Hays, *Court: U.S. Can Withhold Images of Guantánamo Prisoner*, Miami Herald, Sept. 3, 2014, at 5A.

3690. Status Report, *Odah v. Obama*, No. 1:06-cv-1668 (D.D.C. Jan. 7, 2013), D.E. 357.

Medical Evaluation and Treatment

In 2004, Judge Bates denied a motion by the detainee Khadr for an independent medical evaluation.³⁶⁹¹ Khadr was captured as a juvenile in Kabul in 2002.³⁶⁹² Judge Bates determined that his mental competency was not legally an issue because he did not face criminal charges, and Judge Bates declined to interfere with conditions of detention at Guantánamo Bay.³⁶⁹³ Later, Judge Bates denied Khadr a preliminary injunction against torture because Khadr's attorneys could not show that torture was imminent.³⁶⁹⁴

From September 19 to September 29, 2005, counsel representing six detainees in four cases before Judge Kessler moved for emergency injunctive relief ordering the government to provide the attorneys with access to their clients, who were being force-fed because of their participation in a hunger strike, and to their clients' medical records.³⁶⁹⁵ The government argued that it would be infeasible to provide every detainee's attorney with medical updates.³⁶⁹⁶ On October 26, Judge Kessler ordered the government to provide contemporaneous medical information on force-fed detainees to their attorneys.³⁶⁹⁷

In 2009 and 2010, Judge Urbina ordered medical treatment and psychiatric evaluation for Abdul Rahman Shalabi to ensure that Shalabi could meaningfully assist counsel with his petition.³⁶⁹⁸ Shalabi had been on a hunger strike since August 2005.³⁶⁹⁹ To keep him alive, the government force-fed him twice a day through his nose.³⁷⁰⁰

Adil Said al-Haj Obeid al-Busayss's attorneys filed a motion on May 16, 2014, seeking information about al-Busayss's psychiatric treatment and impairment.³⁷⁰¹

3691. *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

3692. *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K.*, 344 F. Supp. 2d at 49.

3693. *O.K.*, 344 F. Supp. 2d at 48, 54; *see also* Opinion, *Al-Ghizzawi v. Bush*, No. 1:05-cv-2378 (Oct. 2, 2006), D.E. 47, *available at* 2006 WL 2844781 (denying a similar medical care motion).

3694. *O.K. v. Bush*, 377 F. Supp. 2d 102, 103, 111–15, 118 (D.D.C. 2005).

3695. Motion, *Al-Razak v. Bush*, No. 1:05-cv-1601 (D.D.C. Sept. 29, 2005), D.E. 8; Motion, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Sept. 20, 2005), D.E. 49; Motion, *Al-Joudi v. Bush*, No. 1:05-cv-301 (D.D.C. Sept. 19, 2005), D.E. 37; Motion, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. Sept. 19, 2005), D.E. 40.

3696. *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 15–16 (D.D.C. 2005).

3697. *Id.* at 23; *see* Neil A. Lewis, *Guantánamo Detainees Gain in Ruling*, N.Y. Times, Oct. 27, 2005, at A22.

Judge Kessler observed that it was very difficult to determine how disruptive the detainees' forced feeding was. Interview with Hon. Gladys Kessler, May 31, 2011.

3698. *Al-Oshan v. Obama*, 753 F. Supp. 2d 1 (D.D.C. 2010); Order, *Al-Oshan v. Obama*, No. 1:05-cv-520 (D.D.C. Nov. 13, 2009), D.E. 300; Order, *id.* (July 14, 2009), D.E. 276; Order, *id.* (June 3, 2009), D.E. 262.

3699. *Al-Oshan*, 753 F. Supp. 2d at 2; *see* Carol Rosenberg, *Guantánamo's 9-Year Hunger Striker Asks to Go Home*, Miami Herald, Apr. 22, 2015, at 3A ("Abdul Rahman Shalabi, 39, has been described as Guantánamo's longest-running hunger striker.").

3700. *Al-Oshan*, 753 F. Supp. 2d at 2.

3701. Motion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. May 16, 2014), D.E. 1033.

Treatment Preferences

Government attorneys assured the court that specific cardiac treatment would not be forced upon a detainee.³⁷⁰² Judge Friedman ruled against the detainee's request for transfer to the Bethesda Naval Hospital for the procedure.³⁷⁰³ Saifullah Paracha was a Pakistani millionaire arrested in Bangkok in July 2003.³⁷⁰⁴ He was interrogated at the Bagram Airbase in Afghanistan; in September 2004, he was transferred to Guantánamo Bay.³⁷⁰⁵ He allegedly acted as a financier and weapons-smuggler for Al-Qaeda.³⁷⁰⁶ In July 2006, his son Uzair was sentenced in the Southern District of New York to thirty years for providing material support to Al-Qaeda.³⁷⁰⁷ The elder Paracha, who had survived two heart attacks, reported chest pains the following fall, so prison physicians prescribed a cardiac catheterization, in which a catheter is snaked through a patient's artery into the heart for diagnostic purposes.³⁷⁰⁸ The unsuccessful motion was based on a claim that the procedure could not be performed safely at Guantánamo Bay.³⁷⁰⁹ Judge Friedman ruled that Paracha failed to establish irreparable injury.³⁷¹⁰ The court of appeals summarily affirmed.³⁷¹¹

Suicide

Litigation over medical issues occurred against a backdrop of occasional suicides. In addition to the three June 2006 suicides, Abdul Rahman Ma'ath Thafir al-Amri

3702. Cardiac Catheterization Order, *Paracha v. Bush*, No. 1:04-cv-2022 (D.D.C. Nov. 20, 2006), D.E. 127, available at 2006 WL 3355177; see Carol Rosenberg, *Captive Seeks Medical Venue*, Miami Herald, Nov. 16, 2006, at 3A (reporting on a government representation that "with the exception of involuntary forced feedings, medical procedures are only carried out with the consent of a detainee").

3703. Cardiac Catheterization Order, *supra* note 3702; see Carol J. Williams, *Detainee Refuses Surgery*, L.A. Times, Nov. 23, 2006, at 22.

3704. See Zarar Khan, *Wife Says Detainee Has Done No Wrong*, Phila. Inquirer, Mar. 6, 2006, at A7.

3705. See Rosenberg, *supra* note 3702.

3706. See *Detainee Wants to Be Relocated for Surgery*, Wash. Post, Nov. 19, 2006, at A10 [hereinafter *Relocated*].

3707. Docket Sheet, *United States v. Paracha*, No. 1:03-cr-1197 (S.D.N.Y. Oct. 8, 2003); see Opinion, *id.* (Jan. 3, 2006), D.E. 82, available at 2006 WL 12768 (discussing the son's unsuccessful motion to compel the father's testimony at trial). See generally Human Rights Watch, *Illusion of Justice* 6, 196–200 (2014). The court of appeals affirmed the conviction. *United States v. Paracha*, 313 Fed. App'x 347 (2d Cir. 2008).

3708. See *Relocated*, *supra* note 3706; Rosenberg, *supra* note 3702; Williams, *supra* note 3703.

3709. See Rosenberg, *supra* note 3702; see also Cucullu, *supra* note 2754, at 161–62 (reporting anger by a military officer that so many resources had been wasted on a detainee who ultimately refused the procedure); Williams, *supra* note 3703 (reporting on the government's claim that "nearly \$400,000 was spent flying in a 24-member team of cardiac specialists and equipment to be on hand in case of complications").

3710. Cardiac Catheterization Order, *supra* note 3702.

3711. Order, *Paracha v. Bush*, No. 06-5379 (D.C. Cir. Dec. 1, 2006).

was found dead by apparent suicide in 2007.³⁷¹² Mohammad Ahmed Abdullah Saleh al-Hanashi, who had been on a hunger strike, apparently committed suicide in 2009.³⁷¹³ Hajji Nassim, a high-value detainee, apparently killed himself in 2011.³⁷¹⁴ Adnan Farhan Abdul Latif apparently killed himself by drug overdose in 2012.³⁷¹⁵

In 2005, Jumah al-Dosari tried to kill himself during a bathroom break while his attorney was visiting him so that the attorney would be a witness.³⁷¹⁶ He made another suicide attempt in 2006,³⁷¹⁷ and he was transferred to Saudi Arabia in 2007.³⁷¹⁸

Hunger Strikes

On Tuesday, February 26, 2002, a Guantánamo Bay guard ordered a prisoner at prayer to remove a makeshift turban from his head; turbans were forbidden because they could be used to conceal weapons, so guards provided tight-fitting prayer caps on request.³⁷¹⁹ On the following day, many prisoners began refusing to take meals, in protest.³⁷²⁰ An announcement on Thursday that prisoners could wear turbans, reserving a right to inspect them, abated the hunger strike somewhat.³⁷²¹ A month later, camp doctors began force-feeding two strikers.³⁷²² Hunger strikes and suicide attempts were a problem at Guantánamo Bay from time to time thereafter.³⁷²³ Some detainees engaged in hunger strikes for several years.³⁷²⁴

3712. See Cucullu, *supra* note 2754, at 132–33; William Glaberson, *Detainee Found Dead in Guantánamo Cell*, N.Y. Times, May 31, 2007, at A14; William Glaberson & Margot Williams, *Pentagon Files Offer Details on Detainee in Suicide*, N.Y. Times, June 1, 2007, at A22; Gorman, *supra* note 2851, at 16 (reporting that before his death al-Amri suffered from untreated hepatitis B and tuberculosis and was so ill that he could barely walk); Savage, *supra* note 3369.

3713. Al-Hanashi Death Notice, *supra* note 2891; see William Glaberson & Margot Williams, *Officials Report Suicide of Guantánamo Detainee*, N.Y. Times, June 3, 2009, at A17; Savage, *supra* note 3369.

3714. Nassim Death Notice, *supra* note 2891; see *Afghan Detainee Is Found Dead at Guantánamo*, N.Y. Times, May 19, 2011, at A19.

3715. See Rosenberg, *supra* note 3177; Savage, *supra* note 3177; Savage, *supra* note 2891; Tate, *supra* note 3177.

3716. Joshua Colangelo-Bryan, *Jumah al-Dossari: What Indefinite Detention Without Charge or Trial Looks Like*, 10 N.Y. City L. Rev. 379, 381–83 (2007).

3717. See *id.* at 383.

3718. Transfer Notice, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 16, 2007), D.E. 179.

3719. See James Dao, *Detainees Stage Protest at Base Over a Turban*, N.Y. Times, Mar. 1, 2002, at A12; Greenberg, *supra* note 2754, at 182–83.

3720. See Dao, *supra* note 3719; Greenberg, *supra* note 2754, at 185; Margulies, *supra* note 2732, at 138.

3721. See Greenberg, *supra* note 2754, at 190; Eric Schmitt, *A Concession on Turbans Calms Protest in Cuba Camp*, N.Y. Times, Mar. 2, 2002, at A9.

3722. See James Dao, *Navy Doctors Force-Feeding 2 Prisoners*, N.Y. Times, Apr. 2, 2002, at A12.

3723. See Carlotta Gall & Neil A. Lewis, *Tales of Despair from Guantánamo*, N.Y. Times, June 17, 2003, at A1.

On July 21, 2005, the Pentagon reported that fifty Guantánamo Bay detainees were on a hunger strike.³⁷²⁵ Promises to improve conditions abated the strike a week later.³⁷²⁶ In August, however, detainees were striking again.³⁷²⁷ On September 1, habeas attorneys in five cases filed with the classified information security officers motions for a preliminary injunction requiring the government to provide the striking detainees with appropriate medical treatment.³⁷²⁸ The judges assigned to these cases transferred the motions to Judge Oberdorfer for resolution.³⁷²⁹ While the motions were pending, hunger striking became more prevalent.³⁷³⁰ Judge Oberdorfer followed Judge Bates's resolution of a medical care motion and, on September 28, denied the injunction without prejudice.³⁷³¹ Judges Kollar-Kotelly and Urbina denied similar motions in other cases a few days later.³⁷³² In 2009, Judge Leon relied on Judge Bates's opinion in denying a motion for an independent medical examination.³⁷³³

In early 2013, hunger strikes again became prevalent; news reports suggested that the strikes were sparked by a change in search procedures coinciding with a new rotation of guards and fueled by years of confinement uncertainty for the detainees.³⁷³⁴ Guards engaged in a forceful crackdown on the strikes and other

3724. *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 117 (D.D.C. 2009); *see also id.* at 114 n.3 (“The Government designates detainees as hunger-strikers after they have missed nine consecutive meals.”).

3725. *See Guantánamo Hunger Strike Is Reported*, N.Y. Times, July 22, 2005, at A16.

3726. *See Lewis*, *supra* note 2922.

3727. *See Al Odah v. United States*, 406 F. Supp. 2d 37, 39 (D.D.C. 2005) (concerning the hunger strike of Fawzi al-Odah); Neil A. Lewis, *Hunger Strike by Detainees Goes to Court*, N.Y. Times, Sept. 22, 2005, at A29.

3728. Notice of Filing, *Al-Habashi v. Bush*, No. 1:05-cv-765 (D.D.C. Sept. 14, 2005), D.E. 12; Notice of Filing, *Abu Imran v. Bush*, No. 1:05-cv-764 (D.D.C. Sept. 13, 2005), D.E. 13; Notice of Filing, *Abdulaziz v. Bush*, No. 1:05-cv-492 (D.D.C. Sept. 13, 2005), D.E. 21; Notice of Filing, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Sept. 13, 2005), D.E. 23; Notice of Filing, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Sept. 13, 2005), D.E. 151; *see Lewis*, *supra* note 3727.

3729. Order, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 27, 2005), D.E. 154 (order by Roberts); Order, *Deghayes*, No. 1:04-cv-2215 (D.D.C. Sept. 26, 2005), D.E. 27 (order by Collyer); Order, *Al-Habashi*, No. 1:05-cv-765 (D.D.C. Sept. 23, 2005), D.E. 14 (order by Sullivan); Order, *Aziz*, No. 1:05-cv-492 (D.D.C. Sept. 23, 2005), D.E. 23 (order by Robertson); Order, *Abu Imran*, No. 1:05-cv-764 (D.D.C. Sept. 21, 2005), D.E. 15 (order by Kollar-Kotelly).

3730. *See Lewis*, *supra* note 2922.

3731. *El-Banna v. Bush*, 394 F. Supp. 2d 76, 78–79 (D.D.C. 2005).

3732. Order, *Al-Oshan v. Bush*, No. 1:05-cv-520 (D.D.C. Oct. 5, 2005), D.E. 59 (also applying to Nos. 1:05-cv-1048, 1:05-cv-1429, 1:05-cv-1453, and 1:05-cv-1724); Opinion, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 30, 2005), D.E. 254; *see Al Odah*, 406 F. Supp. 2d 37 (denying a subsequent motion because the detainee's medical situation was caused by his own hunger strike).

3733. Order, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Apr. 28, 2009), D.E. 234.

3734. *See Peter Finn & Julie Tate, Signs of Growing Frustrations at Guantánamo Bay*, Wash. Post, Mar. 17, 2013, at A3; *Life at Gitmo*, 60 Minutes (CBS television broadcast Nov. 18, 2013), available at www.cbsnews.com/news/life-at-gitmo/ (featuring an interview with the new warden); Carol Rosenberg, *U.S. Acknowledges Hunger Strike*, Miami Herald, Mar. 16, 2013, at 3A; Carol Rosenberg, *Weapons-in-Quarans Claim at Crux of Strike*, Miami Herald, Apr. 6, 2013, at 1A; Charlie Savage, *Hunger Strike Cases at Guantánamo Rise to at Least 25*, N.Y. Times, Mar. 21, 2013, at A15;

forms of protest in April.³⁷³⁵ The hunger strikes did not abate, and because the strikes were heavily influenced by what detainees considered disrespectful searches of their Qurans, guards agreed to allow the detainees to forego having Qurans.³⁷³⁶ The number of strikers continued to increase until they included a majority of the detainees.³⁷³⁷

Some of the strikers were force-fed to keep them alive:³⁷³⁸

Twice a day at the military detention center at Guantánamo Bay, Cuba, guards take a group of detainees from their cells, one at a time to a camp clinic or a private room on their block.

The detainees are offered a hot meal or a liquid nutritional supplement, and, if they refuse, they are strapped into a chair. A nurse then passes a tube through their noses and down into their stomachs; for one to two hours, they are fed a drip of Ensure while a Navy corpsman watches.³⁷³⁹

The International Committee of the Red Cross³⁷⁴⁰ and the World Medical Association,³⁷⁴¹ among others, have determined it to be an unethical deprivation of

see also Samir Naji al-Hasan Moqbel, Op-Ed, *Gitmo Is Killing Me*, N.Y. Times, Apr. 15, 2013, at A19 (account by hunger striker).

3735. *See* Peter Finn, *Military, Detainees Clash at Guantánamo Bay*, Wash. Post, Apr. 14, 2013, at 1A; Carol Rosenberg, *Details Emerge of Guards' Clash with Captives*, Miami Herald, Apr. 17, 2013, at 3A; Carol Rosenberg, *U.S. Guards Raid Camp, Move Hunger Strikers to Single Cells*, Miami Herald, Apr. 14, 2013, at 4A; Carol Rosenberg, *White House Alerted Ahead of Prison Raid*, Miami Herald, Apr. 16, 2013, at 3A; Charlie Savage, *Mounting Tensions Escalate Into Violence During Raid at Guantánamo Prison*, N.Y. Times, Apr. 14, 2013, at A16; Charlie Savage, *Officials Describe Chaos at Guantánamo in Weeks That Preceded Raid on Prison*, N.Y. Times, Apr. 17, 2013, at A10.

On April 13, 2013, upon order of the Commander, JTF-GTMO, detainees residing in Camp 6 were transitioned from communal to single-cell living to ensure the health and security of the detainees. This action was taken in response to efforts by detainees to limit the guard force's ability to observe the detainees, including by covering surveillance cameras, windows, sally port fences, and glass partitions.

Government Notice at 2, *In re Guantánamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Aug. 8, 2013), D.E. 1997.

3736. *See* Carol Rosenberg, *Almost a Third of Captives Now Hunger Strikers*, Miami Herald, Apr. 18, 2013, at 3A.

3737. *See* Carol Rosenberg, *Hunger Strike Tally Rises to 102 at Guantánamo*, Miami Herald, May 17, 2013, at 4A; Carol Rosenberg, *Hunger Strike Toll Keeps Getting Bigger*, Miami Herald, Apr. 21, 2013, at 3A; Carol Rosenberg, *More Terror Captives Begin Hunger Strikes*, Miami Herald, Apr. 19, 2013, at 3A; Charlie Savage, *Despair Drives Guantánamo Detainees to Revolt*, N.Y. Times, Apr. 25, 2013, at A1.

3738. *See* Carol Rosenberg, *Third of Hunger Strikers Being Force Fed by U.S.*, Miami Herald, May 27, 2013, at 3A (reporting on the force-feeding of thirty-five detainees and reporting, "The prison won't identify those on hunger strike but the Justice Department has notified attorneys for at least 16 of the men that their clients are being force-fed.").

3739. Peter Finn & Julie Tate, *Protest Spotlights Indefinite Detention*, Wash. Post, May 3, 2013, at A1; *see* Carol Rosenberg, *Rights Groups: End "Cruel" Force-Feeding*, Miami Herald, May 15, 2013, at 3A.

3740. *Hunger Strikes in Prisons: The ICRC's Position*, www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm.

rights to force-feed a mentally competent hunger striker.³⁷⁴² On June 19, Senator Dianne Feinstein, then chair of the U.S. Senate Select Committee on Intelligence, expressed to the Secretary of Defense her opposition to the force-feeding of Guantánamo Bay hunger strikers.³⁷⁴³ Four habeas petitioners—Ahmed Belbacha, Habil Hadjarab, Abu Wa’el Jihad Dhiab, and Shaker Aamer—filed motions on June 30 with Judges Kessler and Collyer for relief from force-feeding.³⁷⁴⁴ On July 8, Judge Kessler determined in Dhiab’s case that “force-feeding is a painful, humiliating, and degrading process,” but she denied the motion on the ground that the Military Commissions Act of 2006 (MCA) stripped the courts of jurisdiction over conditions of confinement for enemy combatants.³⁷⁴⁵

Senators Feinstein and Richard Durbin wrote to President Obama on July 10 to ask him to scale back the force-feeding.³⁷⁴⁶

3741. World Medical Association Reiterates its Policies on Hunger Strikes, www.wma.net/en/40news/20archives/2012/2012_12/index.html.

3742. See Peter Finn, *Number of Protesting Guantanamo Bay Detainees Being Force-Fed Grows to 41*, Wash. Post, June 7, 2013, at A6; Finn & Tate, *supra* note 3739; Carol Rosenberg, *Medical Ethicists: Stop Prison Force-Feeding*, Miami Herald, June 13, 2013, at 6A; Rosenberg, *supra* note 3739.

The United Nations Committee Against Torture “considers that force-feeding of prisoners on hunger strike constitutes ill-treatment in violation of the Convention [Against Torture].” United Nations Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America*, Nov. 20, 2014, at 6 (advance unedited version), available at <http://justsecurity.org/wp-content/uploads/2014/11/UN-Committee-Against-Torture-Concluding-Observations-United-States.pdf>. The committee advised the United States to “[p]ut an end to force-feeding of detainees in hunger strike as long as they are able to take informed decisions.” *Id.*

3743. Senator Feinstein Letter to Secretary Hagel, June 19, 2013, available at www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=17585d4b-c235-4f32-b957-50648d4e6252; see Feinstein: *End Force-Feeding of Prisoners at Guantánamo*, Miami Herald, June 20, 2013, at 3A.

3744. *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20 (D.D.C. 2014); Motion, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. June 30, 2013), D.E. 212 (also filed in Nos. 1:05-cv-1457, 1:05-cv-1504, and 1:05-cv-2349); see Carol Rosenberg, *Lawyers Ask Judges to Halt Force-Feeding*, Miami Herald, July 2, 2013, at 3A.

3745. *Dhiab v. Obama*, 952 F. Supp. 2d 154 (D.D.C. 2013); *Dhiab*, 74 F. Supp. 3d at 20; see Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. Aug. 29, 2013), D.E. 192 (denying reconsideration); see also Michael Doyle, *Judge: I Can’t Stop Force-Feeding, but Obama Can*, Miami Herald, July 9, 2013, at 3A; Charlie Savage, *Judge Urges President to Address Prison Strike*, N.Y. Times, July 9, 2013, at A12.

Even though this Court is obligated to dismiss the Application for lack of jurisdiction, and therefore lacks any authority to rule on Petitioner’s request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2013, President Barack Obama stated “Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. . . . Is [this] who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that.”

Dhiab, 952 F. Supp. 2d at 156; see Remarks at National Defense University, May 23, 2013, Comp. Pres. Docs., 2013 DCPD 361.

3746. Senators Feinstein and Durbin Letter to President Obama, July 10, 2013, available at www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=4bdc8dd7-dc7f-48a4-b718-d8fb6fc4294d; see Carol Rosenberg, *2 Senators Ask Obama to Halt Force-Feedings*, Miami Herald, July 11, 2013, at

On July 16, Judge Collyer denied the force-feeding motion in her three cases for lack of jurisdiction, but she also observed that the motion was deficient on the merits: “As his custodian, the United States cannot ‘allow’ any person held in custody to starve himself to death. Whatever the medical ethics for a person at liberty, the United States as custodian has additional obligations.”³⁷⁴⁷

Hadjarab was willingly transferred to Algeria in August.³⁷⁴⁸

Appeals on force-feeding were heard on October 18.³⁷⁴⁹ After argument, the government notified the court that none of the appellants was any longer a hunger striker.³⁷⁵⁰ Imad Abdullah Hassan, who “has been on hunger strike nearly continuously since 2007,” moved to intervene on November 4 to prevent mootness of the appeals.³⁷⁵¹ On November 8, the government notified the court that Dhiab was again a hunger striker.³⁷⁵²

On February 11, 2014, a panel of the court of appeals held by a vote of two to one that as a result of the Supreme Court’s 2008 holding in *Boumediene v. Bush*³⁷⁵³ that the habeas-stripping provision of the MCA was unconstitutional, conditions of confinement properly challenged in petitions for writs of habeas corpus are within the courts’ jurisdiction, and the remaining provisions of the MCA only bar *Bivens*³⁷⁵⁴ actions.³⁷⁵⁵ Although the petitioners might be able to prove entitlement to relief after a full trial, however, they had not made a sufficient showing for a preliminary injunction.³⁷⁵⁶ “This is a court of law, not an arbiter of medical ethics”³⁷⁵⁷ “[T]he overwhelming majority of courts have concluded, as did Judge Collyer and as we do now, that absent exceptional circum-

3A; see also Dianne Feinstein & Dick Durbin Op-Ed, *How to Close Guantánamo*, L.A. Times, Aug. 14, 2013, at 13 (newspaper column urging the closing of the detention facility); Carol Rosenberg, *Feinstein Wants Changes to Guantánamo Force-Feedings*, Miami Herald, Apr. 8, 2015, at 3A.

3747. *Aamer v. Obama*, 953 F. Supp. 2d 213, 221 (D.D.C. 2013); see Ann E. Marimow, *Judge Rejects Request to Block Force-Feeding of Guantánamo Detainees*, Wash. Post, July 17, 2013, at A5.

3748. *Nabil* Transfer Notice, *supra* note 3134; *Aamer v. Obama*, 742 F.3d 1023, 1027 (D.C. Cir. 2014).

3749. Docket Sheet, *Dhiab v. Obama*, No. 13-5276 (D.C. Cir. Sept. 5, 2013); Docket Sheet, *Belbacha v. Obama*, No. 13-5225 (D.C. Cir. July 22, 2013); Docket Sheet, *Hadjarab v. Obama*, No. 13-5224 (D.C. Cir. July 22, 2013); Docket Sheet, *Aamer v. Obama*, No. 13-5223 (D.C. Cir. July 22, 2013).

3750. Letter, *Aamer*, No. 13-5223 (D.C. Cir. July 22, 2013).

3751. Motion, *id.* (Nov. 4, 2013).

3752. Letter, *id.* (Nov. 8, 2013).

3753. 553 U.S. 723 (2008).

3754. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

3755. *Aamer v. Obama*, 742 F.3d 1023, 1026, 1028–38 (D.C. Cir. 2014) (opinion by Circuit Judge Tatel, joined by Circuit Judge Griffith); see *id.* at 1044–50 (dissenting opinion by Circuit Judge Williams); see also *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20 (D.D.C. 2014); Frommer, *supra* note 3004; Savage, *supra* note 3004.

3756. *Aamer*, 742 F.3d at 1038–44.

3757. *Id.* at 1039.

stances prison officials may force-feed a starving inmate actually facing the risk of death.³⁷⁵⁸

During Ramadan in the summer of 2013, prisoner segregation was relaxed for compliant prisoners and the number of hunger strikers began to decrease.³⁷⁵⁹ The number of strikers reached a low of eleven in November and then increased a bit to fifteen.³⁷⁶⁰ In December, the government stopped drawing attention to the strike by releasing daily strike numbers.³⁷⁶¹ In March 2014, the *Miami Herald* reported that the government had begun to refer to hunger strikes as “long term non-religious fasting.”³⁷⁶²

Hassan filed a district-court motion to enjoin force-feeding on March 11, 2014.³⁷⁶³ Two days later, Belbacha was willingly transferred to Algeria.³⁷⁶⁴ On March 27, Mohammad Ahmad Ghulam Rabbani joined the force-fed petitioners.³⁷⁶⁵

On May 16, Judge Kessler temporarily enjoined the force-feeding of Dhiab until it could be determined at a May 21 status conference how soon the government could produce evidentiary videotapes of his force-feeding.³⁷⁶⁶ On May 22, Judge Kessler declined to extend temporary injunctive restrictions on force-feeding, unwilling to let Dhiab die but disappointed by the government’s intransigence in refusing to mitigate unnecessary pain.³⁷⁶⁷

In the summer of 2014, the *Miami Herald* reported that the Navy decided not to court-martial a nurse who refused on ethical grounds to participate in the

3758. *Id.* at 1041.

3759. See Carol Rosenberg, *25 Captives Quit Hunger Strike Since Ramadan*, *Miami Herald*, July 15, 2013, at 2A; Charlie Savage, *15 Held at Guantánamo Are Said to Quit Hunger Strike*, *N.Y. Times*, July 15, 2013, at A3; see also Carol Rosenberg, *Key Guantánamo Detainee Posts Remain Vacant*, *Miami Herald*, Sept. 7, 2013, at 4A (“Captives began quitting the strike in early July once the prison leveraged eating to release from lockdown.”).

3760. See Carol Rosenberg, *Daily Hunger-Strike Report Ends*, *Miami Herald*, Dec. 4, 2013, at 3A.

3761. See *id.*; see also Steve Coll, Comment, *Two More Years*, *New Yorker*, Nov. 17, 2014, at 33, 34.

A *Miami Herald* website displays daily government counts of strikers through December 2013. www.miamiherald.com/static/media/projects/gitmo_chart/.

3762. Carol Rosenberg, *U.S. Officially Defines Away Guantánamo “Hunger Strike”*, *Miami Herald*, Mar. 12, 2014, at 1A.

3763. Motion, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Mar. 11, 2014), D.E. 1001.

3764. Belbacha Transfer Notice, *supra* note 3135.

3765. Motion, *Rabbani v. Obama*, No. 1:05-cv-1607 (D.D.C. Mar. 27, 2014), D.E. 306.

3766. Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. May 16, 2014), D.E. 221; Transcript, *id.* (May 21, 2014, filed June 13, 2014), D.E. 247; *id.* at 4 (“nobody should have the misperception that that TRO represented any kind of ruling on the merits”); see Carol Rosenberg, *Judge Orders Military to Halt Force-Feedings of One Captive*, *Miami Herald*, May 17, 2014, at 1A.

3767. Order, *Dhiab*, No. 1:05-cv-1457 (D.D.C. May 22, 2014), D.E. 224, available at 2014 WL 2134491; see Michael Doyle, *With Reluctance, Forced-Feeding Ban Lifted*, *Miami Herald*, May 24, 2014, at 1A; Dan Lamothe, *Judge Allows Force-Feeding of Detainee at Guantanamo*, *Wash. Post*, May 24, 2014, at A1; Charlie Savage, *U.S. Judge Decides “Anguishing” Case on Force-Feeding*, *N.Y. Times*, May 24, 2013, at A1.

force-feeding, but the nurse was removed from Guantánamo Bay and his military future remained uncertain.³⁷⁶⁸

As Dhiab's force-feeding litigation continued, he narrowed his challenge from force-feeding in general to particularly unpleasant methods of force-feeding, and the government modified those methods somewhat.³⁷⁶⁹ On November 7, Judge Kessler ruled that remaining departures from Dhiab's preferred force-feeding methods did not demonstrate deliberate indifference.³⁷⁷⁰

Having reached this conclusion, the Court feels constrained to make certain comments about the Government's treatment of Mr. Dhiab. It is very hard to understand why the Government refused to give Mr. Dhiab access to the wheelchair and/or crutches that he needed in order to walk to the room for enteral feedings. Had that simple step been taken, numerous painful and humiliating forced cell extractions could have been avoided. While the Government ultimately—but only a short time before the hearing—allowed Mr. Dhiab to use the wheelchair, thereby inducing him to comply with the force-feeding as he had agreed to do, common sense and compassion should have dictated a much earlier result. By the same token, the Government refused Mr. Dhiab's request to provide him with an additional mattress. What could be more reasonable than providing an additional mattress to a man with back pain so severe that he was given morphine to alleviate it?³⁷⁷¹

Dhiab was transferred to Uruguay in December.³⁷⁷² On March 9, 2015, the court of appeals vacated Judge Kessler's ruling and dismissed an appeal as moot.³⁷⁷³ On December 19, 2014, Judge Lamberth denied a preliminary injunction to Rabbani.³⁷⁷⁴

Too Sick to Harm

On February 12, 2014, Mohammed al-Adahi, whose habeas writ had been reversed by the court of appeals in 2010, moved to reopen his case, arguing that his health had deteriorated so much that he could no longer engage in hostilities

3768. *Guantanamo Nurse Could Be Discharged For Not Force-Feeding Detainees*, All Things Considered (NPR radio broadcast Nov. 19, 2014), available at www.npr.org/2014/11/19/365271597/guantanamo-nurse-could-be-discharged-for-not-force-feeding-detainees; Carol Rosenberg, *Navy Nurse Refuses to Force-Feed Prisoner*, Miami Herald, July 16, 2014, at 1A; Carol Rosenberg, *No Court-Martial for Guantánamo Nurse*, Miami Herald, Sept. 16, 2014, at 3A; Carol Rosenberg, *Objections to Force-Feeding Might Lead to Court-Martial*, Miami Herald, Aug. 29, 2014, at 3A.

3769. *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20–21 (D.D.C. 2014).

3770. *Id.* at ___ (pp.9–19 of filed opinion); see Carol Rosenberg, *Judge Upholds Treatment of Hunger Striker*, Miami Herald, Nov. 9, 2014, at 4A; Matt Zapotosky, *Judge Rejects Detainee's Bid to Revise Force-Feedings at Guantánamo Bay*, Wash. Post, Nov. 8, 2014, at A5.

3771. *Dhiab*, 74 F. Supp. 3d at 29 (footnote omitted).

3772. *Dhiab Notice of Transfer*, *supra* note 3268; see Goldman, *supra* note 3266; Rosenberg, *supra* note 2976; Savage, *supra* note 3266; Schwartz & Turner, *supra* note 3258.

3773. *Order, Dhiab v. Obama*, No. 14-5276 (D.C. Cir. Mar. 9, 2015).

3774. *Rabbani v. Obama*, 76 F. Supp. 3d 21 (D.D.C. 2014).

against the United States.³⁷⁷⁵ Shaker Aamer filed a similar motion on April 7, based on both his poor physical health and his poor mental health.³⁷⁷⁶ Judges Kessler and Collyer denied the motions.³⁷⁷⁷ Al-Adahi's appeal is pending.³⁷⁷⁸

Challenge: Religious Accommodation

At the March 6, 2009, hearing that Judge Sullivan held to determine whether al-Sharbi was knowingly and competently withdrawing his habeas petition voluntarily, in which al-Sharbi participated by video conference from Guantánamo Bay, Judge Sullivan recessed the proceeding briefly at al-Sharbi's request so that al-Sharbi could pray.³⁷⁷⁹

Challenge: Ordering Testimony from an Ambassador

On June 10, 2010, Judge Kessler ordered Daniel Fried, Special Envoy for the Closure of the Guantánamo Bay Detention Facility, to appear at a hearing on Bin Mohammed's application for an injunction against his transfer to Algeria.³⁷⁸⁰

In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009.³⁷⁸¹

Ambassador Fried had submitted declarations assuring the court of Bin Mohammed's safety in Algeria,³⁷⁸² and Judge Kessler determined that "this Court has an obligation to ensure that there is real substance behind the conclusory phrases contained in Special Envoy Fried's declarations."³⁷⁸³

3775. Motion, Al-Adahi v. Obama, No. 1:05-cv-280 (D.D.C. Feb. 12, 2014), D.E. 640; Transcript, *id.* (July 29, 2014, filed Oct. 29, 2014), D.E. 659 (oral argument); see Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

3776. Motion, Deghayes v. Obama, No. 1:04-cv-2215 (D.D.C. Apr. 7, 2014), D.E. 255; see Charlie Savage, *Lawyers for a Guantánamo Detainee Cite Failing Health in Seeking His Release*, N.Y. Times, Apr. 8, 2014, at A15.

3777. Order, Al-Adahi, No. 1:05-cv-280 (D.D.C. Aug. 7, 2014), D.E. 653; Aamer v. Obama, 58 F. Supp. 3d 16 (D.D.C. 2014).

3778. Docket Sheet, Al-Adahi v. Obama, No. 14-5251 (D.C. Cir. Oct. 15, 2014).

3779. Al Sharbi v. Bush, 601 F. Supp. 2d 317, 320 n.3 (D.D.C. 2009).

3780. Order, Bin Mohammed v. Obama, No. 1:05-cv-1347 (D.D.C. June 10, 2010), D.E. 295 [hereinafter *Bin Mohammed* Hearing Order].

3781. July 9, 2009, Fried Declaration, *attached as* Ex. 9, Government Opposition, Naji v. Obama, No. 10-5191 (D.C. Cir. July 15, 2010).

3782. Nov. 25, 2009, Fried Declaration, *attached as* Ex. 10, Government Opposition, Naji, No. 10-5191 (D.C. Cir. July 15, 2010); July 15, 2009, Fried Declaration, *supra* note 3781.

3783. *Bin Mohammed* Hearing Order, *supra* note 3780, at 2.

The government sought reconsideration from Judge Kessler and relief from the court of appeals.³⁷⁸⁴ On Friday, June 25, the court of appeals ordered Judge Kessler to put her case in an appealable posture by 4:00 p.m. on Tuesday.³⁷⁸⁵ On June 29, Judge Kessler, without hearing testimony from Ambassador Fried, enjoined Bin Mohammed's transfer to Algeria.³⁷⁸⁶ The court of appeals dissolved the injunction on July 8.³⁷⁸⁷

Ambassador Fried's Guantánamo Bay position was eliminated early in 2013.³⁷⁸⁸ A new special State Department envoy, Cliff Sloan, worked from July 2013³⁷⁸⁹ to December 2014.³⁷⁹⁰ A Defense Department counterpart, Paul M. Lewis, has been in place since October 2013.³⁷⁹¹

Appendix: Habeas Petitioners Transferred Out of Guantánamo Bay

Table 1. 198 Petitioners Transferred by the Time of the 2008 Boumediene Decision.

For 161 transfers, the government filed notices in the detainees' habeas cases:

1. Eight: Notices, No. 1:02-cv-828 (D.D.C. Jan. 18, 2005, to Sept. 15, 2006), D.E. 184, 270, 310 (Nasir Najr Nasir Balud al-Mutayri, Abdullah al-Ajmi, Abdulaziz al-Shammari, Mohammed al-Dihani, Adil al-Zamil, Saad al-Azmi, Omar Rajab Amin, and Abdullah Kamal Abdullah Kamal al-Kandari to Kuwait).
2. One: Notice, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006), D.E. 112 (Murat Kurnaz to Germany); *see* Murat Kurnaz, *Five Years of My Life* (2008); Baher Azmy, *Free at Last*, in *The Guantánamo Lawyers*, *supra* note 2737, at 346; Bernhard Docke, *Lost and Found*, in *The Guantánamo Lawyers*, *supra* note 2737, at 297; Craig Whitlock, *U.S. Frees Longtime Detainee*, *Wash. Post*, Aug. 25, 2006, at A9.
3. Six: Notices, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007), D.E. 192, 206 (Bisher al-Rawi and Jamil el-Banna to the United Kingdom); Notice, No. 1:04-cv-1137 (D.D.C. Jan. 25, 2005), D.E. 93 (Feroz Ali Abbasi, Moazzam Begg, Richard Belmar, and Martin Mubanga to the United Kingdom; also filed in Nos. 1:04-cv-1144 and 1:04-cv-1897); *see* Begg, *supra* note 3036, at 345–74;

3784. *Bin Mohammed* Injunction, *supra* note 3109, at 2.

3785. Order, *Bin Mohammed v. Obama*, No. 10-5200 (D.C. Cir. June 25, 2010); *Bin Mohammed* Injunction, *supra* note 3109, at 2–3.

3786. *Bin Mohammed* Injunction, *supra* note 3109.

3787. *Bin Mohammed* Injunction Reversal, *supra* note 3112.

3788. *See* Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, *N.Y. Times*, Jan. 29, 2013, at A14.

3789. *See* Hannah Allam, *New Envoy Tours Guantánamo Prison Camp*, *Miami Herald*, July 4, 2013, at 3A.

3790. *See* Helene Cooper, *Guantánamo Envoy Quits Amid Delays in Releases*, *N.Y. Times*, Dec. 23, 2014, at A17; Carol Rosenberg, *Guantánamo "Closer" Quitting*, *Miami Herald*, Dec. 23, 2014, at 3A; *see also* Cliff Sloan, Op-Ed, *The Path to Closing Guantánamo*, *N.Y. Times*, Jan. 6, 2015, at A23.

3791. *See* Rosenberg, *supra* note 3790; Carol Rosenberg, *Sources: Hill Lawyer Named Pentagon's "Gitmo Closer"*, *Miami Herald*, Oct. 8, 2013, at 1A; Craig Whitlock, *Hagel Appoints Envoy to Bolster Efforts to Close Guantanamo*, *Wash. Post*, Oct. 9, 2013, at A11; *see also* Obama Meets Guantánamo Envoys, *Miami Herald*, Nov. 5, 2013, at 3A (photo).

Britain Detains 3 Men Freed by U.S., N.Y. Times, Dec. 20, 2007 (reporting on a transfer to Britain of el-Banna and Omar Deghayes, a petitioner in No. 1:04-cv-2215, and one additional detainee, Adbenour Samuer); Glenda Cooper, *Last British Prisoners Leave Guantanamo*, Wash. Post, Jan. 26, 2005, at A14 (reporting on the transfer of Abbasi, Begg, Belmar, and Mubanga); Omonira-Oyekanmi & Finn, *supra* note 2751 (reporting on a British damages settlement paid to Abassi, el-Banna, Begg, Belmar, Mubanga, and al-Rawi); Craig Whitlock, *Iraqi Resident of Britain to Leave Guantanamo*, Wash. Post, Mar. 30, 2007, at A11 (reporting on the transfer of al-Rawi).

Begg was arrested in Britain on February 25, 2014, because of his activities in Syria. See Nicholas Winning & Margaret Coker, *Arrests Ex-Guantanamo Detainee in Syria-Related Case*, Wash. Post, Feb. 26, 2014, at A8; Nicholas Winning & Margaret Coker, *U.K. Police Arrest Muslim Activist*, Wall St. J., Feb. 26, 2014, at A12. Seven months later, he was released without charges. See Alan Cowell, *Terrorism Case Is Dropped*, N.Y. Times, Oct. 2, 2014, at A13; Danica Kirka & Jill Lawless, *U.K. Drops Terror Case Against Former Guantánamo Detainee*, Miami Herald, Oct. 2, 2014, at 10A.

4. One: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006), D.E. 170 (Ali Husayn al-Tays to Yemen).
5. Three: Notices, No. 1:04-cv-1227 (D.D.C. Oct. 26, 2006, to Aug. 10, 2007), D.E. 165, 179, 181 (Salah Abdul Rasool al-Bloushi and Isa Ali Abdulla Almurbati to Bahrain and Juma al-Dosari to Saudi Arabia); see Joshua Colangelo-Bryan, *Habeas on the Gate, Aftermath*, in *The Guantánamo Lawyers*, *supra* note 2737, at 345 (concerning Juma al-Dosari); Khan, *supra* note 2888, at 298–97 (same); Josh White, *16 Detainees Transferred from Guantanamo*, Wash. Post, July 17, 2007, at A3 (same).
6. One: Notice, No. 1:04-cv-1254 (D.D.C. June 22, 2007), D.E. 212 (Sadeq Mohammed Said to Yemen).
7. Two: Notices, No. 1:04-cv-2215 (D.D.C. Feb. 9, 2006, and Dec. 21, 2007), D.E. 39, 68 (Jamal Kiyemba to Uganda and Omar Deghayes to the United Kingdom); see *Britain Detains 3 Men Freed by U.S.*, N.Y. Times, Dec. 20, 2007; Omonira-Oyekanmi & Finn, *supra* note 2751 (reporting on a British damages settlement paid to Deghayes); see also Rodney Muhumuza, *Ex-Guantánamo Detainee Is Arrested*, Miami Herald, Apr. 9, 2015, at 7A (reporting on Kiyemba’s arrest in Uganda).
8. One: Notice, No. 1:05-cv-23 (D.D.C. Sept. 6, 2007), D.E. 74 (Rami Bin Saad al-Oteibi to Saudi Arabia).
9. Four: Notices, No. 1:05-cv-301 (D.D.C. June 27, 2006, to Dec. 31, 2007), D.E. 67, 90, 106, 111 (Abdulla Mohammad al-Ghanmi; Majid Abdulla al-Joudi, Maged in No. 1:05-cv-2386; Yousif Mohammad Mubarak al-Shehri, Yusuf Asshihri in No. 1:05-cv-2386; and Abdul-Hakim Abdul-Rahman al-Moosa to Saudi Arabia).
10. Five: Notices, No. 1:05-cv-345 (D.D.C. May 23, 2006, to Dec. 31, 2007), D.E. 45, 79, 87, 88 (Adel Eglá Hussan al-Nussairi; Ibrahim Suleiman al-Rubaish; Abdulla Thani Faris al-Anazi, Abdulal al-Thani in No. 1:05-cv-2386; Abdulaziz Sa’ad Oshan; and Naief Fahad Mutlaq al-Otaibi to Saudi Arabia).

Habeas Corpus: Guantánamo Bay

- On December 18, 2014, the State Department designated Ibrahim al-Rubaish a specially designated global terrorist. See Carol Rosenberg, *Ex-Detainee a “Global Terrorist,”* Miami Herald, Dec. 19, 2014, at 3A.
11. Five: Notices, No. 1:05-cv-429 (D.D.C. Oct. 3, 2005, to May 5, 2008), D.E. 27, 72, 73, 79 (Sami al-Laithi, also known as Abdul Aziz al-Mossary, Abu Abdul Aziz in No. 1:05-cv-1864 and Alla al-Mossary in No. 1:05-cv-2386, to Egypt; Abdullah, later identified as Abdullah Bin Omar al-Hajji, to Tunisia; Muhammed Sidii, Mohammed al-Amin in No. 1:05-cv-2336, to Mauritania; and Sami Muhyideen and Amir Yakub to Sudan); see *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1328–29 (D.C. Cir. 2014) (al-Laithi, also known as Sami Allaithi); Order at 2, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Nov. 18, 2009), D.E. 255, available at 2009 WL 4251108 (“Al Hajji is in prison in Tunisia, serving a sentence for an earlier conviction in that country.”); Agnieszka Fryszman, *Wrong Side of History*, in *The Guantánamo Lawyers*, *supra* note 2737, at 277, 279 (account by al-Amin’s habeas attorney); William Glaberson, *Cameraman Is Released from Guantánamo*, N.Y. Times, May 2, 2008, at A14 (reporting on the transfer of Al-Jazeera cameraman Sami al-Hajj, identified in his petition as Sami Muhyideen, to Sudan); John Robert Holland & Anna Cayton Holland-Edwards, *Representing the Rightless*, in *The Guantánamo Lawyers*, *supra* note 2737, at 289, 293 (according to al-Amin’s habeas attorneys, “Mohammed Al Amin is now living free.”); Josh White, *6 Detainees Repatriated by Military*, Wash. Post, June 20, 2007, at A6 (concerning Abdullah Bin Omar).
 12. Three: Notice, No. 1:05-cv-431 (D.D.C. Nov. 13, 2007), D.E. 42 (Usama Hasan Abu Kabir; Ahmad Hassan Jamil Suleiman; and Ibrahim Mahdi Ahmed Zaidan, Ibrahim Towkah in No. 1:05-cv-429 and Ibraheem Zaidan in No. 1:05-cv-2386, to Jordan).
 13. One: Notice, No. 1:05-cv-454 (D.D.C. June 27, 2006), D.E. 17 (Rashid Abdul Mosleh Qayed to Saudi Arabia).
 14. One: Notice, No. 1:05-cv-490 (D.D.C. June 27, 2006), D.E. 25 (Abdul-Salam Gaithan Mureef al-Shihry to Saudi Arabia).
 15. Five: Notices, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007), D.E. 47, 65, 92, 98, 113 (Saleh Abdulla al-Oshan; Musa al-Madany, Mishal al-Madany in No. 1:05-cv-2386; Muhammed Fahad al-Qahtany, Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265; Zaben Dhaher al-Shammari; and Abdullah Aali al-Otaibi to Saudi Arabia).
 16. One: Notice, No. 1:05-cv-533 (D.D.C. Dec. 20, 2006), D.E. 19 (Sulaiman Saad Mohaammed al-Oshan to Saudi Arabia).
 17. Two: Notice, No. 1:05-cv-583 (D.D.C. Sept. 7, 2007), D.E. 37 (Abdulrazzaq Abdullah al-Sharekh and Abdulhadi Abdullah al-Sharekh to Saudi Arabia).
 18. One: Notice, No. 1:05-cv-584 (D.D.C. Nov. 13, 2007), D.E. 38 (Murtadha Ali Magram to Saudi Arabia).
 19. One: Notice, No. 1:05-cv-586 (D.D.C. May 23, 2006), D.E. 25 (Abdullah Ibrahim Abdullah al-Rashaidan to Saudi Arabia).
 20. One: Notice, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007), D.E. 29 (Wahidof Abdul Mokit to Tajikistan).
 21. One: Notice, No. 1:05-cv-640 (D.D.C. May 2, 2007), D.E. 47 (Ahmed Er-rachidi, Ahmed Abu Imran in No. 1:05-cv-764, to Morocco); see Christopher

- Chang, *A Cook, Not a General, in The Guantánamo Lawyers*, *supra* note 2737, at 349.
22. One: Notice, Nos. 1:05-cv-714 (D.D.C. Dec. 20, 2006), D.E. 43 (Elham Battayav to Kazakhstan; also filed in No. 1:05-cv-2386).
 23. One: Notice, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69 (Salim Muhood Adem, Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724, to Sudan).
 24. Two: Notice, No. 1:05-cv-764 (D.D.C. May 5, 2008), D.E. 56 (Said to Morocco); Notice, *id.* (Feb. 9, 2006), D.E. 21 (Najeeb al-Husseini to Morocco; also filed in No. 1:05-cv-2386).
 25. One: Notice, No. 1:05-cv-795 (D.D.C. Oct. 5, 2007), D.E. 48 (Sofian Ebrahim Hamad Hamoodah to Libya); *see* Order, *id.* (Nov. 23, 2009), D.E. 64, *available* at 2009 WL 4251102 (“Hamoodah [is] apparently being detained by the Libyan government.”); *see also* Adam Goldman, *Ex-Guantanamo Detainee Implicated in Benghazi Attack*, Wash. Post, Jan. 8, 2014, at A3 (reporting that militiamen under the command of Hamoodah, also known as “Abu Suffian Bin Qumu, the leader of Ansar al-Sharia in the Libyan city of Darnah, participated in the attack that killed U.S. Ambassador J. Christopher Stevens and three other Americans” on September 11, 2012).
 26. One: Notice, No. 1:05-cv-833 (D.D.C. Nov. 20, 2006), D.E. 33 (Ala Abdel Maqsud Muhammad Salim to Albania); *see* *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1328–29 (D.C. Cir. 2014).
 27. One: Notice, No. 1:05-cv-878 (D.D.C. May 5, 2008), D.E. 38 (Rahmattullah to Afghanistan).
 28. One: Notice, No. 1:05-cv-879 (D.D.C. Oct. 24, 2006), D.E. 26 (Taj Mohammad to Afghanistan); *see* Khan, *supra* note 2888, at 296–97.
 29. One: Notice, No. 1:05-cv-880 (D.D.C. Aug. 29, 2006), D.E. 14 (Haji Nasrat, also a petitioner in No. 1:05-cv-1124, to Afghanistan).
 30. One: Notice, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007), D.E. 40 (Fazil Rahman to Afghanistan).
 31. One: Notice, No. 1:05-cv-884 (D.D.C. Oct. 5, 2007), D.E. 33 (Muhibullah to Afghanistan).
 32. One: Notice, No. 1:05-cv-885 (D.D.C. Dec. 20, 2006), D.E. 37 (Alif Mohammad to Afghanistan).
 33. One: Notice, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007), D.E. 81 (Chaman, Chaman Gul Khialigol in No. 1:05-cv-2367, to Afghanistan).
 34. One: Notice, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007), D.E. 65 (Nazul Gul to Afghanistan).
 35. One: Notice, No. 1:05-cv-890 (D.D.C. Feb. 9, 2006), D.E. 12 (Sharbat Khan to Afghanistan).
 36. One: Notice, No. 1:05-cv-891 (D.D.C. Oct. 5, 2007), D.E. 26 (Nasrullah to Afghanistan).
 37. One: Notice, No. 1:05-cv-997 (D.D.C. Feb. 9, 2006), D.E. 14 (Khudaidad to Afghanistan).
 38. One: Notice, No. 1:05-cv-1000 (D.D.C. Oct. 24, 2006), D.E. 29 (Abib Sarajuddin to Afghanistan).
 39. One: Notice, No. 1:05-cv-1001 (D.D.C. May 5, 2008), D.E. 36 (Abdulla Mohammed Kahn to Afghanistan).

Habeas Corpus: Guantánamo Bay

40. One: Notice, No. 1:05-cv-1002 (D.D.C. Aug. 31, 2006), D.E. 10 (Akhtar Mohammad to Afghanistan).
41. One: Notice, No. 1:05-cv-1008 (D.D.C. Oct. 24, 2006), D.E. 36 (Habibullah Mangut to Afghanistan).
42. One: Notice, No. 1:05-cv-1009 (D.D.C. Dec. 14, 2007), D.E. 91 (Adel Hassan Hamad, Adel Hassan in No. 1:05-cv-2386, to Sudan); *see Wax, supra* note 2737, at 327–28.
43. One: Notice, No. 1:05-cv-1010 (D.D.C. Oct. 24, 2006), D.E. 51 (Mohabat Khan to Afghanistan); *see Order, id.* (Nov. 23, 2009), D.E. 68, *available at* 2009 WL 4251091 (“Khan’s current whereabouts is unknown, but his counsel suspects he may be in custody in Afghanistan.”).
44. One: Notice, No. 1:05-cv-1013 (D.D.C. Feb. 9, 2006), D.E. 19 (Abdul Salaam to Afghanistan).
45. Two: Notices, No. 1:05-cv-1124 (D.D.C. Oct. 24, 2006, and May 5, 2008), D.E. 53, 80 (Ali Shah Mousovi, Syed Syed Muhammad Ali Shah in No. 1:05-cv-1012, and Haji Rohullah Wakil to Afghanistan); *see Khan, supra* note 2888, at 281–89 (concerning Mousovi).
46. One: Notice, No. 1:05-cv-1235 (D.D.C. Feb. 9, 2006), D.E. 13 (Abdul Baqi to Afghanistan).
47. One: Notice, No. 1:05-cv-1237 (D.D.C. Aug. 10, 2007), D.E. 33 (Aminullah to Afghanistan).
48. One: Notice, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007), D.E. 42 (Haji Ghalib to Afghanistan).
49. One: Notice, No. 1:05-cv-1242 (D.D.C. Aug. 29, 2006), D.E. 17 (Ahsanullah Pirzai, Ihsan Ullah Peerzai in No. 1:05-cv-1243 and Ehsan Ullah in No. 1:05-cv-1311, to Afghanistan).
50. One: Notice, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006), D.E. 29 (Abdul Majid Mohammadi to Iran).
51. One: Notice, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007), D.E. 51 (Nasser Mazyad Abdullah al-Subaiy to Saudi Arabia).
52. One: Notice, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006), D.E. 33 (Faizullah to Afghanistan).
53. One: Notice, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006), D.E. 22 (Sawat Khan to Afghanistan).
54. One: Notice, No. 1:05-cv-1492 (D.D.C. Oct. 5, 2007), D.E. 22 (Abdul Ahmad to Afghanistan).
55. One: Notice, No. 1:05-cv-1493 (D.D.C. Oct. 24, 2006), D.E. 26 (Mohammed Amon, Tooran Mohammad Amannullah in No. 1:05-cv-2367, to Afghanistan); Unopposed Motion to Dismiss, No. 1:05-cv-2367 (Jan. 3, 2006), D.E. 7.
56. One: Notice, No. 1:05-cv-1509 (D.D.C. June 27, 2006), D.E. 59 (Saddiq Ahmed Turkistani to Saudi Arabia).
57. One: Notice, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006), D.E. 28 (Mohammad Akhtiar, Akhteyar Mohammad in No. 1:05-cv-996, to Afghanistan).
58. Three: Notices, No. 1:05-cv-1641 (D.D.C. June 27 to Dec. 20, 2006), D.E. 29, 30, 45 (Abdulaziz Abdulrahman al-Badah, Ibrahim Mohammed al-Naser, and Abdulaziz Mohammed al-Naser to Saudi Arabia).
59. One: Notice, No. 1:05-cv-1666 (D.D.C. Dec. 31, 2007), D.E. 53 (Ziyad Bin Salih Bin Muhammad al-Bahooth to Saudi Arabia).

60. One: Notice, No. 1:05-cv-1667 (D.D.C. May 23, 2006), D.E. 24 (Abdul-Hadi Muhammed al-Siba'i to Saudi Arabia).
61. One: Notice, No. 1:05-cv-1668 (D.D.C. May 23, 2006), D.E. 37 (Rashid Awadh Rashid al-Uwaidah to Saudi Arabia).
62. One: Notice, No. 1:05-cv-1669 (D.D.C. May 23, 2006), D.E. 29 (Fahd Bin Salih Bin Sulaiman al-Jutaili to Saudi Arabia).
63. One: Notice, No. 1:05-cv-1697 (D.D.C. Oct. 24, 2006), D.E. 22 (Kadeer Khandan to Afghanistan).
64. One: Notice, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006), D.E. 35 (Yousif Abdullah al-Rubaish to Saudi Arabia).
65. One: Notice, No. 1:05-cv-1779 (D.D.C. Nov. 13, 2007), D.E. 52 (Muhammed Qasim to Afghanistan); *see* Sahr Muhammed Ally, *Speaking Through Holes in Glass, in The Guantánamo Lawyers, supra* note 2737, at 339, 340.
66. One: Notice, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007), D.E. 53 (Abdannour Sameur, Abdurrachman in No. 1:05-cv-2386, to the United Kingdom).
67. Three: Notice, No. 1:05-cv-1886 (D.D.C. May 5, 2006), D.E. 30 (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe to Albania).
68. One: Notice, No. 1:05-cv-1894 (D.D.C. June 22, 2007), D.E. 37 (Fawaz Naman Hamoud to Yemen).
69. One: Notice, No. 1:05-cv-2029 (D.D.C. July 17, 2007), D.E. 47 (Bender Ayed Hamoud Hezam al-Oteibi al-Shabany to Saudi Arabia).
70. One: Notice, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006), D.E. 76 (Zakirjan to Albania); *see* Allaithi v. Rumsfeld, 753 F.3d 1327, 1328 (D.C. Cir. 2014).
71. One: Notice, No. 1:05-cv-2087 (D.D.C. Nov. 20, 2006), D.E. 46 (Dr. Abu Muhammed, Dr. Abu Mohammed in No. 1:05-cv-2386, and also known as Fethi Boucetta, to Albania); *see* Anne Castle, Trip Mackintosh & Scott Barker, *Stateless, in The Guantánamo Lawyers, supra* note 2737, at 335.
72. One: Notice, No. 1:05-cv-2104 (D.D.C. Dec. 20, 2006), D.E. 35 (Issam Hamid Ali Bin Ali al-Jayfi to Yemen).
73. One: Notice, No. 1:05-cv-2197 (D.D.C. Dec. 20, 2006), D.E. 43 (Mohammed Ahmed Ali al-Asadi to Yemen).
74. Two: Notices, No. 1:05-cv-2201 (D.D.C. Sept. 7 and Nov. 13, 2007), D.E. 22, 23 (Muhammed Mubarak al-Kurbi and Naif Abdulla al-Nakheelan to Saudi Arabia).
75. Three: Notices, No. 1:05-cv-2216 (D.D.C. May 23 and July 17, 2007), D.E. 30, 31, 55 (Alghamdi Abdulrahman Othman A, Mohammed Bin Jaied Bin Aladi al-Mohammed al-Subaie, and Bijad Defalla Oteibi to Saudi Arabia).
76. One: Notice, No. 1:05-cv-2248 (D.D.C. June 27, 2006), D.E. 25 (Saleh Zaid al-Khatemi to Saudi Arabia).
77. Four: Notice, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007), D.E. 84 (Ghulam Roohani, Abdullah Wazir Zadran, Dr. Hiyatullah, and Abdullah Mujahid Haq to Afghanistan); *see* Khan, *supra* note 2888, at 245–49 (reporting that Mujahid was informed that his transfer was imminent ten months before it occurred); Sahr Muhammed Ally, *Speaking Through Holes in Glass, in The Guantánamo Lawyers, supra* note 2737, at 339, 340 (concerning Ghulam Roohani and Abdullah Wazir).

Habeas Corpus: Guantánamo Bay

78. One: Notice, No. 1:05-cv-2369, (D.D.C. Dec. 20, 2006), D.E. 32 (Abdullah Ali Saleh Gerab Alsaaei, Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452, to Saudi Arabia).
79. One: Notice, No. 1:05-cv-2376 (D.D.C. Oct. 24, 2006), D.E. 30 (Abdul Haleem to Pakistan).
80. Three: Notices, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006, to Sept. 7, 2007), D.E. 61, 73, 75 (Anwar Handan al-Shimmiri, Bandar al-Jaabir, and Salim Said to Saudi Arabia).
81. Sixteen: Notices, No. 1:05-cv-2386 (D.D.C. May 23, 2006, to May 5, 2008), D.E. 39, 40, 251, 256, 257, 259, 385, 387, 395, 403, 405, 434 (Saleh Mohammed Ali Azoba, Abdullah al-Quatany, Slaim Harbi, Seed Farha, Fahd al-Haraazi, Fahd al-Fawzan, Khald al-Barkati, Mohammed Harbi, Jabir al-Quatany, and Sad al-Materi to Saudi Arabia; Abdullah to Kazakhstan; Mohsen and Ali al-Kazmi to Yemen; Omar to Afghanistan; and Waleed to Sudan); Notice, *id.* (D.D.C. Dec. 20, 2006), D.E. 258 (Mohammed Rimi to Libya; also filed in 1:05-cv-2427); *see* Order, *Rimi v. Obama*, No. 1:05-cv-2427 (D.D.C. Nov. 23, 2009), D.E. 30, *available at* 2009 WL 4251097 (Muhammad Abdallah Mansur al-Futuri Rimi is “apparently being detained by the Libyan government.”).

On July 23, 2014, Judge Leon denied a motion to reopen Mohammad Rimi’s habeas corpus petition for relief from collateral consequences of his detention. *Rimi v. Obama*, 60 F. Supp. 3d 52 (D.D.C. 2014); *see id.* at 56 (reciting Rimi’s claim that he was sentenced in Libya to twenty-five years in prison but released when revolutionaries stormed the prison); *see also* Docket Sheet, *Rimi v. Obama*, No. 14-5231 (D.C. Cir. Sept. 25, 2014) (Rimi’s appeal, noting oral argument scheduled for May 11, 2015).
82. Two: Notice, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007), D.E. 49 (Fahd Umar Abdulmajid al-Shareef, Sultan al-Shareef in No. 1:05-cv-2385, and Hani Saeed Mohammed Banan al-Kalf al-Gamdi to Saudi Arabia).
83. One: Notice, No. 1:05-cv-2466 (D.D.C. Oct. 24, 2006), D.E. 11 (Anwar Khan to Afghanistan).
84. One: Notice, No. 1:05-cv-2467 (D.D.C. Dec. 20, 2006), D.E. 17 (Mubark Hussein to Bangladesh).
85. One: Notice, No. 1:05-cv-2479 (D.D.C. July 17, 2007), D.E. 76 (Ghanim-Abdulrahman al-Harbi to Saudi Arabia); *see* Lefrak, *supra* note 2809.
86. One: Notice, No. 1:06-cv-1675 (D.D.C. Dec. 29, 2006), D.E. 11 (Wasim to Saudi Arabia).
87. One: Notice, No. 1:06-cv-1679 (D.D.C. Dec. 14, 2007), D.E. 22 (Abdul Matin to Afghanistan).
88. One: Notice, No. 1:06-cv-1681 (D.D.C. May 5, 2008), D.E. 9 (Sangar Yar Mullah Rahmattullah to Afghanistan).
89. One: Notice, No. 1:06-cv-1682 (D.D.C. Dec. 26, 2006), D.E. 8 (Quari Ismatullah to Afghanistan).
90. One: Notice, No. 1:06-cv-1683 (D.D.C. Aug. 10, 2007), D.E. 12 (Mohammed Mosa Yaakoobi to Afghanistan).
91. One: Notice, No. 1:06-cv-1685 (D.D.C. Dec. 14, 2007), D.E. 22 (Abdul Gafoor Akhouzada to Afghanistan).
92. One: Notice, No. 1:06-cv-1686 (D.D.C. May 2, 2007), D.E. 12 (Azeemullah to Afghanistan).

93. One: Notice, No. 1:06-cv-1687 (D.D.C. Dec. 14, 2007), D.E. 15 (Ameenullah Toukh to Afghanistan).
94. One: Notice, No. 1:06-cv-1689 (D.D.C. Nov. 13, 2007), D.E. 22 (Naseer, also the petitioner in No. 1:06-cv-1676, to Afghanistan).
95. One: Notice, No. 1:06-cv-1752 (D.D.C. Nov. 13, 2007), D.E. 21 (Ezatullah, Izaatullah Nusrat in No. 1:05-cv-1124, to Afghanistan); see Sahr Muhammed Ally, *Speaking Through Holes in Glass*, in *The Guantánamo Lawyers*, *supra* note 2737, at 339, 340.
96. One: Notice, No. 1:06-cv-1753 (D.D.C. Nov. 13, 2007), D.E. 24 (Abdulah Hakmat to Afghanistan).
97. One: Notice, No. 1:06-cv-1763 (D.D.C. Oct. 5, 2007), D.E. 16 (Sabar Lal, also a petitioner in No. 1:05-cv-1124, to Afghanistan); see Ray Rivera, *Mystery and Anger After a Raid*, *N.Y. Times*, Sept. 5, 2011, at A4 (also reporting that the former detainee was killed by coalition and Afghan forces in a night raid at his home on September 2, 2011).
98. One: Notice, No. 1:06-cv-1769 (D.D.C. Dec. 31, 2007), D.E. 21 (Khaled Mallouh Shaye Algahtani to Saudi Arabia).

There were eleven other transfers noted in voluntary dismissals:

1. Two: Notice, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007), D.E. 229 (Shafiq Rasul and Asif Iqbal to the United Kingdom).
2. Three: Status Report, No. 1:04-cv-1142 (D.D.C. July 18, 2008), D.E. 96 (Ridouane Khalid, also a petitioner in No. 1:04-cv-547); Consent Motion, *id.* (Sept. 21, 2004), D.E. 19 (Mourad Benchellali and Nizar Sassi, also a petitioner in No. 1:04-cv-547); see Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, *N.Y. Times*, Feb. 25, 2009, at A5 (discussing transfers to France of Khalid; Benchellali; Sassi; Khaled Ben Mustapha, a petitioner in No. 1:05-cv-22; and one additional detainee, Brahim Yadel); see also Wesley R. Powell, *Preserving Our Image*, in *The Guantánamo Lawyers*, *supra* note 2737, at 296, 296 (“all the French detainees were released by early 2005”).
3. Three: Status Report, No. 1:05-cv-429 (D.D.C. July 18, 2008), D.E. 84 (in addition to other detainees otherwise accounted for, Adel Turkestani to Albania; Ibrahim Fauzee to Maldives; and Hassan al-Gassary, Lahcen Ikasiren in No. 1:05-cv-764, to Spain); see also Carol Rosenberg, *Probe Into U.S. Torture Reopens*, *Miami Herald*, Jan. 14, 2012, at 7A (reporting on Spanish probe into treatment of al-Gassary and three other detainees).
4. One: Status Report, No. 1:05-cv-431 (D.D.C. July 18, 2008), D.E. 49 (in addition to other detainees otherwise accounted for, Khalid Mahmood Alasmar to Jordan).
5. One: Notice, No. 1:06-cv-1754 (D.D.C. Jan. 4, 2007), D.E. 11 (al-Hasan Legseirein to Saudi Arabia).
6. One: Motion, No. 1:06-cv-1760 (D.D.C. Aug. 9, 2007), D.E. 20 (Mohammed Gul to Afghanistan).

A July 14, 2008, status report, Status Report, *In re* Petitioners Seeking Habeas Corpus Relief, No. 1:08-mc-444 (D.D.C. July 14, 2008), D.E. 28 (tallying 127 transfers, but counting three detainees twice each and another detainee three times), noted sixteen transfers not otherwise accounted for:

Habeas Corpus: Guantánamo Bay

1. One: No. 1:02-cv-299 (David Hicks to Australia).
2. One: No. 1:02-cv-1130 (Mamdouh Habib to Australia); *see* Jeffrey M. Strauss, *Family Photo*, in *The Guantánamo Lawyers*, *supra* note 2737, at 358, 360.
3. Three: No. 1:04-cv-1227 (Adel Kamel Abdulla Hajee, Abdullah Majed Sayyah Hasan Alnoaimi, and Salman Bin Ibrahim Bin Mohammed Bin Ali al-Khalifa to Bahrain).
4. One: No. 1:05-cv-22 (Khaled Ben Mustapha to France); *see* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, *N.Y. Times*, Feb. 25, 2009, at A5.
5. Two: No. 1:05-cv-497 (Abu Bakker Qassim, Abu Baker in No. 1:05-cv-2386, and A'del Abdu al-Hakim to Albania); *see also* Qassim v. Bush, 466 F.3d 1073 (D.C. Cir. 2006).
6. One: No. 1:05-cv-551 (Majid Radhi al-Toume al-Shamri to Saudi Arabia).
7. One: No. 1:05-cv-660 (Abdul Salam Zaeef, Abdul Salam Deiff in No. 1:05-cv-2386, to Afghanistan); *see* Khan, *supra* note 2888, at 134–41 (describing Zaeef as a former Taliban ambassador).
8. One: No. 1:05-cv-665 (Hazi Ahmed to France).
9. One: No. 1:05-cv-1011 (Abdul Zuhoor to Afghanistan).
10. One: No. 1:05-cv-1241 (Abdul Hakim Abdul Karim Amin Bukhari to Saudi Arabia).
11. One: No. 1:06-cv-1677 (Mohammed Naseem to Afghanistan).
12. One: No. 1:06-cv-1678 (Gulbas Khan to Afghanistan).
13. One: No. 1:06-cv-1768 (Saed Farhan al-Maliki to Saudi Arabia).

An April 19, 2007, motion filed simultaneously in several cases, e.g., Motion to Dismiss, *Abu Imran v. Bush*, No. 1:05-cv-764 (D.D.C. Apr. 19, 2007), D.E. 51, noted an additional nine transfers not otherwise accounted for:

1. Four: No. 1:05-cv-764 (Mohammed Mazoz, Moussa, Ridouane Shakur, and Tareq).
2. Three: No. 1:05-cv-2385 (Abd al-Rahman Abdullah al-Halmandy, Inshanullah, and Shamsullah).
3. Two: No. 1:05-cv-2386 (Saalih and Hamad).

There is one additional transfer reported in the *New York Times*' online database of Guantánamo Bay detainee information, <http://projects.nytimes.com/guantanamo>: Hafizullah, petitioner in No. 1:08-cv-1227, to Afghanistan on December 15, 2006.

Table 2. 137 Petitioners Transferred After the 2008 Boumediene Decision.

There were 101 transfers documented by notices of transfer in the detainees' habeas cases:

1. Three: Notices, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009, to Nov. 5, 2014), D.E. 660, 676, 773 (Khalid Bin Abdullah al-Mutairi, Fouad al-Rabia, and Fawzi Khalid Abdullah al-Odah to Kuwait); *see* Rosenberg, *supra* note 3020 (al-Mutairi).
2. Two: Notices, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009, and Dec. 5, 2013), D.E. 306, 321 (Saber Lahmar to France and Belkacem Bensayah to Algeria).

3. Two: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 22, 2009), D.E. 682 (noting Abd al-Hakim Ahmad Alhag's transfer to Yemen, but this appears to be an error and an intended notice concerning Riyadh Atiq Ali Abdu al-Haj al-Radai, Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399); *id.* (Nov. 20, 2014), D.E. 1072 (noting the transfer of Abdulkhaliq Ahmed al-Baidhani to Georgia).
4. Three: Notice, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2009, and July 13, 2010), D.E. 722, 888 (Faruq Ali Ahmed, Jamal Muhammad 'Alawi Mar'I, and Mohamed Mohamed Hassan Odaini to Yemen).
5. One: *Hamdan* Transfer Notice, *supra* note 2793 (noting the release of Salim Hamdan to Yemen to serve the last month of his military commission sentence).
6. One: Notice, No. 1:04-cv-2035 (D.D.C. July 29, 2008), D.E. 1102 (Jarallah al-Marri to Qatar).
7. One: Notice, No. 1:04-cv-2046 (D.D.C. Jan. 22, 2010), D.E. 223 (Ahcene Zemiri to Algeria).
8. One: Notice, No. 1:05-cv-270 (D.D.C. Feb. 24, 2010), D.E. 283 (Sherif el-Mashad, Ismail al-Mashad in No. 1:05-cv-833, to Albania).
9. One: Notice, No. 1:05-cv-359 (D.D.C. Dec. 31, 2014), D.E. 279 (Mohammed Abdul Rahman to Kazakhstan).
10. One: Notice, No. 1:05-cv-392 (D.D.C. Dec. 5, 2013), D.E. 345 (Djamel Ameziane to Algeria).
11. One: Notice, No. 1:05-cv-409 (D.D.C. Dec. 22, 2009), D.E. 193 (Ayman Saeed Batarfi to Yemen).
12. Five: Notices, No. 1:05-cv-429 (D.D.C. Oct. 9, 2008, to Dec. 31, 2014), D.E. 121, 137, 242, 317, and 318 (Mustafa Ibrahim to Sudan; Ahmad Abu Abduttawaab to Somaliland; Mohammed el-Gharani, M.C. in No. 1:05-cv-430 and Mohamad Ahmad al-Kara'any in No. 1:05-cv-2386, to Chad; Hisham Sliti to Slovakia; and Adel al-Hakeemy to Kazakhstan).
13. Two: Notices, No. 1:05-cv-526 (D.D.C. Aug. 30, 2009, and July 19, 2010), D.E. 230, 291 (Mohammed Khan Tumani to Portugal and Abd al-Nasir Khan Tumani to Cape Verde); *see* Pardis Kebriaei, *Life After Guantánamo*, Harper's, Apr. 2015, at 51.
14. One: Notice, No. 1:05-cv-573 (D.D.C. Oct. 9, 2008), D.E. 88 (Ameur Mammam, also the petitioner in No. 1:05-cv-1233 and Amer Mohammon in No. 1:05-cv-2386, to Algeria).
15. One: Notice, No. 1:05-cv-763 (D.D.C. Jan. 22, 2010), D.E. 328 (Adel Hamlily to Algeria).
16. One: Notice, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009), D.E. 134 (Benjamin Mohammed al-Habashi to United Kingdom); *see* Yvonne R. Bradley, *A Rigged Process*, in *The Guantánamo Lawyers*, *supra* note 2737, at 173, 176 ("Ironically, he was flown to freedom from Guantánamo to the United Kingdom on the same type of Gulfstream aircraft that the CIA commandeered from Jeppesen Dataplan to fly him across the Middle East for torture and rendition.").
17. One: Status Report, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008), D.E. 67 (Abdul Wahab to Afghanistan).
18. One: Notice, Khiali-Gul v. Obama, No. 1:04-cv-877 (D.D.C. Dec. 22, 2014), D.E. 201 (Khiali Gul to Afghanistan).

Habeas Corpus: Guantánamo Bay

19. One: Notice, No. 1:05-cv-892 (D.D.C. Dec. 8, 2014), D.E. 267 (Ali Hussian Mohammad Muety Shaaban to Uruguay).
20. One: Notice, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009), D.E. 100 (Arkan Mohammad Ghafil al-Karim to Iraq).
21. One: Notice, No. 1:05-cv-999 (D.D.C. Dec. 31, 2014), D.E. 269 (Asim Ben Thabit al-Khalaqi to Kazakhstan).
22. One: Notice, No. 1:05-cv-1220 (D.D.C. Feb. 24, 2010), D.E. 252 (Abu Abdul Rauf Zalita to Albania).

The detainee was killed by a U.S. drone strike in Afghanistan on February 9, 2015. See Deb Riechmann, *Ex-Detainees' Actions May Stall Prison Closure*, Bos. Globe, Feb. 15, 2015, at A6; Amir Shah & Lolita C. Baldor, *Afghan Officials Say Drone Strike Kills Ex-Guantánamo Detainee*, Miami Herald, Feb. 10, 2015, at 4A; Craig Whitlock, *Former Guantanamo Detainee Killed by U.S. Drone Strike in Afghanistan*, Wash. Post, Feb. 11, 2015, at A11.
23. One: Notice, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008), D.E. 84 (Labeled Ahmed to Algeria).
24. One: Notice, No. 1:05-cv-1239 (D.D.C. Jan. 21, 2009), D.E. 61 (Ali Adel Motaleb Aweid al-Khaiy, Ali Abdulmotalib Aweid Hassan Altaiy in No. 1:05-cv-1240, to Iraq).
25. One: Notice, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011), D.E. 330 (Farhi Saeed Bin Mohammed to Algeria).
26. One: Notice, No. 1:05-cv-1353 (D.D.C. Aug. 30, 2013), D.E. 334 (Motai Saib to Algeria).
27. One: Notice, No. 1:05-cv-1457 (D.D.C. Dec. 8, 2014), D.E. 381 (Abu Wa'el Jihad Dhiab to Uruguay).
28. One: Notice, No. 1:05-cv-1487 (D.D.C. June 11, 2009), D.E. 207 (Jawad Jabbar Sadkhan, also the petitioner in No. 1:05-cv-1679, to Iraq).
29. One: Notice, No. 1:05-cv-1490 (D.D.C. Dec. 8, 2014), D.E. 319 (Abdul Hadi Omar Mahmoud Faraj to Uruguay).
30. One: Notice, No. 1:05-cv-1497 (D.D.C. Dec. 8, 2014), D.E. 218 (Adil Bin Muhammed al-Wirghi to Uruguay).
31. One: Notice, No. 1:05-cv-1504 (D.D.C. Aug. 29, 2013), D.E. 313 (Nabil Hadjarab to Algeria).
32. One: Notice, No. 1:05-cv-1505 (D.D.C. Nov. 10, 2008), D.E. 112 (Abbar Sufian al-Hawary to Algeria).
33. Seven: Notice, No. 1:05-cv-1509 (D.D.C. June 11, 2009, and Dec. 31, 2013), D.E. 232, 264 (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat to Bermuda; and Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper to Slovakia).
34. One: Notice, No. 1:05-cv-1555 (D.D.C. Dec. 20, 2013), D.E. 281 (Ibrahim Osman Ibrahim Idris to Sudan).
35. Six: Notice, No. 1:05-cv-1602 (D.D.C. Nov. 2, 2009), D.E. 134 (Ahmad Tourson; Abdul Ghappar Abdul Rahman, Abdurahman in No. 1:05-cv-2386; Edham Mamet; Anwar Hassan, also a petitioner in No. 1:05-cv-2386; Dawut Abdurehim; and Adel Noori, Adel in 1:05-cv-2385 and No. 1:05-cv-2386, to Palau; also filed in 1:05-cv-2370, 1:05-cv-2398, and 1:08-cv-1310).
36. One: Notice, No. 1:05-cv-1645 (D.D.C. Nov. 20, 2014), D.E. 315 (Hussain Salem Mohammed Almerfedi to Slovakia).

37. One: Notice, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009), D.E. 246 (Alla Ali Bin Ali Ahmed to Yemen).
38. Two: Notices, No. 1:05-cv-2104 (D.D.C. Nov. 21, 2014, and Jan. 15, 2015), D.E. 419 and 420 (Saleh Mohammed Saleh al-Thabbii to Georgia and Abdul Qader Ahmed Hussein to Estonia).
39. One: Notice, No. 1:05-cv-2223 (D.D.C. Dec. 31, 2014), D.E. 149 (Mohammed Ali Hussain Khanina to Kazakhstan).
40. One: Notice, No. 1:05-cv-2349 (D.D.C. Mar. 13, 2014), D.E. 272 (Ahmed Belbacha to Algeria); *see* Order, *id.* (Mar. 14, 2014), D.E. 273 (dismissing Belbacha's petition as moot).
41. Four: Notices, No. 1:05-cv-2367 (D.D.C. Dec. 22, 2009, to Dec. 22, 2014), D.E. 334, 426, 435 (Mohammad Rahim and Mohammed Zahir to Afghanistan and Abdul Haq and Mohammed Wabi Umari to Qatar).
42. Two: Notice, No. 1:05-cv-2384 (D.D.C. Dec. 16, 2013, and Nov. 24, 2014), D.E. 325, 332 (Saad al-Wahtani and Mohammed Zahrani to Saudi Arabia).
43. Three: Notices, No. 1:05-cv-2385 (D.D.C. Sept. 2, 2008, to Dec. 31, 2014), D.E. 59, 416, and 549 (Muhammed Saad Iqbal Madni to Pakistan, Riad Nargerri to Italy, and Sabry Mohammed Ebrahim al-Qurashi to Kazakhstan); *see Court Reverses Conviction of Former Guantánamo Prisoner*, N.Y. Times, Feb. 7, 2012, at A12 (reporting that a conviction of Nargerri, also known as Mohamed Ben Riyadh Nasri, in Italy was overturned).
44. Five: Notices, No. 1:05-cv-2386 (D.D.C. June 15, 2009, to Jan. 16, 2015), D.E. 1296, 1513, 1580, 1724, 2029 (Abdul Aziz al-Noofayae to Saudi Arabia; Adel Bin Mabrouk to Italy; Saif Ullah, Saif in No. 1:05-cv-2385, to Albania; Abdul Aziz Naji to Algeria; and Alkhadr Abdullah al-Yafie to Oman).
45. One: Notice, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008), D.E. 131 (Zainulabidin Merozhev, Zein al-Abedein in No. 1:05-cv-2386, to Tajikistan).
46. One: Notice, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008), D.E. 69 (Abdulli Feghoul to Algeria); *see* Christi Charpentier, *Bittersweet*, in *The Guantánamo Lawyers*, *supra* note 2737, at 348.
47. One: Notice, No. 1:06-cv-619 (D.D.C. Jan. 21, 2009), D.E. 77 (Abbas Abid Rumi to Iraq).
48. One: Notice, No. 1:06-cv-1684 (D.D.C. Dec. 22, 2009), D.E. 223 (Mohammad Ahmed Taher to Yemen).
49. One: Notice, No. 1:06-cv-1766 (D.D.C. Jan. 15, 2015), D.E. 317 (Fadhel Hussein Saleh Hentif to Oman).
50. One: Notice, No. 1:07-cv-2338 (D.D.C. Jan. 16, 2015), D.E. 281 (Abdurrahman Abdallah Ali Mahmoud al-Shubati to Oman).
51. One: Notice, No. 1:08-cv-987 (D.D.C. Aug. 30, 2009), D.E. 152 (Moammar Badawi Dokhan to Portugal).
52. One: Notice, No. 1:08-cv-1101 (D.D.C. Dec. 22, 2014), D.E. 282 (Shawali Khan to Afghanistan).
53. One: Notice, No. 1:08-cv-1104 (D.D.C. Jan. 21, 2009), D.E. 59 (Bashir Ghalaab to Algeria).
54. One: Notice, No. 1:08-cv-1153 (D.D.C. Dec. 22, 2009), D.E. 161 (Mohammed Sulaymon Barre to Somaliland).
55. One: Notice, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008), D.E. 23 (Mohammed Abd-Al al-Qadir to Algeria).

Habeas Corpus: Guantánamo Bay

56. One: Notice, No. 1:08-cv-1222 (D.D.C. Dec. 22, 2009), D.E. 103 (Sharifullah to Afghanistan).
57. One: Notice, No. 1:08-cv-1223 (D.D.C. Sept. 2, 2008), D.E. 18 (Mahbub Rahman to Afghanistan).
58. One: Notice, No. 1:08-cv-1229 (D.D.C. Aug. 1, 2008), D.E. 6 (Yakubi to Afghanistan).
59. One: Notice, No. 1:08-cv-1230 (D.D.C. June 15, 2009), D.E. 117 (Khalid Said Mohammed al-Saif to Saudi Arabia).
60. One: Notice, No. 1:08-cv-1231 (D.D.C. Aug. 1, 2008), D.E. 6 (Abdulah Alhamiri to United Arab Emirates).
61. One Notice, No. 1:08-cv-1237 (D.D.C. Dec. 16, 2013), D.E. 267 (Hamoud Abdullah Hamoud Hassan al-Wady to Saudi Arabia).
62. One: Notice, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009), D.E. 92 (Ismail Mohamed to Somaliland).
63. One: Notice, No. 1:08-cv-1805 (D.D.C. June 4, 2014), D.E. 225 (Khair Ulla Said Wali Khaikhwa to Qatar).
64. One: Notice, No. 1:08-cv-1828 (D.D.C. June 5, 2014), D.E. 115 (Mullah Norullah Noori to Qatar).
65. Three: Notices, No. 1:09-cv-745 (D.D.C. Dec. 8, 2014, and Jan. 19, 2015), D.E. 1851, 1852, 1853 (Ahjam and Mohammed Abdullah Taha Mattan to Uruguay and Mohammed Ahmed Salam to Oman).
66. One: Notice, No. 1:09-cv-904 (D.D.C. Dec. 22, 2014), D.E. 122 (Abdul Ghani to Afghanistan).

One transfer was noted in an order by the court of appeals: Order, No. 09-5254 (D.C. Cir. Aug. 17, 2010) (Ayman Mohammed Ahmed al-Shurfa, petitioner in the district court, No. 1:05-cv-431); see Carol Rosenberg, *Camps Census Now 174: Germany Takes Two Arab Captives from Guantánamo*, Miami Herald, Sept. 16, 2010.

An additional thirteen transfers were noted in reports by news media:

1. One: Austen, *supra* note 3010 (return of Omar Khadr, petitioner in No. 1:04-cv-1136, to Canada to serve the remainder of his military commission sentence); see also Londoño, *supra* note 3010; Rosenberg, *supra* note 3010.
2. One: Finn & Tate, *supra* note 2914 (Lakhdar Boumediene, petitioner in No. 1:04-cv-1166, to France); see also Mark. C. Fleming, *A Stunning Reversal*, in *The Guantánamo Lawyers*, *supra* note 2737, at 219, 221 (“the first time a European country accepted a Guantánamo prisoner who was neither its citizen nor its former resident”); Hafetz, *supra* note 2754, at 248; Scott Sayare, *After Guantánamo, Starting Anew*, in *Quiet Anger*, N.Y. Times, May 26, 2012, at A5 (reporting that the French government provided public housing for Boumediene and his family in Nice, and that Boumediene had trouble finding employment there).
3. Three: Glaberson, *supra* note 2914 (Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir, petitioners in No. 1:04-cv-1166, to Bosnia and Herzegovina).
4. One: Savage, *supra* note 3200 (noting the return to Sudan of Ibrahim Ahmed Mahmoud al-Qosi, petitioner in No. 1:04-cv-1937, to Sudan following his serving a two-year sentence on a guilty plea before a military commission and

- dismissal of his habeas petition); *see also* *Inmate Home*, *supra* note 3200; Osman & Fox, *supra* note 3200; Rosenberg, *supra* note 3200.
5. One: Carol Rosenberg, *Camps Census Now 174: Germany Takes Two Arab Captives from Guantánamo*, Miami Herald, Sept. 16, 2010 (Mahmoud Salim al-Ali, Mahmoud Salim al-Mohammed in No. 1:05-cv-247, and Mahmoud al-Soury in 1:05-cv-429, to Germany).
 6. One: Ceberio Belaza, *supra* note 3079 (transfer to Spain of the petitioner in No. 1:05-cv-889).
 7. One: Rosenberg, *supra* note 2926 (Abdel Ghalib Hakim, petitioner in No. 1:05-cv-2199, to Georgia); *see also* Goldman & Tate, *supra* note 2926; Savage, *supra* note 2926.
 8. Two: Rosenberg, *supra* note 2975 (Ahmed Mohamed, petitioner in 1:05-cv-1509, and Abdul Razak, petitioner in 1:05-cv-2370 and 1:05-cv-2386, to El Salvador); *see also* Savage, *supra* note 2947.
 9. One: *Detainee Released*, *supra* note 3031 (Mohammed Jawad, petitioner in No. 1:05-cv-2385, to Afghanistan).
 10. One: Rosenberg, *supra* note 3245 (Noor Uthman Mohammed, petitioner in No. 1:05-cv-2386, and another detainee to Sudan); *see also* Charlie Savage, *Lawyers Press Pentagon to Abide by Detainee Deal*, N.Y. Times, May 15, 2013, at A14 (reporting that repatriation in December 2013 was part of a plea deal).

The detainee's military commission conviction was vacated in 2015 in light of rulings that the crime of material support could not be tried by military commission. News Release, *Findings and Sentence Disapproved in US v. Noor Uthman Muhammed*, U.S. Dep't of Def., Jan. 9, 2015, www.defense.gov/releases/release.aspx?releaseid=17107; *see* Carol Rosenberg, *Pentagon Throws Out Foot Soldier's War Court Conviction*, Miami Herald, Jan. 10, 2015, at 5A.

There are twenty-two additional transfers reported in the *New York Times'* online database of Guantánamo Bay detainee information, <http://projects.nytimes.com/guantanamo>:

1. One: Adel Fattough Ali Algazzar, petitioner in Nos. 1:05-cv-270 and 1:05-cv-833, to Slovakia on January 24, 2010.
2. One: Rafiq Bin Bashir Bin Jallul Alhami, petitioner in No. 1:05-cv-359, to Slovakia on January 24, 2010.
3. One: Hedi Hammamy, also known as Abdul Haddi Bin Hadiddi, petitioner in Nos. 1:05-cv-429, 1:05-cv-766, and 1:05-cv-2386, to Georgia on March 23, 2010.
4. One: Mohammad Mustafa Sohail, petitioner in No. 1:05-cv-993, to Spain on July 22, 2010.
5. One: Kasimbekov Komoliddin Tohirjanovich, petitioner in No. 1:05-cv-994, to Latvia on July 22, 2010.
6. One: Abdul Rahim Abdul Razak al-Janko, petitioner in Nos. 1:05-cv-1310 and 1:10-cv-1702 (damages case), to Belgium on October 9, 2009.
7. Two: Bahtiyar Mahnut, identified as Sadar, and Arkin Mahmud, identified as Arkeen, petitioners in No. 1:05-cv-1704, to Switzerland on March 23, 2010.

Habeas Corpus: Guantánamo Bay

8. One: Oybek Jamoldinovich Jabbarov, petitioner in Nos. 1:05-cv-2112 and 1:05-cv-2386, to Ireland on September 27, 2009.
9. One: Abin Alhamed Abid Alsallam Alkesawi, petitioner in Nos. 1:05-cv-2378 and 1:05-cv-2386, to Georgia on March 23, 2010. *See Freed Former Guantánamo Inmate to Arrive Today*, Libya Herald, Sept. 25, 2013 (noting Alkesawi's move to Libya in September 2013, identifying him as Abdulhamid Abdussalam el-Ghazzawi).
10. Two: Maher el-Falesteny and Abd al-Zaher, petitioners in No. 1:05-cv-2386, to Hungary on November 30, 2009, and to Slovakia on January 24, 2010, respectively.
11. Three: Ali, Elisher in 1:06-cv-1759; Mohammed al-Palestini; and Maasoum Abdah Mouhammad, petitioners in No. 1:05-cv-2386, to Switzerland on January 26, 2010, to Spain on February 24, 2010, and to Bulgaria on May 3, 2010, respectively.
12. One: Qari Saad Iqbal, petitioner in Nos. 1:06-cv-1674 and 1:06-cv-1688, to Pakistan on August 31, 2008.
13. One: Achraf Salim Abdessalam, petitioner in No. 1:06-cv-1761, to Georgia on March 23, 2010.
14. One: Ahmed Zaid Salem Zuhair, petitioner in No. 1:08-cv-864, to Saudi Arabia on June 12, 2010.
15. One: Shakhrukh Hamiduva, petitioner in No. 1:08-cv-1221, to Ireland on September 27, 2009.
16. One: Mustafa Ahmed Hamlily, petitioner in No. 1:08-cv-1628, to Algeria on July 2, 2008.
17. One: Mohammed Hashim, petitioner in No. 1:09-cv-1460, to Afghanistan on December 19, 2009.
18. One: Abdul Hafiz, petitioner in No. 1:09-cv-1461, to Afghanistan on December 19, 2009.

OTHER CIVIL CASES

In criminal cases, the government is pursuing the litigation, so it has an incentive to help the court and the parties move the case forward while accommodating national security interests. The incentive structure in civil cases is often different, because in civil cases the government is frequently a defendant.

The Classified Information Procedures Act technically applies only to criminal cases, but its principles are often applied to civil cases (“Burma”). The government may resist this application when it conflicts with the government’s litigation interests (“Milan”).

Actions under the Freedom of Information Act (FOIA) concerning information that may be related to national security frequently require judges to review information held by the government to determine whether FOIA requires its production (“Detainee Documents,” “Section 215”). In a case concerning “Muslim Surveillance,” the judge concluded that the government had improperly misled him about what information the government had that was responsive to the FOIA request.

In an employment action initially dismissed on state-secrets grounds (“Burma”), the judge concluded that the dismissal was based on inaccurate representations of secrecy, and the case ultimately settled for \$3 million. Tort actions concerning “Mistaken Rendition” and “Torture Flights” were also dismissed on state-secrets grounds.

The government is a complex entity, and it is possible for its attorneys in court to not be fully informed about the extent of classified information at issue in a civil case (“Surveillance Software”) or even about ongoing actions of government clients (“No-Fly List”).

The cases described here include two large collections of complex litigation.

Litigation concerning “Warrantless Wiretaps” is complex multidistrict civil litigation over a closely guarded yet widely reported national security program. The government presented to several district and circuit judges in several jurisdictions classified arguments in defense of government actions as too secret for litigation. In addition, special security measures were imposed for one secret but inadvertently disclosed document that apparently is direct evidence of the government’s subjecting two attorneys to a legally questionable surveillance program that the courts generally concluded was no longer secret. Just when it looked like this litigation was coming to a close, disclosures in 2013 breathed new life into remaining cases.

Also described is litigation concerning “September 11 Damages.” Although classified information was not a large factor in this litigation, sensitive unclassified information required special procedures during discovery.

A mix of sensitive unclassified information and classified information was central to litigation over the “No-Fly List.”

Burma

Horn v. Huddle (Royce C. Lamberth, D.D.C.)

On August 11, 1994, Richard A. Horn, who had been the country attaché in Burma for the Drug Enforcement Administration (DEA), filed a civil action alleging illegal surveillance of his telephone calls by the Department of State's chief of mission there and by a CIA officer, arising from disagreements over how much credit Burma should have received for addressing drug enforcement issues.³⁷⁹² The U.S. District Court for the District of the District of Columbia assigned the Case to Judge Harold H. Greene.³⁷⁹³

The complaint alleged that Horn “made substantial progress working in concert with the Burmese government to improve its performances in addressing major drug issues.”³⁷⁹⁴ Because of a “political and personal agenda to thwart and undermine DEA’s mission in Burma,”³⁷⁹⁵ however, information that the defendants provided to Congress and the President “was deliberately shaped to conform with [a] political policy [that] in effect prevented [Burma] from accruing any credit for its efforts or achievements.”³⁷⁹⁶

A week after the complaint was filed, the government moved to seal the case in order to protect classified information from public disclosure.³⁷⁹⁷ Judge Greene granted the motion on August 29.³⁷⁹⁸

On September 12, 1996, Horn filed a class action complaint alleging a pattern and practice of illegal surveillance of DEA agents,³⁷⁹⁹ and that case, which remains sealed,³⁸⁰⁰ was dismissed in 2000.³⁸⁰¹

3792. Redacted Complaint, *Horn v. Huddle*, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994, refiled June 9, 2009), D.E. 233 [hereinafter *Horn v. Huddle* Complaint]; see *In re Sealed Case*, 494 F.3d 139, 141 (D.C. Cir. 2007); *Horn v. Huddle*, 699 F. Supp. 2d 236, 237 (D.D.C. 2010); *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); Docket Sheet, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994); see also Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 172–84 (2010); Mike Scarcella, *DOJ Won’t Open Classified Minds*, Legal Times, Sept. 21, 2009, at 21; Tim Weiner, *Suit by Drug Agent Says U.S. Subverted His Burmese Efforts*, N.Y. Times, Oct. 27, 1994, at A9.

3793. *Horn v. Huddle* Complaint, *supra* note 3792; Donohue, *supra* note 3792, at 173.

3794. *Horn v. Huddle* Complaint, *supra* note 3792, at 6.

3795. *Id.* at 3.

3796. *Id.* at 6.

3797. Sealing Motion, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 19, 1994, refiled June 9, 2009), D.E. 234 (motion by U.S. Attorney Eric H. Holder, Jr., and Assistant U.S. Attorney John D. Bates).

3798. Order, *id.* (Aug. 29, 1994, refiled June 9, 2009), D.E. 237; see *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009).

3799. *Horn v. Huddle*, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 15, 2000, refiled June 9, 2009), D.E. 340.

3800. Docket Sheet, *Horn v. Christopher*, No. 1:96-cv-2120 (D.D.C. Sept. 12, 1996) (sealed).

The complaint is filed unsealed in the record of Horn’s earlier action. Class Action Complaint, *Horn*, No. 1:94-cv-1756 (D.D.C. Sept. 12, 1996, refiled June 9, 2009), D.E. 258.

3801. *In re Sealed Case*, 494 F.3d 139, 141 n.1 (D.C. Cir. 2007).

Other Civil Cases: Burma

Horn's *Bivens* action³⁸⁰² claimed surveillance, in violation of the Fourth Amendment, conducted to facilitate a transfer of Horn out of Burma.³⁸⁰³ On February 10, 1997, Judge Greene denied the government's motion to dismiss.³⁸⁰⁴ In 1999, Judge Royce C. Lamberth assumed responsibility for the case because of Judge Greene's illness and death.³⁸⁰⁵

On July 28, 2004, Judge Lamberth granted the government's motion to dismiss the case on state-secrets grounds.³⁸⁰⁶ On June 29, 2007, the court of appeals reversed, in part.³⁸⁰⁷ The court ruled that the case could proceed against Franklin Huddle, Jr., the chief of mission, but not against the CIA officer, whose identity was classified.³⁸⁰⁸

A government attorney, who began working on the case after the remand, discovered and informed Judge Lamberth that since 2002 the CIA officer's identity had actually not been classified.³⁸⁰⁹ In light of the remand and finding that "the conduct of an attorney within the CIA's office of general counsel in 2005 escalated this case from one of simple misrepresentation to fraud on the court,"³⁸¹⁰ Judge Lamberth decided, on January 15, 2009, to give Horn an opportunity to show how he could proceed using unprivileged material against both Huddle and the CIA agent, Arthur Brown.³⁸¹¹

3802. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

3803. *In re Sealed Case*, 494 F.3d at 141; see Scarcella, *supra* note 3792 ("Horn was moved to a DEA office in New Orleans in 1993").

3804. Opinion, *Horn*, No. 1:94-cv-1756 (Feb. 10, 1997, refiled June 9, 2009), D.E. 263.

3805. *In re Sealed Case*, 494 F.3d at 142 n.2; Notice, *Horn*, No. 1:94-cv-1756 (June 27, 1999, refiled June 9, 2009), D.E. 298; Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Greene's January 29, 2000, death); see Donohue, *supra* note 3792, at 173; Scarcella, *supra* note 3792.

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

3806. Opinion, *Horn*, No. 1:94-cv-1756 (D.D.C. July 28, 2004, refiled June 9, 2009), D.E. 380; see *In re Sealed Case*, 494 F.3d at 142; *Horn v. Huddle*, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); see Donohue, *supra* note 3792, at 175; Scarcella, *supra* note 3792; *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011) [hereinafter *Too Secret?*], available at <http://thekojonnamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification>.

3807. *In re Sealed Case*, 494 F.3d 139; see Scarcella, *supra* note 3792.

3808. *In re Sealed Case*, 494 F.3d 139; see *Horn*, 636 F. Supp. 2d at 13–14 & n.2; see Donohue, *supra* note 3792, at 175; *Too Secret?*, *supra* note 3806.

3809. *Horn*, 636 F. Supp. 2d at 15; Jan. 15, 2009, Opinion at 2 & n.2, *Horn*, No. 1:94-cv-1756 (D.D.C. Jan. 15, 2009, refiled June 9, 2009), D.E. 402; see Donohue, *supra* note 3792, at 175–76; Scarcella, *supra* note 3792.

"And if you had simply Googled his name, you would have seen that he appeared on 'The Charlie Rose Show' a couple of years before." *Too Secret?*, *supra* note 3806; see *A Conversation with Arthur Brown, Former CIA East Asia Division Chief About the Nuclear Program in North Korea*, Charlie Rose (PBS television broadcast June 17, 2005).

3810. Jan. 15, 2009, Opinion, *supra* note 3809, at 5; see *Horn*, 636 F. Supp. 2d at 15; see also Scarcella, *supra* note 3792.

3811. Jan. 15, 2009, Opinion, *supra* note 3809, at 12–13; see *Horn*, 636 F. Supp. 2d at 15.

Initially, Judge Lamberth was told that Brown's unclassified status did not come to the attention of CIA attorneys until 2005, at which time it should have been brought to the attention of the court of appeals,³⁸¹² but after Judge Lamberth ruled that the case against Brown might go forward, Brown informed the court that he informed the CIA's office of general counsel about his change in status within a few months of its occurring.³⁸¹³

Judge Lamberth ordered the government to provide the court and the plaintiff with an unclassified redacted version of every document filed so far in the still-sealed case.³⁸¹⁴ On June 9, 2009, the case was unsealed and public versions of all documents filed before then were added to the case file.³⁸¹⁵

On October 26, the case settled for \$3 million.³⁸¹⁶ In cooperation with the Attorney General, Judge Lamberth referred the evidence of possible misconduct by CIA lawyers to the House of Representatives Intelligence Committee.³⁸¹⁷

Challenge: Classified Evidence

Judge Lamberth decided to apply to this civil case the principles of the Classified Information Procedures Act (CIPA),³⁸¹⁸ which technically only applies to criminal cases.³⁸¹⁹ Using CIPA procedures, the court determines what information must be protected as classified and what unclassified substitutions—redactions, summaries, or admissions—can be used so that the case can proceed.³⁸²⁰

3812. *Horn*, 636 F. Supp. 2d at 13 n.2; Feb. 6, 2009, Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Feb. 6, 2009, refiled June 9, 2009), D.E. 414; Jan. 15, 2009, Opinion, *supra* note 3809, at 5–6.

3813. *Horn*, 636 F. Supp. 2d at 13–14 n.2; Feb. 6, 2009, Opinion, *supra* note 3812; see Donohue, *supra* note 3792, at 178.

Although Judge Lamberth had been told that Brown's name would forever be classified, Brown's affiliation with the CIA was declassified so that he could cite his CIA experience in obtaining post-retirement employment. Interview with Hon. Royce C. Lamberth, May 13, 2011; Donohue, *supra* note 3792, at 177.

3814. *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14; see Donohue, *supra* note 3792, at 180.

3815. *Horn*, 636 F. Supp. 2d at 21.

3816. *Horn v. Huddle*, 699 F. Supp. 2d 236, 237–38 (D.D.C. 2010); Stipulation, *Horn*, No. 1:94-cv-1756 (D.D.C. Nov. 3, 2009), D.E. 510; see Donohue, *supra* note 3792, at 182–83; *U.S. to Pay \$3 Million to Settle CIA Lawsuit*, Wash. Post, Nov. 5, 2009, at A12.

3817. Interview with Hon. Royce C. Lamberth, May 13, 2011; see Donohue, *supra* note 3792, at 183–84.

3818. 18 U.S.C. app. 3 (2013).

3819. *Horn v. Huddle*, 647 F. Supp. 2d 55, 59–60 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14, 18–19; see Donohue, *supra* note 3792, at 179.

3820. *Horn*, 636 F. Supp. 2d at 18–19; see Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 9–22 (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

The government appealed,³⁸²¹ and the case settled while the appeal was pending. As a condition of settlement, Judge Lamberth vacated his order calling for CIPA-like procedures, noting that “a District Court’s opinions are non-precedential and only persuasive authority” anyway, his opinions on the matter had already been published in the Federal Supplement, and “[t]he reasoning is unaltered, to the extent it is deemed persuasive by anyone.”³⁸²²

The state secrets privilege is a judicial doctrine, and when the Court evaluates the privilege, its evaluation is not merely an academic exercise. When the privilege is denied, the Court has the ability to order the information disclosed in litigation. Were the rule otherwise, the Executive Branch could immediately ensure that the “state secrets privilege” was successfully invoked simply by classifying information, and the Executive’s actions would be beyond the purview of the judicial branch. This would of course usurp the judicial branch’s obligation “to say what the law is.”³⁸²³

Although the Department of Justice’s Litigation Security Group determined that the plaintiff’s and defendants’ attorneys were eligible for security clearances, it determined that they did not have a “need to know” classified information.³⁸²⁴ Judge Lamberth overruled that determination.³⁸²⁵

[T]he Executive must grant counsel for plaintiff and defendants, who have been favorably adjudicated for access to classified information, security clearances commensurate with the level of information known by their clients. . . . It is important to remember that at this juncture, the plaintiff, defendants, and their counsel, only have a need-to-know the classified and/or privileged information already known to them or to their clients for purposes of allowing this lawsuit to proceed. If it is necessary to renew the security clearances of the plaintiff and defendants themselves in order to implement the lawful discussion of the information that will be contained in the filings in preparation of the CIPA-like proceedings, the Executive must do that as well.³⁸²⁶

Challenge: Classified Arguments

Judge Lamberth ordered all filings made after the case became unsealed that might include classified information to be filed with a classified information security officer; redacted versions were filed on the public docket after a classification review.³⁸²⁷

3821. Docket Sheet, *Horn v. Huddle*, No. 09-5311 (D.C. Cir. Sept. 3, 2009).

3822. *Horn v. Huddle*, 699 F. Supp. 2d 236, 238 (D.C. Cir. 2010); see *Donohue*, *supra* note 3792, at 183.

3823. *Horn*, 647 F. Supp. 2d at 62–63.

3824. *Id.* at 63 n.11, 65 n.18; see *Scarcella*, *supra* note 3792.

3825. See *Scarcella*, *supra* note 3792.

3826. *Horn*, 647 F. Supp. 2d at 66; see *Scarcella*, *supra* note 3792 (“The twist is that the classified information at issue resides in the memories of the plaintiff and the defendants themselves. (Lamberth’s order does not compel the government to turn over documents.)”).

3827. *Horn v. Huddle*, 636 F. Supp. 2d 20, 22–23 (D.D.C. 2009); see *Reagan*, *supra* note 3820, at 21–22 (providing information about classified information security officers).

September 11 Damages

In re Terrorist Attacks on September 11, 2001
(Richard Conway Casey, George B. Daniels,
and Frank Maas) and *In re September 11 Litigation*
and Related Actions (Alvin K. Hellerstein) (S.D.N.Y.)

Actions for damages resulting from the terrorist attacks on September 11, 2001, include a couple of dozen actions against the terrorists and a few thousand actions against airlines, airport security companies, and property managers. Many complexities have resulted in prolonged litigation.

Actions Against Terrorists

On September 4, 2002, 318 survivors of the September 11, 2001, attacks on the United States filed in the U.S. District Court for the Southern District of New York a ninety-one-page civil complaint for damages.³⁸²⁸ The plaintiffs were forty-four persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.³⁸²⁹ The 141 defendants were (1) the “Al Qaeda Islamic Army” and thirty-eight affiliated persons and entities, including Osama Bin Laden; (2) the nineteen deceased hijackers and Zacarias Moussaoui; (3) the Taliban and Muhammad Omar; (4) the Republic of Iraq and fifteen affiliated persons and entities, including Saddam Hussein; and sixty-four “entities or individuals who provided financial or other support to Al Qaeda and its terrorist activities.”³⁸³⁰

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.³⁸³¹ On September 10, the plaintiffs amended their complaint to include 300 estates and fifty-one individuals as plaintiffs.³⁸³² On the same day, four other actions were filed against similar defendants.³⁸³³

3828. Complaint, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 4, 2002), D.E. 1 [hereinafter *Ashton* Complaint]; see *In re Terrorist Attacks on Sept. 11, 2001*, 689 F. Supp. 2d 552, 555–56 (S.D.N.Y. 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.

3829. *Ashton* Complaint, *supra* note 3828.

3830. *Id.*; *id.* at 29; see Coyle, *supra* note 3828.

3831. Docket Sheet, *Beyer v. Al Qaeda Islamic Army* No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); see Coyle, *supra* note 3828; Kelley, *supra* note 3828.

3832. First Amended Complaint, *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002), D.E. 2.

3833. 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

Consolidation

All six actions were consolidated before Judge Allen G. Schwartz,³⁸³⁴ and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.³⁸³⁵ The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.³⁸³⁶

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.³⁸³⁷

On December 9, 2003, the Judicial Panel on Multidistrict Litigation joined the consolidated action with three other actions in the Southern District of New York³⁸³⁸ and two actions in the District of the District of Columbia,³⁸³⁹ creating *In*

owners of a building across the street from the World Trade Center); Docket Sheet, *Schneider v. Al Qaeda Islamic Army*, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002) (action by six estates).

3834. Consolidation Order, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002), D.E. 5.

3835. Consolidated Master Complaint, *id.* (Mar. 6, 2003), D.E. 11 [hereinafter *Ashton Consolidated Master Complaint*].

3836. Reassignment Notice, *id.* (Apr. 16, 2003), D.E. 14; Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Schwartz's March 22, 2003, death).

The action was reassigned to Judge George B. Daniels after Judge Casey's March 22, 2007, death. Apr. 17, 2007, Reassignment Notice, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Apr. 17, 2007); see Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Casey's March 22, 2007, death); *Obit., Richard Conway Casey, 74, Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

For this report, Tim Reagan interviewed Owen Smith, Judge Casey's law clerk from June 2006 through the transition of Judge Casey's cases, by telephone on May 17, 2007, and in Mr. Smith's office on June 26, 2007.

3837. Sixth Amended Consolidated Master Complaint, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1463; Fifth Amended Consolidated Master Complaint, *id.* (Sept. 20, 2004), D.E. 447; Fourth Amended Consolidated Master Complaint, *id.* (Mar. 10, 2004), D.E. 111; Third Amended Consolidated Master Complaint, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 5, 2003), D.E. 111; Second Amended Consolidated Master Complaint, *id.* (Aug. 13, 2003), D.E. 38; First Amended Consolidated Master Complaint, *id.* (Aug. 1, 2003), D.E. 32.

3838. Docket Sheet, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, *Salvo v. Al Qaeda Islamic Army*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003) [hereinafter *Salvo Docket Sheet*]; Docket Sheet, *Tremsky v. Bin Laden*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002).

A pro se action was dismissed for failure to execute service, Docket Sheet, *Iwachiw v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); see Docket Sheet, *Iwachiw v. Al-Baraka Inv. & Dev. Corp.*, No. 03-9028 (2d Cir. Oct. 3, 2002) (noting denial of a motion to appeal in forma pauperis), and another action was dismissed voluntarily, Docket Sheet, *Adone v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002).

3839. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett Docket Sheet*], *refiled as Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *Havlish v. Bin-Laden*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), *refiled as Havlish v. Bin-Laden*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 11, 2003);

*re Terrorist Attacks on September 11, 2001*³⁸⁴⁰ in the Southern District of New York.³⁸⁴¹

The first panel-added New York case was a class action filed on September 11, 2002, by three named plaintiffs against Osama Bin Laden, Saddam Hussein, the Taliban, and ninety-eight other defendants.³⁸⁴² 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.³⁸⁴³ The third New York case also was filed on July 8—by four estates against 222 defendants similar to the list in the original complaint in the first-filed action of the original consolidation.³⁸⁴⁴

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 nineteen hijackers and Zacarias Moussaoui; and more than 100 persons and entities identified by the government as global terrorists.³⁸⁴⁵ An amended complaint listed eighty-five plaintiff estates and twenty-seven defendants, omitting the “global terrorists.”³⁸⁴⁶

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*).

3840. 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].

3841. *In re Terrorist Attacks* on Sept. 11, 2001, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); *In re Terrorist Attacks* on Sept. 11, 2001, 714 F.3d 659, 671–72 (2d Cir. 2013); *see Consolidation and Transfer Motion, In re Terrorist Attacks* on Sept. 11, 2001, No. 1570 (J.P.M.L. Aug. 7, 2003, filed Aug. 21, 2003), D.E. 1; *see also In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); *In re Terrorist Attacks* on Sept. 11, 2001, 718 F. Supp. 2d 456, 464 (S.D.N.Y. 2010); *In re Terrorist Attacks* on Sept. 11, 2001, 689 F. Supp. 2d 552, 555 (S.D.N.Y. 2010) (“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).

3842. Complaint, *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002), D.E. 1; *see also Amended Complaint, id.* (Aug. 22, 2003), D.E. 10 (same parties).

3843. Complaint, *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003), D.E. 1; *see Ashton Consolidated Master Complaint, supra* note 3835. The case was designated as related to the original consolidation and assigned to Judge Casey on August 13, 2003. *Salvo* Docket Sheet, *supra* note 3838.

3844. Complaint, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003), D.E. 1; *see Ashton* Complaint, *supra* note 3828. 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), D.E. 2; 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), D.E. 8.

3845. Class Action Complaint, *Havlish v. Bin-Laden*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), D.E. 1.

3846. Second Amended Complaint, *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Sept. 7, 2006), D.E. 214, *also filed in In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Sept. 7, 2006), D.E. 1894; *see Amended Complaint, Havlish*, No. 1:02-cv-305 (D.D.C. May 3, 2002), D.E. 12 (listing fifty-five plaintiff estates and 20 defendants); *see also Third Amended Complaint, In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 23, 2010), D.E. 259.

The second District of Columbia case was based on a complaint filed on August 15 against 100 alleged financial supporters of the terrorist attacks.³⁸⁴⁷ Listed as plaintiffs were 407 named estates, thirty-seven named individuals, seventy-three “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).³⁸⁴⁸ The case came to include 4,779 listed plaintiffs and 205 defendants.³⁸⁴⁹ By the time this case had been included in the multidistrict consolidation, its plaintiffs already had filed a similar complaint in the Southern District of New York,³⁸⁵⁰ which was added to the multidistrict consolidation as a tag-along case on March 10, 2004,³⁸⁵¹ and then voluntarily dismissed as duplicative on February 12, 2008.³⁸⁵²

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 seventy-three defendants, includ-

3847. Complaint, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), D.E. 1 [hereinafter D.D.C. *Burnett* Complaint]; see *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); Coyle, *supra* note 3828; Chris Heffelfinger, *Radical Islam in America* 74 (2011).

3848. D.D.C. *Burnett* Complaint, *supra* note 3847.

3849. Addition of Parties, *Burnett*, No. 1:02-cv-1616 (D.D.C. Dec. 30, 2003), D.E. 438 (adding two defendants); Addition and Removal of Parties, *id.* (Dec. 19, 2003), D.E. 432 (adding 224 plaintiffs and removing eight plaintiffs and one defendant); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (November 14, 2003, dismissal of two defendants); Addition and Removal of Defendants, *Burnett*, No. 1:02-cv-1616 (D.D.C. Oct. 27, 2003), D.E. 367 (removing one defendant); Addition and Removal of Parties, *id.* (Sept. 10, 2003), D.E. 313 (adding 207 plaintiffs and removing three plaintiffs); Addition and Removal of Parties, *id.* (Sept. 5, 2003), D.E. 305 (adding 489 plaintiffs and removing eleven plaintiffs); Addition and Removal of Defendants, *id.* (Aug. 22, 2003), D.E. 261 (removing six defendants); Addition and Removal of Parties, *id.* (Aug. 1, 2003), D.E. 232 (adding 550 plaintiffs and removing one plaintiff); Addition and Removal of Parties, *id.* (May 23, 2003), D.E. 155 (adding 375 plaintiffs and removing three plaintiffs); Addition and Removal of Defendants, *id.* (May 2, 2003), D.E. 139 (adding twenty-seven defendants and removing one defendant); Addition and Removal of Parties, *id.* (Feb. 21, 2003), D.E. 77 (adding 245 plaintiffs and nine defendants and removing seven plaintiffs and eleven defendants); Third Amended Complaint, *id.* (Nov. 22, 2002), D.E. 29 (listing as plaintiffs 1,785 named estates, 799 named individuals, 129 Doe estates, nine Doe individuals, and 5,000 additional Doe plaintiffs, and listing 189 defendants); Amended Complaint, *id.* (Sept. 4, 2002), D.E. 3; see Jennifer Senior, *A Nation Unto Himself*, N.Y. Times, Mar. 14, 2004, at 636.

3850. Complaint, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003), D.E. 1; see *id.* at 265 (stating that the action “is commenced in this Court solely as a prophylactic measure to protect 9/11 victims whose rights have been threatened by certain New York workers’ compensation insurance carriers and in the event that subject matter jurisdiction is lacking in the District of Columbia action”); see also Amended Complaint, *id.* (Sept. 3, 2003), D.E. 3.

3851. Docket Sheet, *id.* (Aug. 1, 2003).

3852. Notice of Voluntary Dismissal, *id.* (Feb. 12, 2008), D.E. 337.

The New York action was filed as a jurisdictional precaution, but the complaint was never served. Status Conference, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. June 26, 2007) (representation by a plaintiff’s attorney).

ing Iraq, Al-Qaeda, and the nineteen September 11 hijackers;³⁸⁵³ (2) an action filed on September 10 by twenty-nine insurance companies against Al-Qaeda and 524 alleged supporters;³⁸⁵⁴ (3) an action filed on September 10 by twenty-eight estates and twenty-seven individuals against the defendants listed in the original consolidation's third amended master complaint;³⁸⁵⁵ and (4) an action filed on October 30 by three insurance companies against Saudi Arabia and Syria.³⁸⁵⁶

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,³⁸⁵⁷ and thirty-eight alleged financial supporters of the September 11 terrorists.³⁸⁵⁸ Another seven cases were filed in August and September of 2004: (1) on August 6, an insurance company filed an action against 495 defendants;³⁸⁵⁹ (2) on September 1, six insurance

3853. Complaint, *O'Neill v. Republic of Iraq*, No. 1:03-cv-1766 (D.D.C. Aug. 20, 2003), D.E. 1; see Docket Sheet, *O'Neill v. Republic of Iraq*, No. 1:04-cv-1076 (S.D.N.Y. Feb. 10, 2003) (noting multidistrict consolidation on January 27, 2004); see also First Consolidated Complaint, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1568 (naming 109 defendants); Third Amended Complaint, *O'Neill*, No. 1:04-cv-1076 (S.D.N.Y. June 7, 2005), D.E. 67 (naming 108 defendants); Second Amended Complaint, *id.* (Dec. 30, 2004), D.E. 21 (naming 112 defendants); First Amended Complaint, *id.* (Sept. 28, 2004), D.E. 16 (naming eighty defendants); Docket Sheet, *id.* (Feb. 10, 2004) (noting intradistrict consolidation on February 9, 2004).

It was reported that John O'Neill was an FBI expert on the terrorist plans of Osama Bin Laden and Al-Qaeda who was forced out of the FBI a few months before the September 11, 2001, attacks. *Frontline: The Man Who Knew* (PBS television broadcast Oct. 3, 2002), available at www.pbs.org/wgbh/pages/frontline/shows/knew/view/.

3854. Complaint, *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003), D.E. 1; Docket Sheet, *id.* (Sept. 10, 2003) (noting intradistrict consolidation on March 10, 2004). At the time of consolidation, the complaint was amended to include forty-one plaintiffs. First Amended Complaint, *id.* (Mar. 10, 2004), D.E. 104; 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").

3855. Complaint, *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003), D.E. 1; Docket Sheet, *id.* (Sept. 10, 2003) (noting intradistrict consolidation on March 10, 2004).

3856. Docket Sheet, *Vigilant Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:03-cv-8591 (S.D.N.Y. Oct. 30, 2003) (noting intradistrict consolidation on November 12, 2003, which appears to be an error).

3857. Class Action Complaint, *O'Neill v. Kingdom of Saudi Arabia*, No. 1:04-cv-1922 (S.D.N.Y. Mar. 10, 2004), D.E. 1; see Docket Sheet, *id.* (Mar. 10, 2004) (noting intradistrict consolidation on April 7, 2004); see also First Consolidated Complaint, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1569.

3858. Class Action Complaint, *O'Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004), D.E. 1; see Docket Sheet, *id.* (Mar. 10, 2004) (noting intradistrict consolidation on April 7, 2004); see also First Consolidated Complaint, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1570 (naming ninety-five defendants).

3859. Complaint, *New York Marine and Gen. Ins. Co. v. Al Qaida*, No. 1:04-cv-6105 (S.D.N.Y. Aug. 6, 2004), D.E. 1; see Docket Sheet, *id.* (Aug. 6, 2004) (noting intradistrict consolidation on

companies filed an action against 426 defendants;³⁸⁶⁰ (3) on September 2, Cantor Fitzgerald filed an action against eighty-eight defendants;³⁸⁶¹ (4) on September 10, ten insurance companies filed an action against Saudi Arabia and Syria;³⁸⁶² (5) on September 10, ten World Trade Center businesses filed an action against 201 defendants;³⁸⁶³ (6) on September 10, the World Trade Center property managers filed an action against 201 defendants;³⁸⁶⁴ and (7) on September 10, plaintiffs filed a complaint against Riggs Bank for failure to notice suspicious financial transactions that aided the September 11 terrorists, and they amended their complaint on March 24, 2005, to name 1,233 individuals and 1,117 estates as plaintiffs.³⁸⁶⁵

Sovereign Immunity

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.³⁸⁶⁶ On September 21, Judge Casey dismissed additional Saudi royals and other defendants.³⁸⁶⁷ The dismissals

September 21, 2004); *see also* Second Amended Complaint, *id.* (Sept. 30, 2005), D.E. 234 (listing 419 defendants); First Amended Complaint, *id.* (Dec. 23, 2004), D.E. 29 (listing 478 defendants).

3860. Complaint, *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 1, 2004) (noting intradistrict consolidation on September 29, 2004); *see also* Second Amended Complaint, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005, filed Oct. 6, 2005), D.E. 1406 (420 defendants); First Amended Complaint, *Continental Cas. Co.*, No. 1:04-cv-5970 (S.D.N.Y. Dec. 8, 2004), D.E. 4 (434 defendants); Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, N.Y. Times, Sept. 9, 2004, at B1.

3861. Complaint, *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 2, 2004) (noting intradistrict consolidation on September 21, 2004); *see also* Amended Complaint, *id.* (Sept. 10, 2004), D.E. 5.

3862. Complaint, *Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:04-cv-7216 (S.D.N.Y. Sept. 10, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 21, 2004).

3863. Complaint, *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 29, 2004).

3864. Complaint, *World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 29, 2004).

3865. Amended Complaint, *Vadhan v. Riggs Nat'l Corp.*, No. 1:04-cv-7281 (S.D.N.Y. Mar. 24, 2005), D.E. 17; *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on October 15, 2004).

3866. *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), D.E. 883 (applying the January 18, 2005, ruling to dismiss all claims in all cases against the Kingdom of Saudi Arabia, members of its royal family, and the Al Rajhi Banking and Investment Corporation); *see also* *In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78–79 (2d Cir. 2008); *In re Terrorist Attacks* on Sept. 11, 2001, 689 F. Supp. 2d 552, 556–57 (S.D.N.Y. 2010); Murphy, *supra* note 3841, at 329.

3867. *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; *In re Terrorist Attacks*, 689 F. Supp. 2d at 557; Mark Hamblett, *Saudi Charity Dropped from Suit Over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

became final on January 10, 2006,³⁸⁶⁸ and the court of appeals affirmed on August 14, 2008.³⁸⁶⁹

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.³⁸⁷⁰ Discovery and other matters were referred to Magistrate Judge Frank Maas.³⁸⁷¹

On June 16, 2010, Judge Daniels dismissed actions against forty-nine foreign defendants for lack of personal jurisdiction,³⁸⁷² but decided that the plaintiffs had pleaded facts sufficient to confer the court's jurisdiction over Dubai Islamic Bank.³⁸⁷³ Also for lack of personal jurisdiction, Judge Daniels dismissed an additional seven defendants on September 13,³⁸⁷⁴ and he dismissed the Saudi Bin Laden Group on January 11, 2012.³⁸⁷⁵ Reviewing on appeal thirty-seven of these dismissals, the court of appeals affirmed twenty-five on April 16, 2013 (including the Saudi Bin Laden Group), and remanded twelve dismissals for further jurisdiction discovery.³⁸⁷⁶

3868. Judgment, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006), D.E. 1594; *In re Terrorist Attacks* on Sept. 11, 2001, 714 F.3d 659, 672 (2d Cir. 2013); see *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2006 WL 708149 (S.D.N.Y. Mar. 20, 2006) (explaining that Judge Casey decided to certify appeals for defendants dismissed on Rule 12(b)(1) or 12(b)(2) grounds but not defendants dismissed on Rule 12(b)(6) grounds); see also *In re Terrorist Attacks*, 538 F.3d at 75.

3869. *In re Terrorist Attacks*, 538 F.3d 71, cert. denied, 557 U.S. 935 (2009); *In re Terrorist Attacks*, 714 F.3d at 672; see *In re Terrorist Attacks*, 689 F. Supp. 2d at 555–58; Heffelfinger, *supra* note 3847, at 74; Eric Lichtblau, *Supreme Court Refuses Case by Sept. 11 Victims' Families*, N.Y. Times, June 30, 2009, at A12.

3870. *In re Terrorist Attacks* on Sept. 11, 2001, 718 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); Apr. 17, 2007, Reassignment Notice, *supra* note 3836; see *Obit.*, *supra* note 3836.

Tim Reagan attended Judge Daniels' first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

3871. *In re Terrorist Attacks*, 718 F. Supp. 2d at 487; S.D.N.Y. *In re Terrorist Attacks* Docket Sheet, *supra* note 3840.

Tim Reagan interviewed Judge Maas for this report in the judge's chambers on June 26, 2007, and November 6, 2009.

3872. *In re Terrorist Attacks*, 718 F. Supp. 2d at 469–89, 495 (original opinion dated June 16 and filed on June 17); *In re Terrorist Attacks*, 714 F.3d at 672.

3873. *In re Terrorist Attacks*, 718 F. Supp. 2d at 488–95 (“It can be reasonably inferred, from the allegations pled, that DIB personally and intentionally provided material support to al Qaeda in aid of al Qaeda's plan to commit an aggressive terrorist strike against the United States, with knowledge that the United States and its residents would likely bear the brunt of the resulting injuries.”).

3874. *In re Terrorist Attacks* on Sept. 11, 2001, 740 F. Supp. 2d 494, 506–11, 524 & n.12 (2d Cir. 2011); *In re Terrorist Attacks*, 714 F.3d at 672.

3875. *In re Terrorist Attacks* on Sept. 11, 2001, 840 F. Supp. 2d 776 (S.D.N.Y. 2012); *In re Terrorist Attacks*, 714 F.3d at 672–73.

3876. *In re Terrorist Attacks*, 714 F.3d 659.

On the same day, the court affirmed the dismissal of five defendants for failure to state a claim, *In re Terrorist Attacks* on Sept. 11, 2011, 714 F.3d 118 (2d Cir. 2013), and the dismissal of two Saudi charities as immune under the Foreign Sovereign Immunities Act, *In re Terrorist Attacks* on Sept. 11, 2011, 714 F.3d 109 (2d Cir. 2013). On June 30, 2014, the Supreme Court denied a petition for

On December 16, 2011, Judge Daniels approved a calculation by Judge Maas of insurance companies' default-judgment damages against Al-Qaeda in the amount of \$9,351,247,965.99.³⁸⁷⁷ Judge Daniels extended liability for this amount to Hezbollah on March 27, 2012.³⁸⁷⁸

The U.S. Court of Appeals for the Second Circuit, on November 7, 2011, contradicted its earlier ruling by a different panel in favor of sovereign immunity for Saudi Arabia³⁸⁷⁹ by provisionally denying sovereign immunity to Afghanistan.³⁸⁸⁰

The ruling arose in litigation initiated earlier than the cases included in the multidistrict litigation. On December 4, 2001, Lynn Faulkner filed suit in the District of the District of Columbia against Osama Bin Laden, Al-Qaeda, the Taliban, Afghanistan, and Iraq for the wrongful death of his wife Wendy, who perished in Two World Trade Center on September 11.³⁸⁸¹ Judge Richard W. Roberts granted³⁸⁸² Faulkner's request to proceed as John Doe "[i]n order to protect the health, safety, welfare, and privacy interests of Plaintiff and his family, including two teenagers, from both further terrorist attacks and from media harassment."³⁸⁸³ On February 27, 2004, Afghanistan sought to vacate³⁸⁸⁴ a default judgment that was

writ of certiorari as to all three opinions. *O'Neill v. Al Rajhi Bank*, 573 U.S. ___, 134 S. Ct. 2870 (2014).

3877. Opinion, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Dec. 16, 2011), D.E. 2502, available at 2011 WL 6318975; Report and Recommendation, *id.* (Oct. 14, 2011), D.E. 2479, available at 2011 WL 4903584; see Eric Lichtblau, *Prospects Improve for Sept. 11 Suits Against Nations*, N.Y. Times, Nov. 19, 2011, at A13.

3878. Order, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 27, 2012), D.E. 2582, available at 2012 WL 1034414.

3879. *Doe v. Bin Laden*, 663 F.3d 64, 70–71 n.10 (2d Cir. 2011); see *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 78 (2d Cir. 2008); see also Lichtblau, *supra* note 3877.

The second panel circulated its opinion to members of the first panel and to all active judges of the court before filing, and no judge objected to the new opinion. *Doe*, 663 F.3d at 70–71 n.10. The court considers this a mini en banc procedure. *Id.*; *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 n.90 (2d Cir. 2009); *United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007).

3880. *Doe*, 663 F.3d 64; see Lichtblau, *supra* note 3877.

3881. Complaint, *Doe v. Bin Laden*, No. 1:01-cv-2516 (D.D.C. Jan. 4, 2002), D.E. 2.

3882. Order, *id.* (Dec. 4, 2001), D.E. 4; *Doe*, 663 F.3d at 65 n.1.

3883. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Dec. 4, 2001), D.E. 3.

On October 7, 2002, Faulkner filed a John Doe complaint against banks and charities alleging financial support of the terrorists. Complaint, *Doe v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1980 (D.D.C. Oct. 7, 2002), D.E. 1. He moved to intervene instead in a pending action against the same defendants—the second District of Columbia action added to the multidistrict consolidation. Motion, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Feb. 5, 2003), D.E. 67. Parties objected to his intervening as a John Doe, and Judge James Robertson denied the motion. Order, *id.* (Feb. 24, 2003), D.E. 82. Faulkner renewed his motion under his own name, Motion, *id.* (Mar. 21, 2003), D.E. 101, and Judge Robertson granted intervention, D.D.C. *Burnett* Docket Sheet, *supra* note 3839 (noting that the motion was granted on August 6, 2003). On the following day, Faulkner dismissed his separate action against the banks and charities. Notice, *Doe*, No. 1:02-cv-1980 (D.D.C. Aug. 7, 2003), D.E. 4.

3884. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Feb. 27, 2004), D.E. 26.

issued against it on January 29, 2003,³⁸⁸⁵ claiming sovereign immunity pursuant to the Foreign Sovereign Immunities Act (FSIA).³⁸⁸⁶ Judge Roberts determined, on September 30, 2008, that jurisdiction depended upon whether the plaintiff could show an FSIA exception for noncommercial torts³⁸⁸⁷ and whether the Taliban controlled the government of Afghanistan during the September 11, 2001, conspiracy or it merely had partial military control over Afghanistan's territory.³⁸⁸⁸

On November 24, 2009, the court of appeals for the District of Columbia Circuit transferred the appeal to the Second Circuit in light of the multidistrict consolidation in the Southern District of New York.³⁸⁸⁹ The Second Circuit's court of appeals agreed with Judge Roberts that the noncommercial tort exception might apply and remanded the case to the district court for the Southern District of New York for jurisdictional discovery.³⁸⁹⁰

On March 15, 2012, the district court entered a default judgment against Sudan in one of the originally consolidated actions from the District of the District of Columbia.³⁸⁹¹

On December 19, 2013, the Second Circuit's court of appeals issued a remand to Judge Daniels respecting claims against Saudi Arabia.³⁸⁹² As part of discovery following the remand, Zacarias Moussaoui was deposited in prison on October 20 and 21, 2014, in support of the plaintiffs' case.³⁸⁹³

3885. Order, *id.* (Jan. 29, 2003), D.E. 16; *see also* Order, *id.* (Jan. 29, 2003), D.E. 15 (default judgment against Iraq).

3886. Pub. L. No. 94-583, 90 Stat. 2891 (1976); *see* 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (2013); *see also* David P. Stewart, *The Foreign Sovereign Immunities Act* (Federal Judicial Center 2013) (“a practical introduction for those who have little knowledge of or experience with the statutes as interpreted and applied in U.S. courts”).

3887. 28 U.S.C. § 1605(a)(5) (providing an exception of immunity for tort damages because of noncommercial activity that is not discretionary or defamatory).

3888. *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008); *Doe v. Bin Laden*, 663 F.3d 64, 66 (2d Cir. 2011).

3889. Order, *Doe v. Bin-Laden*, No. 08-7117 (D.C. Cir. Nov. 24, 2009); *Doe*, 663 F.3d at 66.

3890. *Doe*, 663 F.3d 64; *see* Stewart, *supra* note 3886, at 88; Lichtblau, *supra* note 3877.

3891. Default Judgment, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Mar. 15, 2012), D.E. 621.

3892. *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353 (2d Cir. 2013), *cert. denied*, 573 U.S. ___, 134 S. Ct. 2875 (2014); *see* Dan Christensen, *Saudi Arabia Added to 9/11 Lawsuit*, *Miami Herald*, Dec. 25, 2013, at 1A.

3893. Affirmation Exs. 5–7, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Feb. 3, 2015), D.E. 2927 (deposition transcripts); *see* Ben Hubbard & Scott Shane, *Pre-9/11 Ties Haunt Saudis as More Accusations Surface*, *N.Y. Times*, Feb. 5, 2015, at A10; Larry Neumeister, *Lawyers: Evidence Shows Saudi Arabia Aided Hijackers*, *Miami Herald*, Feb. 5, 2015, at 3A; James Risen, *Terrorist Claims Return Sept. 11 Suit to Spotlight*, *N.Y. Times*, Feb. 11, 2015, at A8; Scott Shane, *Terrorist Names Saudis as Patrons*, *N.Y. Times*, Feb. 4, 2015, at A1; *see also supra* “Twentieth Hijacker.”

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.³⁸⁹⁴

Victim Compensation Fund

On September 22, 2001, the President signed the Air Transportation Safety and System Stabilization Act.³⁸⁹⁵ Title IV of the Act created a “September 11th Victim Compensation Fund of 2001”³⁸⁹⁶ 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.”³⁸⁹⁷ The Attorney General appointed Kenneth Feinberg as a special master to administer the fund.³⁸⁹⁸ 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,³⁸⁹⁹ and after promulgation of the regulations the deadline became December 22, 2003.³⁹⁰⁰ The Act required plaintiffs to elect either recovery from

3894. Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 Wash. Univ. L. Rev. 653 (2013) [hereinafter *Litigation Database*]; Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 Cornell L. Rev. 127 (2012) [hereinafter *Managerial Judging*].

3895. Pub. L. No. 107-42, 115 Stat. 230 (2001), 49 U.S.C. § 40101 note (2013); see *In re Sept. 11 Litig.*, 236 F.R.D. 164, 166 (S.D.N.Y. 2006); Colaio v. Feinberg, 262 F. Supp. 2d 273, 279 (S.D.N.Y. 2003); Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 128–29, 132; see also Jill Schachner Chanen & Margaret Graham Tebo, *Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

3896. Pub. L. No. 107-42, § 401, 115 Stat. at 237, 49 U.S.C. § 40101 note.

3897. *Id.*, § 403; see *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *United States v. Moussaoui*, 483 F.3d 220, 225 n.4 (4th Cir. 2007); *Schneider v. Feinberg*, 345 F.3d 135, 138–39 (2d Cir. 2003); *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *Colaio*, 262 F. Supp. 2d at 278–79; Hellerstein et al., *supra* note 3894, at 128–29, 132.

3898. *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 3895, 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 3895, at 59. “Ultimately, 97% of all potential individual wrongful death claimants presented their claims to the Special Master, Kenneth Feinberg.” *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

3899. Pub. L. No. 107-42, § 405(a)(3), 115 Stat. at 238, 49 U.S.C. § 40101 note; see *Schneider*, 345 F.3d at 139.

3900. 28 C.F.R. § 104.62 (2014); see *Colaio*, 262 F. Supp. 2d at 278–79, 281; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 133; see also Pub. L. No. 107-42, § 407, 115 Stat. at 240, 49 U.S.C. § 40101 note (providing for promulgation of implementing regulations no later than ninety days after enactment of the Act); Hartocollis, *supra* note 3898.

the fund or recovery by civil action.³⁹⁰¹ The Act also established exclusive jurisdiction in the Southern District of New York for civil actions,³⁹⁰² except for actions against the terrorists and their supporters.³⁹⁰³

Master Dockets

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.³⁹⁰⁴ The court assigned the case to Judge Alvin K. Hellerstein.³⁹⁰⁵

During the first six months of 2002, twelve additional actions were filed by estates of passengers,³⁹⁰⁶ estates of workers in the World Trade Center,³⁹⁰⁷ and op-

3901. Pub. L. No. 107-42, § 405(c)(3)(B), 115 Stat. at 239–40, 49 U.S.C. § 40101 note; see *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; *Schneider*, 345 F.3d at 139; *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 614 (S.D.N.Y. 2008); *Colaio*, 262 F. Supp. 2d at 279; see also Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & Soc’y Rev. 645 (2008) (analyzing reasons survivors gave for their choices between the fund and litigation); Hartocollis, *supra* note 3898 (describing parents of an eleven-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.”).

3902. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. at 241, 49 U.S.C. § 40101 note; see *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d 477, 478 (S.D.N.Y. 2015); *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 619; *Moussaoui*, 483 F.3d at 225 n.4; *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004); *Colaio*, 262 F. Supp. 2d at 279; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 134; Chanen & Tebo, *supra* note 3895, at 59.

3903. Pub. L. No. 107-42, § 408(c), 115 Stat. at 241, 49 U.S.C. § 40101 note; see also Pub. L. No. 107-71, 115 Stat. 646, 49 U.S.C. § 40101 note; (also exempting from exclusive jurisdiction “civil actions to recover collateral source obligations”).

3904. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (D.E. 1).

3905. *Id.*; see Hartocollis, *supra* note 3898.

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.

3906. Docket Sheet, *Miller v. Am. Airlines, Inc.*, No. 1:02-cv-3676 (S.D.N.Y. May 14, 2002) (action by the estate of American Flight 11 passenger David Angell, a television screenwriter, against American Airlines and Globe Aviation Services, dismissed as settled on February 13, 2008); Docket Sheet, *Koutny v. United Airlines, Inc.*, No. 1:02-cv-2802 (S.D.N.Y. Apr. 12, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA, dismissed as settled on December 29, 2006); Docket Sheet, *Miller v. United Airlines, Inc.*, No. 1:02-cv-1728 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security, dismissed as settled on November 14, 2007); Docket Sheet, *Sweeney v. United Airlines, Inc.*, No. 1:02-cv-1727 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA, dismissed as settled on December 29, 2006); Docket Sheet, *Lopez v. United Airlines, Inc.*, No. 1:02-cv-458 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA, dismissed as settled on March 3, 2008); Docket Sheet, *O’Hare v. United Airlines, Inc.*, No. 1:02-cv-

erators of businesses in the World Trade Center³⁹⁰⁸ against the airlines that operated the hijacked flights³⁹⁰⁹ and the companies providing security for their departures.³⁹¹⁰

On June 20, the government initiated a motion to intervene to ensure that transportation “sensitive security information” (SSI) would be protected in these lawsuits.³⁹¹¹ The court granted the government’s motion and ordered the cases consolidated.³⁹¹²

456 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security, dismissed as settled on November 14, 2006); Docket Sheet, *Doe v. Am. Airlines, Inc.*, No. 1:02-cv-454 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, voluntarily dismissed on March 28, 2002); Docket Sheet, *Debeuneure v. Am. 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).

3907. Docket Sheet, *Pitt v. Am. Airlines, Inc.*, No. 1:02-cv-4365 (S.D.N.Y. June 11, 2002) (action by the estate of an employee of Cantor Fitzgerald in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on December 31, 2003); Docket Sheet, *Smithwick v. Am. Airlines, Inc.*, No. 1:02-cv-2669 (S.D.N.Y. Apr. 8, 2002) (action by the estate of a worker in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on December 20, 2002).

3908. Docket Sheet, *Tower Computer Servs., Inc. v. Am. Airlines, Inc.*, No. 1:02-cv-3295 (S.D.N.Y. Apr. 30, 2002) (action by the operators of a business in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on November 5, 2004); Docket Sheet, *World Trade Farmers v. United Air Lines, Inc.*, No. 1:02-cv-2987 (S.D.N.Y. Apr. 18, 2002) (action by the operators of a business at the World Trade Center against United Airlines, American Airlines, Globe Aviation Services, and Huntleigh USA).

3909. 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).

3910. 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 September 11 Litig.*, 500 F. Supp. 2d 356 (S.D.N.Y. 2007).

3911. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (D.E. 10, June 20, 2002, government letter).

3912. Order, *id.* (July 25, 2002), D.E. 20; see Benjamin Weiser, *Ruling Favors Limited Access to 9/11 Data*, N.Y. Times, July 13, 2002, at B1; Benjamin Weiser, *Security Cited in Proposals on Lawsuits from Sept. 11*, N.Y. Times, Sept. 20, 2002, at B5.

During the next four months, 120 additional cases were filed.³⁹¹³ On November 1, Judge Hellerstein ordered the consolidation of “all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the [Air Transportation Safety and System Stabilization Act] against any defendant (including defendants airlines and airline security companies), except for alleged hijackers or terrorists” and established a master docket case entitled *In re September 11 Litigation*.³⁹¹⁴

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.³⁹¹⁵ After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.³⁹¹⁶

The plaintiffs filed five master complaints on December 11—four pertaining to personal injuries arising from the crash of each plane and one pertaining to property damage and business interruption.³⁹¹⁷ Both the court and the plaintiffs’

3913. 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.

3914. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002), D.E. 1; see Docket Sheet, *id.*; see also *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *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 email with Southern District of New York Staff, Aug. 20, 2009.

3915. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Dec. 2, 2003), D.E. 233; Order, *id.* (Nov. 21, 2003), D.E. 216; Order, *id.* (July 23, 2003), D.E. 160; Order, *Mulligan v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6885 (S.D.N.Y. Sept. 6, 2002), D.E. 2; *In re Sept. 11 Litig.*, 236 F.R.D. at 166–67; see Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. Times, Sept. 4, 2002, at B3.

“Proceedings [before Judge Hellerstein] began after the Victim Compensation Fund closed, so that the litigation did not compete with the workings of the Fund.” *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

3916. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Feb. 20, 2004), D.E. 294.

Subsequently, the court resolved the suspense docket for cleanup and aftermath cases. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Mar. 15, 2004), D.E. 34; Corrective Order, *id.* (Mar. 3, 2004), D.E. 33.

3917. Docket Sheet, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); see Fourth Amended Complaint, *id.* (Sept. 14, 2007), D.E. 1212 (concerning United Flight 175 from Boston to

Other Civil Cases: September 11 Damages

executive committee established publicly accessible Internet webpages to post information about the litigation and selected court filings.³⁹¹⁸

By February 11, 2003, an additional thirty-eight cases had been filed.³⁹¹⁹ On that date, Judge Hellerstein divided the cases into two groups: (1) cases claiming damages arising from conduct through the September 11, 2001, attacks, and (2) cases claiming damages arising mostly from respiratory injuries during the cleanup and aftermath period.³⁹²⁰ Cases in the first group remained part of the original master docket case, and cases in the second group were assigned to a new master docket case entitled *In re World Trade Center Disaster Site Litigation*.³⁹²¹

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.³⁹²² Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.³⁹²³

Los Angeles, which crashed into Two World Trade Center); Fourth Amended Complaint, *id.* (Sept. 14, 2007), D.E. 1211 (concerning American Flight 11 from Boston to Los Angeles, which crashed into One World Trade Center); Fourth Amended Complaint *id.* (Aug. 1, 2007), D.E. 1195 (concerning American Flight 77 from Dulles to Los Angeles, which crashed into the Pentagon); Third Amended Complaint, *id.* (Aug. 1, 2007), D.E. 1194 (concerning United Flight 93 from Newark to San Francisco, which crashed in Pennsylvania); Fourth Amended Complaint, *id.* (Jan. 18, 2005), D.E. 640 (concerning property injuries).

3918. See <http://nysd.uscourts.gov/sept11> (the court's website); www.sept11tortlitigation.com (former address for the plaintiffs' website).

3919. 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.

3920. Case Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003), D.E. 1; Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

3921. See Docket Sheet, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 168 n.3 (S.D.N.Y. 2006).

Cases were added to this docket as recently as 2014. Docket Sheet, *Holgerson v. A Russo Wrecking, Inc.*, No. 1:14-cv-3061 (S.D.N.Y. Apr. 30, 2014); Docket Sheet, *Lombardo v. A Russo Wrecking, Inc.*, No. 1:14-cv-3060 (S.D.N.Y. Apr. 30, 2014).

Judge Hellerstein denied the government defendants' motions to dismiss on immunity grounds, *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006), *aff'd*, 521 F.3d 169 (2d Cir. 2008); see Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. Times, Mar. 30, 2008, at 18.

3922. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

3923. *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004). See generally Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 Tort Trial & Ins. Prac. L.J. 685 (2011) (discussing September 11, 2001, insurance coverage litigation).

Judge Hellerstein ruled that World Trade Center liability insurance policies did not include defense costs, except for one policy that would come into effect once \$265 million in damages had been paid. *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104 (S.D.N.Y. 2006). Judge Hellerstein resolved this part of the litigation by sanctioning insurance companies \$1,250,000 for denying coverage and by dismissing the action. *In re Sept. 11th Liab. Ins. Coverage Cases*, 243

By the end of June, another thirteen cases had been filed; eight of these were consolidated in the cleanup master docket,³⁹²⁴ and the other five were consolidated in the attacks master docket.³⁹²⁵

Some cleanup cases were filed in state court against the City of New York, the Port Authority of New York and New Jersey, or both, and removed to federal court.³⁹²⁶ The Southern District of New York's exclusive jurisdiction applies to suits for damages "resulting from or relating to" the terrorist attacks.³⁹²⁷ Judge Hellerstein determined that with respect to actions in New York his court's exclusive jurisdiction applied to injuries at the World Trade Center site from the time of the crashes on September 11 until the search for survivors ceased on September 29.³⁹²⁸ 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.³⁹²⁹

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.³⁹³⁰ Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands to state court are not reviewable.³⁹³¹ The appellate court reviewed some plaintiffs' cross-appeals

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), D.E. 833; Order, *id.* (Jan. 18, 2007), D.E. 774 (dismissal). Appeals were settled subsequent to oral arguments. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-991 (2d Cir. Mar. 12, 2007) (settled January 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-776 (2d Cir. Mar. 1, 2007) (settled October 24, 2008); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-706 (2d Cir. Feb. 26, 2007) (settled January 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-530 (2d Cir. Feb. 14, 2007) (same).

3924. 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.

3925. The cases were assigned the following docket numbers: 1:03-cv-1016, 1:03-cv-1040, 1:03-cv-2004, 1:03-cv-2684, and 1:03-cv-3999.

3926. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003); Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 134.

3927. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001), 49 U.S.C. § 40101 note (2013).

3928. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 134–35.

Judge Hellerstein previously remanded two cleanup cases that were never consolidated with the other September 11 damages cases described here. *Spagnuolo v. Port Auth. of N.Y. & N.J.*, 245 F. Supp. 2d 519 (S.D.N.Y. 2003) (remanding *Spagnuolo v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6360 (S.D.N.Y. Aug. 9, 2002)); *Graybill v. City of N.Y.*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding *Graybill v. City of N.Y.*, No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); see *In re World Trade Ctr.*, 270 F. Supp. 2d at 365.

3929. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

3930. *Id.* at 380–81; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 135.

3931. *In re WTC Disaster Site*, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005); see 28 U.S.C. § 1447(d) (2011) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from

of Judge Hellerstein's denials of their remand motions and affirmed.³⁹³² 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.³⁹³³ 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.³⁹³⁴ So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.³⁹³⁵

By March of 2005, more than 1,000 civil cases against defendants other than the terrorists and their supporters claimed damages related to the September 11, 2001, attacks. On March 10, the court created a third master docket case for complaints alleging property damage as a result of the terrorist attacks, calling the new consolidation *In re September 11 Property Damage and Business Loss Litigation*.³⁹³⁶ The court created a fourth master docket case called *In re World Trade Center Lower Manhattan Disaster Site Litigation* on August 9 for claimed injuries outside the immediate World Trade Center area.³⁹³⁷

which it was removed pursuant to section [1442 or] 1443 of this title shall be reviewable by appeal or otherwise." (quotation alteration added by amendment, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545)); *see also id.*, § 1443 (providing for removal of certain civil rights cases).

3932. *In re WTC Disaster Site*, 414 F.3d at 357, 371–81.

3933. *Id.* at 380–81 ("we have noted our agreement with cross-appellants' contention that there was no appropriate basis for the district court's conclusion that their claims should be retained while those of plaintiffs who asserted claims of respiratory injury suffered at sites other than the World Trade Center site or after Sept. 29, 2001, were to be remanded."); *see Hellerstein et al., Managerial Judging, supra* note 3894, at 135; *see also* Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

3934. *In re WTC Disaster Site*, 414 F.3d at 381; Hellerstein et al., *Managerial Judging, supra* note 3894, at 135–36.

3935. *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).

3936. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 14, 2005), D.E. 3; *see* Docket Sheet, *id.* (Mar. 21, 2005); *see also In re Sept. 11 Litig.*, 236 F.R.D. 164, 167 n.1, 168 n.3 (S.D.N.Y. 2006).

On March 14, 2007, the U.S. Court of Appeals for the Fourth Circuit ruled that a different district court hearing the case of *United States v. Moussaoui*, *see supra* "Twentieth Hijacker," did not have the power to grant the plaintiffs in these cases access to discovery produced to a criminal defendant in the other court. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007).

On December 11, 2008, Judge Hellerstein ruled that insurance recovery for loss of the World Trade Center towers would be fair market value at the time of destruction rather than replacement value. *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535 (S.D.N.Y. 2008).

3937. Case Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Aug. 8, 2005), D.E. 267; *see* First Amended Master Complaint, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. Apr. 18, 2008), D.E. 2327; Master Complaint, *id.* (June 11, 2007), D.E. 117; Docket Sheet, *id.* (Aug. 9, 2005); *see also In re World*

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)*.³⁹³⁸

Settling Wrongful Death Claims

By July 2007, of the ninety-five actions included in the original master docket, fifty-three had settled and one was dismissed.³⁹³⁹ Judge Hellerstein limited attorney fees, at least among those cases settling during early phases, to 15% of settlement.³⁹⁴⁰ 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.³⁹⁴¹ Judge Hellerstein believed that this would help the plaintiffs and the defendants in all of the remaining cases assess the values of the claims.³⁹⁴² All six cases settled before damages trials were held.³⁹⁴³

Trade Ctr. Lower Manhattan Disaster Site Litig., 758 F.3d 202, 205–06 (2d Cir. 2014); *In re Sept. 11 Litig.*, 236 F.R.D. at 168 n.3.

On March 6, 2014, Judge Hellerstein designated fifteen of the cases in this docket to proceed to trial. Order, *In re Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. Mar. 6, 2014), D.E. 5009.

3938. 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), D.E. 1; see Docket Sheet, *id.* (Mar. 28, 2007); see also *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 484–85 & n.1 (2d Cir. 2013).

Judge Hellerstein dissolved this master docket case in 2013. Order, *In re Combined Disaster Site Litig.*, No. 1:21-mc-103 (S.D.N.Y. Oct. 29, 2013), D.E. 1220; Order, *id.* (Sept. 27, 2013), D.E. 1212.

3939. *In re Sept. 11 Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); see Hartocollis, *supra* note 3898.

3940. E.g., Order Concerning Settlement, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Aug. 9, 2007), D.E. 1175, available at 2007 WL 2298352; Order Concerning Settlement, *id.* (June 29, 2007), D.E. 1108; *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

3941. Damages Trials Opinion, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), D.E. 1123, available at 2007 WL 1965559; Order, *id.* (July 2, 2007), D.E. 1114; *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 554 (S.D.N.Y. 2009) (“I determined that the problems of discovery delay arose in connection with issues of liability, not damages.”); *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 616.

3942. Damages Trials Opinion, *supra* note 3941, at 4; Interview with Hon. Alvin K. Hellerstein, June 25, 2007; see Hartocollis, *supra* note 3898 (reporting, “The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.”).

3943. *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554 (“The experiment was successful. After some discovery, and without the need of any trials, all six cases settled and more followed.”); *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 617; Settlement Order, *Wilson v. Am. Airlines*, No. 1:03-cv-6968 (S.D.N.Y. Nov. 1, 2007), D.E. 98; Settlement Order, *Shontere v. AMR Corp.*, No. 1:03-cv-6966 (S.D.N.Y. Nov. 1, 2007), D.E. 105; Settlement Order, *Ambrose v. Am. Airlines*, No. 1:02-cv-7150 (S.D.N.Y. Nov. 1, 2007), D.E. 77; Settlement Order, *Driscoll v. Argenbright Sec., Inc.*, No. 1:02-cv-7912 (S.D.N.Y. Sept. 17, 2007), D.E. 50; Settlement Order, *Carstanjen v. UAL Corp.*, No. 1:02-cv-7153 (S.D.N.Y. Sept. 17, 2007), D.E. 71; Settlement Order, *O’Hare v. United Airlines*, No. 1:02-cv-456 (S.D.N.Y. Sept. 17, 2007), D.E. 61.

By March 19, 2008, so many of the original actions had settled that Judge Hellerstein closed the original master docket consolidation, *In re September 11 Litigation*, and transferred remaining cases to the master docket consolidation for property damage cases, *In re September 11 Property Damage and Business Loss Litigation*.³⁹⁴⁴

A law firm representing four of the last remaining plaintiffs among the original wrongful death actions—for modest-wage earners at the Pentagon—negotiated settlements totaling \$28.5 million, averaging much more than previous settlements, and negotiated a fee with each plaintiff of 25%.³⁹⁴⁵ 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.³⁹⁴⁶ The judge also disapproved the firm’s fee as out of line with others’ in the litigation.³⁹⁴⁷ “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.”³⁹⁴⁸

The one remaining wrongful death action was scheduled to go to trial in November 2011.³⁹⁴⁹ On September 16, the plaintiffs filed 127 exhibits in opposition to a motion for summary judgment.³⁹⁵⁰ Three days later, the plaintiffs filed a notice that the case had settled.³⁹⁵¹ It was reported that the September 16 filing made the public case that the plaintiffs were seeking to make.³⁹⁵²

3944. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 18, 2008), D.E. 410; Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Mar. 18, 2008), D.E. 1442.

3945. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; see *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3946. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 621; see *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554; *New Ruling Sought in 9/11 Settlements*, Wash. Post, Aug. 7, 2008, at A5.

3947. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; see *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3948. *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3949. *In re Sept. 11 Litig.*, 811 F. Supp. 2d 883, 885 (S.D.N.Y. Sept. 7, 2011) (action against United Airlines and Huntleigh USA Corporation by the mother of Mark Bavis, who died on United Flight 175, which departed Boston for Los Angeles and struck World Trade Center 2); Order, *Bavis v. UAL Corp.*, No. 1:02-cv-7154 (S.D.N.Y. June 14, 2011), D.E. 157; see *In re Sept. 11 Litig.*, 760 F. Supp. 2d 433, 436 (S.D.N.Y. 2011) (“Ninety-four of the ninety-five cases have settled.”); see also Benjamin Weiser, *A 9/11 Judge Sets a Timer for a Month*, N.Y. Times, Apr. 28, 2011, at A1.

On August 11, 2010, two other cases settled. Stipulation, *Low v. U.S. Airways, Inc.*, No. 1:03-cv-7040 (S.D.N.Y. Aug. 11, 2010), D.E. 95; Stipulation, *Keating v. Am. Airlines, Inc.*, No. 1:02-cv-7156 (S.D.N.Y. Aug. 11, 2010), D.E. 2750; see *In re Sept. 11 Litig.*, 723 F. Supp. 2d 534, 539 n.6 (S.D.N.Y. 2010) (noting pending motions for approval of settlements).

3950. Declaration, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 16, 2011), D.E. 240; see Benjamin Weiser, *Filing Details Shortcomings of Airport Screeners on 9/11*, N.Y. Times, Sept. 17, 2011, at A15.

3951. Stipulation, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 19, 2011), D.E. 242; see Transcript at 2, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Oct. 18, 2011, filed Jan. 26, 2012), D.E. 2750; see also Benjamin Weiser, *Last 9/11 Wrongful-Death Suit Is Settled, as Family and Airline Reach Terms*, N.Y. Times, Sept. 20, 2011, at A21.

3952. Weiser, *supra* note 3951 (focusing on inadequate airport security as the reason for the disaster, according to the plaintiffs).

Cleanup Plaintiffs

By the end of 2008, only three of the original ninety-five wrongful death and personal injury cases remained unsettled,³⁹⁵³ but there remained approximately 10,000 cases by rescue and cleanup workers for respiratory and other injuries.³⁹⁵⁴ 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.”³⁹⁵⁵

To help the parties assess the values of the claims, Judge Hellerstein again initiated a process for test trials: thirty cases, mostly representing the most severe cases but also representing other cases, would proceed through discovery for trial in May 2010.³⁹⁵⁶

To cope with the unprecedented complexity, the Court appointed Special Masters Aaron D. Twerski and James A. Henderson, Jr. to organize the fundamental facts of the case in a manageable way. The Special Masters and the parties developed a set of 360 narrowly-tailored questions seeking case-crucial information. The information received from the plaintiffs was then organized and housed in a “core discovery” database (the “TCDI Database”).³⁹⁵⁷

In March, parties announced a global settlement.³⁹⁵⁸ Judge Hellerstein determined that the settlement was not a good enough deal for the individual plain-

3953. *In re Sept. 11 Litig.*, 723 F. Supp. 2d at 539; *In re Sept. 11 Litig.*, 621 F. Supp. 2d 131, 140 (S.D.N.Y. 2009); *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 553–54; *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 504 n.9 (S.D.N.Y. 2009); *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

3954. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 499 n.1, 501, 503; see Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 132–33; see also *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 117 (2d Cir. 2014); *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d 477, 478 (S.D.N.Y. 2015) (pp.1–2 of opinion filed at S.D.N.Y. No. 1:21-mc-102, D.E. 5767).

3955. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

3956. *Id.* at 504; *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 142–55; see Mireya Navarro, *Effort to Settle Sept. 11 Lawsuits*, N.Y. Times, Feb. 5, 2010, at A1 (“Several hundred lawyers are working on the cases, and the court documents run to tens of millions of pages.”).

The case management order called for division of the cases into five groups, depending upon when the case was filed, and the selection of six cases from each group. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–04. From the 200 cases in each group with the most severe injuries, the two sides of the litigation would each select two cases. *Id.* at 504. Special masters would identify an additional twenty-five representative cases, and Judge Hellerstein would select two cases from among the 196 severe cases not selected by the parties and the twenty-five other representative cases. *Id.*

3957. *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d at 479; Hellerstein et al., *Litigation Database*, *supra* note 3894.

3958. *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011); Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 155–57; see Mireya Navarro, *Deal Is Reached on Health Costs of 9/11 Workers*, N.Y. Times, Mar. 12, 2010, at A1.

tiffs,³⁹⁵⁹ but he approved a revised settlement that gave more money to workers and less to their lawyers.³⁹⁶⁰

On November 19, an allocation neutral reported to the court that eight plaintiffs more than a required 95% had accepted the settlement.³⁹⁶¹ Judge Hellerstein appointed a special counsel to help the several hundred other plaintiffs decide whether or not to join the settlement at a later time.³⁹⁶²

A month later, Congress passed the James Zadroga 9/11 Health and Compensation Act,³⁹⁶³ which provided rescue and cleanup workers additional funds for health monitoring and treatment and which reopened the September 11th Victim Compensation Fund to provide compensation for employment and other economic losses.³⁹⁶⁴ Plaintiffs were given until January 2, 2012, to decide whether to pursue damages from the fund or through litigation.³⁹⁶⁵ The fund began to pay out awards on January 29, 2013.³⁹⁶⁶

3959. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188 (“my study of the settlement caused me to reject it, as not fair and adequate, and for providing too much money for the lawyers, for reserving too much money for unlikely claims in the future, and for providing too little money for the settling Plaintiffs, and because its terms were unfair and purported to be judicially unreviewable and unaccountable”); *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 157–59; see Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. Times, May 3, 2010, at A16; Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. Times, Mar. 20, 2010, at A12.

3960. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. June 10, 2010), D.E. 2083; *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 117–18; *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188; see *Judge Approves 9/11 Settlement*, Wash. Post, June 11, 2010, at A3.

Appeals were withdrawn. Stipulation, *In re World Trade Ctr.*, No. 10-3172 (2d Cir. Oct. 26, 2010), D.E. 17 (cross-appeal by some plaintiffs); Stipulation, *Quinones v. City of N.Y.*, No. 10-2765 (2d Cir. Oct. 26, 2010), D.E. 49 (defendants’ appeal).

3961. Letter, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 19, 2010), D.E. 2256 (reporting agreements by 10,043 out of 10,563 plaintiffs); see Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. Times, Nov. 20, 2010, at A1.

3962. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 24, 2010), D.E. 2257 (noting that plaintiffs not accepting the settlement included plaintiffs who could not be reached, plaintiffs who refused communication from their attorneys, plaintiffs who had withdrawn from the litigation but still remained on the docket, and plaintiffs still on the fence); *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 192–93; see *In re World Trade Ctr. Disaster Site Litig.*, 762 F. Supp. 2d 631 (S.D.N.Y. 2010).

3963. Pub. L. No. 111-347, 124 Stat. 3623 (2011).

3964. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); see Hellerstein et al., *Managerial Judging*, *supra* note 3894, at 129–31; Raymond Hernandez, *Senate Passes 9/11 Health Bill as Republicans Back Down*, N.Y. Times, Dec. 23, 2010, at A1; see also Sheryl Gay Stolberg, *Obama Signs 9/11 Health Care Bill*, N.Y. Times, Jan. 3, 2011, at A17.

3965. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; see David B. Caruso, *For Those With 9/11 Health Lawsuits, A Compensation Dilemma*, Wash. Post, Dec. 26, 2011, at A7.

3966. See Anemona Hartocollis, *9/11 Health Compensation Fund Pays Out Its First 15 Awards*, N.Y. Times, Jan. 30, 2013, at A23.

After Judge Hellerstein dismissed some plaintiffs “because they had given up being parties, if, indeed, they had ever been real parties,”³⁹⁶⁷ the fraction of settling plaintiffs rose to 99.4%.³⁹⁶⁸ Judge Hellerstein overruled the insurer’s motion to include involuntarily dismissed plaintiffs in the denominator to reduce its obligation of an additional \$1.25 million in settlement payments for every tenth of a percentage the fraction of settlers surpassed 95%.³⁹⁶⁹ On the question of this bonus payment, the court of appeals remanded the case, on June 9, 2014, for additional findings as to the parties’ intent.³⁹⁷⁰ Judge Hellerstein referred the matter to the parties for negotiation.³⁹⁷¹

In 2013 and 2014, the court of appeals affirmed dismissals of actions by plaintiffs who did not file certified evidence of injury.³⁹⁷² The court of appeals, however, reversed dismissals based on answers of “none” to an interrogatory on diagnosed injuries.³⁹⁷³

While we appreciate that the sheer number of cases before the district court made its task of managing this mass tort litigation extraordinarily difficult, the district court was obliged to individually consider each plaintiff’s answer of “none” in the context of any other evidence of injury.

The use of the word “diagnosed” in the interrogatory created some ambiguity. It was possible that a plaintiff manifested symptoms of a condition, illness, or disease that had not yet been diagnosed when he answered the interrogatory.³⁹⁷⁴

Property Damage

On July 1, 2010, Judge Hellerstein approved settlements in property damage actions over the objection of non-settling plaintiffs affiliated with the long-term lessee of the World Trade Center, Larry Silverstein,³⁹⁷⁵ and the court of appeals affirmed.³⁹⁷⁶ In 2011, however, Judge Hellerstein dismissed an action by Consolidated Edison, whose power station was destroyed when Building 7 of the World

3967. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 185.

3968. *Id.* at 190.

3969. *Id.* at 199; *see In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 119 n.2, 120 (2d Cir. 2014).

3970. *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 121–24; Transcript at 10, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Dec. 1, 2014, filed Dec. 9, 2014), D.E. 3177.

3971. *In re World Trade Ctr. Disaster Site Litig.*, ___ F. Supp. 3d ___, ___, 2015 WL 437758 (S.D.N.Y. 2015) (p.8 of opinion filed at S.D.N.Y. No. 1:21-mc-100, D.E. 3196).

On March 19, 2015, Judge Hellerstein approved settlements of seventy-eight plaintiffs with most of their defendants. *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d 477, 478 (S.D.N.Y. 2015).

3972. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483 (2d Cir. 2013).

3973. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 210–13.

3974. *Id.* at 210–11.

3975. *In re Sept. 11 Litig.*, 723 F. Supp. 2d 534 (S.D.N.Y. 2010); *see In re Sept. 11 Litig.*, 760 F. Supp. 2d 433, 437 (S.D.N.Y. 2011).

3976. *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145 (2d Cir. 2011).

Trade Center collapsed, apparently as a result of hot debris from the twin towers.³⁹⁷⁷ Judge Hellerstein concluded that Building 7's developer and principal tenant, whose diesel-fueled backup generators contributed to the fires that destroyed Building 7, were not liable for the improbable chain of events that resulted in Building 7's destruction.³⁹⁷⁸

On March 20, 2013, Judge Hellerstein had an opportunity to determine that the September 11, 2001, attack was an act of war.³⁹⁷⁹ The owner of property near the World Trade Center sued the port authority, the airlines, and other defendants for damages pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).³⁹⁸⁰ Judge Hellerstein determined that the action was barred by the statute's time limitation and the injury was not covered by the statute.³⁹⁸¹ The court of appeals remanded the case for a determination of whether CERCLA's act-of-war defense applied.³⁹⁸² Judge Hellerstein determined that it did.³⁹⁸³ In response to the attack, Congress authorized military action against Al-Qaeda in retaliation for the attack and against the Taliban government of Afghanistan for harboring Al-Qaeda.³⁹⁸⁴ On May 2, 2014, the court of appeals agreed.³⁹⁸⁵

Judge Hellerstein ruled on August 1, 2013, after a bench trial in July, that operators of the World Trade Center were not owed any damages from the airlines

3977. *Aegis Ins. Servs., Inc. v. 7 World Trade Co.*, No. 865 F. Supp. 2d 370 (2011).

3978. *Id.*

3979. *In re Sept. 11 Litig.*, 931 F. Supp. 2d 496 (S.D.N.Y. 2013); *In re Sept. 11 Litig.*, 751 F.3d 86, 90 (2d Cir. 2014).

3980. Complaint, *Cedar & Wash. Assocs. v. Port Auth. of N.Y. & N.J.*, No. 1:08-cv-9146 (S.D.N.Y. Oct. 24, 2008), D.E. 1; *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 498; see 42 U.S.C. §§ 9601–9675 (2013); *In re Sept. 11 Litig.*, 751 F.3d at 89.

3981. Order, *Cedar & Wash. Assocs.*, No. 1:08-cv-9146 (S.D.N.Y. Sept. 22, 2010), D.E. 96; *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 498–99; *In re Sept. 11 Litig.*, 751 F.3d at 89.

3982. *In re Sept. 11 Litig.*, 485 F. App'x 443 (2d Cir. 2012) (retaining jurisdiction); *In re Sept. 11 Litig.*, 751 F.3d at 89; *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 499.

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

...

(2) an act of war; . . .

42 U.S.C. § 9607(b).

3983. *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 499, 512–14; *In re Sept. 11 Litig.*, 751 F.3d at 89–90.

3984. Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C. § 1541 note (2012); *In re Sept. 11 Litig.*, 931 F. Supp. 2d at 501–02, 510–11; *In re Sept. 11 Litig.*, 751 F.3d at 90.

3985. *In re Sept. 11 Litig.*, 751 F.3d at 89 (“Both the President and Congress responded to the September 11 attacks by labeling them acts of war, and this classification warrants notice, and perhaps some deference, in the CERCLA context.”), *cert. denied*, 574 U.S. ___, 135 S. Ct. 742 (2014).

and airport security companies because of their insurance recoveries.³⁹⁸⁶ On January 15, 2014, Judge Hellerstein approved a settlement payment of \$135 million in damages to Cantor Fitzgerald, which lost 658 employees in the attacks.³⁹⁸⁷

I look upon this settlement with mixed feelings. It's been a long, long effort, and this settlement is the last case of all the 9/11 cases focused on the airplanes and upon the World Trade Center properties; that is to say, it takes into consideration all lawsuits that claimed wrongful death, personal injury, of those who received the direct impact of the captured airplanes and of their crashes into the World Trade Center buildings. It includes property damage claims and also the claims of the 11,000 approximately first responders which sued for alleged injuries to their respiratory tracts and personal injuries and cancers, and the like, in the eight-month cleanup of the World Trade Center

. . . .
[T]here hasn't been a single trial, and although we've had excellent reports along the way analyzing and describing what happened in September of 2001, how the terrorists got through, what's the right way to stop terrorists like this, how do we preserve our liberties in the effort to do so, was there really some wrongdoing in terms of negligence that allowed this to happen, all of this will remain a mystery.³⁹⁸⁸

Challenge: Service of Process on International Terrorists

Plaintiffs in the actions against terrorists were faced with unusual service difficulties. One process server was murdered trying to serve the complaint in Saudi Arabia.³⁹⁸⁹ Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.³⁹⁹⁰

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.³⁹⁹¹ The court agreed.³⁹⁹²

3986. *In re Sept. 11 Litig.*, 957 F. Supp. 2d 501 (S.D.N.Y. 2013); Transcripts, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. July 15–18, 2013, filed Aug. 2, 2013), D.E. 1794, 1796, 1798, 1800.

An appeal was heard on January 14, 2015. Docket Sheet, *In re Sept. 11 Litig.*, No. 13-3619 (2d Cir. Sept. 25, 2013) (D.E. 233).

3987. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Jan. 15, 2014), D.E. 1885, available at 2014 WL 250255 (“only two other sets of plaintiffs—the World Trade Center Properties LLC plaintiffs and the Cedar & Washington Associates, LLC plaintiffs, whose cases remain on appeal—have pending suits against the Aviation Defendants that implicate the liability cap”); Transcript, *id.* (Jan. 13, 2014, filed Jan. 23, 2014), D.E. 1886; see Julie Steinberg, *Companies Settle 9/11 Lawsuit*, Wall St. J., Dec. 18, 2013, at A8; Benjamin Weiser, *Cantor Fitzgerald Says Airline Will Pay \$135 Million to End 9/11 Lawsuit*, N.Y. Times, Dec. 18, 2013, at A20.

3988. Transcript at 3–5, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Dec. 17, 2013, filed Dec. 23, 2013), D.E. 1879.

3989. *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 490 (S.D.N.Y. 2010); Interview with Owen Smith, law clerk to Hon. Richard Conway Casey, May 17, 2007.

3990. Opinion, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. June 14, 2004), D.E. 231, available at 2004 WL 1348996.

3991. *Id.* at 1–2.

The plaintiffs proposed that the government serve process on defendants in their custody.³⁹⁹³ The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.³⁹⁹⁴ 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.³⁹⁹⁵ The court ruled that service by publication would be effective for those individuals whom the government did not serve.³⁹⁹⁶

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.³⁹⁹⁷ 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.³⁹⁹⁸

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.³⁹⁹⁹ It was reported that the documents had been anonymously leaked to the plaintiffs' attorneys.⁴⁰⁰⁰ 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.⁴⁰⁰¹ The government determined that at least some of the documents were classified, so the court's copies were securely stored.⁴⁰⁰² The plaintiffs were required to surrender their copies.⁴⁰⁰³ Judge Daniels denied the plaintiffs' request that he review the documents.⁴⁰⁰⁴

3992. *Id.* at 2–3.

3993. *Id.* at 1–2.

3994. *Id.* at 4.

3995. *Id.* at 4. The government acknowledged custody of ten of the twenty-three defendants who the plaintiffs claimed were in the government's custody. *Id.*

3996. *Id.* at 6.

3997. *Id.* at 1–2, 5.

3998. *Id.* at 6 & n.2.

3999. *In re Terrorist Attacks on Sept. 11, 2001*, 689 F. Supp. 2d 552, 563 (S.D.N.Y. 2010).

4000. 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; *In re Terrorist Attacks*, 689 F. Supp. 2d at 563.

4001. *In re Terrorist Attacks*, 689 F. Supp. 2d at 563.

4002. *Id.*

4003. *Id.*

4004. Order, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. July 16, 2009), D.E. 2182; see *In re Terrorist Attacks*, 689 F. Supp. 2d at 564; Lichtblau, *supra* note 4000 (“The Justice Department had the lawyers’ copies destroyed and now wants to prevent a judge from even looking at the material.”).

Challenge: Sensitive Unclassified Information

Classified information is information protected by the government for national security reasons; information protected by the government for other reasons is known as “controlled unclassified information.”⁴⁰⁰⁵

Litigation that claimed inadequate security required discovery concerning security procedures. The government decided that the Transportation Security Administration (TSA) should screen discovery for “sensitive security information” (SSI), which is controlled unclassified information related to transportation security.⁴⁰⁰⁶ This slowed substantially the progress of the litigation.⁴⁰⁰⁷

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.⁴⁰⁰⁸ It took the TSA two years to screen the discovery.⁴⁰⁰⁹ The plaintiffs noticed depositions of the defendants for April 2006.⁴⁰¹⁰ TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.⁴⁰¹¹ 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.⁴⁰¹² Judge Hellerstein was sympathetic to the defendants’ position.

4005. Exec. Order No. 13,556, 75 Fed. Reg. 68,675 (Nov. 9, 2010); Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information (Aug. 25, 2009), *available at* www.justice.gov/ag/cui_task_force_rpt.pdf; *see Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011), *available at* <http://thekojonnamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification>.
4006. *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

Regulations provide the following definition:

SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which 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) (2014); *see In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); *In re Sept. 11 Litig.*, 236 F.R.D. 164, 169 (S.D.N.Y. 2006); *see also* Dep’t of Homeland Sec. v. MacLean, 574 U.S. ___, ___, 135 S. Ct. 913, 916 (2015) (pp.1–2 of opinion filed at U.S. No. 13-894) (describing sensitive security information).

49 C.F.R. § 1520.5(a) (2013).

4007. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 616; Interview with Hon. Alvin K. Hellerstein, June 25, 2007. “The TSA has reviewed over a million pages of documents and 121 deposition transcripts before allowing their release, in original or redacted form. As a result, discovery has become extended, and a number of judicial interventions were necessary to avoid impasse.” *In re Sept. 11 Litig.*, 621 F. Supp. 2d 131, 142 (S.D.N.Y. 2009) (citations omitted).

4008. *In re Sept. 11 Litig.*, 236 F.R.D. at 167.

4009. *Id.*

4010. *Id.* at 169.

4011. *Id.* at 165–66, 169.

4012. *Id.* at 166, 169.

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.⁴⁰¹³

Judge Hellerstein ruled that the depositions be conducted with only cleared counsel and witnesses present, that TSA be granted thirty days to redact the transcript, and that the original be filed under seal.⁴⁰¹⁴ 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."⁴⁰¹⁵ 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."⁴⁰¹⁶ So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.⁴⁰¹⁷

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.⁴⁰¹⁸ So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.⁴⁰¹⁹ The plaintiffs' attorneys were unwilling to be represented by other parties' attorneys, but the government relaxed its insistence that deposition participation be limited, so depositions finally commenced in September 2006.⁴⁰²⁰

In October 2007, plaintiffs moved to set aside discovery confidentiality designations so that all discovery other than SSI could be made public.⁴⁰²¹ Plaintiffs

4013. *Id.* at 173.

4014. *Id.* at 173–74.

4015. *In re Sept. 11 Litig.*, 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

4016. *Id.* at 410.

4017. *Id.*

4018. Order at 1, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. June 5, 2006), D.E. 818.

4019. *Id.* at 1–2.

4020. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

4021. Opinion at 1–3, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. July 30, 2009), D.E. 866.

subsequently withdrew this motion, but they renewed it on January 14, 2009.⁴⁰²² 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.⁴⁰²³

For the single wrongful death action against the airlines not to settle, Judge Hellerstein issued a protective order governing the use of SSI at trial.⁴⁰²⁴ “TSA has determined, pursuant to its discretionary authority under 49 C.F.R. § 1520.15(e), to grant Plaintiff, Defendants and the members of the jury limited and conditional access to certain SSI, subject to the terms and conditions set forth in this Order.”⁴⁰²⁵ Judge Hellerstein called for use of the silent witness rule to present SSI to the jury without presenting it to the public.⁴⁰²⁶ With this rule, witnesses testify about secret matters in code so that the jury and the participants know the secrets in the testimony but the public does not.⁴⁰²⁷

In 2013, Judge Hellerstein issued a similar SSI protective order in Cantor Fitzgerald’s action.⁴⁰²⁸

Challenge: Witness Security

Nine years after they filed their original complaint in the District of Columbia, some plaintiffs introduced as evidence supporting a default judgment against Iran⁴⁰²⁹ videotaped testimony from three defectors from the Iranian government.⁴⁰³⁰ To protect the safety of the witnesses and their families, the court allowed the plaintiffs to file both a public brief and a sealed supplemental brief, with the defectors’ testimony as sealed exhibits.⁴⁰³¹ A few months later, the plaintiffs notified the court that one of the witnesses “has obtained satisfactory protections as to his identity and location such that he has given his permission to un-

4022. *Id.* at 1.

4023. *Id.* at 1, 4, 9.

4024. Protective Order, *Bavis v. UAL Corp.*, No. 1:02-cv-7154 (S.D.N.Y. June 28, 2011), D.E. 176.

4025. *Id.* at 2.

4026. *Id.* at 15.

4027. *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987); *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007); *see supra* “Giving State Secrets to Lobbyists.”

4028. Protective Order, *Cantor Fitzgerald & Co. v. Am. Airlines, Inc.*, No. 1:04-cv-7318 (S.D.N.Y. May 8, 2013), D.E. 120.

4029. Judgment, *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 22, 2011), D.E. 295; Findings of Fact and Conclusions of Law, *id.* (Dec. 22, 2011), D.E. 294; *see also* Default Judgment, *Ashton v. Al-Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Dec. 22, 2011), D.E. 651 (default judgment against Iran on behalf of plaintiffs in another action).

4030. Default Judgment Brief at 12, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. May 19, 2011), D.E. 273; *see* Benjamin Weiser & Scott Shane, *Court Filings Assert Iran Had Link to 9/11 Attacks*, N.Y. Times, May 20, 2011, at A6.

4031. Order, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. July 5, 2011), D.E. 278; *see* Weiser & Shane, *supra* note 4030.

seal his identity and the majority of his testimony.”⁴⁰³² Judge Daniels reduced the scope of sealing accordingly on the next day.⁴⁰³³

Challenge: Foreign Evidence

Judge Maas agreed on April 9, 2013, to issue letters rogatory to the government of Iran to obtain discovery from Iranian defendants.⁴⁰³⁴ The letters came back from Switzerland in July unexecuted.⁴⁰³⁵ In another case, Judge Maas again agreed to issue letters rogatory to Iran on November 26.⁴⁰³⁶

4032. Motion, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 14, 2011), D.E. 289.

4033. Order, *id.* (Dec. 15, 2011), D.E. 291.

4034. Order, *id.* (Apr. 11, 2013), D.E. 289. *See generally* T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory* (Federal Judicial Center 2014).

4035. *In re Terrorist Attacks* Docket Sheet, *supra* note 3840.

4036. Order, *Hoglan v. Iran*, No. 1:11-cv-7550 (S.D.N.Y. Nov. 27, 2013), D.E. 66.

Mistaken Rendition

*El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)*⁴⁰³⁷

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claimed that the U.S. Central Intelligence Agency abducted him on December 31, 2003, while he was on vacation in Macedonia and imprisoned him for five months as part of its extraordinary rendition program and then abandoned him in Albania after realizing that it had apprehended the wrong person.⁴⁰³⁸ It was reported that el-Masri's captors thought he was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.⁴⁰³⁹

The Senate Select Committee on Intelligence determined in 2014 that not only may el-Masri have been apprehended as a result of mistaken identity, but the capture might not have been legally justified had he been the actual target.⁴⁰⁴⁰ Apparently it took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.⁴⁰⁴¹ He was released with his belongings, provided €14,500, and steered toward a fake border crossing.⁴⁰⁴²

4037. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

4038. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006); see Complaint at 1–2, 7–17, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005), D.E. 1, available at www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; see also Jonathan Hafetz, *Habeas Corpus After 9/11* 58–59 (2011); David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. Times, Apr. 23, 2005, at A3; Bob Kemper, *A Privilege or a Free Pass?*, Wash. Lawyer, Nov. 2009, at 24, 24 (reporting that “German investigators and a fellow detainee in the Afghan prison have confirmed El-Masri’s story and the identities of his captors”); Neil A. Lewis, *Federal Judge Dismisses Lawsuit by Man Held in Terror Program*, N.Y. Times, May 19, 2006, at A22 [hereinafter *Man Held*]; Neil A. Lewis, *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*, N.Y. Times, Nov. 29, 2006, at A15 [hereinafter *Mistakenly Abducted*]; Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 Rev. Litig. 479, 480 (2008); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 192 (2006) (“On New Year’s Eve 2003, Khaled Masri traveled by bus from his home in Ulm, Germany, to Macedonia, after he and his wife got into an argument.”); *The Passionate Eye: CIA’s Secret War* (CBC television broadcast Oct. 15, 2006); Dana Priest, *The Wronged Man*, Wash. Post, Nov. 29, 2006, at C1; Anthony D. Romero & Dina Temple-Raston, *In Defense of Our America* 66–69 (2007); Don Van Natta, Jr., & Souad Mekhennet, *German’s Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11; Steven M. Watt & Ben Wizner, *The Not-So-Secret Man*, in *The Guantánamo Lawyers* 387 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (reflections by el-Masri’s attorneys).

4039. Van Natta & Mekhennet, *supra* note 4038.

4040. Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program, at 128–29 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], available at www.intelligence.senate.gov/study2014/sscistudy1.pdf.

4041. See Johnston, *supra* note 4038; Lewis, *Man Held*, *supra* note 4038.

4042. SSCI Executive Summary, *supra* note 4040, at 129.

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.⁴⁰⁴³ The Supreme Court denied certiorari.⁴⁰⁴⁴

El-Masri's complaint, which he filed on December 6, 2005, alleged that he was beaten, stripped, sodomized with a foreign object, and then flown to Kabul, Afghanistan, where he was imprisoned in the "Salt Pit" for another four months.⁴⁰⁴⁵ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.⁴⁰⁴⁶ 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

4043. *El-Masri*, 479 F.3d 296; *see id.* at 310 ("virtually any conceivable response to El-Masri's allegations would disclose privileged information"); *El-Masri*, 437 F. Supp. 2d at 539, 541 (district court's dismissal); *see also* T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1627–28 (2013) (remarks from Judge Ellis: "But I was not at all pleased with this result, although I felt it was compelled by well-established law."); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 185 (2010); Kemper, *supra* note 4038, at 24; Lewis, *Man Held*, *supra* note 4038; Lewis, *Mistakenly Abducted*, *supra* note 4038; Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. Times, Mar. 3, 2007, at A6; Priest, *supra* note 4038.

4044. *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 4038, at 24.

4045. *El-Masri*, 437 F. Supp. 2d at 533; Complaint, *supra* note 4038, 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); Romero & Temple-Raston, *supra* note 4038, at 69 (describing the Salt Pit as "a secret U.S.-run prison just north of Kabul" and noting that the suit was filed on a day that Rice, who had become Secretary of State, arrived in Berlin for a visit with Chancellor Angela Merkel); *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."); Jeremy Scahill, *Dirty Wars* 27 (2013) (reporting on "an old brick factory north of Kabul. Doubling as a CIA substation, the factory became known as the 'Salt Pit' and would be used to house prisoners, including those who had been snatched in other countries and brought to Afghanistan.").

4046. Docket Sheet, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005) [hereinafter E.D. Va. Docket Sheet]; Ellis, *supra* note 4043, at 1627–28; *see* Kemper, *supra* note 4038, at 24.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

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.⁴⁰⁴⁷

It took four days for el-Masri to find his wife and children.⁴⁰⁴⁸

It was reported that el-Masri received very little psychiatric treatment for the trauma he experienced until he was committed to a psychiatric institution following his setting fire to a supermarket in Ulm, Germany, on May 17, 2007.⁴⁰⁴⁹ On March 30, 2010, he was sentenced to two years in prison for attacking the mayor of his home town.⁴⁰⁵⁰

In 2007, a German court issued arrest warrants for thirteen CIA operatives who participated in el-Masri's abduction.⁴⁰⁵¹ The German government, however, did not seek the operatives' extradition,⁴⁰⁵² and a German court rejected a suit by el-Masri to compel prosecution.⁴⁰⁵³ On allegations that the plane that transported el-Masri stopped in La Palma, Spain, prosecutors asked a Spanish court to also issue arrest warrants for the operatives.⁴⁰⁵⁴

On December 13, 2012, the European Court of Human Rights granted el-Masri a €60,000 judgment against Macedonia for its complicity in el-Masri's mistreatment.⁴⁰⁵⁵

4047. *El-Masri*, 437 F. Supp. 2d at 532–34; see Complaint, *supra* note 4038, at 7, 14–16; see also Johnston, *supra* note 4038; Van Natta & Mekhennet, *supra* note 4038.

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.

4048. See Van Natta & Mekhennet, *supra* note 4038.

4049. 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*, Independent (London), May 19, 2007, at 3; see also Dana Priest & William M. Arkin, *Top Secret America* xxiii (2011) (concluding that “the CIA’s bungled operation” cost el-Masri his sanity).

4050. See *Ex-CIA Torture Victim Convicted of Assault*, Toronto Star, Mar. 31, 2010, at 17.

4051. 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 4038, at 480; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, at A1.

4052. See Michael Slackman, *Officials Pressed Germans on Kidnapping by C.I.A.*, N.Y. Times, Dec. 9, 2010, at A13.

4053. See *Court Rejects Lawsuit Related to a C.I.A. Kidnapping*, N.Y. Times, Dec. 11, 2010, at A10.

4054. See Manuel Altozano, *High Court Seeks Arrest of CIA Agents for 2004 Kidnap*, El Pais, May 12, 2010, at 1.

4055. Judgment, *El-Masri v. Former Yugoslav Republic of Macedonia*, No. 39630/09 (Eur. Ct. H.R. Dec. 13, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>; see Nicholas Kulish, *Court Finds Rights Violation in C.I.A. Rendition Case*, N.Y. Times, Dec. 14, 2012, at A13; Marta A. Orpiszewska, Note, *El-Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program*, 39 N.C. J. Int'l L. & Com. Reg. 1165 (2014).

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.⁴⁰⁵⁶

The classified declaration was delivered to the judge by a classified information security officer, who took responsibility for its storage when the judge was not privately reviewing it.⁴⁰⁵⁷

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.⁴⁰⁵⁸

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.”⁴⁰⁵⁹ The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.⁴⁰⁶⁰ 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.⁴⁰⁶¹ 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 compart-

4056. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006); see E.D. Va. Docket Sheet, *supra* note 4046 (D.E. 40, March 23, 2006, notice of a submission in camera).

4057. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22* (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

4058. *El-Masri*, 437 F. Supp. 2d at 537.

4059. *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

4060. Docket Sheet, *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006).

For this report, Tim Reagan interviewed Judge Duncan by telephone on November 8, 2007; Judge King in the judge’s Richmond chambers on March 19, 2008; and Judge Shedd by telephone on September 3, 2009.

4061. Interview with Hon. Robert B. King, March 19, 2008. The drive is approximately 320 miles.

mented information facility (SCIF) when the judge was finished.⁴⁰⁶² Judges Shedd and Duncan reviewed the declaration in their Richmond chambers when they were in town for a sitting.⁴⁰⁶³

Two Supreme Court justices reviewed the classified declaration to consider el-Masri's petition for certiorari,⁴⁰⁶⁴ which the court denied.⁴⁰⁶⁵

4062. *Id.*; see Reagan, *supra* note 4057, at 22–23 (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."

4063. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009; Interview with Hon. Allyson Kay Duncan, Nov. 8, 2007.

4064. Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

4065. *El-Masri v. United States*, 552 U.S. 947 (2007).

Detainee Documents

ACLU v. Department of Defense (Alvin K. Hellerstein, S.D.N.Y.)

Several civil rights organizations—the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace—sought injunctive relief in aid of Freedom of Information Act (FOIA) requests to the government—specifically the Departments of Defense, Homeland Security, Justice, and State, and the CIA—by filing an action in the Southern District of New York on June 2, 2004.⁴⁰⁶⁶ The court assigned the case to Judge Alvin K. Hellerstein.⁴⁰⁶⁷

The FOIA requests were presented to the various government agencies from October 2003 to May 2004.⁴⁰⁶⁸ 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.⁴⁰⁶⁹ The only document produced before the lawsuit was filed was a set of State Department talking points.⁴⁰⁷⁰

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.⁴⁰⁷¹ Judge Hellerstein scheduled a status conference for ten days following that deadline.⁴⁰⁷²

4066. Complaint, *ACLU v. Dep’t of Def.*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004), D.E. 1; *ACLU v. Dep’t of Def.*, 40 F. Supp. 3d 377, 380 (S.D.N.Y. 2014); see Amended Complaint, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. July 6, 2004), D.E. 5; see also Larry Siems, *The Torture Report* 15 (2011).

4067. 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.

4068. *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); Amended Complaint, *supra* note 4066, at 2–3; see *ACLU*, 40 F. Supp. 3d at 380; see also Amrit Singh, *Freedom of Information*, in *The Guantánamo Lawyers* 246, 246 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

4069. *ACLU v. Dep’t of Def.*, 723 F. Supp. 2d 621, 623 (S.D.N.Y. 2010); *ACLU*, 339 F. Supp. 2d at 502; Amended Complaint, *supra* note 4066, at 2.

Amnesty International, the Center for Constitutional Rights, and Washington Square Legal Services pursued a separate FOIA action before Judge Loretta A. Preska against the same defendants for documents pertaining to extraordinary rendition. *Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010) (largely approving the CIA’s response to the FOIA requests); Docket Sheet, *Amnesty Int’l USA v. CIA*, No. 1:07-cv-5435 (S.D.N.Y. June 7, 2007); see *CIA Sustained in Shielding Interrogation Documents*, Nat’l L.J., Aug. 16, 2010, at 8.

4070. See Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 31, 2009, at A4.

4071. *ACLU*, 339 F. Supp. 2d at 505; *ACLU*, 40 F. Supp. 3d at 380.

4072. *ACLU*, 339 F. Supp. 2d at 505.

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. . . .

. . . .

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.⁴⁰⁷³

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.⁴⁰⁷⁴ 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.⁴⁰⁷⁵ Moreover, the statute excepts from the exemption files relating to government investigations of illegal conduct.⁴⁰⁷⁶ The documents sought by the plaintiffs related to an investigation by the CIA's Inspector General of the CIA's treatment of detainees.⁴⁰⁷⁷

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.⁴⁰⁷⁸ Determinations by the CIA Director that the illegality exception does not apply are not subject to district court review.⁴⁰⁷⁹

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."⁴⁰⁸⁰ Judge Hellerstein resolved some pending disputes concerning document production, including by reviewing some documents in camera.⁴⁰⁸¹

4073. *Id.* at 504–05 (citation omitted).

4074. *ACLU v. Dep't of Def.*, 351 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

4075. *Id.* at 268, 272, 278.

4076. *Id.* at 271.

4077. *Id.* at 268, 271–73.

4078. Order, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. April 18, 2005), D.E. 86.

4079. *ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010).

4080. *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005) (citation omitted).

4081. *Id.*, 389 F. Supp. 2d 547; *ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377, 379 (S.D.N.Y. 2014).

Judge Hellerstein's June 2006 rulings on twenty-nine "photographs taken by individuals serving in Iraq and Afghanistan"⁴⁰⁸² received Supreme Court action. On September 22, 2008, the court of appeals affirmed Judge Hellerstein's order that the government release 21 of these photographs, with redactions to protect the subjects' privacy.⁴⁰⁸³ 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."⁴⁰⁸⁴ This act allows the Secretary of Defense to protect from disclosure any detainee photograph taken from September 11, 2001, through January 22, 2009, if disclosure would endanger American citizens, military personnel, or employees abroad.⁴⁰⁸⁵ The Supreme Court remanded the case back to the court of appeals for reconsideration in light of the act,⁴⁰⁸⁶ and the court of appeals vacated Judge Hellerstein's June 2006 rulings.⁴⁰⁸⁷

On December 7, 2007, news media reported that in 2005 the CIA destroyed videotapes of detainee interrogations.⁴⁰⁸⁸ Five days later, plaintiffs moved for contempt and sanctions.⁴⁰⁸⁹ On January 2, 2008, Attorney General Michael Mukasey announced a criminal investigation into the destruction of the tapes.⁴⁰⁹⁰ Judge Hellerstein stayed consideration of the contempt motion until February 2009 so as not to interfere with the criminal investigation.⁴⁰⁹¹ 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.⁴⁰⁹² On November 9, 2010, the government announced that the tape destruction would result in no criminal charges.⁴⁰⁹³ Judge Hellerstein, on October 5, 2011, denied the contempt

4082. Supplemental Order, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 21, 2006), D.E. 196, available at 2006 WL 1722574; Order, *id.* (June 9, 2006), D.E. 193, available at 2006 WL 1638025; see *ACLU*, 40 F. Supp. 3d at 379–80.

4083. *ACLU v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008), vacated, 558 U.S. 1042 (2009); *ACLU*, 40 F. Supp. 3d at 379–80.

4084. Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184–85 (2009); *ACLU*, 40 F. Supp. 3d at 379 (noting that the statute was enacted in the context of Iraq's President Nouri al-Maliki's request that the photographs not be released).

4085. *Id.*; see Adam Liptak, *Supreme Court Overturns Decision on Detainee Photos*, N.Y. Times, Dec. 1, 2009, at A18.

4086. *ACLU*, 558 U.S. 1042; *ACLU*, 40 F. Supp. 3d at 381; see Liptak, *supra* note 4085.

4087. Order, *ACLU v. Dep't of Def.*, No. 06-3140 (2d Cir. May 6, 2010); see *ACLU*, 40 F. Supp. 3d at 381.

4088. 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.

4089. July 30, 2009, Opinion at 1, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. July 30, 2009), D.E. 369, available at 2009 WL 9095653; see Siems, *supra* note 4066, at 15.

4090. 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.

4091. July 30, 2009, Opinion, *supra* note 4089, at 1.

4092. July 30, 2009, Opinion, *id.*

4093. See Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12.

motion, because a finding of contempt would not cure any present impropriety, but he did agree to award the plaintiffs attorney fees for the motion.⁴⁰⁹⁴

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 forty-nine from the CIA.⁴⁰⁹⁵ Information based in part on this FOIA action is presented in the ACLU's online *Torture Report*.⁴⁰⁹⁶

On May 21, 2012, the court of appeals reversed some of Judge Hellerstein's disclosure orders and affirmed denials of disclosure in a companion case concerning legal memoranda prepared by the Justice Department's Office of Legal Counsel.⁴⁰⁹⁷

On August 27, 2014, Judge Hellerstein ruled that the government's recertification that the photographs should not be released, an action required by the protected documents statute to preserve the documents' protection, was too conclusory.⁴⁰⁹⁸ Judge Hellerstein observed that the number of photographs withheld had not been disclosed, but there may be hundreds or thousands.⁴⁰⁹⁹ The government stated on March 17, 2015, that it would respond to Judge Hellerstein's ruling with a combination of recertification and appeal.⁴¹⁰⁰

With respect to documents other than the photographs remaining in dispute, the parties agreed to a payment to plaintiffs of \$1.25 million in attorney fees and costs.⁴¹⁰¹

Challenge: Classified Evidence

All of Judge Hellerstein's law clerks obtain security clearances.⁴¹⁰² They begin the process of getting cleared at hiring, before they start work.⁴¹⁰³ However, the government did not extend the law clerks' need to know to all classified materials

Pending before Judge J. Paul Oetken is a FOIA action by the *New York Times* for a copy of the criminal investigation's report. Complaint, *N.Y. Times Co. v. U.S. Dep't of Justice*, No. 1:14-cv-3777 (S.D.N.Y. May 28, 2014), D.E. 2.

4094. *ACLU v. Dep't of Def.*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011); Transcript at 49–51, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Aug. 1, 2011, filed Oct. 28, 2011).

4095. See Shane, *supra* note 4070; see also Singh, *supra* note 4068, at 251 (more than 100,000 pages).

4096. www.thetorturereport.org; see also Siems, *supra* note 4066 (book version).

4097. *ACLU v. Dep't of Justice*, 681 F.3d 61 (2d Cir. 2012); see Complaint, *ACLU v. Dep't of Justice*, No. 1:05-cv-9620 (S.D.N.Y. Nov. 15, 2005), D.E. 1.

4098. *ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377, 380 (S.D.N.Y. 2014).

4099. *Id.* at 380 & n.2; see Cora Currier, "A Line in the Sand" in *Fight to Release Thousands of Prisoner Abuse Photos*, *The Intercept*, Feb. 5, 2015, <https://firstlook.org/theintercept/2015/02/05/line-sand-fight-release-thousands-photos-prisoner-abuse/>.

4100. Letter, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Mar. 17, 2015), D.E. 547; see Judgment, *id.* (Mar. 20, 2015), D.E. 549; see also Jennifer Peltz, *US Judge Orders Release of Detainee Abuse Photos*, *Bos. Globe*, Mar. 22, 2015, at A14.

4101. Stipulation and Order, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Aug. 27, 2014), D.E. 514; *id.*, *ACLU*, No. 1:05-cv-9620 (S.D.N.Y. Aug. 27, 2014), D.E. 49.

4102. Interview with Hon. Alvin K. Hellerstein, Nov. 5, 2009.

4103. *Id.*

that Judge Hellerstein had to review.⁴¹⁰⁴ As a result, Judge Hellerstein developed a procedure where he could examine documents on the record by being the only one looking at them.⁴¹⁰⁵ 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.⁴¹⁰⁶ 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.⁴¹⁰⁷

Judge Hellerstein described one occasion in a published opinion:

On September 30, 2009, I conducted an *in camera, ex parte* review of the documents at issue in the fourth and fifth motions for summary judgment. Government attorneys and a court reporter were present. I reviewed the documents and expressed preliminary rulings, and at times, posed questions to the Government attorneys about the documents. The transcript of this proceeding was classified but was released, in redacted form, several weeks later. After the *ex parte* session ended, I heard oral argument in open court on various of the legal issues at hand, and expressed initial rulings . . .⁴¹⁰⁸

The court reporter for this proceeding had a security clearance, as did Judge Hellerstein's law clerk, but the law clerk was asked to step out three times during the proceeding.⁴¹⁰⁹

Challenge: Classified Arguments

For the government's appeal of Judge Hellerstein's ordered disclosure of redacted information at issue in Judge Hellerstein's September 30, 2009, *ex parte* proceeding, the government asked the court of appeals to permit *ex parte* oral argument.⁴¹¹⁰ The court declined the request.⁴¹¹¹

4104. *Id.*

4105. *Id.*

4106. *Id.*

4107. *Id.*

4108. *ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621, 624 (S.D.N.Y. 2010); *see* Sept. 30, 2009, Transcript, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. Sept. 30, 2009, filed Oct. 16, 2009), D.E. 392, *also filed as* Ex. B, Government Security Motion, *ACLU v. Dep't of Def.*, No. 10-4290 (2d Cir. Feb. 2, 2012), D.E. 132.

The ACLU has posted online redacted opinions by the Office of Legal Counsel that are at issue in this proceeding. www.thetorturedatabase.org/search/apachesolr_search; *see* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1 (reporting on the opinions at issue).

4109. Sept. 30, 2009, Transcript, *supra* note 4108, at 8, 19, 34.

4110. Government Security Motion, *supra* note 4108.

4111. Docket Sheet, *ACLU*, No. 10-4290 (2d Cir. Oct. 26, 2010); Order, *id.* (June 27, 2012), D.E. 162.

No-Fly List

Ibrahim v. Department of Homeland Security (William Alsup, N.D. Cal.)

Dr. Rahinah Ibrahim filed a federal complaint in the Northern District of California on January 27, 2006, alleging injuries arising from her mistakenly being placed on the no-fly list.⁴¹¹²

Ibrahim was finishing her doctorate at Stanford University on a student visa and traveling with her fourteen-year-old daughter to Kuala Lumpur, Malaysia, on January 2, 2005, to speak at a conference.⁴¹¹³ She was detained at the ticket counter for a couple of hours and then arrested.⁴¹¹⁴ A medical condition requiring use of a wheelchair for long walks was not accommodated, and she missed her flight.⁴¹¹⁵ There was substantial confusion during her travel to the conference on the next day about whether she was or was not on the no-fly list.⁴¹¹⁶ While in Malaysia, her visa was revoked.⁴¹¹⁷ She has never been permitted to return to the United States.⁴¹¹⁸

The complaint named twenty-five defendants, including federal and local government agencies and personnel, United Airlines, and 100 Does.⁴¹¹⁹ An amended complaint filed on August 4, 2006, substituted three organizations for three of the Does.⁴¹²⁰

The government's May 22, 2006, motion to dismiss all claims against federal defendants explained that the Transportation Security Administration's (TSA's) security directives include two watch lists: a selectee list of fliers that must under-

4112. Complaint, *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Jan. 27, 2006), D.E. 1; *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 991 (9th Cir. 2012); Findings of Fact and Conclusions of Law at 2, 18, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Jan. 14, 2014), D.E. 682; see *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1253–54 (9th Cir. 2008); see also Dan Reed, *Woman Sues Government Over No-Fly List*, San Jose Mercury News, Feb. 5, 2006, at B1.

4113. Findings of Fact and Conclusions of Law, *supra* note 4112, at 1, 8, 10, 16; see Complaint, *supra* note 4112, at 7–8.

4114. Findings of Fact and Conclusions of Law, *supra* note 4112, at 1, 10–11; see Complaint, *supra* note 4112, at 8–9.

4115. Findings of Fact and Conclusions of Law, *supra* note 4112, at 10; see Complaint, *supra* note 4112, at 8–9.

4116. Findings of Fact and Conclusions of Law, *supra* note 4112, at 1, 11, 17; see Complaint, *supra* note 4112, at 9.

4117. *Ibrahim*, 669 F.3d at 988; Findings of Fact and Conclusions of Law, *supra* note 4112, at 1; see Second Amended Complaint at 11, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 2, 2009), D.E. 161; see also Reed, *supra* note 4112.

4118. Findings of Fact and Conclusions of Law, *supra* note 4112, at 11, 24.

4119. Complaint, *supra* note 4112, at 1, 3–5.

4120. Amended Complaint at 2, 5–6, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Aug. 4, 2006), D.E. 96.

go extra screening before they fly and a no-fly list of persons that must not be permitted to fly.⁴¹²¹

On August 16, Judge William Alsup determined that the no-fly list constituted a TSA order that had to be reviewed by the court of appeals rather than by a district court.⁴¹²² In fact, Ibrahim filed an action with the Ninth Circuit's court of appeals on January 30, and that court transferred the case on June 13 to the District of Columbia Circuit because Ibrahim was a resident of Malaysia rather than California.⁴¹²³

Judge Alsup determined that United Airlines and its employee were only alleged to have done what they were required to do, so they were dismissed as defendants.⁴¹²⁴ Another individual defendant, a TSA employee in Washington, DC, was dismissed for lack of personal jurisdiction.⁴¹²⁵ At Ibrahim's request, Judge Alsup stayed the case pending Ibrahim's appeal.⁴¹²⁶

On August 18, 2008, the court of appeals determined, by a vote of two to one, that the agency that put Ibrahim's name on the no-fly list was the Terrorist Screening Center (TSC), which was part of the FBI, not a transportation agency, so the jurisdiction statute for transportation agencies did not apply and the district court did have jurisdiction over Ibrahim's claims against federal defendants.⁴¹²⁷ The court determined that the district court had specific personal jurisdiction over the TSA employee, and the court of appeals affirmed dismissal of United and its employee.⁴¹²⁸ Ibrahim filed a second amended complaint on April 2, 2009.⁴¹²⁹

On July 27, Judge Alsup dismissed some claims, including those against the federal defendants, finding that because Ibrahim was an alien living abroad she

4121. Government Brief at 4, *id.* (May 22, 2006), D.E. 63; *see* 49 U.S.C. § 114(h)(3)(B) (2013) (requiring the development of procedures to prevent dangerous travelers from boarding airplanes).

4122. Aug. 16, 2006, Opinion at 2, 8–13, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Aug. 16, 2006), D.E. 101, *available at* 2006 WL 2374645; *see* 49 U.S.C. § 46110(a).

For this report, Tim Reagan interviewed Judge Alsup and his law clerk Dena Chen in the judge's chambers on August 21, 2014.

4123. Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 06-70574 (9th Cir. Jan. 30, 2006); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1253–54 n.2 (9th Cir. 2008); *see* Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 06-1218 (D.C. Cir. June 21, 2006).

4124. Aug. 16, 2006, Opinion, *supra* note 4122, at 18–20.

4125. *Id.* at 13–18.

4126. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 2, 2006), D.E. 133, *available at* 2006 WL 3190670; *see* Notice of Appeal, *id.* (Sept. 15, 2006), D.E. 114.

4127. *Ibrahim*, 538 F.3d at 1254–56 (opinion by Chief Circuit Judge Alex Kozinski, joined by Central District of California District Judge S. James Otero, sitting by designation); *see id.* at 1259–61 (dissenting opinion by Circuit Judge N. Randy Smith); *see also* *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 991 (9th Cir. 2012); Bob Egelko, *Court Rules Those on No-Fly List Should Get to Take Case to Court*, S.F. Chron., Aug. 19, 2008, at B1.

4128. *Ibrahim*, 538 F.3d at 1258–59.

4129. Second Amended Complaint, *supra* note 4117.

had no constitutional rights for the future relief she sought—removal from the no-fly list.⁴¹³⁰

Without waiving claims against the federal defendants, Ibrahim and the other defendants reached a settlement of \$225,000 on March 11, 2010.⁴¹³¹ On February 8, 2012, the court of appeals—again by a vote of two to one, although the panel was different from the panel that issued the 2008 decision—decided that Ibrahim could pursue her constitutional claims, noting, “The purpose of her trip was to further, not to sever, her connection to the United States, and she intended her stay abroad to be brief.”⁴¹³²

On November 1, 2013, Judge Alsup denied the government’s motion for summary judgment on state secrets grounds:

At this juncture, it is not clear to the undersigned judge whether plaintiff’s claims can be resolved without recourse to information protected by the state secrets privilege. The government’s contentions on this point are highly conclusory. Going forward with the trial to see how the evidence develops charts a better course than a speculative ruling on a paper record. This is particularly true given that the parties have stipulated to a bench trial, which will reduce somewhat the risk of inappropriate disclosure.⁴¹³³

Judge Alsup conducted a bench trial from December 2 to 6, 2013.⁴¹³⁴ Evidence from Dr. Ibrahim was presented by playing a recording of and reading from her deposition.⁴¹³⁵

One of Ibrahim’s daughters, a United States citizen and not the one with Dr. Ibrahim when she was arrested, was on the plaintiff’s witness list; on the first day of trial, a plaintiff’s attorney informed Judge Alsup that on the previous day the defendant prevented the daughter from boarding an airplane in Malaysia as the

4130. Opinion at 1, 10–12, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. July 27, 2009), D.E. 197, available at 2009 WL 2246194.

4131. Settlement, *id.* (Mar. 11, 2010), D.E. 325; see *Ibrahim*, 669 F.3d at 992; see also Bob Egelko, *Ex-Stanford Student’s No-Fly Suit Reinstated*, S.F. Chron., Feb. 9, 2012, at C3; Howard Mintz, *Stanford Grad Takes “No-Fly” Battle to Trial*, San Jose Mercury News, Dec. 2, 2013, at 1A.

4132. *Ibrahim*, 669 F.3d at 997 (opinion by Circuit Judge William A. Fletcher, joined by Circuit Judge Dorothy W. Nelson); see *id.* at 999–1005 (dissenting opinion by Southern District of New York District Judge Kevin Thomas Duffy); see also Egelko, *supra* note 4131; Matt O’Brien, *Ex-Stanford Grad Student Gets Reprieve*, San Jose Mercury News, Feb. 10, 2012, at 2B.

The Solicitor General decided that the government should not seek Supreme Court review. Transcript at 2–3, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Oct. 11, 2012, filed Jan. 31, 2013), D.E. 404.

4133. Nov. 1, 2013, Opinion, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 1, 2013), filed as *attach.*, Notice of Compliance, *id.* (Nov. 8, 2013), D.E. 593.

4134. Dec. 6, 2013, Transcript, *id.* (Dec. 6, 2013, filed Dec. 30, 2013), D.E. 676; Dec. 5, 2013, Transcript, *id.* (Dec. 5, 2013, filed Dec. 30, 2013), D.E. 675; Dec. 4, 2013, Transcript, *id.* (Dec. 4, 2013, filed Dec. 30, 2013), D.E. 673; Dec. 3, 2013, Transcript, *id.* (Dec. 3, 2013, filed Dec. 30, 2013), D.E. 672; Dec. 2, 2013, Transcript, *id.* (Dec. 2, 2013, filed Dec. 30, 2013), D.E. 671; Minutes, *id.* (Dec. 2, 3, and 6, 2013), D.E. 653, 654, 660; see Mintz, *supra* note 4131.

4135. Dec. 3, 2013, Transcript, *supra* note 4134, at 208–46; Dec. 2, 2013, Transcript, *supra* note 4134, at 159–61.

daughter attempted to fly to the United States to attend the trial.⁴¹³⁶ The government's attorney said that he knew nothing about the matter, but he would look into it; late in the day the government attorney reported that the daughter had simply missed her flight.⁴¹³⁷

On the second day of trial, Ibrahim's attorney offered email correspondence rebutting the government's claim.⁴¹³⁸ The plaintiff's attorney also acknowledged, "She is not going to book another ticket until she's assured she will be allowed to enter this country."⁴¹³⁹ Judge Alsup scolded the government for making representations so easily rebutted, and Judge Alsup scolded the plaintiff's side for a less than vigorous and sincere effort to get the daughter to the trial.⁴¹⁴⁰

On the fourth day of trial, the government presented a government official who promised that the government would provide on the following day a witness who could speak about the daughter's travel difficulties; a declaration from the witness was presented to Judge Alsup at the end of the fourth trial day.⁴¹⁴¹ After closing arguments on the fifth and last day of trial, Judge Alsup heard closed testimony on the daughter's travel difficulties.⁴¹⁴² After the closed proceeding, the plaintiff declined to seek reopening of evidence so that the daughter could testify.⁴¹⁴³

Judge Alsup issued findings of fact and conclusions of law on January 14, 2014.⁴¹⁴⁴ "At long last, the government has conceded that plaintiff poses no threat to air safety or national security and should never have been placed on the no-fly list."⁴¹⁴⁵ An FBI agent checked the wrong boxes on a form nominating Ibrahim to a watch list.⁴¹⁴⁶ The form instructed the agent to check the boxes that do not apply, but the agent checked the boxes that did apply, so by not checking the box for the no-fly list, the agent mistakenly put Ibrahim on that list.⁴¹⁴⁷

As a post-deprivation remedy, therefore, due process requires, and this order requires, that the government remediate its wrong by cleansing and/or correcting all of its lists and records of the mistaken 2004 derogatory designation

4136. Dec. 2, 2013, Transcript, *supra* note 4134, at 3–4, 167; Findings of Fact and Conclusions of Law, *supra* note 4112, at 6–7, 24; see Bob Egelko, *Ex-Stanford Student Sues Over No-Fly List*, S.F. Chron., Dec. 4, 2013, at D2 (reporting also that the daughter was a lawyer in Malaysia).

4137. Dec. 2, 2013, Transcript, *supra* note 4134, at 5, 45–46, 166–67.

4138. Dec. 3, 2013, Transcript, *supra* note 4134, at 173–74.

4139. *Id.* at 175.

4140. *Id.* at 175–78.

4141. Dec. 5, 2013, Transcript, *supra* note 4134, at 499–501, 716–18.

A heavily redacted version of the declaration was filed on the public record. Notice, Ibrahim v. Dep't of Homeland Sec., No. 3:06-cv-545 (N.D. Cal. Jan. 28, 2014), D.E. 692.

4142. Dec. 6, 2013, Transcript, *supra* note 4134, at 800–53.

4143. Notice, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Dec. 9, 2013), D.E. 658; Findings of Fact and Conclusions of Law, *supra* note 4112, at 7.

4144. Findings of Fact and Conclusions of Law, *supra* note 4112.

4145. *Id.* at 26.

4146. *Id.* at 9, 16, 26.

4147. *Id.* at 9, 26.

and by certifying that such cleansing and/or correction has been accurately done as to every single government watchlist and database. This will not implicate classified information in any way but will give plaintiff assurance that, going forward, her troubles in returning to the United States, if they continue, are unaffected by the original wrong.⁴¹⁴⁸

On April 15, the Department of Justice issued to Dr. Ibrahim an official notice that she had not been on the no-fly list since January 2, 2005.⁴¹⁴⁹ On April 14, 2014, however, Dr. Ibrahim was again denied a visa to return to the United States.⁴¹⁵⁰

Litigation over fees began in January 2014: “On January 28, plaintiff’s counsel filed a motion for an award of attorney’s fees and expenses, seeking a whopping \$3.67 million in fees and \$294,000 in expenses.”⁴¹⁵¹ Judge Alsup specified procedures for the use of a special master to determine a smaller award.⁴¹⁵²

All of us who practice or serve in this district should be proud that we still have counsel willing and able to undertake pro bono representation of someone like our plaintiff here, especially when it requires standing up to our national government and its large litigation resources. Not so long ago, this spirit flourished within our district. More recently, however, pro bono representation seems to have taken second seat to money bono. . . . The Court hereby extends its compliments.

This, however, does not translate to approving the massive award they seek under the Equal Access to Justice Act. . . .

. . . The essence of this order is that counsel are entitled to recover for their work and expenses on procedural due process, substantive due process, Administrative Procedure Act claims and post-2012 remand standing issues, and no more.⁴¹⁵³

Judge Alsup approved awards of \$419,987.36 for fees,⁴¹⁵⁴ \$34,768.71 for expenses,⁴¹⁵⁵ and \$20,640.67 for costs,⁴¹⁵⁶ totaling \$475,396.74.⁴¹⁵⁷ Ibrahim’s appeals are pending.⁴¹⁵⁸

4148. *Id.* at 26.

4149. Freeborne Declaration, Ibrahim v. Dep’t of Homeland Sec., No. 3:06-cv-545 (N.D. Cal. April 15, 2014), D.E. 737.

4150. McNeil Declaration, *id.* (Apr. 15, 2014), D.E. 737-6; see Bob Egelko, *Terrorist Allegation Bars Woman from U.S.*, S.F. Chron., Apr. 17, 2014, at D1.

4151. Fees Opinion at 5, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Apr. 16, 2014), D.E. 739, available at 2014 WL 1493561.

4152. Order, *id.* (Apr. 16, 2014), D.E. 740.

4153. Fees Opinion, *supra* note 4151, at 1–2; see Mar. 25, 2014, Transcript at 35, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Mar. 25, 2014, filed Mar. 28, 2014), D.E. 735 (“When I was a lawyer, we took plenty of cases like this, and never expected a penny. We did it for the public good.”).

4154. Fees Order, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Oct. 9, 2014), D.E. 803, available at 2014 WL 5073582; see Report and Recommendation, *id.* (Sept. 18, 2014), D.E. 787.

4155. Fees Order, *supra* note 4154; see Report and Recommendation, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Sept. 23, 2014), D.E. 789.

4156. Order, Ibrahim, No. 3:06-cv-545 (N.D. Cal. May 1, 2014), D.E. 755; see Order, *id.* (Apr. 16, 2014), D.E. 741, available at 2014 WL 1493541.

Other Civil Cases: No-Fly List

In no-fly litigation in the District of Oregon, Judge Anna J. Brown determined on June 24, 2014, that due process requires notice to persons denied travel because they are on the no-fly list and an opportunity to rebut the reasons for their being on the list.⁴¹⁵⁹ The government withdrew an appeal on December 31.⁴¹⁶⁰

On July 23, the online magazine *The Intercept* published an apparently leaked March 2013 “Watchlisting Guidance” document describing how the no-fly list is maintained.⁴¹⁶¹ *The Intercept* reported on August 5, 2014, that the no-fly list contained 47,000 names.⁴¹⁶² On August 14, five Muslims filed in the Eastern District of Michigan a copy of the guidance document to support a federal complaint challenging the watchlists.⁴¹⁶³ The plaintiff in a similar action pending in the Eastern District of Virginia also brought the guidance document to the court’s attention.⁴¹⁶⁴

4157. Judge Alsup approved a payment of \$427,481.50 to the special master, assessing 100% of the payment for work on a fees-on-fees-on-fees demand and 75% of the payment for the rest of the special master’s work to the plaintiff. Fees Order, *supra* note 4154.

4158. Docket Sheet, *Ibrahim v. Dep’t of Homeland Sec.*, No. 14-17272 (9th Cir. Nov. 17, 2014) (fees appeal); Docket Sheet, *Ibrahim v. Dep’t of Homeland Sec.*, No. 14-16161 (9th Cir. June 17, 2014) (costs appeal); *see* Order, *Ibrahim v. Dep’t of Homeland Sec.*, No. 14-17142 (9th Cir. Apr. 8, 2015), D.E. 13 (voluntary dismissal of the government’s appeal).

4159. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014); *see* Joel Millman, *Judge Rules No-Fly List Is Violation of Rights*, Wall St. J., June 25, 2014, at A2; Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15; Eileen Sullivan, *US Changing Rules for No-Fly List of Terrorism Suspects*, Bos. Globe, Aug. 20, 2014, at A7; *see also* Steve Chapman, *The No-Fly List Hits Turbulence*, Chi. Trib., Jan. 30, 2014, at 21.

Also pending before Judge Brown are an action by an American citizen put on the no-fly list while he was trying to return to the United States after conducting humanitarian work in Libya, Docket Sheet, *Tarhuni v. Holder*, No. 3:13-cv-1 (D. Or. Jan. 2, 2013); *Tarhuni v. Holder*, 8 F. Supp. 3d 1253 (D. Or. 2014) (dismissing some claims), and an action by an American citizen in refuge in Sweden following alleged abuses overseas after the plaintiff declined to work as an informant, Docket Sheet, *Fikre v. FBI*, No. 3:13-cv-899 (D. Or. May 30, 2013); *Fikre v. FBI*, 23 F. Supp. 3d 1268 (D. Or. 2014) (dismissing some claims).

4160. Order, *Latif v. Holder*, No. 14-36027 (9th Cir. Dec. 31, 2014), D.E. 4.

4161. Jeremy Scahill & Ryan Devereaux, *The Secret Government Rulebook for Labeling You a Terrorist*, *The Intercept*, July 23, 2014, <https://firstlook.org/theintercept/article/2014/07/23/blacklisted/>; *see* Adam Goldman, *Document Details Watch-List Procedure*, Wash. Post, July 24, 2014, at A4; *see also* *Citizenfour* (Praxis Films 2014); Andres Rice, *The Pierre Omidyar Insurgency*, New York, Nov. 3–9, 2014, at 52 (reporting on the founding of *The Intercept*).

4162. Jeremy Scahill & Ryan Devereaux, *Barack Obama’s Secret Terrorist-Tracking System, by the Numbers*, *Intercept*, Aug. 5, 2014, <https://firstlook.org/theintercept/article/2014/08/05/watch-commander/>; *see* Charlie Savage, *Secret Papers Describe Size of Terror Lists Kept by U.S.*, N.Y. Times, Aug. 6, 2014, at A10.

4163. Complaint, *Kadura v. Holder*, No. 4:14-cv-13128 (E.D. Mich. Aug. 14, 2014), D.E. 1.

4164. Status Report, *Mohamed v. Holder*, No. 1:11-cv-50 (E.D. Va. Aug. 15, 2014), D.E. 126; *see* *Mohamed v. Holder*, 995 F. Supp. 2d 520, 539 (E.D. Va. 2014) (concluding that resolution of due process requirements for the no-fly list requires forthcoming fact-intensive considerations); Opinion, *Mohamed*, No. 1:11-cv-50 (E.D. Va. Sept. 15, 2014), D.E. 139, *as amended*, Order, *id.* (Nov. 7, 2014), D.E. 145 (affirming the judge’s own order requiring presentation to the court ex

An action pending in the Southern District of New York accuses the government of putting the Muslim plaintiffs on the no-fly list in retaliation for their not agreeing to become informants.⁴¹⁶⁵

On August 23, 2014, Judge Alsup denied Ibrahim's request to reopen her case in light of the *Intercept* posting.⁴¹⁶⁶

On April 13, 2015, in Oregon and Virginia cases, the government filed notices that it was revising its no-fly procedures so that the government would no longer keep secret from a passenger the passenger's no-fly status if the passenger is denied travel for being on the list.⁴¹⁶⁷

Challenge: Sensitive Unclassified Information

To support its motion to dismiss all claims against federal defendants, the government sought permission on May 22, 2006, to file under seal the government's no-fly list security directives.⁴¹⁶⁸

Judge Alsup provisionally granted permission to file the directives under seal, subject to a final decision on sealing after the judge reviewed the directives, and Judge Alsup ordered the government to file a public statement "describing with as much detail as practicable the contents of the purported security information being provided to the Court."⁴¹⁶⁹ The government responded, "The documents that were submitted to the Court for filing under seal consist of two Security Directives which direct air carriers to implement specific security procedures and to take specific security measures with respect to individuals who are identified on one of two TSA watch lists: the 'No Fly List' and the 'Selectee List.'"⁴¹⁷⁰

parte and in camera documents purportedly subject to the state secrets privilege and observing that the secret but unclassified guidance document has apparently been publicly disseminated); *see also* Order, *id.* (Jan. 8, 2015), D.E. 165 (ordering ex parte in camera review of all documents that the government claims are required for a defense and subject to the state secrets privilege); Matthew Barakat, *No-Fly List Might Be Unlawful, Judge Says*, *Bos. Globe*, Jan. 31, 2015, at A7.

4165. Amended Complaint, *Tanvir v. Holder*, No. 1:13-cv-6951 (S.D.N.Y. Apr. 22, 2014), D.E. 15; *see* Complaint, *Tanvir v. Comey*, *id.* (Oct. 1, 2013), D.E. 1; *see also* Adam Goldman, *Lawsuit: FBI Uses No-Fly List in Bid to Recruit Muslim Informants*, *Wash. Post*, Apr. 23, 2014, at A4; Joseph Goldstein, *New York Police Recruit Muslims to Be Informers*, *N.Y. Times*, May 11, 2014, at A1; Carrie Johnson, *4 Muslim Men to Sue Feds Over No-Fly List*, *Morning Edition* (NPR radio broadcast Apr. 23, 2014), available at www.npr.org/2014/04/23/306102446/4-men-suing-feds-over-no-fly-list.

4166. Opinion, *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Aug. 23, 2014), D.E. 786 ("The need for repose and the need for the parties to be able to rely on finality counsel in favor of respect for a judgment and letting it be.").

4167. Notice, *Fikre v. FBI*, No. 3:13-cv-899 (D. Or. Apr. 13, 2015), D.E. 63; Notice, *Tarhuni v. Holder*, No. 3:13-cv-1 (D. Or. Apr. 13, 2015), D.E. 93; Notice, *Latif v. Holder*, No. 3:10-cv-750 (D. Or. Apr. 13, 2015), D.E. 197; Notice, *Mohamed*, No. 1:11-cv-50 (E.D. Va. Apr. 13, 2015), D.E. 188; *see also* Adam Goldman, *U.S. Lifts Secrecy on List of Banned Fliers*, *Wash. Post*, Apr. 15, 2015, at A3.

4168. Motion, *id.* (May 22, 2006), D.E. 62.

4169. Order, *id.* (May 23, 2006), D.E. 66; *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 991 (9th Cir. 2012); *see* Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* (Federal Judicial Center 2010).

4170. Government Notice at 2, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. May 26, 2006), D.E. 67.

Although the government had been dismissed as a party, Ibrahim continued to seek discovery from the government.⁴¹⁷¹ The government informed the court that it would only produce to the plaintiff information it designated as “sensitive security information” (SSI) if the government found that the plaintiff needed it.⁴¹⁷² SSI is controlled unclassified information related to transportation security.⁴¹⁷³ Other defendants also sought the ability to use SSI in the case.⁴¹⁷⁴ At a December 7, 2009, discovery hearing, Judge Alsup expressed frustration with the government’s limited cooperation with the parties’ development of their evidence:

THE COURT: . . . [T]he San Francisco police officers who tried to protect the good citizens of our city. They’re about to get hit with millions of dollars in damages because they are not allowed to explain to the jury that they were told to do this by the federal government.

[GOVERNMENT ATTORNEY]: But your Honor, discovery could go into whether or not they received any instructions to detain or arrest from the federal government.

THE COURT: Well, that’s not enough. They ought to be told what it was that they were told, so that the jury can say, “Yeah, that was reasonable. We would want the police to do what they did.”⁴¹⁷⁵

After consultation with the parties, Judge Alsup issued a protective order on January 13, 2010, specifying how SSI would be handled.⁴¹⁷⁶ Access to SSI was granted to defendants, the plaintiff’s attorneys, subject to a background check, and court personnel without a background check, but not to the plaintiff herself.⁴¹⁷⁷ Both Ibrahim and the government appealed.⁴¹⁷⁸ The court of appeals affirmed Judge Alsup’s denial of Ibrahim’s request to share SSI with non-testifying

4171. *E.g.*, Motion to Compel Discovery, *id.* (Nov. 5, 2009), D.E. 231.

4172. Government Brief at 3–4, *id.* (Nov. 12, 2009), D.E. 243.

4173. 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 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) (2014); *see* Dep’t of Homeland Sec. v. MacLean, 574 U.S. ___, ___, 135 S. Ct. 913, 916 (2015) (pp.1–2 of opinion filed at U.S. No. 13-894) (describing sensitive security information).

4174. *E.g.*, Motion, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 9, 2009), D.E. 238.

4175. Transcript at 18–19, *id.* (Dec. 7, 2009, filed Dec. 14, 2009), D.E. 284; *see* Opinion at 1, *id.* (Dec. 17, 2009), D.E. 285, *available at* 2009 WL 5069133 (“important evidence at the heart of the case is still under lock and key by TSA”).

4176. Protective Order, *id.* (Jan. 13, 2010), D.E. 312.

4177. *Id.* at 5–6.

4178. Docket Sheet, *Ibrahim v. U.S. Dep’t of Homeland Sec.*, No. 10-15352 (9th Cir. Feb. 17, 2010) (*Ibrahim’s* appeal); Docket Sheet, *Ibrahim v. U.S. Dep’t of Homeland Sec.*, No. 10-15342 (9th Cir. Feb. 16, 2010) (the government’s appeal).

experts.⁴¹⁷⁹ Judge Alsup again issued an SSI protective order on February 25, 2013.⁴¹⁸⁰

Having lost two appeals in this case, the government moved again on November 7, 2012, to dismiss the case, filing a redacted brief on the public record.⁴¹⁸¹ With its brief, the government filed a notice that it was lodging with a classified information security officer an unredacted brief and redacted declarations that contain “law enforcement sensitive” information.⁴¹⁸²

Aware in advance that the government intended this filing, the classified information security officer initiated contact with Judge Alsup to explain procedures for presenting protected information to the court.⁴¹⁸³ Surprised by the contact⁴¹⁸⁴ and somewhat unfamiliar with the government’s presenting classified information to the court in civil cases, Judge Alsup ordered briefing on the matter:

A “Court Information Officer” from Washington D.C. has contacted the clerk’s office of this district court concerning this case and wishes to travel to San Francisco to show certain documents to the undersigned judge. Afterward, the officer intends to take the documents back to Washington, apparently without disclosure of the documents to plaintiff or plaintiff’s counsel, and without leaving copies for the record.

The Court is unfamiliar with such a procedure and requests a memorandum from each side concerning the purpose of any such in-camera disclosure as well as the extent to which counsel (on both sides) should be permitted to view the documents. The memoranda should quote from applicable statutes, regulations, and other legal authority. Be specific.⁴¹⁸⁵

The Department of Justice’s Litigation Security Group, which provides the courts with classified information security officers—formerly known ambiguously as court security officers—now realizes that it was a mistake for the classified information security officer in this case to initiate contact with the court before the court had formal notice that such contact would be necessary. The officer was trying to coordinate his visit to Judge Alsup with other west coast travel. At a conference on November 8, Judge Alsup admonished the government that it should

4179. *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 998–99 (9th Cir. 2012).

4180. Protective Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 25, 2013), D.E. 421.

4181. Motion, *id.* (Nov. 7, 2012), D.E. 373.

4182. Nov. 7, 2012, Notice of Lodging, *id.* (Nov. 7, 2012), D.E. 374.

4183. Dec. 20, 2012, Opinion at 4, *id.* (Dec. 20, 2012), D.E. 399, available at 2012 WL 6652362; Nov. 7, 2012, Order, *id.* (Nov. 7, 2012), D.E. 372; Briefing Order, *id.* (Nov. 8, 2012), D.E. 377.

Because of its unfamiliarity with customary procedures for protecting classified information presented to federal courts, the *San Francisco Chronicle* misleadingly reported, “President Obama’s Justice Department privately contacted Alsup last fall and said an agent would arrive shortly carrying evidence for dismissal of the suit.” Bob Egelko, *Judge Won’t Allow Secret Evidence in No-Fly Suit*, S.F. Chron., Jan. 10, 2013, at D2.

4184. Judge Alsup is quite averse to ex parte communications. Interview with Hon. William Alsup, Aug. 21, 2014.

4185. Nov. 7, 2012, Order, *supra* note 4183.

have received his permission before it attempted to present protected information to the court *ex parte* and *in camera*.⁴¹⁸⁶

The November 7 filing apparently included SSI, but not classified information.⁴¹⁸⁷ In particular, the government regarded as protected information whether Ibrahim was on any terrorist screening list, including the no-fly list.⁴¹⁸⁸ The government instructed, “should the Court grant access to [the plaintiff’s] counsel, the Court’s order may not extend such access to Plaintiff or grant counsel access to classified information in these proceedings.”⁴¹⁸⁹ At the November 8 conference, the government’s attorney explained that the government was concerned that the plaintiff’s attorneys’ “obligation to zealously defend their client” would put the sensitive information at risk.⁴¹⁹⁰

Judge Alsup decided not to review the *ex parte* submission:

I am not going to look at your *in camera* submissions. That is so at odds with the way we do things in America. It’s not justified.

I’m not going to receive your materials *ex parte*. I am not going to review them. . . . I’m going to rule on the record I have, that both sides have access to.⁴¹⁹¹

Judge Alsup denied the government’s motion to dismiss the case and rejected “the government’s argument that Ibrahim’s counsel cannot be trusted to handle sensitive information in this case. They are reputable lawyers in a reputable firm with no history of infractions.”⁴¹⁹²

Judge Alsup issued his thirty-eight-page findings of fact and conclusions of law under temporary seal.⁴¹⁹³ On the public record, Judge Alsup filed a three-page summary.⁴¹⁹⁴ In compliance with Judge Alsup’s order, the government filed on February 6, 2014, a redacted version of Judge Alsup’s findings and conclusions.⁴¹⁹⁵ The government filed a slightly less redacted version on the following day.⁴¹⁹⁶ Upon notice by the government that it would not seek relief from the court of ap-

4186. Nov. 8, 2012, Transcript at 3, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 8, 2012, filed Nov. 9, 2012).

4187. Nov. 7, 2012, Notice of Lodging, *supra* note 4182.

4188. Government Brief, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 20, 2012), D.E. 380.

4189. *Id.* at 8.

4190. Nov. 8, 2012, Transcript, *supra* note 4186, at 6.

4191. Transcript at 7–8, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 20, 2012, filed Jan. 14, 2013), D.E. 403; *see* Dec. 20, 2012, Opinion, *supra*, note 4183, at 3–9.

4192. Dec. 20, 2012, Opinion, *supra*, note 4183, at 11.

4193. Findings of Fact and Conclusions of Law, *supra* note 4112, at 35–38.

4194. Findings of Fact and Conclusions of Law Summary, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Jan. 14, 2014), D.E. 683; *see* Howard Mintz, *Judge: Name on “No-Fly” List a Violation*, San Jose Mercury News, Jan. 15, 2014, at 1B.

4195. Notice, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 6, 2014), D.E. 701.

4196. Notice, *id.* (Feb. 7, 2014), D.E. 703.

peals preventing Judge Alsup from completely unsealing his findings and conclusions, Judge Alsup unsealed them on April 16.⁴¹⁹⁷

Challenge: Classified Evidence

The National Counterterrorism Center and the FBI submit nominations of known and suspected terrorists, and TSC then decides who to include on the List based on classified intelligence. TSC subsequently provides the List—which contains only sensitive, unclassified identity information, *not* the underlying classified intelligence information—to TSA, which in turn implements the List at the airport.⁴¹⁹⁸

On February 5, 2013, the government informed the court that Ibrahim’s discovery requests called for information that the government regarded as classified.⁴¹⁹⁹ The government said that it would be willing to inform Ibrahim’s attorneys, but not Ibrahim herself, whether Ibrahim was currently on a no-fly list subject to a protective order excluding classified information from the case.⁴²⁰⁰ Judge Alsup ordered the government to provide a privilege log.⁴²⁰¹

The government argued that an ordinary privilege log for classified information could itself reveal classified information,⁴²⁰² so Judge Alsup ordered the government to submit responsive classified documents to him for review.⁴²⁰³ On March 5, the government filed a notice that it had lodged the classified documents and a classified privilege log with the classified information security officer, who would provide the documents to Judge Alsup for the court’s review and then ensure that the documents were securely stored.⁴²⁰⁴

When Judge Alsup first started receiving classified material in this case, he had an extern who had previously received a security clearance, and the extern was cleared to assist Judge Alsup with classified materials.⁴²⁰⁵ By the end of the case, Judge Alsup had a law clerk who received a security clearance.⁴²⁰⁶ Judge

4197. Order, *id.* (Apr. 16, 2014), D.E. 738; Mar. 25, 2014, Transcript, *supra* note 4153, at 39–40; *see* Egelko, *supra* note 4150.

4198. *Latif v. Holder*, 686 F.3d 1122, 1125 (9th Cir. 2012) (footnotes omitted).

4199. Government Letter Brief, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 5, 2013), D.E. 406.

4200. *Id.*

4201. Order, *id.* (Feb. 7, 2013), D.E. 407.

4202. Request for Clarification, *id.* (Feb. 12, 2013), D.E. 408.

4203. Order, *id.* (Feb. 15, 2013), D.E. 414.

4204. Notice of Lodging, *id.* (Mar. 5, 2013), D.E. 431.

4205. Interview with Hon. William Alsup, Aug. 21, 2014.

The classified information security officer facilitated a recognition of the extern’s “need to know.” Interview with Dep’t of Justice Litig. Sec. Group Staff, Aug. 26, 2014; *see* Revised Security Procedures Established Pursuant to Pub. L. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 4 (2012) (noting that access to classified information required both a security clearance and a need to know the classified information).

4206. Interview with Hon. William Alsup, Aug. 21, 2014.

Alsup now always asks potential clerks if they would be willing to seek a security clearance if necessary.⁴²⁰⁷

Judge Alsup made sure that the record reflected each time he reviewed classified information.⁴²⁰⁸ Reviewing the ostensibly classified documents, Judge Alsup asked for clarification of the status of documents not clearly marked as classified:

With respect to the recent lodging of classified documents, the Court has found at least one that is marked “Sensitive But Unclassified.” Government counsel shall please submit (*ex parte* and *in camera*) a list specifying all such documents in the submission and, as to each, explain why it should not be turned over to plaintiff’s counsel on an attorney’s eyes only basis. Further, as to each document in the submission that bears no legend at all, meaning no classified or other stamp, identify each and explain why it should not be turned over to plaintiff’s counsel.⁴²⁰⁹

The government lodged its responses with the classified information security officer.⁴²¹⁰ On March 20, Judge Alsup ordered the government to file under seal and produce to the plaintiff’s attorneys, for their eyes only, all unclassified documents and paragraphs among the lodged submissions.⁴²¹¹

As the discovery dispute proceeded, the government invoked the state-secrets privilege.⁴²¹² Reasoning that “the extension of the state secrets privilege is not a given, nor an absolute,” Judge Alsup concluded,

After a careful review of the classified materials by the Court, this order concludes that a few documents could potentially be produced with little or no modifications to them. *First*, any correspondence directly from plaintiff to defendants (and vice versa) cannot be classified and should be produced without restriction. *Second*, some classified documents appear to contain mostly *unclassified* material, save one or two classified paragraphs.⁴²¹³

Judge Alsup also issued an order to show cause why two internal training documents could not be produced to Ibrahim’s attorneys, who were not cleared for

4207. *Id.*

4208. *Id.*

4209. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Mar. 8, 2013), D.E. 436.

4210. Notice of Lodging, *id.* (Mar. 18, 2013), D.E. 439.

4211. Order, *id.* (Mar. 20, 2013), D.E. 441.

4212. Notice of Lodging, *id.* (Mar. 15, 2013), D.E. 438; Attorney General Declaration, *id.* (Mar. 14, 2013, filed Apr. 23, 2013), D.E. 472; Director of National Intelligence Declaration, *id.* (Mar. 13, 2013, filed Apr. 23, 2013), D.E. 471; see Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 3–9 (Federal Judicial Center, 2d ed. 2013) (discussing the state-secrets privilege).

4213. Order to Show Cause at 2, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 19, 2013), D.E. 462; see Transcript at 9, *id.* (Apr. 18, 2013, filed Apr. 22, 2013), D.E. 468 (“I think the invocation in most cases—not all cases—the invocation of the State Secrets Privilege was proper by the United States and these defendants on the classified material; not a hundred percent, but most of it.”).

Judge Alsup noticed some information among the classified material presented to him in this case to be identical to some unclassified information. Interview with Hon. William Alsup, Aug. 21, 2014.

classified information but were cleared for sensitive material.⁴²¹⁴ The government responded by producing to the plaintiff's attorneys documents with limited redactions.⁴²¹⁵

Judge Alsup agreed with the government that neither party would be able to rely on classified information at trial.⁴²¹⁶ At the final pretrial conference, Judge Alsup overruled the government's argument that Judge Alsup should rely on classified information presented by the government to dismiss the case.⁴²¹⁷ By conducting a trial without classified information and reviewing the government's classified submissions later on paper, Judge Alsup was able to rule without the confusion that might arise if the unclassified material and the classified material were comingled.⁴²¹⁸ Judge Alsup reviewed the government's final classified submissions to determine whether a ruling in favor of the plaintiff would be unfair to the government.⁴²¹⁹

Because the government's proposed findings of fact and conclusions of law included classified information not available to the plaintiff's attorneys, Judge Alsup asked the parties to brief him on the possibility of the plaintiff's attorneys obtaining security clearances.⁴²²⁰ The government opposed the idea,⁴²²¹ and the plaintiff's attorneys agreed to seek security clearances subject to conditions⁴²²² that Judge Alsup found to be unreasonable.⁴²²³

Experience of members of the clerk of court's staff with classified materials greatly facilitated Judge Alsup's ability to work with the materials efficiently.⁴²²⁴

Challenge: Closed Proceedings

On October 31, 2013, Judge Alsup ascended the bench to preside over the government's summary judgment motion.⁴²²⁵ The government asked Judge Alsup to close the proceeding, arguing, "Sensitive security information permeates the arguments."⁴²²⁶ Ibrahim's attorneys argued that the hearing should be open, at

4214. Order to Show Cause, *supra* note 4213.

4215. Notice, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. May 15, 2013), D.E. 476; *see* Notice, *id.* (Aug. 8, 2013), D.E. 524 (concerning subsequent discovery).

4216. Transcript at 4, *id.* (Nov. 15, 2013, filed Nov. 18, 2013), D.E. 619.

4217. *Id.* at 23–26; *see* Bob Egelko, *Ex-Stanford Student to Get Trial on No-Fly*, S.F. Chron., Nov. 16, 2013, at C2; *see also supra* "Kenya and Tanzania" (Judge Krieger's doubt about a requested second bite at the apple).

4218. Interview with Hon. William Alsup, Aug. 21, 2014 (noting that the segregation also helped to avoid confusion between classified information and SSI).

4219. *Id.*

4220. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 18, 2013), D.E. 666.

4221. Government Brief, *id.* (Dec. 23, 2013), D.E. 670.

4222. Plaintiff's Brief, *id.* (Dec. 23, 2013), D.E. 669.

4223. Order, *id.* (Dec. 30, 2013), D.E. 674.

4224. Interview with Hon. William Alsup, Aug. 21, 2014.

4225. Transcript, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Oct. 31, 2013, filed Nov. 1, 2013), D.E. 591.

4226. *Id.* at 4.

which time a law school class arrived at the proceeding.⁴²²⁷ After approximately two hours of argument about whether to close the hearing, Judge Alsup decided, “I’m going to take under submission the motion for summary judgment without further argument and decide it on the papers.”⁴²²⁸

With an initially sealed opinion, Judge Alsup mostly denied the government’s summary judgment motion.⁴²²⁹ One week later, the government complied with Judge Alsup’s order within the opinion and filed a redacted version.⁴²³⁰

Parts of the bench trial were conducted in closed session by temporarily clearing the court of spectators.⁴²³¹ There were approximately ten closings of the courtroom.⁴²³² Judge Alsup tried to schedule the presentation of SSI evidence so as to minimize the public’s coming and going.⁴²³³

Challenge: Subpoenaing Senior Government Officials

On May 13 and 14, 2013, respectively, James Clapper, the Director of National Intelligence, and Attorney General Eric Holder signed declarations supporting the government’s invocation of the state-secrets privilege.⁴²³⁴ On May 15, Ibrahim sought their depositions.⁴²³⁵ By letter two days later, the government informed Judge Alsup that it would seek to quash the deposition notices.⁴²³⁶ In the interest of time, Judge Alsup regarded the government’s letter as a motion to quash,⁴²³⁷ which he granted⁴²³⁸ after Ibrahim responded.⁴²³⁹

The Attorney General and the Director of National Intelligence are very occupied with protecting national security and the proper administration of justice. The nation has a strong interest in shielding them from the burdens of sitting for deposition discovery. Invocation of the state secrets privilege should not

4227. *Id.* at 5–6.

4228. *Id.* at 71.

4229. Opinion, *id.* (Nov. 4, 2013), D.E. 592 (sealed); Findings of Fact and Conclusions of Law, *supra* note 4112, at 5.

4230. Nov. 1, 2013, Opinion, *supra* note 4133; *see id.* at 5 (“this order contains certain sensitive (though non-classified) information”).

4231. Findings of Fact and Conclusions of Law, *supra* note 4112, at 7 (“at least ten times, the Court reluctantly asked the press and the public to leave the courtroom”); Dec. 6, 2013, Transcript, *supra* note 4134, at 770–93, 800–53; Dec. 5, 2013, Transcript, *supra* note 4134, at 571–83, 595–622, 703–05; Dec. 4, 2013, Transcript, *supra* note 4134, at 295–383, 469–94; Dec. 3, 2013, Transcript, *supra* note 4134, at 251–62; Dec. 2, 2013, Transcript, *supra* note 4134, at 108–10.

4232. Interview with Hon. William Alsup, Aug. 21, 2014.

4233. *Id.*

4234. Attorney General Declaration, *supra* note 4212; Director of National Intelligence Declaration, *supra* note 4212.

4235. Government Letter Exs., Ibrahim v. Dep’t of Homeland Sec., No. 3:06-cv-545 (N.D. Cal. May 17, 2013), D.E. 477.

4236. Government Letter, *id.*

4237. Order, *id.* (May 20, 2013), D.E. 478.

4238. Quash Opinion, *id.* (May 23, 2013), D.E. 481.

4239. Plaintiff Letter Brief, *id.* (May 21, 2013), D.E. 480 (redacted).

result in high-ranking officials being required to sit for deposition absent extraordinary circumstances.⁴²⁴⁰

4240. Quash Opinion, *supra* note 4238, at 2.

Surveillance Software⁴²⁴¹

Montgomery v. eTreppid Technologies, Inc., In re Search Warrant, eTreppid Technologies, LLC v. Montgomery, and United States ex rel. Montgomery v. Trepp (Philip M. Pro and Valerie P. Cooke, D. Nev.)

Civil litigation between business partners became a national security case, because the business included classified government contracts.

Warren Trepp and Dennis Montgomery founded eTreppid in 1998 in Reno, Nevada, to develop facial-recognition surveillance software for casinos.⁴²⁴² The U.S. government entered into multimillion dollar contracts with eTreppid to develop terrorist surveillance software.⁴²⁴³

Montgomery was eTreppid's chief software developer until he separated in January 2006.⁴²⁴⁴ On January 19, eTreppid sued Montgomery in Nevada's state court for Washoe County, claiming that Montgomery had wrongfully removed source code when he separated.⁴²⁴⁵ Montgomery removed the action to federal court in Reno on January 25.⁴²⁴⁶ Judge Howard D. McKibben remanded the action on January 31.⁴²⁴⁷ On that day, Montgomery filed his own federal action against Trepp and eTreppid, also in the nature of unfair competition, and including a claim of copyright infringement.⁴²⁴⁸ An amended complaint on February 21 added the Department of Defense as a defendant.⁴²⁴⁹ The court assigned this case

4241. Margaret S. Williams collaborated on the research for this case study.

4242. See Martha Bellisle, *Company's Pattern Recognition Technology Could Be Useful to Military, Casino Industry*, Reno Gazette-J., Apr. 29, 2007, at A1; David Kihara, *True Believers*, L.V. Rev.-J., June 7, 2009, at 1A; Ryan Randazzo, *Gibbons' Ties to Tech Firm Scrutinized*, Reno Gazette-J., Nov. 2, 2006, at 1A.

4243. See Sheigh Crabtree, *Small eTreppid Eyes Big Time with DCI Invite*, Hollywood Reporter, Apr. 20, 2004, at 8; Jeff German & J. Patrick Coolican, *Trepp May Have Had More Contracts*, L.V. Sun, Mar. 7, 2007, at A1; Kihara, *supra* note 4242; Randazzo, *supra* note 4242.

4244. See Kihara, *supra* note 4242.

4245. Complaint, eTreppid Techs., Inc. v. Montgomery, No. CV06-114 (Nev. 2d Dist. Ct. Washoe Cnty. Jan. 19, 2006), attached to Notice of Removal, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 25, 2006), D.E. 3; Cooke Sanction Opinion at 2, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 31, 2009), D.E. 985, available at 2009 WL 910739; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 202 (2010).

4246. Notice of Removal, *supra* note 4245; Pro Sanction Opinion at 2, *Montgomery*, No. 3:06-cv-56 (D. Nev. Apr. 5, 2010), D.E. 1150, available at 2010 WL 1416771.

4247. Judgment, *eTreppid Techs., Inc.*, No. 3:06-cv-41 (D. Nev. Jan. 31, 2006), D.E. 13; Minutes, *id.* (Jan. 31, 2006), D.E. 12.

4248. Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Jan. 31, 2006), D.E. 1; Pro Sanction Opinion, *supra* note 4246, at 2-3; Cooke Sanction Opinion, *supra* note 4245, at 4.

4249. Amended Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Feb. 21, 2006), D.E. 7.

to Judge Brian E. Sandoval.⁴²⁵⁰ (On May 24, 2007, the court dismissed copyright claims against the Department of Defense, because they could only be brought in the Court of Federal Claims.⁴²⁵¹)

Trepp reported to the FBI that Montgomery had stolen trade secrets and was unlawfully retaining national defense information,⁴²⁵² so from February 28 through March 3, 2006, the FBI sought and obtained from Magistrate Judge Valerie P. Cooke search warrants for Montgomery's home and five storage units.⁴²⁵³ On March 10, Montgomery sued for the return of his property and for other relief.⁴²⁵⁴ The government responded that before return of Montgomery's property could be contemplated it must first be reviewed to make sure classified information was not improperly returned.⁴²⁵⁵

On March 20, the government removed again the Washoe County District Court action by eTreppid against Montgomery, because the Department of Defense was named as a defendant in a counterclaim by Montgomery.⁴²⁵⁶

Judge Sandoval recused himself from the litigation on November 2; the court reassigned the case to Judge Larry R. Hicks.⁴²⁵⁷

4250. Docket Sheet, *id.* (Jan. 31, 2006) [hereinafter *Montgomery v. eTreppid Techs., Inc.* Docket Sheet].

4251. Order, *id.* (May 24, 2007), D.E. 177, available at 2007 WL 1560338.

4252. Return of Property Order at 2, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Nov. 28, 2006), D.E. 88; Search Warrant Application, *id.* (Feb. 28, 2006), D.E. 1.

4253. Docket Sheet, *id.* (May 10, 2006) [hereinafter *In re Search Warrant* Docket Sheet]; Pro Sanction Opinion, *supra* note 4246, at 3; Cooke Sanction Opinion, *supra* note 4245, at 4; *see* Kihara, *supra* note 4242.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on September 25, 2012.

4254. Motion, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 10, 2006), D.E. 21; Pro Sanction Opinion, *supra* note 4246, at 3; Cooke Sanction Opinion, *supra* note 4245, at 5.

4255. Government Response, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 27, 2006), D.E. 23; *see* Government Motion, *id.* (May 8, 2006), D.E. 34 (expressing concern that the litigation may have released confidential classified information, which is the level of classification below secret).

4256. Notice of Removal, *eTreppid Techs., LLC v. Montgomery*, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006), D.E. 1; Pro Sanction Opinion, *supra* note 4246, at 3; Cooke Sanction Opinion, *supra* note 4245, at 2–3; *see* Third Amended Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Dec. 17, 2007), D.E. 370; Second Amended Complaint, *id.* (June 11, 2007), D.E. 186.

4257. *In re Search Warrant* Docket Sheet, *supra* note 4253 (D.E. 121); Docket Sheet, *eTreppid Techs., LLC*, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006) (D.E. 61); *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4250; *see* J. Patrick Coolican, *Lawsuits Promise Headaches for Gibbons*, L.V. Sun, Nov. 18, 2006, at A1 (“The case was further complicated earlier this month when U.S. District Judge Brian Sandoval, formerly a prominent Nevada Republican and the state's attorney general, recused himself the day after Montgomery gave Sandoval a secret, detailed declaration about the case.”).

Judge Sandoval resigned in September 2009, Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html, and was elected governor on November 2, 2010, *see* Benjamin Spillman, *Sandoval's Victory a First*, L.V. Rev.-J., Nov. 3, 2010, at 1B.

After evidentiary hearings held on June 29, July 31, and August 17, Judge Cooke determined on November 28 that she had been misled about pertinent facts by the FBI in the government's application for search warrants against Montgomery.⁴²⁵⁸ The search warrants were not, in fact, based on probable cause, and the searches obtained no classified information.⁴²⁵⁹ So she ordered the property returned and the search warrant affidavits unsealed.⁴²⁶⁰

Montgomery filed a qui tam False Claims action against Trepp on December 14.⁴²⁶¹ The complaint alleged a plot by Trepp to take control of Montgomery's surveillance software that was part and parcel of efforts to defraud the government.⁴²⁶² As provided by the False Claims Act, the whistleblower complaint was sealed until the government decided whether or not to take the lead in pursuing the civil case.⁴²⁶³

On February 21, 2007, Judge Hicks recused himself from the litigation,⁴²⁶⁴ and the cases were reassigned to Chief Judge Philip M. Pro in Las Vegas, who had substantial experience handling national security information in both criminal and civil cases.⁴²⁶⁵

Montgomery's principal attorney was Michael Flynn, a California attorney licensed to practice in Massachusetts and appearing in the Nevada litigation pro hac vice.⁴²⁶⁶ As a result of a fee dispute, he sought permission to withdraw on July 9, 2007.⁴²⁶⁷ On August 21, he sought a fee order from the Nevada federal court.⁴²⁶⁸ His supporting brief alleged that fees owed were improperly caught up in divorce

4258. Return of Property Order, *supra* note 4252, at 1, 13, 17–32.

4259. *Id.* at 13, 17–32.

4260. *Id.* at 1, 32, *aff'd*, Opinion, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 19, 2007), D.E. 122 [hereinafter Return of Property Affirmance].

4261. Complaint, *United States ex rel. Montgomery v. Trepp*, No. 3:06-cv-691 (D. Nev. Dec. 14, 2006), D.E. 2.

4262. *Id.* at 2.

4263. See 31 U.S.C. § 3730(b) (2013).

4264. Minutes, *Montgomery v. eTreppid Techs., Inc.*, No. 3:06-cv-56 (D. Nev. Feb. 23, 2007), D.E. 116; Minutes, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007), D.E. 111; see Jeff German & J. Patrick Coolican, *Claims of "Judicial Tampering" Emerge After Judge's Recusal*, L.V. Sun, Feb. 22, 2007, at A1.

4265. Minutes, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007), D.E. 112; *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4250 (D.E. 23); Interview with Hon. Philip M. Pro, Sept. 26, 2012. Tim Reagan interviewed Judge Pro for this report in the judge's chambers. Judge Pro retired on January 23, 2015. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/public/home.nsf/hisj.

4266. Pro Sanction Opinion, *supra* note 4246, at 3; Cooke Sanction Opinion, *supra* note 4245, at 2–8; see Flynn Declaration, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007), D.E. 205.

4267. Withdrawal Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007), D.E. 204; Pro Sanction Opinion, *supra* note 4246, at 6; Cooke Sanction Opinion, *supra* note 4245, at 9; see Martha Bellisle, *2 Lawyers for Former eTreppid Employee Want to Quit*, Reno Gazette-J., July 11, 2007, at A3; Donohue, *supra* note 4245, at 203; David Kihara & Molly Ball, *Attorneys Seek to Withdraw*, L.V. Rev.-J., July 10, 2007, at 1B.

4268. Attorney Fee Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 21, 2007), D.E. 248; Pro Sanction Opinion, *supra* note 4246, at 9; Cooke Sanction Opinion, *supra* note 4245, at 13.

proceedings involving Montgomery's new business partner Edra Blixseth and suggested that the software at issue in the litigation was ineffective.⁴²⁶⁹ Judge Pro granted Flynn's motion to withdraw on September 4.⁴²⁷⁰ Flynn's demand for fees and Montgomery's new attorneys' demand for Flynn's files remained unresolved.⁴²⁷¹

Discovery litigation continued until August 2008, at which time the parties filed a notice that they were amenable to settlement negotiations.⁴²⁷² On December 11, the parties filed confessed judgments of \$20 million in favor of eTreppid and \$5 million in favor of Trepp, secured by Blixseth.⁴²⁷³

The settlement was not perfected. As a result of a real estate bubble's bursting, Blixseth declared bankruptcy in March 2009.⁴²⁷⁴ In July, Montgomery was arrested in California on a Nevada indictment for writing bad checks in connection with gambling debts.⁴²⁷⁵ Montgomery also launched bankruptcy proceedings.⁴²⁷⁶ In December, *Playboy* reported that Montgomery's false representations of his software's ability to detect secret codes in Al-Jazeera broadcasts resulted in the unnecessary cancellation of international flights and elevation of the nation's security level to orange in December 2003.⁴²⁷⁷

4269. Attorney Fee Motion, *supra* note 4268.

4270. Withdrawal Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 4, 2007), D.E. 256; Pro Sanction Opinion, *supra* note 4246, at 10; Cooke Sanction Opinion, *supra* note 4245, at 14.

4271. Withdrawal Order, *supra* note 4270; Cooke Sanction Opinion, *supra* note 4245, at 10; Docket Sheet, *Montgomery v. Flynn*, No. 2:07-cv-5078 (C.D. Cal. Aug. 6, 2007) (action for return of files removed from California's state court and then remanded back to the state court for lack of federal jurisdiction).

4272. Joint Proposal, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2008), D.E. 830; Transcript at 7, *id.* (Nov. 19, 2008, filed Jan. 6, 2009), D.E. 928; *see* Proposed Stipulation, *id.* (Sept. 26, 2008), D.E. 866; *see also* *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4250 (listing docket entries 257 to 829 between Judge Pro's granting Flynn's withdrawal and the parties' notice of settlement amenability).

4273. Confessions of Judgment, *Montgomery*, No. 3:06-cv-56 (D. Nev. Dec. 11, 2008), D.E. 897, 898; Pro Sanction Opinion, *supra* note 4246, at 16.

4274. Docket Sheet, *In re Blixseth*, No. 2:09-bk-60452 (D. Mont. Bankr. Mar. 26, 2009); *In re Blixseth*, 684 F.3d 865 (9th Cir. 2012); *In re Blixseth*, 459 B.R. 444 (D. Mont. Bankr. 2011); *see* Amy Wallace, *Checkmate at the Yellowstone Club*, N.Y. Times, June 14, 2009, at 1.

Blixseth's bankruptcy was discharged on February 8, 2011. Discharge, *In re Blixseth*, No. 2:09-bk-60452 (D. Mont. Bankr. Feb. 8, 2011), D.E. 876.

4275. *See* David Kihara, *Gibbons Accuser Arrested in California*, L.V. Rev.-J., July 23, 2009, at 1B; Francis McCabe, *Man Who Triggered Gibbons Probe Faces Bad Check Charges*, L.V. Rev.-J., Nov. 13, 2010, at 2B.

4276. Docket Sheet, *In re Montgomery*, No. 2:10-bk-18510 (C.D. Cal. Bankr. June 26, 2009); Discharge Report, *id.* (Aug. 1, 2014) (D.E. 248); Docket Sheet, *In re Montgomery*, No. 6:09-bk-24322 (C.D. Cal. Bankr. June 26, 2009) (noting a March 8, 2010, transfer from the Riverside Division to the Los Angeles Division).

4277. *See* Eric Lichtblau & James Risen, *Hiding Details of Dubious Deal, U.S. Invokes National Security*, N.Y. Times, Feb. 20, 2011, at A1; *The Man Who Conned the Pentagon*, All Things Considered (NPR radio broadcast Dec. 19, 2009), available at www.npr.org/templates/story/story.php?storyId=121667905; Steve Tetreault, *Report: Nevadan's Bogus Data Sparked Terror Alert*, L.V. Rev.-J., Dec. 24, 2009, at 1B.

On March 31, 2009, Judge Cooke sanctioned Montgomery and his new attorneys \$204,411 for their vexatious litigation strategy in their fee and file dispute with Flynn: half of the sanction was assessed against Montgomery and half was assessed against his new attorneys, but they were held jointly and severally liable.⁴²⁷⁸ Judge Pro affirmed the sanction against Montgomery,⁴²⁷⁹ but he determined that the sanctions against the lawyers were flawed.⁴²⁸⁰ The individual attorneys did not receive sufficient notice, and their law firm could not be sanctioned under section 1927, which applies only to individual lawyers.⁴²⁸¹

Pending in the Southern District of Florida is a defamation action by Montgomery against the author and publisher of James Risen's 2014 *Pay Any Price: Greed, Power, and Endless War*, which suggests that Montgomery was a con artist.⁴²⁸²

Challenge: Classified Evidence

What began as a dispute between business partners became a matter of national security for the court because the business included government contracts with one or more intelligence agencies. The parties initiating the litigation did not take sufficient precautions to prevent disclosures of classified information, but once the Justice Department's Civil Division became aware of the security risks posed by the litigation, Civil Division attorneys brought in the Justice Management Division's Litigation Security Group, which provides the courts with classified information security officers.⁴²⁸³

Judge Cooke was granted a security clearance.⁴²⁸⁴ District judges are automatically cleared to see classified information necessary for their work, but magistrate judges require the granting of a clearance.⁴²⁸⁵ Because of the background checks performed when they become judges, their clearances are typically granted quick-

4278. Cooke Sanction Opinion, *supra* note 4245, at 52.

4279. Pro Sanction Opinion, *supra* note 4246, at 24–32, 38.

4280. *Id.* at 21–24, 33–38.

4281. *Id.*; see 28 U.S.C. § 1927 (2013).

4282. Docket Sheet, *Montgomery v. Risen*, No. 1:15-cv-20782 (S.D. Fla. Feb. 24, 2015).

4283. Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 7, 2012; see Transcript at 3, *Montgomery v. eTrepid Techs., Inc.*, No. 3:06-cv-56 (D. Nev. Sept. 10, 2007, filed Apr. 7, 2009), D.E. 1014 (hearing on a trade secrets discovery protective order); see also Martha Bellisle, *ETrepid Case Gets Special Treatment*, *Reno Gazette-J.*, Apr. 19, 2007, at A1 (reporting that the Justice Department's decision not to ask that the case be dismissed for national security reasons benefitted Trepp); see also Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22* (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

4284. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012.

4285. See Reagan, *supra* note 4283, at 2.

ly.⁴²⁸⁶ Members of Judge Cooke's staff, including a court reporter, also received security clearances.⁴²⁸⁷

Once classified information has been disclosed, it is difficult to undisclosed it. It is difficult to claw back secrets once they have been released, and efforts to do so might draw additional attention to the secrets.

When eTreppid's action against Montgomery was removed from state court to federal court in 2006, eTreppid sought in federal court a protective order to protect its trade secrets.⁴²⁸⁸ The brief supporting this motion stated that the state court action was sealed to protect both trade secrets and national security.⁴²⁸⁹ When Montgomery filed his own action in federal court, eTreppid again sought sealing of court records to protect trade secrets.⁴²⁹⁰ Montgomery opposed the motion as overbroad.⁴²⁹¹

Approximately eight months after Montgomery filed his civil action against eTreppid in federal court, the government sought a protective order preserving a situation in which the government neither confirmed nor denied any relationship between the parties and an intelligence agency.⁴²⁹² Judge Pro issued such a protective order on August 29, 2007.⁴²⁹³

The case file created for the Montgomery search warrants remains sealed.⁴²⁹⁴ Judge Cooke was concerned that because the case included participants inexperienced in dealing with classified information that the case file might include classified material, and she conveyed her concern to Judge Pro.⁴²⁹⁵ Judge Pro's March 19, 2007, affirmance of Judge Cooke's ordering property returned to Montgomery ordered warrant records to be unsealed in the case file for the property-return action.⁴²⁹⁶ Judge Pro gave the parties 21 days to show cause why any part of the

4286. *See id.* n.9.

4287. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 7, 2012.

4288. Protective Order Motion, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 27, 2006), D.E. 6.

4289. *Id.* at 2.

4290. Protective Order Motion, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 17, 2006), D.E. 33.

4291. Protective Order Opposition, *id.* (Apr. 5, 2006), D.E. 39.

4292. Protective Order Motion, eTreppid Techs., LLC v. Montgomery, No. 3:06-cv-145 (D. Nev. Sept. 25, 2006), D.E. 51; Protective Order Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 25, 2006), D.E. 83.

4293. Protective Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2007), D.E. 253; *see* Donohue, *supra* note 4245, at 101.

4294. Docket Sheet, Application and Affidavit for Search Warrant, No. 3:06-mj-23 (Feb. 28, 2006) (sealed).

4295. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012.

4296. Return of Property Affirmance, *supra* note 4260, at 16; *see* Martha Bellisle, *Judge Says FBI Raid in eTreppid Case Went Too Far*, Reno Gazette-J., Mar. 20, 2007, at A1; J. Patrick Coolican, *Why Did Feds Intervene in Civil Dispute?*, L.V. Sun, Mar. 21, 2007, at A1; David Kihara, *Judge Orders FBI to Return Property*, L.V. Rev.-J., Mar. 20, 2007, at 1B .

case file should remain sealed.⁴²⁹⁷ On March 23, Judge Pro granted a motion by the Defense Department to perform a classification review of the case file and present redaction requests to Judge Pro *in camera*.⁴²⁹⁸ He also ordered the parties to cease reviewing the sealed records until this classification review was complete.⁴²⁹⁹ On March 30, Judge Pro approved redactions and ordered that the unredacted documents be retained by the classified information security officer for subsequent review by the courts as needed.⁴³⁰⁰ The deadline for the parties to request additional redactions was extended until April 20.⁴³⁰¹ In time, the deadline was extended until May 15.⁴³⁰²

Judge Pro admonished the parties not to put the court in the position of having to put the genie back in the bottle.⁴³⁰³

From the *in camera* review of the Search Warrant case file conducted by the Court on March 30, 2007, it has become apparent that the parties to the Search Warrant case, both Montgomery and the United States, have not guarded against the disclosure of classified information as carefully as they should. To the extent Montgomery or any other party to these proceedings possess classified information it is incumbent upon them strictly to avoid disclosure of such information in any filing with the Court be it an unsealed, sealed or *in camera* submission. This is not an onerous requirement. Any party to this litigation who thinks it is necessary to raise a classified matter with the Court can do so with a proper filing of a Motion to Permit the Disclosure of Classified Information to the Court. In doing so, however, the party making the motion must be careful not to disclose the classified content of the very information they seek to bring to the Court's attention unless and until the Court has given them specific permission to do so.

....

The United States of America is a party to each of these cases. Unfortunately, because many executive branch entities which comprise the United States are involved, as well as an equally diverse aggregation of government counsel, it is imperative that the various components of the United States which make up the parties involved in these related cases exert greater effort to communicate and cooperate amongst themselves prior to making filings with the Court which are later determined to have been improvident. To date, the United States has failed to do so. The result has been the inadvertent release of classified information

4297. Return of Property Affirmance, *supra* note 4260, at 16.

4298. Minutes, *Montgomery*, No. 3:06-cv-56 (D. Nev. Mar. 23, 2007), D.E. 143 [hereinafter Mar. 23, 2007, *Montgomery* Minutes]; Reconsideration Order, *id.* (Apr. 2, 2007), D.E. 147; Transcript at 6, *id.* (Nov. 9, 2007, filed Apr. 7, 2009), D.E. 1015 (“Judge Pro gave the Department of Justice an opportunity . . . to go to Las Vegas, review all of the papers in Judge Pro’s chambers personally, and redact them.”).

4299. Mar. 23, 2007, *Montgomery* Minutes, *supra* note 4298, at 2.

4300. Reconsideration Order, *supra* note 4298, at 3–4; see Martha Bellisle, *Judge: Some eTrepid Case Data to Remain Classified*, Reno Gazette-J., Apr. 3, 2007, at A4.

4301. Reconsideration Order, *supra* note 4298, at 4.

4302. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. May 11, 2007), D.E. 165.

4303. Reconsideration Order, *supra* note 4298, at 6.

which could have been avoided had the various representatives of the United States in these cases taken the care and the time necessary to communicate more effectively. . . . [T]he Court, as well as every other party to these related cases and the public is entitled to have the United States as a party speak with “one voice” at least insofar as it relates to representations as to what is or is not subject to a claim of the military and state secrets privilege.⁴³⁰⁴

On March 23, Judge Pro also ordered the parties to show cause why any other document in the related cases should remain sealed.⁴³⁰⁵

To the extent the basis for sealing a particular filing relates to the pendency of state secrets or trade secrets, counsel of the parties have only to identify the pertinent sealed filing at issue. Otherwise, the parties shall articulate the alternative basis which warrants continued sealing of the particular sealed filings they have made.⁴³⁰⁶

When Flynn withdrew as Montgomery’s attorney, Judge Pro agreed to include in his withdrawal order a reminder that both new and old attorneys were bound by obligations to protect state secrets.⁴³⁰⁷ Judge Pro declined to condition the withdrawal on a surrender to the government by Flynn of all documents containing state secrets.⁴³⁰⁸

The court did not store any classified documents for this case; classified information security officers brought classified documents to the court as necessary.⁴³⁰⁹

4304. *Id.* at 5–6.

4305. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Mar. 23, 2007), D.E. 142.

4306. *Id.* at 2.

4307. Withdrawal Order, *supra* note 4270, at 4.

4308. *Id.*; Pro Sanction Opinion, *supra* note 4246, at 10.

4309. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012; Interview with Dep’t of Justice Litig. Sec. Group Staff, Nov. 7, 2012.

Warrantless Wiretaps

*Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and Related Actions (Vaughn R. Walker and Jeffrey S. White, N.D. Cal.) and Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.),*⁴³¹⁰ *ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.),*⁴³¹¹ *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.⁴³¹²

4310. Appeals were heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown.

4311. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

4312. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y. Times*, Dec. 16, 2005, at A1; *see Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 669 F.3d 933, 930–31 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 671 F.3d 881, 890–91 (9th Cir. 2011); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); Dismissal Order at 3, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Jan. 21, 2010), D.E. 57 [hereinafter *Jewel Dismissal Order*], available at 2010 WL 235075; Office of Inspectors General, *Unclassified Report on the President's Surveillance Program 1*, 36 (July 10, 2009) [hereinafter *PSP Report*], available at www.justice.gov/oig/special/s0907.pdf; *see also* Matthew M. Aid, *The Secret Sentry 287* (2009); Luke Harding, *The Snowden Files 90–94* (2014). *See generally* Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (2010) (providing a historical analysis of news media reports of government secrets).

In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization

Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1143–44 (2013) (quotation marks omitted).

“After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.” Risen & Lichtblau, *supra*. The news-

President Bush acknowledged the existence of the program on the following day.⁴³¹³ 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

paper 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). In 2013, the *Times’s* public editor reported that publication of the story was triggered by the imminent publication of the book, *The State of War*, by James Risen, one of the article’s authors. Margaret Sullivan, *Lessons in a Surveillance Drama Redux*, *N.Y. Times*, Nov. 10, 2013, Sun. Rev., at 12.

The story appeared eighteen months after the newspaper received a tip from a Justice Department lawyer. See Michael Isikoff, *The Fed Who Blew the Whistle*, *Newsweek*, Dec. 22, 2008, at 40, 42. In the summer of 2007, FBI agents executed a classified search warrant in a raid of the lawyer’s home as part of an investigation into the leak. See Michael Isikoff, *Looking for a Leaker*, *Newsweek*, Aug. 13, 2007, at 8. Nearly four years later, the government dropped its case against the lawyer. See Dana Priest & William M. Arkin, *Top Secret America* xxi (2011); Charlie Savage, *No Prosecution Seen for Official in N.S.A. Leak Case*, *N.Y. Times*, Apr. 27, 2011, at A17; A retired NSA employee “was cleared of any wrongdoing, but the investigation derailed his career and changed his life.” Ethan Bronner, Charlie Savage & Scott Shane, *Leak Inquiries Show How Wide a Net U.S. Cast*, *N.Y. Times*, May 26, 2013, at A1. He lost his security clearance and therefore had to close his security business. See *id.*

Part of the Department of Defense, the NSA was established in 1952 to conduct communication surveillance. See Priest & Arkin, *supra*, at 5 n.1. According to the 9/11 Commission, “The law requires the NSA to not deliberately collect data on U.S. citizens or on persons in the United States without a warrant based on foreign intelligence requirements.” The 9/11 Commission Report 87 (2004).

4313. President’s Radio Address, Dec. 17, 2005, Comp. Pres. Docs., 41 WCPD 1880.

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

Id.; see *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (it is undisputed that “the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties”); PSP Report, *supra* note 4312, at 5–6 (“beginning in December 2005 the President and other Administration officials acknowledged that these activities included the interception without a court order of certain international communications”).

For a discussion of the *New York Times’s* 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).

direct knowledge of the arrangement told *USA Today*.⁴³¹⁴ 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.⁴³¹⁵ Dozens of lawsuits followed these revelations.⁴³¹⁶ 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.⁴³¹⁷

4314. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, *USA Today*, May 11, 2006, at 1A.

BellSouth and Verizon denied participation in this program, but MCI, which Verizon acquired, may have participated. See Susan Page, *Lawmakers: NSA Database Incomplete*, *USA Today*, June 30, 2006, at 2A; see also *Al-Haramain Islamic Found.*, 507 F.3d at 1193 n.1; *Hepting*, 439 F. Supp. 2d at 988–89.

4315. Cauley, *supra* note 4314; see *Hepting*, 439 F. Supp. 2d at 988; see also Laura K. Donohue, *FISA Reform*, 10 I/S: A J. of L & Pol'y 599, 604 (2014) (describing the subject of *USA Today* reporting as “domestic telephony metadata”); Scott Shane & David Johnston, *Mining of Data Prompted Fight Over U.S. Spying*, *N.Y. Times*, July 29, 2007, at A1 (reporting that the government acknowledged warrantless wiretaps but did not acknowledge data mining in calling records, although the latter was widely reported).

In 2013, *The New Yorker* reported, “Over the weekend of October 6, 2001, the three major telephone companies—A. T. & T., Verizon, and BellSouth, which for decades have had classified relationships with the N.S.A.—began providing wiretap recordings of N.S.A. targets. The content of e-mails followed shortly afterward.” Ryan Lizza, *State of Deception*, *New Yorker*, Dec. 16, 2013, at 48, 52.

4316. *In re NSA*, 671 F.3d at 890; *In re NSA*, 633 F. Supp. 2d at 955; *Jewel Dismissal Order*, *supra* note 4312, at 3–4; see Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, *San Jose Mercury News*, Aug. 11, 2006, at A12; Laura K. Donohue, *The Shadow of State Secrets*, 159 *U. Pa. L. Rev.* 77, 139–40 (2010); Jason McLure, *DOJ Losing Ground in Wiretap Fight*, *Legal Times*, Sept. 4, 2006, at 1.

4317. Conditional Transfer Order 6, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007), D.E. 137 (transferring one action against a telephone company); *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007) (transferring actions by the federal government against states); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006), D.E. 128 [hereinafter Dec. 15, 2006, J.P.M.L. Transfer Order] (transferring three actions against the government and one action against telephone companies); Conditional Transfer Order 5, *id.* (issued Nov. 3, 2006, final Nov. 21, 2006), D.E. 103 (transferring one action against a telephone company); Conditional Transfer Order 2, *id.* (issued Sept. 11, 2006, final Sept. 27, 2006), D.E. 63 (transferring one action against a telephone company); Conditional Transfer Order 1, *id.* (issued Aug. 31, 2006, final Sept. 18, 2006), D.E. 62 (transferring one action against the government and 15 actions against telephone companies); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial August 9, 2006, transfer order transferring seventeen actions against telephone companies, one transfer of which was later vacated because the case already was dismissed); see Northern District of California Consolidation Order, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Aug. 31, 2006), D.E. 15 (consolidating for pretrial purposes all cases already before Judge Walker); Docket Sheet, *id.* (Aug. 14, 2006); see also *In re NSA*, 671 F.3d at 891; *In re NSA*, 633 F. Supp. 2d at 956; *Jewel Dismissal Order*, *supra* note 4312, at 5; Carey, *supra* note 4316; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, *S.F. Chron.*, Aug. 11, 2006, at B1; McLure, *supra* note 4316.

Tim Reagan interviewed Judge Walker for this report in the judge’s chambers on February 15, 2007, September 29, 2008, and February 23, 2011. Judge Walker retired on February 28, 2011. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

On January 19, 2006, Attorney General Alberto Gonzales provided to Congress “Legal Authorities Supporting the Activities of the National Security Agency Described by the President.”⁴³¹⁸

The NSA activities are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. . . .

...

. . . Indeed, were FISA and Title III interpreted to impede the President’s ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt.⁴³¹⁹

The government argued for dismissal of the civil cases, claiming that they could not be litigated without revealing state secrets.⁴³²⁰ This argument was successful with respect to alleged transfers of communication records by the telephone companies to the government,⁴³²¹ but less successful with respect to the warrantless monitoring of the contents of communications, because the government acknowledged that it did that.⁴³²²

4318. www.justice.gov/olc/opinion/legal-authorities-supporting-activities-national-security-agency-described-president.

4319. *Id.* at 1, 3.

4320. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 650 & nn.2–3 (6th Cir. 2007); Government Brief, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 20, 2007), D.E. 254; Government Brief, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006), D.E. 53; Government Brief, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. June 21, 2006), D.E. 59; Government Brief, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006), D.E. 34; Government Brief, *Ctr. for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006), D.E. 28; Government Brief, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 124; *see Jewel v. NSA*, 673 F.3d 902, 905, 913–14 (9th Cir. 2011); U.S. Statement of Interest, *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex., July 17, 2006), D.E. 38 (announcing an intent to seek dismissal on state-secrets grounds). *See generally* 1 David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* 489–524 (2d ed. 2012) (analyzing the legality of the surveillance).

4321. *ACLU v. NSA*, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing data-mining claims); *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing the complaint with leave to amend); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995–98 (N.D. Cal. 2006) (provisionally denying discovery on transfers of communication records); *see ACLU*, 493 F.3d at 650 n.2 (“The alleged data mining, which has not been publicly acknowledged, might fall within [the state-secrets rule of non-justiciability].”); *id.* at 719 (Judge Gilman, dissenting) (“After 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 4316; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6.

4322. *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.

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).⁴³²³ She issued a permanent injunction against the program,⁴³²⁴ but a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed her injunction and ordered the challenge to the program dismissed.⁴³²⁵ Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,⁴³²⁶ but Judge Ronald Lee Gilman would have affirmed the injunction.⁴³²⁷ The Supreme Court denied certiorari.⁴³²⁸

2d at 980, 991–94; see Egelko, *supra* note 4317; 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 4316; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9; see also Jewel, 673 F.3d at 912 (“It is no secret that in the weeks after the attacks of September 11, 2001, President Bush authorized the NSA to engage in warrantless wiretapping.”).

The New York University School of Law’s Center on Law and Security described two types of “electronic surveillance,” which is a more formal term for wiretaps, and which implicitly acknowledges that not all electronic communications pass through wires: “We define ‘trawling surveillance’ as NSA interception of entire streams of communications, which are then subjected to computer analysis for particular names, internet addresses, and trigger words. ‘Targeted surveillance’ refers to intercepts focused on one person or phone number.” 1 *For the Record* 7 (Jan. 2007), available at www.lawandsecurity.org/Portals/0/Documents/NSA_jan_07.pdf; see also Aid, *supra* note 4312, 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.”).

4323. *ACLU*, 438 F. Supp. 2d at 775–76, 778–80, 782; *ACLU*, 493 F.3d at 650; see Eggen & Linzer, *supra* note 4321; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcheson & Margaret Talev, *Wiretap Program Is Ruled Illegal*, San Jose Mercury News, Aug. 18, 2006, at A1; Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. Times, Aug. 18, 2006, at A1; McLure, *supra* note 4316; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 149, 195 (2007).

Tim Reagan interviewed Judge Taylor for this report in the judge’s chambers on December 7, 2006.

4324. *ACLU*, 438 F. Supp. 2d at 782; Judgment and Permanent Injunction Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006), D.E. 71 [hereinafter *ACLU* Judgment and Permanent Injunction Order].

4325. *ACLU*, 493 F.3d at 648, 687–88; see *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (staying the injunction pending appeal); Dismissal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Nov. 28, 2007), D.E. 100; see also Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, Wash. Post, July 7, 2007, at A1; Adam Liptak, *Panel Dismisses Suit Challenging Secret Wiretaps*, N.Y. Times, July 7, 2007, at A1; Charlie Savage, *Court Gives Bush Win on Surveillance*, Bos. Globe, July 7, 2007, at 1A.

4326. *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

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveilled, but the U.S. Court of Appeals for the Ninth Circuit held that the proffered evidence was too secret to afford them standing.⁴³²⁹ On remand, Judge Walker ruled that an amended complaint alleged sufficient public information to create inferences supporting the plaintiffs' claims,⁴³³⁰ and the plaintiffs were entitled to summary judgment because the government did not rebut those inferences.⁴³³¹ The court of appeals subsequently determined that the government was entitled to sovereign immunity.⁴³³²

Judge Walker dismissed other consolidated suits against the government as generalized grievances insufficient to afford the plaintiffs standing,⁴³³³ but the court of appeals determined that the plaintiffs did have standing.⁴³³⁴

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.

Termination of the Program

On February 1, 2007, because of orders obtained from the Foreign Intelligence Surveillance Court (FISC), the government abandoned the warrantless feature of the surveillance program.⁴³³⁵ According to the government, the FISA court issued

by the NSA"); *id.* at 692 (Judge Gibbons, concurring in the judgment) ("Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.").

4327. *Id.* at 693, 720 (Judge Gilman, dissenting).

For this report, Tim Reagan interviewed Judge Batchelder in the judge's Cincinnati chambers on October 30, 2007; interviewed Judge Gilman in the judge's home chambers on October 29, 2007; and interviewed Judge Gibbons in the judge's home chambers on October 29, 2007, and by telephone on November 1, 2007.

4328. *ACLU v. NSA*, 552 U.S. 1179 (2008); see Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

4329. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95, 1205 (9th Cir. 2007); *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 849 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1110–15, (N.D. Cal. 2008); see Lichtblau, *supra* note 4322.

4330. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009).

4331. *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); see Order, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Dec. 21, 2010), D.E. 134 [hereinafter *Al-Haramain Remedies Order*] (awarding damages and attorney fees).

4332. *Al-Haramain Islamic Found.*, 705 F.3d 845; see Human Rights Watch, *Illusion of Justice* 106 (2014).

4333. Order, *Ctr. for Constitutional Rights v. Obama*, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51 [hereinafter *Manhattan Action Dismissal Order*]; *Jewel Dismissal Order*, *supra* note 4312.

4334. *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011); see *Court Upholds Law That Protects Companies Aiding U.S. Surveillance*, N.Y. Times, Dec. 30, 2011, at B4 [hereinafter *Court Upholds Law*]; Carol J. Williams, *Court Revives Suit Against Wiretapping*, L.A. Times, Dec. 30, 2011, at 13.

4335. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 651 n.4 (6th Cir. 2007); *Al-Haramain Remedies Order*, *supra* note 4331, at 8;

classified negotiated orders, and the government decided that it no longer had to conduct its surveillance without warrants.⁴³³⁶ Redacted versions of the two helpful FISA court orders were released in 2014.⁴³³⁷

PSP Report, *supra* note 4312, at 30; Notice of Attorney General's Letter to Congress, *In re NSA Telcomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Jan. 17, 2007); *see* Dan Eggen, *Court Will Oversee Wiretap Program*, Wash. Post, Jan. 18, 2007, at A1 (reporting "a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people"); *Frontline: Spying on the Home Front* (PBS television broadcast May 15, 2007) [hereinafter *Home Front*], available at www.pbs.org/wgbh/pages/frontline/homefront/; 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 4323, 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).

4336. Notice of Filing, Ex. 2, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175 (also stating that "the number, nature, and contents of the specific orders described herein are highly classified"); *see* NSA Director's Declaration, *ACLU v. NSA*, Nos. 06-2095 and 06-2140 (6th Cir. Jan. 25, 2007), D.E. 152, 141, respectively ("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*; *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, ___, 133 S. Ct. 1138, 1144 (2013) ("After a FISC Judge subsequently narrowed the FISC's authorization of . . . surveillance . . . , the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism."). *See generally* Donohue, *supra* note 4315, at 606–07; Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38Harv. J.L. & Pub. Pol'y 117, 131–34 (2014).

4337. Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 12, 2014, www.odni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001?tmpl=component&format=pdf; *see* Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12; *see also infra* "Foreign Intelligence Surveillance Act Litigation."

Reporting through the summer of 2013 provided outlines of what the orders did. "In January 2007, a judge on the FISA court issued two orders, one covering the collection of foreign communications and another dealing with domestic ones." Charlie Savage & James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, N.Y. Times, June 28, 2013, at A6; *see* 1 Kris & Wilson, *supra* note 4320, at 566 ("the government appeared to find a judicial solution to the problem of FISA modernization, advancing a new and expansive interpretation of the statute that at least one judge accepted"). It was also 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*, *Bos. Globe*, Aug. 3, 2007, at 2A; *see also* 1 Kris & Wilson, *supra* note 4320, at 566–80 (providing an educated analytical guess about what the orders did).

According to a leaked working draft of the NSA's Inspector General report, in order to move the content collection involved in the President's Surveillance Program to a more secure legal footing, from mid-2005 to January 2007, [the Department of Justice] worked with NSA to redefine facility. Instead of understanding the word in the traditional sense, (as a specific

FISA Amendments Act of 2008

On July 10, 2008, President Bush signed amendments to FISA expanding the government's statutory surveillance power and providing telephone companies with immunity for their assistance with pre-amendment surveillance.⁴³³⁸

On the day that President Bush signed the amendments, the ACLU filed an action in the Southern District of New York challenging the amendments' constitutionality,⁴³³⁹ and it filed a motion before the FISA court seeking participation in that court's review of the amendments.⁴³⁴⁰

In the trial court, Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments,⁴³⁴¹ but the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.⁴³⁴² In *Clapper v. Amnesty International USA*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.⁴³⁴³

The FISA court denied the ACLU's motion.⁴³⁴⁴

On August 12, 2012, the Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) for release of a FISA court opinion ex-

telephone number or email address), [the department] argued that it should be understood as a "general gateway" or "cable head."

Donohue, *supra* note 4336, at 132 (footnotes omitted).

4338. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; see *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *Jewel Dismissal Order*, *supra* note 4312, at 6; 1 *Kris & Wilson*, *supra* note 4320, at 593–664; Donohue, *supra* note 4336, at 137–39; Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008, at A1; Lizza, *supra* note 4315, at 56; see also Ellen Nakashima, *Senate Votes to Renew Contentious Surveillance Law*, Wash. Post, Dec. 29, 2012, at A3 (reporting that the amendments were extended for another five years at the end of 2012); Robert Pear, *Federal Power to Intercept Messages Is Extended*, N.Y. Times, Dec. 29, 2012, at A12 (same).

4339. Complaint, *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

4340. Motion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. July 10, 2008), available at www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

4341. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

4342. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir.), *rehearing en banc denied*, 667 F.3d 163 (2d Cir. 2011) (*rehearing denied on a vote of six to six, rev'd*, 568 U.S. ___, 133 S. Ct. 1138 (2013)); see Eric Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 22, 2011, at A17; Eric Lichtblau, *Split Decision and Barbed Comments Show a Court Deeply Divided on Wiretapping*, N.Y. Times, Sept. 22, 2011, at A15; Larry Neumeister, *Federal Appellate Court Reinstates Eavesdropping Suit*, Wash. Post, Mar. 22, 2011, at A2.

4343. 568 U.S. ___, 133 S. Ct. 1138 (2013); see Robert Barnes, *Challenge to Foreign-Surveillance Law Rejected*, 5–4, Wash. Post, Feb. 27, 2013, at A2; Adam Liptak, *Justices Reject Legal Challenge to Surveillance*, N.Y. Times, Feb. 27, 2013, at A1.

4344. Opinion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. Aug. 27, 2008), available at 2008 WL 9487946.

pressing constitutional concerns about the 2008 amendments.⁴³⁴⁵ The government released a redacted opinion on August 21, 2013.⁴³⁴⁶ The opinion by Judge John D. Bates held that aspects of some NSA surveillance violated the Fourth Amendment's reasonableness requirement.⁴³⁴⁷

In 2009, Judge Walker determined that the FISA amendments required dismissal of all actions against telephone companies⁴³⁴⁸ and summary judgment for the federal government in all actions against states.⁴³⁴⁹ On January 6, 2012, the Ninth Circuit's court of appeals ruled that the telephone companies' retroactive immunity was constitutional.⁴³⁵⁰

New Disclosures

In 2013, as this complex multijurisdictional litigation appeared to be drawing to a close, Edward Snowden, who worked for a government contractor in national security matters, disclosed to selected journalists top-secret details about extensive FISA court-approved surveillance of telecommunication patterns.⁴³⁵¹ In October, the *New York Times* reported that Snowden was motivated to do this when

4345. Complaint, *Electronic Frontier Found. v. Dep't of Justice*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; see Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

On June 12, 2013, the FISA court determined that its rules did not prohibit disclosure of the opinion. Order, *In re Motion for Consent to Disclosure of Court Records*, No. Misc. 13-1 (FISA Ct. June 12, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf.

4346. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011), available at www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional; see Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans' Emails*, Miami Herald, Aug. 22, 2013, at 3A; Ellen Nakashima, *NSA Collected Thousands of Domestic E-mails*, Wash. Post, Aug. 22, 2013, at A1; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

4347. Opinion at 78–80, ___, No. ___ (FISA Ct. Oct. 3, 2011), available at www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional.

4348. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009).

4349. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

4350. *In re NSA Telecomm. Records Litig.*, 669 F.3d 933 (9th Cir. 2012); see *Court Upholds Law*, *supra* note 4334; Williams, *supra* note 4334.

4351. See Ken Auletta, *Freedom of Information*, New Yorker, Oct. 7, 2013, at 46, 52; Citizenfour (Praxis Films 2014); Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, Wash. Post, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, Guardian (London), June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, Guardian (London), June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. Times, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, Wash. Post, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story*, N.Y. Times, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1.

A substantial amount of additional litigation followed Snowden's disclosures. See *infra* "Foreign Intelligence Surveillance Act Litigation."

he came across what appears to be a classified version of the July 2009 inspectors general report.⁴³⁵² Snowden was fired on June 11, 2013,⁴³⁵³ as the government pursued charges against him.⁴³⁵⁴ A sealed criminal complaint was filed on June 14 and temporarily unsealed on June 21.⁴³⁵⁵

On June 28, 2013, the *Washington Post* reported that the surveillance program authorized on October 4, 2001, was called Stellar Wind.⁴³⁵⁶ On May 13, 2014, *Frontline* reported that the program was created by David Addington, the Vice President's counsel, and only disclosed to a small hand-selected group.⁴³⁵⁷

Suits Against the Government

The ACLU, other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's program of warrantless wiretaps on January 17, 2006, in federal court in Detroit.⁴³⁵⁸ The court assigned the case to Judge Taylor,⁴³⁵⁹ who enjoined the program on August 17.⁴³⁶⁰ The government

4352. James Risen, *Snowden Says He Took No Secret Files to Russia*, N.Y. Times, Oct. 18, 2013, at A1; see PSP Report, *supra* note 4312.

4353. See Thomas Heath & Marjorie Censer, *NSA Leak Puts Focus on Area Firm Owned by the Carlyle Group*, Wash. Post, June 12, 2013, at A6.

The employer apparently was not disadvantaged in its contracting with the intelligence community. See Michael Gurnow, *The Edward Snowden Affair* 279–80 (2014).

4354. See Michael S. Schmidt, Eric Schmitt & Keith Bradsher, *U.S. Preparing Charges Against Leaker of Data*, N.Y. Times, June 11, 2013, at A12.

4355. Complaint, *United States v. Snowden*, No. 1:13-cr-265 (E.D. Va. June 14, 2013) (now again sealed); see Peter Finn & Sari Horwitz, *U.S. Files Charges Against Snowden*, Wash. Post, June 22, 2013, at A1; Scott Shane, *Leaker Charged with Violating Espionage Act*, N.Y. Times, June 22, 2013, at A1.

4356. Robert O'Harrow, Jr. & Ellen Nakashima, *NSA Collected Data with Private Sector After 9/11*, Wash. Post, June 28, 2013, at A6; see also Gurnow, *supra* note 4353, at 122–26; Harding, *supra* note 4312, at 53, 90–95, 117; Lizza, *supra* note 4315, at 52. See generally Donohue, *supra* note 4336, at 119–22, 125–28.

4357. *Frontline: United States of Secrets (Part One)* (PBS television broadcast May 13, 2014), available at www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/; see also Lizza, *supra* note 4315, at 52.

4358. *ACLU v. NSA*, 493 F.3d 644, 648–50 (6th Cir. 2007); Complaint, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); see David Ashenfelter & Niraj Wari, *Suits Filed to Stop Domestic Spying*, Detroit Free Press, Jan. 18, 2006, at 1; Donohue, *supra* note 4316, at 164; Eric Lichtblau, *Two Groups Planning to Sue Over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14; Romero & Temple-Raston, *supra* note 4323, at 71–72. See generally Jameel Jaffer, *Balancing Power in the U.S. Response to External Threats: NSA Surveillance and Guantánamo Detention*, 10 N.Y. City L. Rev. 361 (2007) (outlining the ACLU's legal analysis).

4359. 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 4358.

4360. *ACLU*, 493 F.3d at 650; *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006); *ACLU* Judgment and Permanent Injunction Order, *supra* note 4324; see Eggen & Linzer, *supra* note 4321; Gibson, *supra* note 4323; Hutcheson & Talev, *supra* note 4323; Liptak & Lichtblau, *supra* note 4323; McLure, *supra* note 4316; Romero & Temple-Raston, *supra* note 4323, at 149.

immediately appealed,⁴³⁶¹ and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication records claims.⁴³⁶² On July 6, 2007, the court of appeals vacated the injunction and ordered the case dismissed,⁴³⁶³ with one judge dissenting.⁴³⁶⁴

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.⁴³⁶⁵ Judge Lynch heard arguments on the plaintiffs' motion for partial summary judgment⁴³⁶⁶ and the government's motion for dismissal on state-secrets grounds⁴³⁶⁷ on September 5,⁴³⁶⁸ but did not rule before the case was transferred to Judge Walker.⁴³⁶⁹

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.⁴³⁷⁰

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.

4361. Docket Sheet, *ACLU v. NSA*, No. 06-2095 (6th Cir. Aug. 17, 2006) [hereinafter 6th Cir. *ACLU* Docket Sheet]; Defendants' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006), D.E. 72; see Gibson, *supra* note 4323; Hutcheson & Talev, *supra* note 4323; Liptak & Lichtblau, *supra* note 4323.

4362. *ACLU*, 493 F.3d at 648, 650; Docket Sheet, *ACLU v. NSA*, No. 06-2140 (6th Cir. Aug. 30, 2006); Plaintiffs' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006), D.E. 76.

In the appeal, eleven amicus curiae briefs were filed. Docket Sheets, *ACLU*, Nos. 06-2095 and 06-2140 (6th Cir. Aug. 17 and 30, 2006).

4363. *ACLU*, 493 F.3d at 648, 687–88; see Goldstein, *supra* note 4325; Liptak, *supra* note 4325; Savage, *supra* note 4325.

4364. *ACLU*, 493 F.3d at 693–720 (Judge Gilman, dissenting).

4365. Complaint, *Ctr. for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *id.*; Manhattan Action Dismissal Order, *supra* note 4333, at 2; see Ashenfelter & Wari, *supra* note 4358; Lichtblau, *supra* note 4358.

Tim Reagan interviewed Judge Lynch for this report by e-mail on May 16, 2007.

Judge Lynch was elevated to the U.S. Court of Appeals for the Second Circuit on September 18, 2009, Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html, and he authored the opinion—ultimately reversed—recognizing standing in a constitutional challenge to the 2008 FISA amendments, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *rev'd*, 568 U.S. ___, 133 S. Ct. 1138 (2013).

4366. Plaintiffs' Partial Summary Judgment Brief, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

4367. Government's Brief, *id.* (May 27, 2006).

4368. Transcript, *id.* (Sept. 5, 2006, filed Nov. 2, 2006) [hereinafter *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript]; Order, *id.* (Aug. 8, 2006); see Adam Liptak, *Judge Hears Arguments on Federal Spying Program*, N.Y. Times, Sept. 6, 2006, at A14.

4369. Manhattan Action Dismissal Order, *supra* note 4333, at 5; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4370. Brief by Members of Congress, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. May 31, 2006); Brief by Members of Congress, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 10, 2006).

The Al-Haramain Islamic Foundation—a charity that the government accused of aiding terrorists—and two of its attorneys filed a federal suit in Portland, Oregon, on February 28, 2006, claiming not that the plaintiffs’ communications *might* be tapped, but that their communications actually were tapped, according to inadvertently disclosed top-secret evidence.⁴³⁷¹ The secret evidence was improperly included in materials submitted to the foundation’s attorneys in August 2004 in an action to freeze the foundation’s assets because of its alleged support of terrorism.⁴³⁷² The U.S. District Court for the District of

4371. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95 (9th Cir. 2007); *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182, 1185 (N.D. Cal. 2010); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Complaint, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 1 [hereinafter *Al-Haramain Complaint*] (describing the document as “United States Treasury Office of Foreign Assets Control logs of . . . conversations”); see *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (“In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted.”); *Al-Haramain Remedies Order*, *supra* note 4331, at 2; see also Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, *Oregonian*, Apr. 15, 2006, at B1 [hereinafter *U.S. Attacks Lawsuit*]; Patrick Radden Keefe, *State Secrets*, *New Yorker*, Apr. 28, 2008, at 28, 28, 31; Lichtblau, *supra* note 4322; Liptak, *supra* note 4322; Liptak, *supra* note 4325; McLure, *supra* note 4316; Justin Scheck, *NSA’s Wiretaps Face Scrutiny in S.F. Courtroom*, *S.F. Recorder*, Apr. 10, 2006, at 1.

“Al Haramain was established, with help from the Saudi royal family, in 1991.” Keefe, *supra*, at 29. “Al Haramain Oregon was incorporated in 1991.” *Id.* at 30; see also The 9/11 Commission Report 170 (2004) (describing the charity as a suitable source for Al-Qaeda funds from sympathetic employees because of its “lax external oversight and ineffective internal controls”).

“The document’s value to plaintiffs is in its confirmation that plaintiffs were targets of the President’s warrantless electronic surveillance program—which establishes their standing to prosecute this lawsuit.” Plaintiffs’ Reply Brief at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 22, 2006), D.E. 37 (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. *Al-Haramain Complaint*, *supra*, at 3–4, *id.* (Feb. 28, 2006); see Ashbel S. Green, *Lawsuits Challenge Feds’ Stance on Secrets*, *Oregonian*, June 7, 2006, at A1 [hereinafter *Feds’ Stance*]; Keefe, *supra*, at 28 (the four-page document “appears to have been a summary of intercepted telephone conversations between two of Al Haramain’s American lawyers, in Washington, and one of the charity’s officers, in Saudi Arabia”); *id.* at 30–31 (“The document was dated May 24, 2004; the conversations took place in March and April—just as the Treasury Department was investigating the charity.”); Pamela A. MacLean, *Critical Juncture for Spying Cases*, *Nat’l L.J.*, July 16, 2007, at 5 (describing the document as “a 2004 phone log from the spy program”).

4372. *Al-Haramain Islamic Found.*, 705 F.3d at 848; *Al-Haramain Islamic Found.*, 507 F.3d at 1193–95; *In re NSA*, 700 F. Supp. 2d at 1185; *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218–19; Defendants’ Response to the Oregonian’s Motion to Intervene and to Unseal Records at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006), D.E. 24; Acting Office of Foreign Assets Control Director’s Declaration, Attach. A, *id.*; see Keefe, *supra* note 4371, at 28; Lichtblau, *supra* note 4322; Liptak, *supra* note 4322; Liptak, *supra* note 4325; MacLean, *supra* note 4371 (“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 4371 (“The most

Oregon assigned the case against the government to Judge Garr M. King,⁴³⁷³ who denied a motion by the government to dismiss the case on state-secrets grounds and certified an immediate appeal.⁴³⁷⁴ The court of appeals affirmed Judge King's ruling 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.⁴³⁷⁵

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.⁴³⁷⁶ The state-secrets privilege did apply, however, to the evidence that the charity and its attorneys proffered to establish standing.⁴³⁷⁷ The court remanded the case for a determination of whether FISA afforded the plaintiffs a statutory mechanism for

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.”). See generally *supra* “Ashland and Moscow.”

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.

4373. Docket Sheet, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter D. Or. *Al-Haramain Islamic Found.* Docket Sheet]; see Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Cases*, Oregonian, Apr. 25, 2006, at A1.

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on February 14, 2007.

4374. *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 4322. The court of appeals agreed to hear the appeal. Order, *Al-Haramain Islamic Found. v. Bush*, No. 06-80134 (9th Cir. Dec. 22, 2006), D.E. 1 (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]; see also Donohue, *supra* note 4316, at 163–64.

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* (D.E. 12, April 4, 2007, stay order).

4375. *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”); *Al-Haramain Islamic Found.*, 705 F.3d at 849; see Keefe, *supra* note 4371, at 33; Lichtblau, *supra* note 4322.

For this report, Tim Reagan interviewed Judge McKeown and her law clerk Kathy Tran in the judge's home chambers on January 9, 2008; interviewed Judge Hawkins in the judge's San Francisco chambers on September 30, 2008; and interviewed Judge Pregerson in the judge's home chambers on October 1, 2008.

4376. *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 4322.

4377. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; see Lichtblau, *supra* note 4322.

challenging the legality of the alleged surveillance that preempts the privilege.⁴³⁷⁸ Judge Walker, to whom the case was transferred, determined that FISA did preempt the state-secrets privilege, but the plaintiffs would still have to establish standing without access to the secret evidence.⁴³⁷⁹ On January 5, 2009, Judge Walker ruled that an amended complaint did that.⁴³⁸⁰ On March 31, 2010, Judge Walker granted the plaintiffs summary judgment, because the plaintiffs submitted public evidence that they were surveilled and the government presented no evidence that it had a warrant for the surveillance.⁴³⁸¹

Judge Walker awarded the two Al-Haramain attorneys \$20,400 each in liquidated FISA damages, as requested by the plaintiffs, representing \$100 per day for the 204 days between the freezing of Al-Haramain's assets and a designation of Al-Haramain as a Specially Designated Global Terrorist.⁴³⁸² Judge Walker also awarded \$2,537,399.45 in attorney fees and costs.⁴³⁸³ Judge Walker ruled against burdening the taxpayers with punitive damages⁴³⁸⁴ and ruled that as a Specially Designated Global Terrorist Al-Haramain was ineligible for damages.⁴³⁸⁵ The court of appeals, however, determined that sovereign immunity precluded the damages awarded.⁴³⁸⁶

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn⁴³⁸⁷ and Atlanta.⁴³⁸⁸ The government moved on July 18, 2006, to dismiss the Atlanta case for lack of standing,⁴³⁸⁹ and the government moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.⁴³⁹⁰

4378. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; see Lichtblau, *supra* note 4322.

4379. *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.

4380. *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.

4381. *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); see Donohue, *supra* note 4316, at 162; Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Were Illegal*, N.Y. Times, Apr. 1, 2010, at A1.

4382. *Al-Haramain Remedies Order*, *supra* note 4331, at 2, 9, 11, 13–14, 46; *id.* at 12 (“Plaintiffs’ estimate of the duration of unlawful surveillance appears conservative.”); *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848, 850 (9th Cir. 2012); see 50 U.S.C. § 1810(a) (2012) (providing for “actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of [FISA] violation, whichever is greater”); see also Eric Lichtblau, *U.S. Ordered to Pay Group of Muslims*, N.Y. Times, Dec. 22, 2010, at A23.

4383. *Al-Haramain Remedies Order*, *supra* note 4331, at 3, 28–46; *Al-Haramain Islamic Found.*, 705 F.3d at 848, 850.

4384. *Al-Haramain Remedies Order*, *supra* note 4331, at 2; *Al-Haramain Islamic Found.*, 705 F.3d at 849.

4385. *Al-Haramain Remedies Order*, *supra* note 4331, at 2–3, 14–16, 29, 46.

4386. *Al-Haramain Islamic Found.*, 705 F.3d 845.

4387. *Complaint, Shubert v. Bush*, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006), D.E. 1; see *Jewel Dismissal Order*, *supra* note 4312, at 4.

4388. *Complaint, Guzzi v. Bush*, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006), D.E. 1.

4389. *Government Motion, id.* (July 18, 2006), D.E. 8.

4390. *Government Motion, In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 295.

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.⁴³⁹¹ Nearly two years later, an action was filed against the government by plaintiffs who filed the first action against a telephone company,⁴³⁹² and Judge Walker accepted assignment of the case as related to the others before him.⁴³⁹³

On January 21, 2010, Judge Walker dismissed the last-filed action and the action originally filed in Brooklyn for lack of standing.⁴³⁹⁴ Thereafter, plaintiffs voluntarily dismissed the Atlanta action,⁴³⁹⁵ and Judge Walker dismissed the Manhattan action for lack of standing.⁴³⁹⁶ The court of appeals reversed Judge Walker's standing ruling, remanding for a determination by the district court whether suit was barred by the state-secrets privilege.⁴³⁹⁷ On June 10, 2013, however, the court of appeals affirmed dismissal of the Manhattan action, relying on the Supreme Court's February 26 denial of standing in *Clapper*.⁴³⁹⁸

Following Judge Walker's retirement, the litigation was assigned to Judge Jeffrey S. White, who ruled on July 8 that FISA displaced the state-secrets privilege in the remaining cases—the last-filed action and the Brooklyn action—and that potentially valid constitutional claims remained.⁴³⁹⁹ On July 24, Judge White accepted as related to the cases already before him a new case challenging dragnet electronic surveillance.⁴⁴⁰⁰

4391. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 4317; Conditional Transfer Order 2, *supra* note 4317; Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, Ctr. for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) (action transferred from the Southern District of New York); Docket Sheet, Shubert v. Bush, No. 4:07-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).

4392. Complaint, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. Sept. 18, 2008), D.E. 1.

4393. Order, *id.* (Oct. 28, 2008), D.E. 9.

4394. Jewel Dismissal Order, *supra* note 4312, at 16–17.

4395. Order, Guzzi, No. 3:06-cv-6225 (N.D. Cal. Mar. 5, 2010), D.E. 27; *see* Donohue, *supra* note 4316, at 162.

4396. Manhattan Action Dismissal Order, *supra* note 4333.

4397. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011); *see Court Upholds Law*, *supra* note 4334; Williams, *supra* note 4334.

4398. Ctr. for Constitutional Rights v. Obama, 522 F. App'x 383 (9th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 1497 (2014); *see* Clapper v. Amnesty Int'l USA, 568 U.S. ___, 133 S. Ct. 1138 (2013); *see also* Schmidt et al., *supra* note 4354.

Tim Reagan interviewed Judge White for this report in the judge's chambers on August 21, 2014.

4399. Jewel v. NSA, 965 F. Supp. 2d 1090, (N.D. Cal. 2013); *see* Jerry Markon, *Classified Programs Challenged in Court*, Wash. Post, July 16, 2013, at A1.

4400. Order, First Unitarian Church of L.A. v. NSA, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7; *see* Complaint, *id.* (July 16, 2013), D.E. 1; *see* Second Amended Complaint, *id.* (Aug. 20, 2014), D.E. 119; Amended Complaint, *id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations).

In the two cases inherited from Judge Walker, Judge White granted the government partial summary judgment on February 10, 2015, with respect to the plaintiffs' Fourth Amendment challenge to a program of "upstream collection," in which telecommunication companies search their records for communications with identified foreign intelligence targets.⁴⁴⁰¹ Judge White's ruling is based on both standing and state secrets.

Although the public and admissible evidence presented establishes that Plaintiffs are indeed AT&T customers with Internet communications and would fall into the class of individuals surveilled, the evidence at summary judgment is insufficient to establish that the Upstream collection process operates in the manner in which Plaintiffs allege it does.

...
... In addition, without disclosing any of the classified content of the Government Defendants' submissions, the Court can confirm that the Plaintiffs' version of the significant operational details of the Upstream collection process is substantially inaccurate.⁴⁴⁰²

Suits Against Telephone Companies

In 2006 and 2007, forty-five 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 thirty-eight 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.⁴⁴⁰³ 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.⁴⁴⁰⁴ To support their case, the plaintiffs filed under seal ev-

4401. Opinion, *Shubert v. Obama*, No. 4:07-cv-693 (N.D. Cal. Feb. 10, 2015), D.E. 146, *available at* 2015 WL 545925.

4402. *Id.* at 7–8.

4403. See Cauley, *supra* note 4314.

4404. Docket Sheet, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006), D.E. 8 [hereinafter N.D. Cal. *Hepting* Docket Sheet]; see Amended Complaint, *id.* (Feb. 22, 2006); see also *Jewel* Dismissal Order, *supra* note 4312, at 3–4; *Home Front*, *supra* note 4335; 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 thirteen. See *Key Figure in Wiretapping Suit Goes Public*, Morning Edition (NPR radio broadcast Mar. 6, 2008), *available at* www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=87938069&m=87938133.

idence provided by a former AT&T employee.⁴⁴⁰⁵ The court assigned the case to Judge Walker.⁴⁴⁰⁶

On May 30, another class action against AT&T was filed in federal court in San Francisco,⁴⁴⁰⁷ and the court assigned this case to Judge Walker as related to the first case against AT&T.⁴⁴⁰⁸

On June 5 and June 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.⁴⁴⁰⁹

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.”⁴⁴¹⁰ 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.⁴⁴¹¹ This case was randomly assigned to Judge

4405. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); see McLure, *supra* note 4316; Scheck, *supra* note 4371.

Judge Walker denied motions by news media to unseal the declarations, Order, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Feb. 20, 2007), D.E. 171, but they and portions of their exhibits were later unsealed by stipulation, Order, *id.* (Oct. 1, 2007), D.E. 382; Stipulation, *id.* (Sept. 25, 2007), D.E. 376.

“*Los Angeles Times*[] editor Dean Baquet killed a story in 2006 by his reporters about a secret collaboration between AT&T and the NSA, based on information given by whistle-blower Mark Klein.” Glenn Greenwald, *No Place to Hide* 233 (2014). In a 2014 television program, the NSA’s general counsel from 1998 to 2006, Robert Dietz, acknowledged that Klein, the AT&T employee, had witnessed evidence of a surveillance program. *Frontline: United States of Secrets (Part Two)* (PBS television broadcast May 20, 2014), available at www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/.

4406. N.D. Cal. *Hepting* Docket Sheet, *supra* note 4404; see Scheck, *supra* note 4371.

4407. Complaint, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006), D.E. 1.

4408. Related Case Order, *id.* (June 9, 2006), D.E. 4.

4409. Notice of Removal, *Campbell v. AT&T Commc’ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006), D.E. 1 [hereinafter *Campbell* Notice of Removal]; Docket Sheet, *Riordan v. Verizon Commc’ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006).

The government moved to intervene as a defendant in these cases in order to defeat motions to remand, U.S. Motion to Intervene, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. Aug. 4, 2006), D.E. 47; U.S. Motion to Intervene, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. Aug. 4, 2006), D.E. 45, 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).

4410. Complaint at 1, *Campbell v. AT&T Commc’ns of Cal.*, No. 06-452626 (Cal. Sup. Ct. S.F. May 26, 2006), attached as Ex. A, *Campbell* Notice of Removal, *supra* note 4409.

4411. *Campbell* Notice of Removal, *supra* note 4409.

Walker,⁴⁴¹² who reassigned it to himself as related to the first case against AT&T.⁴⁴¹³

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.⁴⁴¹⁴ The case was assigned to Judge Walker as related to the removed case against AT&T.⁴⁴¹⁵

On July 7, 2006, yet another class action was filed in San Francisco federal court—this one against MCI.⁴⁴¹⁶ Judge Walker took assignment of this case as related to the first case filed against AT&T.⁴⁴¹⁷

In the first San Francisco case against AT&T, the court denied the government's motion to dismiss on state-secrets grounds.⁴⁴¹⁸ The court certified an appeal of its order,⁴⁴¹⁹ and the court of appeals granted petitions for interlocutory appeal by both the government and AT&T.⁴⁴²⁰ The appeal was heard on August 15, 2007, in San Francisco,⁴⁴²¹ but the court remanded the case to the district court on August 21, 2008, in light of the July 10 amendments to FISA.⁴⁴²²

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in twenty-six

4412. Docket Sheet, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); see Administrative Motion at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006), D.E. 3 [hereinafter *Riordan* Administrative Motion].

4413. Related Case Order, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 20, 2006), D.E. 8.

4414. See *Riordan* Administrative Motion, *supra* note 4412.

4415. Related Case Order, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. July 5, 2006), D.E. 19.

4416. Class Action Complaint, *Spielfogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006), D.E. 1.

4417. Related Case Order, *id.* (July 17, 2006), D.E. 4.

4418. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); see *Jewel* Dismissal Order, *supra* note 4312, at 5; *Markoff*, *supra* note 4322; *McLure*, *supra* note 4316; *Mohammed*, *supra* note 4322.

4419. *Hepting*, 439 F. Supp. 2d at 1011; see *Jewel* Dismissal Order, *supra* note 4312, at 5; *McLure*, *supra* note 4316.

4420. Order, *United States v. AT&T Corp.*, Nos. 06-80109 and 06-80110 (9th Cir. Nov. 7, 2006), D.E. 7, 5, respectively, attached, *e.g.*, as Attach. B, Joint Case Management Statement, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Nov. 7, 2006), D.E. 61; see Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir. Nov. 8, 2006) (appeal by the government); Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17132 (9th Cir. Nov. 8, 2006) (appeal by AT&T).

Twelve amicus curiae briefs were filed. Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006).

4421. Docket Sheets, *Hepting*, Nos. 06-17132 and 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 9th Cir. *Hepting* Docket Sheets]; see Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. Times, Aug. 16, 2007, at A13; Karl Vick, *Judges Skeptical of State-Secrets Claim*, Wash. Post, Aug. 16, 2007, at A4.

4422. *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); see *Jewel* Dismissal Order, *supra* note 4312, at 7.

other districts.⁴⁴²³ The JPML transferred those cases not voluntarily dismissed to Judge Walker.⁴⁴²⁴

A Chicago attorney filed a class action against telephone companies on May 15, 2006.⁴⁴²⁵ The U.S. District Court for the Northern District of Illinois assigned the case to Judge Matthew F. Kennelly.⁴⁴²⁶ 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.⁴⁴²⁷ Judge Kennelly took assignment of this case as related to the first case.⁴⁴²⁸ Judge Kennelly dismissed the second case on state-secrets grounds, but granted the plaintiffs leave to amend,⁴⁴²⁹ which they did.⁴⁴³⁰ A third class action against AT&T in Chicago federal court was

4423. *Jewel* Dismissal Order, *supra* note 4312, at 4.

4424. *Supra* note 4317; *see Carey*, *supra* note 4316; *Egelko*, *supra* note 4317.

Among the cases filed in the Northern District of California, only the first action against AT&T was part of the multidistrict consolidation order. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006). But the others were consolidated before Judge Walker. Northern District of California Consolidation Order, *supra* note 4317; *see also* August 14, 2006, docket sheet notations in Docket Sheet, *Spielfogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, *Campbell v. AT&T Commc'ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); Docket Sheet, *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006); Docket Sheet, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

"Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with local rules for the assignment of related actions." J.P.M.L. Rule 7.5(a).

4425. Complaint, *Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006), D.E. 1 (class action on behalf of the attorney and others against AT&T); *see* Amended Complaint, *id.* (May 22, 2006), D.E. 10 (adding other telephone companies and the government as defendants); Second Amended Complaint, *Joll v. AT&T Corp.*, *id.* (July 7, 2006), D.E. 31 (removing the attorney as a plaintiff, which caused the case name to change, and removing the government as a defendant).

4426. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this report in the judge's chambers on May 24, 2007.

4427. Complaint, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006), D.E. 1; *see* Amended Complaint, *id.* (June 5, 2006), D.E. 14.

Studs Terkel died, while his action was pending, on October 31, 2008, at age ninety-six. *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.

4428. Executive Committee Order, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. June 2, 2006), D.E. 22.

4429. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 4321; McLure, *supra* note 4316; Robinson, *supra* note 4321.

Judge Kennelly, however, denied AT&T's motion to dismiss on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903-04, 920.

4430. Second Amended Class Action Complaint, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006), D.E. 73.

filed on May 24⁴⁴³¹ and assigned to Judge Kennelly as related to the first two.⁴⁴³² All of these cases were transferred to Judge Walker.⁴⁴³³

Also transferred to Judge Walker were thirty-one cases⁴⁴³⁴ originally filed in the following districts:

- the Eastern District of California (one case);⁴⁴³⁵
- the Southern District of California (one case);⁴⁴³⁶
- the Southern District of Florida (two cases);⁴⁴³⁷
- the Northern District of Georgia (one case);⁴⁴³⁸
- the District of Hawaii (one case);⁴⁴³⁹
- the Southern District of Indiana (two cases);⁴⁴⁴⁰

4431. Complaint, *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006), D.E. 1.

4432. Executive Committee Order, *id.* (June 12, 2006), D.E. 14.

4433. The first two cases were part of the original multidistrict consolidation. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); see Docket Sheet, *Joll v. AT&T Corp.*, No. 3:06-cv-5485 (N.D. Cal. Sept. 7, 2006); Docket Sheet, *Terkel v. AT&T Corp.*, No. 3:06-cv-5340 (N.D. Cal. Aug. 30, 2006).

The third case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; see Docket Sheet, *Waxman v. AT&T Corp.*, No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

4434. In addition to the cases listed here, Verizon stated that it intended to remove one case filed against it in Nebraska's state court. Defendant's Administrative Motion, *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. Aug. 14, 2006), D.E. 46 (expressing an intention to remove *Davis v. AT&T*, No. 1063569 (Neb. Dis. Ct. Douglas County)).

4435. Notice of Removal, *Conner v. AT&T*, No. 1:06-cv-632 (E.D. Cal. May 23, 2006), D.E. 2. 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).

4436. Complaint, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 12, 2006), D.E. 1. 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).

4437. Two cases were transferred from the Southern District of Florida:

1. Complaint, *Fortnash v. AT&T Corp.*, No. 0:06-cv-60828 (S.D. Fla. June 12, 2006), D.E. 1; see John Holland, *Hollywood Conservative Files Suit Over NSA Wiretaps*, S. Fla. Sun-Sentinel, June 28, 2006, at 1B. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; 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), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 6, *supra* note 4317; see Docket Sheet, *Jacobs v. AT&T Corp.*, No. 3:07-cv-2538 (N.D. Cal. May 14, 2007).

4438. Complaint, *Lebow v. BellSouth Corp.*, No. 1:06-cv-1289 (N.D. Ga. May 25, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; see Docket Sheet, *Lebow v. BellSouth Corp.*, No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007) [hereinafter N.D. Cal. *Lebow* Docket Sheet].

4439. Class Action Complaint, *Crockett v. Verizon Wireless LLC*, No. 1:06-cv-345 (D. Haw. June 26, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; see Docket Sheet, *Crockett v. Verizon Wireless LLC*, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006).

4440. Two cases were transferred from the Southern District of Indiana:

1. Complaint, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-847 (S.D. Ind. May 25, 2006), D.E. 1.

Other Civil Cases: Warrantless Wiretaps

- the Western District of Kentucky (one case);⁴⁴⁴¹
- the Eastern District of Louisiana (two cases);⁴⁴⁴²
- the District of Maryland (one case);⁴⁴⁴³
- the Western District of Michigan (one case);⁴⁴⁴⁴
- the District of Minnesota (one case);⁴⁴⁴⁵
- the Eastern District of Missouri (one case);⁴⁴⁴⁶
- the District of Montana (two cases);⁴⁴⁴⁷

-
2. Notice of Removal, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-932 (S.D. Ind. June 14, 2006), D.E. 1.

These cases were transferred as tag-along cases. Conditional Transfer Order 1, *supra* note 4317; *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).

4441. Complaint, *Suchanek v. Sprint Nextel Corp.*, No. 1:06-cv-71 (W.D. Ky. May 18, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, *Suchanek v. Sprint Nextel Corp.*, No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006).

4442. Two cases were transferred from the Eastern District of Louisiana:

1. Complaint, *Herron v. Verizon Global Networks, Inc.*, No. 2:06-cv-2491 (E.D. La. May 12, 2006), D.E. 1. This case was part of the original multidistrict consolidation. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, *Herron v. Verizon Global Networks, Inc.*, No. 3:06-cv-5343 (N.D. Cal. Aug. 30, 2006).
2. Complaint, *Hardy v. AT&T Corp.*, No. 2:06-cv-2853 (E.D. La. May 30, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, *Hardy v. AT&T Corp.*, No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006).

4443. Notice of Removal, *Bready v. Verizon Md. Inc.*, No. 1:06-cv-2185 (D. Md. Aug. 23, 2006), D.E. 1; *see* Plaintiffs' Motion for Remand, *id.* (Sept. 6, 2006), D.E. 15. This case was transferred as a tag-along case. Order, *id.* (Oct. 4, 2006), D.E. 19 (administratively closing the action while the case is pending in the transferee court); Conditional Transfer Order 2, *supra* note 4317; *see* Docket Sheet, *Bready v. Verizon Md. Inc.*, No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006).

4444. Amended Complaint, *Dubois v. AT&T Corp.*, No. 5:06-cv-85 (W.D. Mich. June 12, 2006), D.E. 3; Complaint, *id.* (May 30, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, *Dubois v. AT&T Corp.*, No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006).

4445. Notice of Removal, *Roche v. AT&T Corp.*, No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 5, *supra* note 4317; *see* Docket Sheet, *Roche v. AT&T Corp.*, No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007).

4446. Notice of Removal, *Mink v. AT&T Commc'ns of the Southwest, Inc.*, No. 4:06-cv-1113 (E.D. Mo. July 20, 2006). This case was transferred as a tag-along case. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 4317; Conditional Transfer Order 1, *supra* note 4317 (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).

4447. Two cases were transferred from the District of Montana:

1. Complaint, *Fuller v. Verizon Commc'ns, Inc.*, No. 9:06-cv-77 (D. Mont. May 12, 2006), D.E. 1.
2. Complaint, *Dolberg v. AT&T Corp.*, No. 9:06-cv-78 (D. Mont. May 15, 2006), D.E. 1.

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).

- the District of New Jersey (one case);⁴⁴⁴⁸
- the Eastern District of New York (one case);⁴⁴⁴⁹
- the Southern District of New York (four cases);⁴⁴⁵⁰
- the District of Oregon (one case);⁴⁴⁵¹
- the Eastern District of Pennsylvania (one case);⁴⁴⁵²
- the District of Rhode Island (three cases);⁴⁴⁵³

4448. Amended Notice of Removal, *Chulsky v. Cellco P'ship*, No. 2:06-cv-2530 (D.N.J. June 16, 2006), D.E. 5; Notice of Removal, *id.* (June 6, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, *Chulsky v. Cellco P'ship*, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006).

4449. Complaint, *Marck v. Verizon Commc'ns, Inc.*, No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006), D.E. 1. 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).

4450. Four cases were transferred from the Southern District of New York:

1. Amended Complaint, *Mayer v. Verizon Commc'ns Inc.*, No. 1:06-cv-3650 (S.D.N.Y. June 23, 2006), D.E. 16; Complaint, *id.* (May 12, 2006), D.E. 1.
2. Complaint, *Electron Tubes Inc. v. Verizon Commc'ns*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), D.E. 1.
3. Complaint, *Basinski v. Verizon Commc'ns Inc.*, No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006), D.E. 1.
4. Complaint, *Payne v. Verizon Commc'ns, Inc.*, No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006), D.E. 1.

The first case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, *Anderson v. Verizon Commc'ns, Inc.*, No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007) [hereinafter N.D. Cal. *Anderson* Docket Sheet]. The other three cases were transferred as tag-along cases. Conditional Transfer Order 1, *supra* note 4317; *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).

4451. Amended Complaint, *Hines v. Verizon Northwest, Inc.*, No. 3:06-cv-694 (D. Or. June 2, 2006), D.E. 8; Complaint, *id.* (May 12, 2006), D.E. 1. 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).

4452. Complaint, *Solomon v. Verizon Commc'ns, Inc.*, No. 2:06-cv-2193 (E.D. Pa. May 24, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, *Solomon v. Verizon Commc'ns, Inc.*, No. 3:06-cv-6388 (N.D. Cal. Oct. 12, 2006).

4453. Three cases were transferred from the District of Rhode Island:

1. Complaint, *Bissitt v. Verizon Commc'ns, Inc.*, No. 1:06-cv-220 (D.R.I. May 15, 2006), D.E. 1.
2. Complaint, *Mahoney v. AT&T Commc'ns, Inc.*, No. 1:06-cv-223 (D.R.I. May 15, 2006), D.E. 1.
3. Complaint, *Mahoney v. Verizon Commc'ns, Inc.*, No. 1:06-cv-224 (D.R.I. May 15, 2006), D.E. 1.

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, *Ma-*

Other Civil Cases: Warrantless Wiretaps

- the Southern District of Texas (one case);⁴⁴⁵⁴
- the Western District of Texas (one case);⁴⁴⁵⁵ and
- the Western District of Washington (one case).⁴⁴⁵⁶

Two of these actions subsequently were dismissed voluntarily.⁴⁴⁵⁷

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.⁴⁴⁵⁸

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.⁴⁴⁵⁹ Plaintiffs voluntarily dismissed actions filed in the District of the District of Columbia

honey 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).

4454. Amended Complaint, Trevino v. AT&T Corp., No. 2:06-cv-209 (S.D. Tex. May 19, 2006), D.E. 3; Complaint, *id.* (May 17, 2006), D.E. 1. 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).

4455. Third Amended Complaint, Harrington v. AT&T, Inc., No. 1:06-cv-374 (W.D. Tex. Aug. 14, 2006), D.E. 50; Second Amended Complaint, *id.* (June 12, 2006), D.E. 15; First Amended Complaint, *id.* (June 5, 2006), D.E. 4; Complaint, *id.* (May 18, 2006), D.E. 1. 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).

4456. Complaint, Derosier v. Cingular Wireless LLC, No. 2:06-cv-917 (W.D. Wash. June 28, 2006), D.E. 1. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 4317; *see* Docket Sheet, Derosier v. Cingular Wireless LLC, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006).

4457. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008), D.E. 22; Voluntary Dismissal Order, *Electron Tubes Inc. v. Verizon Commc'ns*, No. 3:06-cv-6433 (N.D. Cal. Feb. 22, 2007), D.E. 3 (dismissing *Electron Tubes Inc. v. Verizon Commc'ns*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006)); *see* Donohue, *supra* note 4316, at 160.

4458. *See In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 956 (N.D. Cal. 2009). Plaintiffs filed consolidated master complaints against

1. defendants affiliated with Cingular, Master Consolidated Cingular Complaint, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Jan. 16, 2007), D.E. 121;
2. defendants affiliated with Comcast, Master Comcast Consolidated Complaint, *id.* (Jan. 16, 2007), D.E. 123;
3. defendants affiliated with Sprint, Master Consolidated Sprint Complaint, *id.* (Jan. 16, 2007), D.E. 124;
4. defendants affiliated with Verizon, Master Consolidated Verizon Complaint, *id.* (Jan. 16, 2007), D.E. 125; and
5. defendants affiliated with BellSouth, Master Consolidated BellSouth Complaint, *id.* (Jan. 16, 2007), D.E. 126.

4459. Opinion, *Tyler v. AT&T*, No. 8:06-cv-523 (D. Neb. Aug. 30, 2006), D.E. 18 (finding that the complaint stated no facts and claimed no relief), *sum. aff'd*, Judgment, *Tyler v. AT&T*, No. 06-4174 (8th Cir. Feb. 28, 2007); *see* Amended Complaint, *Tyler*, No. 8:06-cv-523 (D. Neb. Aug. 4, 2006), D.E. 3; Notice of Removal, *id.* (July 31, 2006), D.E. 1.

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), D.E. 56.

(three cases),⁴⁴⁶⁰ the Eastern District of Missouri (one case),⁴⁴⁶¹ and the Middle District of Tennessee (one case).⁴⁴⁶²

In 2008, an additional action was filed in the Southern District of New York⁴⁴⁶³ and transferred to Judge Walker.⁴⁴⁶⁴

On June 3, 2009, Judge Walker dismissed all actions against telephone companies in light of immunity granted by Congress for these cases.⁴⁴⁶⁵ On December 29, 2011, in thirty-three consolidated appeals, the court of appeals affirmed.⁴⁴⁶⁶ Finding that the complaints also included claims against the government, the court remanded a case originating in the Northern District of Georgia and a case originating in the Southern District of New York.⁴⁴⁶⁷

4460. Notice of Voluntary Dismissal, *Phillips v. BellSouth Corp.*, No. 1:06-cv-918 (D.D.C. May 25, 2006), D.E. 3; Notice of Voluntary Dismissal, *Ludman v. AT&T Inc.*, No. 1:06-cv-917 (D.D.C. May 25, 2006), D.E. 3; Notice of Voluntary Dismissal, *Driscoll v. Verizon Commc'ns, Inc.*, No. 1:06-cv-916 (D.D.C. May 25, 2006), D.E. 2; see Complaint, *Phillips*, No. 1:06-cv-918 (D.D.C. May 15, 2006), D.E. 1; Complaint, *Ludman*, No. 1:06-cv-917 (D.D.C. May 15, 2006), D.E. 1; Complaint, *Driscoll*, No. 1:06-cv-916 (D.D.C. May 15, 2006), D.E. 1.

These cases were included in Verizon's original multidistrict consolidation motion. Verizon Transfer Brief at 4–7, *In re NSA*, No. 1791 (J.P.M.L. May 30, 2006), D.E. 1.

4461. Notice of Dismissal, *Mink v. AT&T Corp.*, No. 4:06-cv-831 (E.D. Mo. June 22, 2006), D.E. 11; Docket Sheet, *id.* (May 26, 2006) (noting dismissal on July 5, 2006); see Amended Notice of Removal, *id.* (June 12, 2006), D.E. 10; Notice of Removal, *id.* (May 26, 2006), D.E. 1. 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 4446.

4462. Order, *Potter v. BellSouth Corp.*, No. 3:06-cv-469 (M.D. Tenn. July 17, 2006), D.E. 16; Notice of Dismissal, *id.* (July 13, 2006), D.E. 15; see Complaint, *id.* (May 15, 2006), D.E. 1. This case was listed in the multidistrict consolidation order, *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006), but the transfer was vacated because the case was dismissed before transfer, Order Vacating Transfer, *In re NSA*, No. 1791 (J.P.M.L. Aug. 17, 2006), D.E. 53.

4463. Complaint, *McMurray v. Verizon Commc'ns Inc.*, No. 1:08-cv-6264 (S.D.N.Y. July 10, 2008), D.E. 1.

4464. Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 19, 2008), D.E. 144; see Docket Sheet, *McMurray v. Verizon Commc'ns Inc.*, No. 3:09-cv-131 (N.D. Cal. Jan. 12, 2009).

4465. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009); see *id.* at 956 (“On July 7, 2008, after months of election-year legislative exertion that received considerable press coverage, Congress enacted [the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.]”); see also *Jewel Dismissal Order*, *supra* note 4312, at 7; *Donohue*, *supra* note 4316, at 160–61.

4466. *In re NSA Telecomm. Records Litig.*, 671 F.3d 881 (9th Cir. 2011), *cert. denied*, 568 U.S. ___, 133 S. Ct. 421 (2012); see *In re NSA Telecomm. Records Litig.*, 669 F.3d 933 (9th Cir. 2012) (also rejecting an argument that the statutory amendment was an unconstitutional taking); see also *Court Upholds Law*, *supra* note 4334; *Williams*, *supra* note 4334.

4467. *In re NSA*, 671 F.3d at 904; N.D. Cal. *Anderson* Docket Sheet, *supra* note 4450 (action transferred from the Southern District of New York); N.D. Cal. *Lebow* Docket Sheet, *supra* note 4438 (action transferred from the Northern District of Georgia).

Suits by the Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.⁴⁴⁶⁸ The government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,⁴⁴⁶⁹ Missouri,⁴⁴⁷⁰ Maine,⁴⁴⁷¹ Connecticut,⁴⁴⁷² and Vermont.⁴⁴⁷³ Also filed in Missouri, and transferred to Judge Walker, was an action by the state against the telephone companies.⁴⁴⁷⁴

Judge John A. Woodcock, Jr., of the District of Maine, granted the government a preliminary injunction against the state of Maine's investigation.⁴⁴⁷⁵

The JPML consolidated all of these actions before Judge Walker,⁴⁴⁷⁶ who denied the government's motions for summary judgment on supremacy and for-

4468. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093 (N.D. Cal. 2009); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 895–96 (N.D. Cal. 2007) (denying summary judgment in the state cases); see Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, Portland Press Herald, Aug. 22, 2006, at A1 (reporting that Maine was the third state sued, following suits against Missouri and New Jersey); Judy Harrison, *Wiretaps Lawsuit Moved to California*, Bangor Daily News, Feb. 17, 2007, at 1 (reporting similar suits filed in Maine, Missouri, New Jersey, Connecticut, and Vermont).

4469. Complaint, *United States v. Farber*, No. 3:06-cv-2683 (D.N.J. June 14, 2006), D.E. 1; 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.

4470. Complaint, *United States v. Gaw*, No. 4:06-cv-1132 (E.D. Mo. July 25, 2006), D.E. 1; see Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006.

4471. *United States v. Adams*, 473 F. Supp. 2d 108, 112 (D. Me. 2007); Complaint, *United States v. Adams*, No. 1:06-cv-97 (D. Me. Aug. 21, 2006), D.E. 1; see Aull, *supra* note 4468; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

4472. Complaint, *United States v. Palermino*, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006), D.E. 1.

4473. Complaint, *United States v. Volz*, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006), D.E. 1.

4474. Notice of Removal, *Gaw v. AT&T Commc'ns of the Southwest Inc.*, No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006), D.E. 1; see *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093–94 (N.D. Cal. 2009); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 896–97 (N.D. Cal. 2007).

4475. *Adams*, 473 F. Supp. 2d 108.

4476. *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007); see *In re NSA*, 633 F. Supp. 2d at 896; Docket Sheet, *United States v. Volz*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007) (action transferred from Vermont); Docket Sheet, *United States v. Palermino*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007) (action transferred from Connecticut); Docket Sheet, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007) (action transferred from New Jersey); Docket Sheet, *United States v. Adams*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007) (action transferred from Maine); Docket Sheet, *United States v. Gaw*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007) (action transferred from the Eastern District of Missouri); Docket Sheet, *Clayton v. AT&T Commc'ns of the Southwest Inc.*, No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007) (action transferred from the Western District of Missouri); see also Harrison, *supra* note 4468.

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).

eign affairs grounds.⁴⁴⁷⁷ 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."⁴⁴⁷⁸ Judge Walker decided to await further guidance from the court of appeals in pending appeals before deciding the matter more precisely.⁴⁴⁷⁹

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.⁴⁴⁸⁰ The states did not appeal.⁴⁴⁸¹

Suits to Discover Secret Documents

On the day that the *New York Times* first reported on the warrantless wiretap program, the Electronic Privacy Information Center submitted requests under the Freedom of Information Act (FOIA) to four government agencies to obtain documents concerning the program.⁴⁴⁸² The ACLU and the National Security Archive Fund submitted similar requests four days later.⁴⁴⁸³ Disappointed by what was produced, the organizations sought relief in the U.S. District Court for the District of the District of Columbia, which assigned the cases to Judge Henry H. Kennedy, Jr.⁴⁴⁸⁴ On September 5, 2007, Judge Kennedy ruled that some of the withheld documents were properly withheld and some needed further justification to withhold.⁴⁴⁸⁵ On October 31, 2008, Judge Kennedy ruled additional documents properly withheld, but he also ruled that he needed to review in camera ten documents containing opinions by the Justice Department's Office of Legal Counsel (OLC) to determine whether they, or parts of them, should be dis-

4477. *In re NSA*, 633 F. Supp. 2d at 902–11.

4478. *Id.* at 912.

4479. *Id.*

4480. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009); see Donohue, *supra* note 4316, at 160–61.

4481. See Donohue, *supra* note 4316, at 161.

4482. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 62–63 (D.D.C. 2007); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 33–34 (D.D.C. 2006); Complaint at 3, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006), D.E. 1 [hereinafter *Elec. Privacy Info. Ctr. Complaint*].

4483. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 63; Complaint at 6, *ACLU v. Dep't of Justice*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006), D.E. 1 [hereinafter *D.D.C. ACLU Complaint*]; see Romero & Temple-Raston, *supra* note 4323, at 71.

4484. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; *D.D.C. ACLU Complaint*, *supra* note 4483; Docket Sheet, *ACLU*, No. 1:06-cv-214 (Feb. 7, 2006); *Elec. Privacy Info. Ctr. Complaint*, *supra* note 4482; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (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.

4485. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56.

closed.⁴⁴⁸⁶ Seventeen days later, the government lodged the documents for Judge Kennedy's review.⁴⁴⁸⁷ Because of Judge Kennedy's disability retirement late in 2011,⁴⁴⁸⁸ the cases were reassigned to Judge Royce C. Lamberth.⁴⁴⁸⁹

On July 10, 2009, inspectors general for the Departments of Defense and Justice, the CIA, the NSA, and the Director of National Intelligence released a report on the "President's Surveillance Program."⁴⁴⁹⁰ In response to arguments by plaintiffs concerning public disclosures in the report,⁴⁴⁹¹ the government agreed to review again four of the withheld OLC opinions.⁴⁴⁹² The government determined that two should remain withheld and, on March 21, 2011, filed redacted versions of the other two.⁴⁴⁹³ The filing included a substantially redacted version of a 108-page May 6, 2004, opinion by Assistant Attorney General Jack Goldsmith concluding that the warrantless wiretap program was legal.⁴⁴⁹⁴ Among the redactions was the program's name,⁴⁴⁹⁵ but in 2014 a less redacted version was released disclosing the name, "Stellar Wind."⁴⁴⁹⁶

Goldsmith's opinion advised that the September 18, 2001, Authorization for the Use of Military Force exempted the program from FISA restrictions, and if it did not then FISA was to that extent an unconstitutional infringement on the President's powers.⁴⁴⁹⁷

The March 21, 2011, filing also included a redacted November 2, 2001, opinion of at least twenty-one pages by Deputy Assistant Attorney General John Yoo from which the only portions not redacted were a handful of statements referring to the inapplicability of FISA to the program.⁴⁴⁹⁸

4486. *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.

4487. Notice of Lodging, *ACLU*, No. 1:06-cv-214 (D.D.C. Nov. 17, 2008), D.E. 42.

4488. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html (noting that Judge Kennedy "[a]ssumed senior status due to certified disability on November 18, 2011.").

4489. Reassignment, *ACLU*, No. 1:06-cv-214 (Dec. 15, 2011), D.E. 57; Reassignment, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Dec. 15, 2011), D.E. 84.

4490. PSP Report, *supra* note 4312; see Carrie Johnson & Ellen Nakashima, "Inappropriate" Secrecy Hurt Surveillance Effort, *Report Says*, Wash. Post, July 11, 2009, at A3; Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. Times, July 11, 2009, at A1.

4491. Plaintiffs' Supplemental Memorandum, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Sept. 15, 2009), D.E. 70.

4492. Stipulation, *id.* (Jan. 18, 2011), D.E. 79.

4493. Notice of Filing, *id.* (Mar. 21, 2011), D.E. 81 [hereinafter Mar. 21, 2011, *Elec. Privacy Info. Ctr.* Notice of Filing].

4494. *Id.*

4495. *Id.*

4496. www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf; see Charlie Savage, *Redactions in U.S. Memo Leave Doubts on Data Plan*, N.Y. Times, Sept. 7, 2014, at A17.

4497. *Elec. Privacy Info. Ctr.* Notice of Filing, *supra* note 4493.

4498. *Id.*

In light of declassifications following Snowden's 2013 disclosures, the government agreed to complete by July 21, 2014, another review of the documents for additional disclosures.⁴⁴⁹⁹ On March 31, however, Judge Lamberth held that the ten documents were properly withheld.⁴⁵⁰⁰

The Electronic Frontier Foundation, who filed the first action against telephone companies, filed a FOIA action against the Justice Department for release of the secret FISA court orders that the government claimed obviated the need for surveillance without warrants.⁴⁵⁰¹ The U.S. District Court for the District of the District of Columbia assigned the case to Judge Thomas F. Hogan,⁴⁵⁰² who on August 14, 2007, granted the government's motion for summary judgment, finding that the orders met FOIA's national defense, statutory, and law enforcement exemptions.⁴⁵⁰³

On August 9, 2007, the ACLU filed a motion directly with the FISA court that its orders on warrantless wiretapping be made public.⁴⁵⁰⁴ On August 16, the

4499. Status Report, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Feb. 24, 2014), D.E. 88.

4500. Opinion, *id.* (Mar. 31, 2014), D.E. 90, available at 2014 WL 1279280.

4501. Complaint, *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

4502. Docket Sheet, *id.*

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the United States Courts from October 2011 through June 2013. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; *New Administrative Office Director Named*, Third Branch, June 11, 2013, available at <http://news.uscourts.gov/new-administrative-office-director-named> (announcing the appointment of Judge John D. Bates as Judge Hogan's successor); *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, available at <http://news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary>.

4503. Opinion at 14–18, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Aug. 14, 2007), D.E. 17 [hereinafter *D.D.C. Elec. Frontier Found. Summary Judgment Opinion*]; see *Elec. Frontier Found. v. Dep't of Justice*, 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a 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) (2013).

4504. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007); see Dan Eggen, *Secret Court Asks for White House View on Inquiry*, Wash. Post, Aug. 18, 2007, at A3; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. Times, Aug. 18, 2007, at A10.

court's Presiding Judge Colleen Kollar-Kotelly issued an order that the government respond to the motion.⁴⁵⁰⁵ Judge Bates issued a public opinion on December 11 denying the motion.⁴⁵⁰⁶ 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.⁴⁵⁰⁷ Judge Bates rejected the ACLU's suggestion that the court determine what need not be withheld to protect properly classified information.

[T]he proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review. The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable.⁴⁵⁰⁸

On May 28, 2014, the *New York Times* filed a FOIA action for additional declassification, in light of the 2013 Snowden revelations, of inspectors general reports on surveillance programs.⁴⁵⁰⁹ A companion action filed on June 3 sought the release of various filings in the FISA court.⁴⁵¹⁰

Challenge: Classified Evidence

The Portland case against the government concerned an evidentiary document so secret that it could be seen only by judges, and it had to be stored in a sensitive

4505. Scheduling Order, *In re Motion for Release of Court Records*, No. Misc. 07-1 (FISA Ct. Aug. 16, 2007); see Eggen, *supra* note 4504; Lichtblau, *supra* note 4504.

4506. *In re Court Records*, 526 F. Supp. 2d 484; see I Kris & Wilson, *supra* note 4320, at 130–34; 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.

4507. *In re Court Records*, 526 F. Supp. 2d at 488; see Williamson, *supra* note 4506.

4508. *In re Court Records*, 526 F. Supp. 2d at 496.

4509. Complaint, N.Y. Times Co. v. U.S. Dep't of Justice, No. 1:14-cv-3776 (S.D.N.Y. May 28, 2014), D.E. 2.

4510. Complaint, N.Y. Times Co. v. U.S. Dep't of Justice, No. 1:14-cv-3948 (S.D.N.Y. June 3, 2014), D.E. 2.

Two redacted FISA court opinions were released in response to this suit on January 26, 2015. Opinion, No. ____ (FISA Ct. Aug. 27, 2007); Opinion, No. ____ (FISA Ct. May 31, 2007); <https://s3.amazonaws.com/s3.documentcloud.org/documents/1509488/nyt-savage-foia-fisc-may-august-2007-orders.pdf> (both opinions); see Charlie Savage, *Collection of Foreigners' Data Began Before Congress Backed It, Papers Show*, N.Y. Times, Jan. 28, 2015, at 13.

compartmented information facility (SCIF).⁴⁵¹¹ Government attorneys would not even disclose whether they were cleared to see it.

Judge King, District of Oregon

The plaintiffs attempted to file under seal a classified document inadvertently disclosed to them in an asset-freezing proceeding.⁴⁵¹² They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."⁴⁵¹³ More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.⁴⁵¹⁴

A government security officer reviewed the document in chambers and determined that it contained "sensitive compartmented information" (SCI), which requires more stringent storage and handling procedures than ordinary top secret information,⁴⁵¹⁵ so it needed to be stored in a SCIF.⁴⁵¹⁶

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.⁴⁵¹⁷ Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.⁴⁵¹⁸ The government argued that creating a SCIF for the court would be infeasible because of the time and expense required.⁴⁵¹⁹ So it was agreed that the document would be sent to the Western District of Washington's U.S. Attorney's SCIF in Seattle.⁴⁵²⁰

4511. See Robert Timothy Reagan, *Classified Information in Federal Court*, 53 Vill. L. Rev. 889, 911–938 (2008); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23* (Federal Judicial Center, 2d ed. 2013) [hereinafter *Keeping Government Secrets*] (describing SCIFs).

4512. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); In Camera Inspection Motion, *Al-Haramain Islamic Found. v. Bush*, 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 2; see Green, *supra* note 4373; Green, *U.S. Attacks Lawsuit*, *supra* note 4371; Liptak, *supra* note 4325.

4513. Interview with Hon. Garr M. King, Feb. 14, 2007; see In Camera Inspection Motion, *supra* note 4512; see also Keefe, *supra* note 4371, at 31.

4514. Interview with Hon. Garr M. King, Feb. 14, 2007; see *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Transcript, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21, 2006, filed Jan. 5, 2007), D.E. 98 [hereinafter *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript], *also filed as* Attach. C, Government Brief, *id.* (Apr. 14, 2006), D.E. 24; see also Liptak, *supra* note 4322; Liptak, *supra* note 4325.

4515. See Reagan, *Keeping Government Secrets*, *supra* note 4511, at 3.

4516. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 4514; Interview with Hon. Garr M. King, Feb. 14, 2007; see *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Government Lodging Reply at 4, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006); see also Keefe, *supra* note 4371, at 31; Liptak, *supra* note 4325.

4517. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 4514; Interview with Hon. Garr M. King, Feb. 14, 2007.

4518. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 4514; Interview with Hon. Garr M. King, Feb. 14, 2007; see Tim Fought, *Mystery Document Headed to Seattle*, *Seattle Times*, Mar. 24, 2006, at B5.

4519. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 4514.

4520. *Id.*; see Fought, *supra* note 4518; Keefe, *supra* note 4371, at 31.

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.⁴⁵²¹ 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.⁴⁵²²

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.⁴⁵²³ 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.”⁴⁵²⁴ 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.⁴⁵²⁵ 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.⁴⁵²⁶ 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.⁴⁵²⁷ 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.⁴⁵²⁸

The government said that it might be necessary to purge the plaintiffs’ attorneys’ computers of data associated with their declaration of what they remember about the classified document.⁴⁵²⁹

Although he saw the classified evidentiary document,⁴⁵³⁰ Judge King was careful not to rely on its contents in his ruling against dismissal.⁴⁵³¹ Judge King granted the government’s motion to deny the plaintiffs access to it, but he said that the

4521. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Hon. Garr M. King, Feb. 14, 2007.

4522. Transcript at 32–33, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006, filed Jan. 5, 2007), D.E. 99 [hereinafter *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript], also filed as Attach. 1, Government Lodging Reply, *supra* note 4516; see Liptak, *supra* note 4325.

4523. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1229 (granting the government’s motion); Government Motion, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006), D.E. 39, 40.

4524. Plaintiffs’ Response at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006), D.E. 49.

4525. Interview with Hon. Garr M. King, Feb. 14, 2007.

4526. *Id.*

4527. *Id.*

4528. *Id.*

4529. *Id.*; see Liptak, *supra* note 4325.

4530. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 4514; see Green, *Feds’ Stance*, *supra* note 4371.

4531. *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”).

plaintiffs could file in camera affidavits “attesting to the contents of the document from their memories,” and that the government should consider providing the plaintiffs with access to a redacted version of the document under a protective order.⁴⁵³²

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.⁴⁵³³ The government said that the identities of persons with clearance to see such documents was a state secret.⁴⁵³⁴ On one occasion, the judge asked a government attorney before him if he had such clearance.⁴⁵³⁵ The attorney responded that he did not think he was permitted to answer that question.⁴⁵³⁶ 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.⁴⁵³⁷

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Members of the appellate panel also reviewed the classified document in camera, pursuant to procedures established by classified information security officers.⁴⁵³⁸

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

4532. *Id.* at 1229; see Liptak, *supra* note 4322; Liptak, *supra* note 4325; MacLean, *supra* note 4371.

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 4325. In addition, it appears that a reporter for *The Washington Post* reviewed the document. *Id.*; MacLean, *supra* note 4371.

4533. Interview with Hon. Garr M. King, Feb. 14, 2007.

4534. *Id.*; see Liptak, *supra* note 4325.

4535. Interview with Hon. Garr M. King, Feb. 14, 2007.

4536. *Id.*

4537. *Id.*

4538. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007); see Reagan, Keeping Government Secrets, *supra* note 4511, at 21–22 (providing information about classified information security officers).

preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.⁴⁵³⁹

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.⁴⁵⁴⁰

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.⁴⁵⁴¹

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.⁴⁵⁴²

The government cleared two attorneys within the court's deadline,⁴⁵⁴³ but the government informed the court that whether the attorneys could see the classified

4539. *Id.* at 1203.

4540. *Id.* at 1204.

4541. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089–90 (N.D. Cal. 2009); *see Johnson, supra* note 4380.

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), D.E. 10.

4542. *In re NSA*, 595 F. Supp. 2d at 1089.

4543. Government's Response to Court Orders at 1, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Feb. 27, 2009), D.E. 576; Plaintiffs' Supplemental Case Management Statement at 1, *id.* (Feb. 18, 2009), D.E. 563 (noting that the attorneys were informed of their clearance on February 12, 2009); *see Johnson, supra* note 4380.

document was a matter for the Executive Branch to decide, and the Executive Branch decided that the attorneys still could not see the document.⁴⁵⁴⁴

On May 22, Judge Walker issued an order to show cause why he should not rule in the plaintiffs' favor as to liability.⁴⁵⁴⁵ On June 5, Judge Walker continued his order to show cause and instead ordered briefing on summary judgment for plaintiffs against the government.⁴⁵⁴⁶

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.⁴⁵⁴⁷

Judge Walker granted the plaintiffs summary judgment on March 31, 2010, because they could present publicly available evidence of surveillance, and the government presented no evidence of surveillance warrants.⁴⁵⁴⁸ On August 7, 2012, the court of appeals ruled that the government was protected from liability by sovereign immunity.⁴⁵⁴⁹

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.⁴⁵⁵⁰

The exemption claims were classified and submitted ex parte.⁴⁵⁵¹ 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.⁴⁵⁵²

4544. *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182, 1184, 1191 (N.D. Cal. 2010); Government's Response to Court Orders at 3–12, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Nov. 5, 2008), D.E. 509; see Transcript, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Sept. 23, 2009, filed Feb. 22, 2010), D.E. 114 (“Mr. Coppolino [for the government]: There is no more direct abrogation of the state secrets privilege than to provide the very information subject to the privilege to counsel for the party that is seeking it.”); see also *Al-Haramain Remedies Order*, *supra* note 4331, at 39–40 (“defendants disobeyed direct court orders to negotiate an appropriate protective order and to give plaintiffs’ counsel access to some of the information once they had obtained security clearances”).

4545. Order to Show Cause re Liability, *Al-Haramain Islamic Found.*, No. 3:07-cv-109 (N.D. Cal. May 22, 2009), D.E. 90, available at 2009 WL 1468792; see Carrie Johnson, *Showdown Looming on “State Secrets,”* Wash. Post, May 26, 2009, at A4.

4546. Briefing Order, *Al-Haramain Islamic Found.*, No. 3:07-cv-109 (N.D. Cal. June 5, 2009), D.E. 96; see Carrie Johnson, *Judge Revisits Warrantless Eavesdropping*, Wash. Post, June 4, 2009, at A4.

4547. Briefing Order, *supra* note 4546, at 2.

4548. *In re NSA*, 700 F. Supp. 2d 1182; *Al-Haramain Remedies Order*, *supra* note 4331 (awarding damages and attorney fees); see Savage & Risen, *supra* note 4381.

4549. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012).

4550. Interview with Hon. Henry H. Kennedy, Jr., Nov. 12, 2008.

4551. *Id.*

Review of the exemption claims required many hours of Judge Kennedy's time over several days without the assistance of staff.⁴⁵⁵³ Doors were closed, windows were covered, and the documents were under the judge's immediate control at all times.⁴⁵⁵⁴ The documents were not stored in chambers; classified information security officers, whose offices and storage facilities, at the time, were a few blocks away from the federal courthouse in the District of Columbia, delivered and retrieved the documents on request.⁴⁵⁵⁵

In denying the government's initial motion for summary judgment, Judge Kennedy expressed frustration that he was denied assistance of law clerks to review classified declarations supporting the motion:

Without expressing approval or disapproval of DOJ's use of these *ex parte* declarations—and without opining regarding whether the declaration redactions are legitimately classified (beyond a measure of skepticism as to some portions thereof)—the court does express substantial frustration with one aspect of the Executive's approach to this information: In part for purposes of this case, this judicial officer had his law clerk cleared through an extensive, high-level background investigation so that the clerk would have access to classified information, and specifically to the documents lodged in this case. Notwithstanding the clearance obtained, it has become apparent that the Executive will not grant the clerk access to the classified declarations filed here, at least not in the absence of vociferous resistance from this judicial officer. This stance is baffling and has been significantly disruptive to the court's review of this matter.⁴⁵⁵⁶

Judge Hogan, District of the District of Columbia

Although Judge Hogan would later join the FISA court, he was not on that court when it issued orders that became the object of the Electronic Frontier Foundation's 2007 FOIA action.⁴⁵⁵⁷ 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.⁴⁵⁵⁸ 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.⁴⁵⁵⁹

Challenge: Classified Arguments

The government regarded the classified arguments in these cases as so secret that it would not permit even attorneys or law clerks with security clearances to see

4552. *Id.*

4553. *Id.*

4554. *Id.*

4555. *Id.*

4556. *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 4484 (quoting text).

4557. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

4558. *Id.*

4559. *Id.*

them.⁴⁵⁶⁰ President Bush personally decided who was cleared to see documents related to the surveillance programs at issue in this litigation.⁴⁵⁶¹ 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.⁴⁵⁶²

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.⁴⁵⁶³ In response, the government lodged a classified declaration for ex parte in camera review.⁴⁵⁶⁴ 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.”⁴⁵⁶⁵ 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

4560. See Liptak, *supra* note 4325.

In addition to submitting classified arguments in the cases described here, the government offered to submit classified arguments to support its motion to enjoin Maine’s investigation of Verizon’s assistance in government surveillance if the court would not grant its motion on the basis of unclassified arguments. TRO Brief at 13 n.3, *United States v. Adams*, No. 1:06-cv-97 (D. Me. Feb. 6, 2007). Because the court did grant the government’s motion on the basis of unclassified arguments, the government did not present classified arguments. See *United States v. Adams*, 473 F. Supp. 2d 108 (D. Me. 2007).

4561. PSP Report, *supra* note 4312, at 10 (“the President made the decision on all requests to ‘read in’ any non-operational persons, including [Department of Justice] officials”); see Lichtblau, *supra* note 1361.

4562. Aid, *supra* note 4312, at 288.

4563. *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 4373 (D.E. 7, March 17, 2006, filing of the motion); see Green, *U.S. Attacks Lawsuit*, *supra* note 4371.

4564. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006), D.E. 25; see Green, *U.S. Attacks Lawsuit*, *supra* note 4371.

The government argued, “On the basis of the public record, therefore, the Oregonian’s Motion to Unseal Records (Mar. 17, 2006) [Docket Nos. 7 & 8] should be denied. Should the Court require additional detail regarding the sealed classified document in this case, however, such detail can only be conveyed in a classified format, which must be reviewed ex parte and in camera, and the Court’s review of Defendants’ classified declaration is appropriate in these circumstances.” Government Lodging Reply, *supra* note 4516, at 3.

4565. Government Lodging Reply, *supra* note 4516, at 2 n.1; see Notice of Lodging of Superseding Material, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006).

understand that in issues involving national security that may be necessary.”⁴⁵⁶⁶ Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian’s motion,⁴⁵⁶⁷ which Judge King denied.⁴⁵⁶⁸

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.⁴⁵⁶⁹ 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.⁴⁵⁷⁰ Ultimately he decided to review the classified materials⁴⁵⁷¹ and permit the case to proceed.⁴⁵⁷²

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.⁴⁵⁷³ The procedure for Judge King’s review of materials in the locked bag was to request that the bag be brought to his chambers, where Judge King would review the materials in private.⁴⁵⁷⁴ 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.⁴⁵⁷⁵

Judge King observed that it is difficult to handle a case if there is material that a law clerk cannot see.⁴⁵⁷⁶ He has to be careful what he tells her, and she cannot help him with the material she cannot see.⁴⁵⁷⁷ 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.⁴⁵⁷⁸

4566. *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript, *supra* note 4522.

4567. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

4568. *Id.* at 1218, 1232–33.

4569. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006), D.E. 69 (providing notice of the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006), D.E. 56 (providing notice of the lodging of (1) a classified brief, (2) a classified declaration by the director of national intelligence, (3) a classified declaration by the director of the NSA, and (4) a classified opposition to the plaintiffs’ pending motion to compel discovery).

4570. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 4373 (D.E. 71).

4571. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 4373 (D.E. 77).

4572. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 4322.

4573. Interview with Hon. Garr M. King, Feb. 14, 2007.

4574. *Id.*

4575. *Id.*; Letter from Carra Sahler, law clerk to Hon. Garr M. King, Apr. 23, 2007.

4576. Interview with Hon. Garr M. King, Feb. 14, 2007.

4577. *Id.*

4578. *Id.*

Because of subsequent cases before Judge King, his law clerks and court reporter later obtained security clearances. Interview with Hon. Garr M. King, Sept. 19, 2012; *see supra* “Ashland and Moscow.”

Judge Taylor, Eastern District of Michigan

In Detroit, on June 12, 2006, Judge Taylor heard arguments on the ACLU's motion for partial summary judgment against the government.⁴⁵⁷⁹ 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.⁴⁵⁸⁰ 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."⁴⁵⁸¹ Judge Taylor elected to wait until after the hearing to review the classified documents,⁴⁵⁸² but she considered them in issuing the injunction.⁴⁵⁸³

Judge Taylor reviewed classified documents three times.⁴⁵⁸⁴ 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.⁴⁵⁸⁵ The security officer told Judge Taylor that she could take notes, but the security officer would have to take them back with her.⁴⁵⁸⁶ So the judge decided not to take notes.⁴⁵⁸⁷

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

4579. E.D. Mich. *ACLU* Docket Sheet, *supra* note 4359; *see* Plaintiffs' Partial Summary Judgment Motion, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006), D.E. 4; *see also* David Ashenfelter, *Battle Over Wiretaps to Begin Today*, *Detroit Free Press*, June 12, 2006, at 1; Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, *N.Y. Times*, June 13, 2006, at A17; Niraj Warikoo, *Wiretap Suit All About Power*, *Detroit Free Press*, June 13, 2006, at 1.

4580. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006), D.E. 36 [hereinafter May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging]; Motion to Dismiss at 4 n.3, *id.* (May 26, 2006), D.E. 34; *see* Liptak, *supra* note 4579; Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, *L.A. Times*, June 12, 2006, at 5.

Strictly speaking, the defendants' brief supported a separate motion and was not a response to the plaintiffs' motion, but the defendants said, "Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state-secrets privilege—were the appropriate response to Plaintiffs' Motion." Defendants' Motion for Clarification at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 2, 2006), D.E. 45; *see* Ashenfelter, *supra* note 4579.

4581. May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging, *supra* note 4580 at 2.

4582. Transcript, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 12, 2006, filed July 7, 2006), D.E. 68; *see* Liptak, *supra* note 4579 (reporting that Judge Taylor did not review the classified documents before the hearing).

4583. *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*").

4584. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006; *see* Notice of Lodging, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Sept. 1, 2006), D.E. 82; Notice of Lodging, *id.* (June 30, 2006), D.E. 67; May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging, *supra* note 4580.

4585. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006.

4586. *Id.*

4587. *Id.*

sealed versions of briefs to protect classified information.⁴⁵⁸⁸ 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.”⁴⁵⁸⁹

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.⁴⁵⁹⁰ The judges worked out with the parties procedures for the judges’ review of classified information.⁴⁵⁹¹ 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.⁴⁵⁹² The meeting was transcribed, and the transcript was sealed.⁴⁵⁹³ 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.⁴⁵⁹⁴ One result of the meeting was the government’s agreement to file a list of classified documents presented to the judges,⁴⁵⁹⁵ a list which the government updated upon each additional lodging.⁴⁵⁹⁶

Approximately two weeks before oral argument, classified information security officers delivered to the judges’ chambers the government’s unredacted opening and reply briefs.⁴⁵⁹⁷

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 FISA court one week earlier.⁴⁵⁹⁸ Five days before this announcement, and two days after the FISA court orders were issued, the government lodged classified materials for the

4588. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 46, October 11, 2006, order).

4589. *Id.* (D.E. 54, October 16, 2006, notice; D.E. 117, December 5, 2006, notice).

4590. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4591. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 56, October 19, 2006, letter from the court to the government concerning the filing of classified information with the court; D.E. 80, November 1, 2006, motion by the government for approval of proposed procedures regarding classified information).

4592. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 4335.

4593. Interview with Hon. Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

4594. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 4335.

4595. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4596. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 143, January 12, 2007, notice of lodging; D.E. 153, January 25, 2007, notice of lodging; D.E. 166, April 9, 2007, notice of lodging; D.E. 176, June 11, 2007, notice of lodging).

4597. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; Interview with Dep’t of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4598. *E.g.*, Notice of Attorney General’s Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Jan. 17, 2007), D.E. 127; *see* Eggen, *supra* note 4335; Lichtblau & Johnston, *supra* note 4335.

court's review.⁴⁵⁹⁹ Security officers brought these materials to the judges at the same time as the briefs.⁴⁶⁰⁰

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 that he had completed his review.⁴⁶⁰¹ The officer asked Judge Gilman to close his window blinds and close the door to his office.⁴⁶⁰² 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.⁴⁶⁰³ Judge Gilman reviewed the materials privately in his office.⁴⁶⁰⁴

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.⁴⁶⁰⁵ Judge Batchelder, who is the only tenant in her small-town building, was not asked to close her blinds.⁴⁶⁰⁶

No one on the judges' staffs saw the classified materials.⁴⁶⁰⁷ Knowing that they would not be able to keep them, none of the judges took notes.⁴⁶⁰⁸ 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.⁴⁶⁰⁹

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.⁴⁶¹⁰ The judges reviewed the classified submission in Cincinnati on the day of oral argument.⁴⁶¹¹

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,⁴⁶¹² and within days of these lodgings,

4599. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 143); *see* *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

4600. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4601. Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007.

4602. *Id.*

4603. *Id.*

4604. *Id.*

4605. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4606. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007.

4607. *Id.*; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4608. 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.

4609. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4610. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 151, January 25, 2007, Supplemental Submission; D.E. 153, notice of lodging); *see* Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. Times, Jan. 27, 2007, at 14.

4611. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4612. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 166, 176).

classified information security officers delivered the classified submissions to the judges' chambers.⁴⁶¹³

There were no oral ex parte communications with government attorneys in this appeal.⁴⁶¹⁴

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.⁴⁶¹⁵

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.⁴⁶¹⁶

With one exception, this was the first time any of these judges had been called upon to review classified information.⁴⁶¹⁷ 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.⁴⁶¹⁸ The secrets in that case were handled by ordinary sealing procedures.⁴⁶¹⁹

Judge Lynch, Southern District of New York

In the Manhattan case against the government, as in the Detroit case, the government lodged, in a secure Washington, D.C., location for the court's ex parte in camera review, a classified brief and classified declarations supporting a motion to dismiss.⁴⁶²⁰ Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,⁴⁶²¹ but Judge Lynch did not

4613. 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.

4614. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4615. *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.").

4616. 6th Cir. *ACLU* Docket Sheet, *supra* note 4361 (D.E. 184, July 6, 2007, denial of the motion); *see* Weinstein, *supra* note 4610 (reporting the filing of the motion).

4617. 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 to 1985 and a district judge 1985 to 1991; 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 to 2002. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

4618. *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.

4619. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4620. Government Brief at 4 n.3, *Ctr. for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006), D.E. 28; Notice of Lodging, *id.* (May 26, 2006), D.E. 31.

4621. Interview with Hon. Gerard E. Lynch, May 16, 2007.

review the classified lodgings before the hearing on the motion.⁴⁶²² He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information during the hearing.⁴⁶²³ The case was transferred to the Northern District of California as part of multidistrict consolidation before Judge Lynch ruled on the motion,⁴⁶²⁴ and he never read the classified lodgings.⁴⁶²⁵

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.⁴⁶²⁶ In advance of this ruling, a classified information security officer brought from Washington classified arguments supporting the motion.⁴⁶²⁷ Judge Kennelly reviewed the documents in private while the security officer waited outside his office.⁴⁶²⁸ 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.⁴⁶²⁹ When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.⁴⁶³⁰

Judge Kennelly's opinion states that he did not rely on classified submissions in reaching this decision.⁴⁶³¹ His opinion, however, describes how he reviewed the submissions:

Only one copy of the materials was provided, and following our review, the materials were removed to a secure location outside the Court's control (we reviewed the materials again on later occasions under similar conditions). The court was not permitted to discuss the materials with other members of our staff, and notes that we took were removed and kept in a secure location outside the court's control. We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera, ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The court asked the government to provide further information about certain matters in the clas-

4622. *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 4368; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4623. *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 4368; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4624. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 4317; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4625. Interview with Hon. Gerard E. Lynch, May 16, 2007.

4626. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 4321; McLure, *supra* note 4316; Robinson, *supra* note 4321.

4627. 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), D.E. 50.

4628. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4629. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

4630. *Id.*

4631. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

sified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.⁴⁶³²

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.⁴⁶³³ 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.⁴⁶³⁴

The night before the classified proceeding, the judge's chambers were swept for surveillance devices.⁴⁶³⁵ 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.⁴⁶³⁶ During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.⁴⁶³⁷

Judge Walker, Northern District of California

Judge Walker found his experience reviewing classified *ex parte* arguments very unpleasant.⁴⁶³⁸ *Ex parte* presentations deprive the judge of the perspective and focus that usually comes with an adversary proceeding.⁴⁶³⁹ Classified information is often presented without sufficient context to understand why it is classified or what injury to national security is at stake, so it can be hard to know what to make of it.⁴⁶⁴⁰

Following the 2013 Snowden revelations, and ensuing political and litigation events, the government partially declassified, from time to time, previously classified filings in the cases before Judge Walker at first and then before Judge White.⁴⁶⁴¹

In the first San Francisco action against AT&T, the government intervened and unsuccessfully argued that the state-secrets privilege required dismissal of the

4632. *Id.* at 902 n.2.

4633. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4634. *Id.*

4635. *Id.*

4636. *Id.*

4637. *Id.*

4638. Interview with Hon. Vaughn R. Walker, Feb. 23, 2011.

4639. *Id.*

4640. *Id.*

4641. Notice, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 21, 2014), D.E. 209; Government Response, *id.* (Mar. 17, 2014), D.E. 193; Dec. 20, 2013, Notice, *id.* (Dec. 20, 2013), D.E. 172; Press Release, Office of the Dir. of Nat'l Intelligence, May 6, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1064-dni-announces-the-release-of-additional-documents-related-to-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-sept-11?tmpl=component&format=pdf; Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 21, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/991-dni-announces-the-declassification-of-the-existence-of-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11,-2001?tmpl=component&format=pdf.

case.⁴⁶⁴² The government sought to support its argument with classified documents.⁴⁶⁴³ An attorney for the government described the procedure for judicial review of classified documents as follows:

The classified brief and the classified declarations on which it relies are available, they are in the possession of a group called the Litigation Security Section of the Department of Justice, which is a subgroup of something called the Security and Emergency Program Staff. The brief, those materials, are in their possession. And when your Honor would like to look at those materials, you just call them up and they fly them out to San Francisco, allow you to take a look at them. When you're done with them, they take the materials back. They're maintained in a secure facility, just like all other documents relating to these materials would be.⁴⁶⁴⁴

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."⁴⁶⁴⁵

Judge Walker reviewed the government's classified briefing in his chambers.⁴⁶⁴⁶ A security officer brought the documents to his chambers in a sealed

4642. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); Motion to Dismiss, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 124; First U.S. Statement of Interest, *id.* (Apr. 28, 2006), D.E. 82; see Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, San Jose Mercury News, May 14, 2006, at A1; John Markoff, *U.S. Steps Into Wiretap Suit Against AT&T*, N.Y. Times, Apr. 29, 2006, at A9; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. Times, May 14, 2006, at 4.

4643. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 125; see *Hepting*, 439 F. Supp. 2d at 979; see also Carey, *supra* note 4642.

4644. Transcript, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006, filed May 22, 2006), D.E. 138, also filed in part as Attach., Notice of Motion for Transfer and Coordination, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 31, 2006), D.E. 4.

4645. Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 6, 2006), D.E. 171, available at 2006 WL 1581965; see *Hepting*, 439 F. Supp. 2d at 980; see also Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. Chron., June 8, 2006, at A4.

"Article III federal judges . . . , by virtue of their Constitutional office, may receive access to classified information in order to address questions before them." U.S. Response to Order to Show Cause, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006), D.E. 315.

4646. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; see Classified Negroponte Declaration, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 12, 2006), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 222 (redacted); Classified Alexander Declaration, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 12, 2006), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 224 (redacted).

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), D.E. 246; see Classified Negroponte Declaration, *id.* (June 16, 2006), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 223 (redacted); Classified Black Declaration, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 16, 2006), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 226 (redacted).

pouch.⁴⁶⁴⁷ Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.⁴⁶⁴⁸ Judge Walker took some notes, which the security officer took back with the classified documents.⁴⁶⁴⁹

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.⁴⁶⁵⁰ In part because of time constraints, instead of bringing classified documents to Judge Walker, a classified information security officer arranged for an FBI agent to bring Judge Walker to an FBI SCIF in the same building as the courthouse, where Judge Walker received a secure fax containing the classified documents for his review, and then he shredded the fax.⁴⁶⁵¹

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.⁴⁶⁵² Again a classified information security officer brought them to his chambers, where Judge Walker reviewed them in private.⁴⁶⁵³

On fourteen additional occasions, the government lodged classified documents.⁴⁶⁵⁴

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.⁴⁶⁵⁵

4647. 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).

4648. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

4649. *Id.*

4650. *Id.*; *see* Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006), D.E. 316.

4651. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4652. Notice of Lodging, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Jan. 13, 2007), D.E. 120; Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4653. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4654. Notices of Lodging, *In re* NSA, No. 3:06-md-1791 (N.D. Cal. Oct. 30, 2009), D.E. 681 to 683; Notices of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009), D.E. 19 to 21; Notices of Lodging, *In re* NSA, No. 3:06-md-1791 (N.D. Cal. Feb. 27, 2009), D.E. 578 to 581; Notice of Lodging, *id.* (Nov. 5, 2008), D.E. 510; Notice of Lodging, *id.* (Sept. 19, 2008), D.E. 470; Notice of Lodging, *id.* (Mar. 14, 2008), D.E. 433; Notice of Lodging, *id.* (Oct. 25, 2007), D.E. 387; Notice of Lodging, *id.* (Aug. 3, 2007), D.E. 341; Notices of Lodging, *id.* (June 8, 2007), D.E. 255 to 257; Notices of Lodging, *id.* (May 25, 2007), D.E. 309, 310; Notices of Lodging, *id.* (Apr. 21, 2007), D.E. 296 to 298; Notice of Lodging, *id.* (Apr. 9, 2007), D.E. 239; Notice of Lodging, *id.* (Mar. 13, 2007), D.E. 195; Notice of Lodging, *id.* (Feb. 22, 2007), D.E. 176.

4655. Notice of Lodging, *id.* (Feb. 22, 2007), D.E. 176.

The next lodging supported a scheduling motion.⁴⁶⁵⁶ 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.⁴⁶⁵⁷

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 were lodging or why.⁴⁶⁵⁸ The government responded that "nothing more may be said without compromising the Government's compelling interest in protecting the Nation's security."⁴⁶⁵⁹

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.⁴⁶⁶⁰ 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.⁴⁶⁶¹ Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.⁴⁶⁶²

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn⁴⁶⁶³ and Manhattan.⁴⁶⁶⁴ Another

4656. Notice of Lodging, *id.* (Mar. 13, 2007), D.E. 195.

4657. Scheduling Motion, *id.* (Mar. 12, 2007), D.E. 194; 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 NSA, to be Negroponte's replacement).

4658. Letter, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 13, 2007), D.E. 246.

4659. Government Response to Plaintiffs' Letter, *id.* (Apr. 27, 2007), D.E. 267.

4660. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

4661. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 21, 2007), D.E. 255 to 257 (a separate notice for each document); see Government Motion, *id.* (Apr. 20, 2007), D.E. 253, 254 (redacted brief and declarations); see Classified McConnell Declaration, *id.* (Apr. 20, 2007), filed in *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 221 (redacted); Classified Alexander Declaration, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 20, 2007), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 225 (redacted).

4662. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4663. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 296 to 298; see Government Motion, *id.* (May 25, 2007), D.E. 295 (redacted brief and declarations); see Classified Alexander Declaration, *id.* (May 25, 2007), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-2 (redacted); Classified McConnell Declaration, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 24, 2007), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-1 (redacted).

4664. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. June 8, 2007), D.E. 309, 310; Manhattan Action Dismissal Order, *supra* note 4333, at 5-6; see Government's Supplemental Motion, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 295 (redacted brief).

lodging was a classified reply brief supporting state-secrets motions to dismiss in several other cases.⁴⁶⁶⁵

The government lodged a classified declaration in opposition to the plaintiffs' motion for an order requiring defendants to preserve evidence.⁴⁶⁶⁶ 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.⁴⁶⁶⁷ The classified declaration specified "how potentially discoverable information, if any, is being preserved."⁴⁶⁶⁸ Determining that the public briefing showed that the plaintiffs were entitled to a preservation order, Judge Walker issued the order without stating whether or not he reviewed the government's classified brief and declaration.⁴⁶⁶⁹

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.⁴⁶⁷⁰

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.⁴⁶⁷¹

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.⁴⁶⁷² On November 5, 2008, the government both lodged a classified reply⁴⁶⁷³ and filed a public redacted reply⁴⁶⁷⁴

4665. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Aug. 3, 2007), D.E. 341.

4666. Notice of Lodging, *id.* (Oct. 25, 2007), D.E. 387; see Classified Declaration, *id.* (Oct. 25, 2007), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 17, 2014), D.E. 193-1 (redacted).

4667. Preservation Opposition Brief, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Oct. 25, 2007), D.E. 386; see Classified Preservation Opposition Brief, *id.* (Oct. 25, 2007), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 17, 2014), D.E. 193-1 (redacted).

4668. Preservation Opposition Brief, *supra* note 4667, at 2.

4669. Preservation Order, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Nov. 6, 2007), D.E. 393.

4670. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Mar. 14, 2008), D.E. 18; Motion to Dismiss, *id.* (Mar. 14, 2008), D.E. 17.

4671. Transcript, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Sept. 12, 2008, filed Nov. 6, 2008), D.E. 512.

4672. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 957 (N.D. Cal. 2009); Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Sept. 19, 2008), D.E. 470; see Classified Certification, *id.* (Sept. 19, 2008), filed in *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 219 (redacted).

4673. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Nov. 5, 2008), D.E. 510.

4674. Reply, *id.* (Nov. 5, 2008), D.E. 509.

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.⁴⁶⁷⁵

Subsequently, the government lodged classified declarations in conjunction with case management statements.⁴⁶⁷⁶ Later, the government lodged classified briefs and classified declarations supporting motions for dismissal of the actions against the government originally filed in San Francisco and Brooklyn.⁴⁶⁷⁷

No one on Judge Walker's staff saw any of the classified documents.⁴⁶⁷⁸ Judge Walker's career law clerk obtained a security clearance, but the classified warrantless wiretap briefs were for judges' eyes only.⁴⁶⁷⁹ The law clerk's clearance allowed her to transport classified briefings between the FBI's SCIF and Judge Walker's chambers.⁴⁶⁸⁰

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.⁴⁶⁸¹ He would have preferred that classified information be referred to in code in the

4675. Transcript at 6, *id.* (Dec. 2, 2008, filed Dec. 9, 2008), D.E. 531.

4676. Notices of Lodging, *id.* (Feb. 27, 2009), D.E. 578 to 581.

4677. Notices of Lodging, *id.* (Oct. 30, 2009), D.E. 681 to 683; Notices of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009), D.E. 19 to 21; *see* Classified Blair Declaration, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Oct. 30, 2009), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-4 (redacted); Classified Alexander Declaration, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Oct. 30, 2009), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-6 (redacted); Classified Blair Declaration, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009, filed Dec. 20, 2013) (redacted); Classified Bonanni Declaration, *id.* (Apr. 3, 2009, filed Dec. 20, 2013), D.E. 172-5 (redacted).

4678. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4679. *Id.* and Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

Judge Walker was his district's chief judge, and he used his career law clerk as his administrative law clerk. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4680. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4681. 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*.

public briefs with a separate document laying out what information is classified.⁴⁶⁸²

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.⁴⁶⁸³ Judges reviewed the material in San Francisco when they were in town.⁴⁶⁸⁴

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.⁴⁶⁸⁵

This had an impact on the judges' work with their law clerks. The law clerks' memoranda had to remain somewhat abstract,⁴⁶⁸⁶ 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.⁴⁶⁸⁷

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.⁴⁶⁸⁸

Judge Hawkins observed that embedding classified information within the narrative structure of the briefs, redacting the classified information for public versions, facilitated comprehension.⁴⁶⁸⁹ A public brief written in code with a separate code sheet would have been more difficult to read.⁴⁶⁹⁰

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

4682. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

4683. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

Now there are safes suitable for storing top secret information in each of the court's four principal places of hearing cases: San Francisco, Pasadena, Seattle, and Portland. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4684. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

4685. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 4374; 9th Cir. *Hepting* Docket Sheets, *supra* note 4421; *see* Vick, *supra* note 4421.

4686. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4687. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4688. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4689. 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*.

4690. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

offer little guidance because they were denied access to the materials.⁴⁶⁹¹ 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.⁴⁶⁹²

The same classified information security officer delivered the classified materials to the judges' chambers both before and after oral argument.⁴⁶⁹³ Unlike the officers who visited the Sixth Circuit judges, she provided no instructions on closing doors or windows.⁴⁶⁹⁴ A separate set of materials was prepared for each judge so that they could make individual notes on the documents.⁴⁶⁹⁵ The officer, whose office was in Washington, D.C., was able to bring the materials back to the judges whenever they wanted to see them on a couple of days' notice.⁴⁶⁹⁶

As classified information security officers coordinate their visits to judges' chambers, they do not disclose to persons other than the judges, such as attorneys representing the government, which judges they are visiting.⁴⁶⁹⁷ This is an issue 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.⁴⁶⁹⁸ And the assignment of opinion authorship is regarded as confidential until the opinion is issued.⁴⁶⁹⁹

The court agreed to permit the televising of 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.⁴⁷⁰⁰ Classified information security officers offered to review the court's opinion for inadvertently disclosed secret information before the opinion's release, but the court declined the offer.⁴⁷⁰¹

This was Judge Hawkins' first case as a judge involving classified information.⁴⁷⁰² Judge McKeown had to review classified information in approximately two previous cases.⁴⁷⁰³ She had substantial experience as a practicing attorney in Seattle arguing trade secret cases in open court without revealing the secrets.⁴⁷⁰⁴ In

4691. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

4692. *Id.*

4693. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4694. *Id.*

4695. *Id.*

4696. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4697. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4698. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4699. *Id.*

4700. *Id.*

Footage from the oral argument was included in the 2014 documentary *Citizenfour* concerning Edward Snowden's 2013 surveillance revelations. *Citizenfour* (Praxis Films 2014).

4701. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4702. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4703. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4704. *Id.*

over forty years as a federal judge, including nearly thirty years as a circuit judge, Judge Pregerson had occasionally reviewed classified information before.⁴⁷⁰⁵

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.⁴⁷⁰⁶ The court ruled, however, that it no longer had jurisdiction to receive the lodging.⁴⁷⁰⁷

In 2011, the appellate court heard appeals of statutorily mandated dismissals of actions against the telephone companies and dismissals of actions against the government for lack of standing. Attorneys for the government admonished the court by letter to its clerk, “All classified information has been provided to the Court with the understanding that the secrecy of this information will be properly protected.”⁴⁷⁰⁸ The court determined that it did not need to consider classified materials to resolve the appeals.⁴⁷⁰⁹

Judge White, Northern District of California

In the cases transferred to Judge White following Judge Walker’s retirement—the cases against the government originally filed in Brooklyn and San Francisco—the government filed notices of lodging classified declarations on five occasions in 2012 through 2014.⁴⁷¹⁰ On December 21, 2013, the Director of National Intelligence released redacted copies of eight classified declarations filed in the litigation pursuant to Judge White’s instructions at a September 27 case-management conference.⁴⁷¹¹

The government adopted a usual practice before Judge White of presenting classified briefing by filing a notice of lodging the classified document with the

4705. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

4706. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Nov. 9, 2009).

4707. Order, *id.* (Nov. 23, 2009).

4708. *E.g.*, Letter, *Jewel v. NSA*, No. 10-15616 (9th Cir. Aug. 3, 2011); Letter, *Hepting v. AT&T*, No. 09-16676 (9th Cir. Aug. 3, 2011).

4709. *In re NSA Telecomm. Records Litig.*, 671 F.3d 881, 894 n.1 (9th Cir. 2011) (“Because this appeal raises only the constitutionality of [the statute] and not its specific application in this case, we need not consider the classified materials.”).

4710. Notice of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Dec. 23, 2014), D.E. 317; Notice of Lodging, *id.* (Nov. 7, 2014), D.E. 301; Notice of Lodging, *id.* (Sept. 29, 2014), D.E. 287; Notices of Lodging, *id.* (Sept. 12, 2012), D.E. 106, 107; Notices of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 170, 171; *see* Classified Clapper Declaration, *id.* (Dec. 20, 2013, filed May 5, 2014), D.E. 220 (redacted); Classified Fleisch Declaration, *id.* (Dec. 20, 2013, filed May 5, 2014), D.E. 227 (redacted); Classified Clapper Declaration, *id.* (Sept. 11, 2012, filed Dec. 20, 2013), D.E. 172-7 (redacted); Classified Fleisch Declaration, *id.* (Sept. 11, 2012, filed Dec. 20, 2013), D.E. 172-8 (redacted).

4711. Dec. 20, 2013, Notice, *supra* note 4641; *see* <http://icontherecord.tumblr.com/tagged/declassified>.

classified information security officer⁴⁷¹² and filing a redacted document on the public record.⁴⁷¹³

Especially because of Snowden's disclosures of classified information in 2013, Judge White found it a challenge to remember what information he read was classified and what information was not.⁴⁷¹⁴

Following a June 6, 2014, public telephonic hearing, the government filed with the classified information security officer an ex parte letter for in camera review stating that the government believed that its attorney inadvertently said something classified during the hearing.⁴⁷¹⁵ The government requested a classification review of the transcript before it was filed publicly or shared with the plaintiffs' attorneys.⁴⁷¹⁶ Judge White agreed to consider the matter under seal, but not ex parte, and he asked for a response from the plaintiffs on the government's request.⁴⁷¹⁷ On July 11, Judge White agreed to the classification review.⁴⁷¹⁸ On July 28, the government notified the court that the transcript contained no classified information.⁴⁷¹⁹ Judge White unsealed the filings on this matter on August 5.⁴⁷²⁰

Judge White's February 10, 2015, partial summary judgment in favor of the government was based on a review of the government's classified briefing.⁴⁷²¹

None of Judge White's staff received a security clearance to work on classified information in these cases.⁴⁷²² A classified information security officer attended court proceedings to help Judge White ensure that public discussions did not include classified information.⁴⁷²³

Judge Hogan, District of the District of Columbia

In the Electronic Frontier Foundation's unsuccessful FOIA suit to discover the secret FISA court orders on which the government said it would rely to obtain warrants for what previously were warrantless wiretaps, the government lodged, on June 25, 2007, for ex parte in camera review, a classified declaration opposing the plaintiff's motion that the court examine the secret orders.⁴⁷²⁴ Judge Hogan

4712. Notice, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 9, 2014), D.E. 231; Notice, *id.* (Mar. 17, 2014), D.E. 194.

4713. Classified Miriam P. Declaration, *id.* (Sept. 29, 2014), D.E. 288; Classified Miriam P. Declaration, *id.* (Mar. 9, 2014), D.E. 230 (redacted); Classified Shea Declaration, *id.* (Mar. 17, 2014, filed May 5, 2014), D.E. 228 (redacted).

4714. Interview with Hon. Jeffrey S. White, Aug. 21, 2014.

4715. Letter, *Shubert v. Obama*, No. 4:07-cv-693 (N.D. Cal. June 12, 2014, filed June 13, 2014), D.E. 130.

4716. *Id.*

4717. Order, *id.* (June 13, 2014), D.E. 131.

4718. Order, *id.* (July 11, 2014), D.E. 138.

4719. Notice, *id.* (July 28, 2014), D.E. 141.

4720. Order, *id.* (Aug. 5, 2014), D.E. 143; *see* Corrected Order, *id.* (Aug. 11, 2014), D.E. 144.

4721. Opinion at 1, 8, *id.* (Feb. 10, 2015), D.E. 146, *available at* 2015 WL 545925.

4722. Interview with Hon. Jeffrey S. White, Aug. 21, 2014.

4723. *Id.*

4724. Notice of Lodging, *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. June 25, 2007), D.E. 12.

relied on this declaration both to grant the government summary judgment and to deny the motion to review the FISA court orders.⁴⁷²⁵

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.⁴⁷²⁶

To write the classified opinion, Judge Kennelly was required to compose the opinion on a "clean" laptop computer provided by the classified information security officer.⁴⁷²⁷ The computer, and all drafts, were stored in the U.S. Attorney's SCIF in the same building.⁴⁷²⁸ As the judge was preparing the classified opinion, he had additional questions for the government.⁴⁷²⁹ It was arranged that he would ask them on a "secured telephone unit" in the U.S. Attorney's SCIF.⁴⁷³⁰

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret opinion.⁴⁷³¹

Challenge: Redacting Secrets

AT&T electronically filed a brief with several lines redacted, but the redacted text could be retrieved easily from the electronic document. It appears that when this was brought to the court's attention, two days after the filing, the electronic text file was replaced with an electronic image file.

At a May 17, 2006, hearing in the first case against telephone companies filed in San Francisco, Judge Walker issued the following order:

Plaintiffs are instructed to file by close of business on May 22, 2006, a memorandum that addresses: (1) whether this case can be litigated without deciding the state secrets issue, thereby obviating any need for the court to review the government's classified memorandum and declarations and (2) whether the state secrets privilege is implicated by plaintiffs' FRCP 30(b)(6) deposition request for information whether AT&T received any certification from the government.

4725. D.D.C. *Elec. Frontier Found.* Summary Judgment Opinion, *supra* note 4503, at 11, 15, 18.

4726. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

4727. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4728. *Id.*

4729. *Id.*

4730. *Id.*

4731. Minute Entry, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007), D.E. 85.

AT&T and the government may each file reply memoranda on these issues by close of business on May 24, 2006.⁴⁷³²

As instructed, AT&T filed a reply brief on May 24, 2006.⁴⁷³³ 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.⁴⁷³⁴ Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.⁴⁷³⁵ On the day of the CNET report, the court filed a substitute electronic version of the redacted file.⁴⁷³⁶

CNET's website provides a link to the originally filed Acrobat text file.⁴⁷³⁷ 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.⁴⁷³⁸

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.”⁴⁷³⁹ 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.”⁴⁷⁴⁰ Judge Walker did not believe that other judges previ-

4732. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006), D.E. 130.

4733. N.D. Cal. *Hepting* Docket Sheet, *supra* note 4404.

4734. Notice of Manual Filing, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 24, 2006), D.E. 142; N.D. Cal. *Hepting* Docket Sheet, *supra* note 4404.

The redacted text appeared in one of AT&T's three arguments—an argument spanning four pages of the twenty-page brief: “II.B. The Court Cannot Adjudicate Plaintiffs’ Prima Facie Claims Until It Reviews The Classified Submissions.” Redacted Reply Brief, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006), D.E. 150.

4735. Declan McCullagh, *AT&T Leaks Sensitive Info in NSA Suit*, May 26, 2006, http://news.cnet.com/AT38T-leaks-sensitive-info-in-NSA-suit/2100-1028_3-6077353.html.

4736. Redacted Reply Brief, *supra* note 4734; N.D. Cal. *Hepting* Docket Sheet, *supra* note 4404.

4737. www.politechbot.com/docs/att.not.redacted.brief.052606.pdf.

4738. Redacted Reply Brief, *supra* note 4734.

4739. *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).

4740. *Id.* at 1010–11; *see id.* at 1011 (noting that the court had a specific candidate in mind). Judge Walker thought that former CIA Director James Woolsey would be a good candidate, but one of the parties expressed concerns about Mr. Woolsey's having opined on the secret surveillance program. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

Other Civil Cases: Warrantless Wiretaps

ously used Federal Rule of Evidence 706(a) to appoint an expert of this type.⁴⁷⁴¹
Judge Walker decided, however, not to appoint such an expert “at this stage.”⁴⁷⁴²

4741. *Hepting*, 439 F. Supp. 2d at 1010.

4742. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Aug. 8, 2006), D.E. 239.

Muslim Surveillance

Islamic Shura Council of Southern California v. FBI and Fazaga v. FBI (Cormac J. Carney, C.D. Cal.)

The U.S. District Court for the Central District of California heard a collection of civil actions against the FBI seeking relief from surveillance of Muslims in Orange County.

Freedom of Information Act

Concerned that many Muslims were avoiding mosques because of suspected government surveillance, on May 15, 2006, with the assistance of the ACLU, six Muslim organizations and five Muslim individuals submitted to the FBI requests pursuant to the Freedom of Information Act (FOIA) for records of their surveillance.⁴⁷⁴³ On April 27, 2007, the FBI notified five of the organizations and four of the individuals that no records responsive to their requests were found.⁴⁷⁴⁴ In May, the FBI informed the Council on American Islamic Relations—California (CAIR) and Hussam Ayloush that it had found one responsive document for each of them.⁴⁷⁴⁵ The FBI presented them with redacted versions in June: one page for CAIR and three pages for Ayloush.⁴⁷⁴⁶

FOIA's subsection (b) *exempts* nine categories of information from government agencies' production obligations:⁴⁷⁴⁷

- classified national defense or foreign policy information
- internal personnel policies
- statutorily exempt information
- trade secrets
- confidential internal correspondence
- confidential personnel and medical files
- confidential law enforcement investigations

4743. *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1162 (9th Cir. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 278 F.R.D. 538, 539 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1118 (C.D. Cal. 2011); see Ann Pepper, *ACLU Seeks FBI Records on Monitoring of Islamic Groups*, Orange Cnty. Reg., May 16, 2006; H.G. Reza, *Area Islamic Groups Sue the FBI*, L.A. Times, Sept. 19, 2007, California, at 4 [hereinafter *Islamic Groups Sue*]; H.G. Reza, *On Behalf of Muslims, ACLU Seeks FBI Surveillance Data*, L.A. Times, May 16, 2006, California Metro, at 4.

4744. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539 & n.1; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

4745. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

4746. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

4747. 5 U.S.C. § 552(b) (2013).

- financial regulation reports
- geophysical information concerning wells

Redactions from the FBI's production to CAIR and Ayloush were related to internal personnel policies, confidential personnel and medical files, and confidential law enforcement investigations.⁴⁷⁴⁸

On September 18, 2007, the eleven Muslim organizations and individuals filed an action in the U.S. District Court for the Central District of California for a more complete response to their FOIA requests.⁴⁷⁴⁹ The court assigned the case to Judge Cormac J. Carney.⁴⁷⁵⁰

As a result of the lawsuit, the government performed an additional search for the nine plaintiffs whom it had told no documents existed in response to their requests and produced to the plaintiffs 120 pages, which included numerous redactions.⁴⁷⁵¹

FOIA's subsection (c) *excludes* three categories of information from government agencies' production obligations; "the agency may treat the records as not subject to the requirements of [FOIA]":⁴⁷⁵²

- ongoing confidential law enforcement investigations
- informant records
- foreign intelligence

"Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information."⁴⁷⁵³

The government supported a motion for summary judgment with a declaration identifying the reasons for each of the redactions in the 124 pages produced

4748. *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

4749. Docket Sheet, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Sept. 18, 2007) [hereinafter C.D. Cal. *Islamic Shura Council* Docket Sheet]; *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539–40; see Reza, *Islamic Groups Sue*, *supra* note 4743.

4750. C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4749.

Tim Reagan interviewed Judge Carney for this report in the judge's chambers on October 16, 2012.

4751. *Islamic Shura Council*, 635 F.3d at 1162–63; *Islamic Shura Council*, 779 F. Supp. 2d at 118.

From September 5 to September 27, 2007, [the Department of Justice's Office of Information and Privacy] affirmed the FBI's "no records" response to the Nine Plaintiffs. Nevertheless, on March 14, 2008, the FBI released an additional 120 pages of responsive documents to seven of the Nine Plaintiffs—a large amount of which was either redacted or withheld as "outside the scope" of Plaintiffs' FOIA request while some of the information was redacted pursuant to specific exemptions under FOIA.

Islamic Shura Council, 278 F.R.D. at 540 (citation omitted).

4752. 5 U.S.C. § 552(c).

4753. *Islamic Shura Council*, 779 F. Supp. 2d at 1123.

to the plaintiffs.⁴⁷⁵⁴ The phrase “outside the scope of plaintiffs’ requests” was used for subsection (c) exclusions without informing the plaintiffs or the court that that was what the phrase meant.⁴⁷⁵⁵ In its reply brief, the government stated that “outside the scope” meant that “the redacted portions did not contain information responsive to plaintiffs’ request.”⁴⁷⁵⁶

Judge Carney decided to review unredacted versions of the documents.⁴⁷⁵⁷ He concluded, “Although the FOIA allows the Government to withhold certain categories of documents from requestors such as Plaintiffs pursuant to statutory exemptions, 5 U.S.C. § 552(b), or exclusions, 5 U.S.C. § 552(c), the FOIA does not permit the Government to withhold responsive information from the Court.”⁴⁷⁵⁸

The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government’s duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.⁴⁷⁵⁹

Judge Carney determined, however, that the government had produced to the plaintiffs all of the documents, and portions of documents, that FOIA required.⁴⁷⁶⁰

Judge Carney resolved summary judgment motions by sealed order on June 23, 2009, which Judge Carney said he would unseal unless ordered otherwise by

4754. Hardy Declaration Supporting Government’s Summary Judgment Motion at 46–131, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Mar. 21, 2008), D.E. 13 [hereinafter Hardy Declaration].

4755. See *Islamic Shura Council*, 278 F.R.D. at 540, 545–46; *Islamic Shura Council*, 779 F. Supp. 2d at 1117–19, 1121–26 & n.4; Hardy Declaration, *supra* note 4754.

4756. Government Reply Brief at 2, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Jan. 23, 2009), D.E. 41.

4757. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1119–20; *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1163 (9th Cir. 2011); see Defendants’ Notice of *In Camera*, *Ex Parte* Submission Pursuant to Court’s Order, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 19, 2009), D.E. 56.

4758. *Islamic Shura Council*, 779 F. Supp. 2d at 1121; accord *Islamic Shura Council*, 635 F.3d at 1165.

4759. *Islamic Shura Council*, 779 F. Supp. 2d at 1125; see *Islamic Shura Council*, 278 F.R.D. at 539 (“false and misleading information”); *id.* (“deception of the court”); *id.* at 540 (“blatantly false and misleading information”); *id.* at 545 (“the Government lied to the Court”).

4760. *Islamic Shura Council*, 779 F. Supp. 2d at 1126; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541; see Transcript at 5, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Apr. 27, 2011, filed Feb. 24, 2012), D.E. 146 (“What I can say, so you know, is based on the information I received in classified hearings, closed hearings, that the government has complied with its obligations under FOIA.”).

the court of appeals.⁴⁷⁶¹ On March 30, 2011, the court of appeals determined that “full disclosure of the Sealed Order would compromise the authorized secrecy from plaintiffs of some of the information it contains.”⁴⁷⁶² The appellate court remanded “to the district court to revise the Sealed Order to eliminate statements the government has designated as national security and sensitive law enforcement information.”⁴⁷⁶³

Although the court of appeals agreed with the government that all of Judge Carney’s sealed order could not be unsealed, the court of appeals agreed with Judge Carney that the government may not represent to the court that it has produced all responsive information when in fact it has not.⁴⁷⁶⁴

Judge Carney issued a revised and public order on April 27.⁴⁷⁶⁵

On November 17, Judge Carney granted the plaintiffs’ motion for sanctions.⁴⁷⁶⁶ Judge Carney awarded the plaintiffs \$36,248 in attorney fees for bringing the motion.⁴⁷⁶⁷ The court of appeals reversed the sanction award on March 18, 2014, because “Shura Council served its motion after the district court decided the merits of the underlying dispute.”⁴⁷⁶⁸

We recognize that because of the *in camera* nature of the proceedings, Shura Council could not have moved for sanctions before the inadequacy of the FBI’s original response was made known to the court. Nevertheless, the motion for sanctions was made after “judicial rejection of the offending contention.” Advisory Committee’s Notes to the 1993 Amendments to Rule 11. The motion for sanctions should not have been granted.⁴⁷⁶⁹

Tort

In “Operation Flex,” the FBI paid Craig Monteilh in 2006 and 2007 to look for dangerous Muslims in Southern California mosques.⁴⁷⁷⁰ The informant’s efforts to foster and identify antisocial violence resulted in a restraining order against him issued in June 2007 by a state court in response to complaints by mosque

4761. Minutes, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 25, 2009), D.E. 59; C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4749; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541.

4762. *Islamic Shura Council*, 635 F.3d at 1169; *see Islamic Shura Council*, 278 F.R.D. at 541–42.

4763. *Islamic Shura Council*, 635 F.3d at 1169.

4764. *Id.* at 1166; *Islamic Shura Council*, 278 F.R.D. at 541.

4765. *Islamic Shura Council*, 779 F. Supp. 2d 1114; *see Islamic Shura Council*, 278 F.R.D. at 542; *see* Transcript, *supra* note 4760, at 3 (“my original order did not disclose the nature, content, or number of the documents that were withheld”).

4766. *Islamic Shura Council*, 278 F.R.D. 538.

4767. *Id.* at 548; Order, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Dec. 14, 2011), D.E. 136 (declining to award an additional \$880 in paralegal fees because of insufficient documentation).

4768. *Islamic Shura Council of S. Cal. v. FBI*, 757 F.3d 870, 872 (9th Cir. 2014).

4769. *Id.* at 873.

4770. *Fazaga v. FBI*, 885 F. Supp. 2d 978, 980 (C.D. Cal. 2012); *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1028–30 (C.D. Cal. 2012).

members.⁴⁷⁷¹ In the state court proceedings, Monteilh revealed details about the FBI's operation.⁴⁷⁷² Monteilh's work as an informant was also revealed in the prosecution of Ahmadullah Sais Niazi.⁴⁷⁷³ Niazi was indicted in 2009 for association with a designated terrorist and for false statements.⁴⁷⁷⁴ Judge Carney drew this case.⁴⁷⁷⁵ In 2010, the indictment was voluntarily dismissed because of "[e]videntiary issues, including the unavailability of an overseas witness."⁴⁷⁷⁶

Monteilh filed a civil action against the FBI on January 22, 2010, complaining that his federal undercover work had resulted in a state court criminal conviction and his reputation as an informant had resulted in a prison stabbing.⁴⁷⁷⁷ The court assigned this case to Judge James V. Selna.⁴⁷⁷⁸ On February 16, 2011, Judge Selna determined that Monteilh's contract claims against the government needed to be brought in the Court of Federal Claims and his tort claims were barred (1) for failure to pursue them administratively first and (2) by discretionary function immunity.⁴⁷⁷⁹

On February 22, three Orange County Muslims filed a class action challenge to the FBI's operation.⁴⁷⁸⁰ With their complaint, the plaintiffs filed a notice that

4771. See Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010, at A1; H.G. Reza, *Restraining Order Bars Man from Irvine Mosque*, L.A. Times, June 30, 2007, at 5.

4772. See Teresa Watanabe, *Man Says He Was FBI Informant*, L.A. Times, Feb. 26, 2009.

4773. *Fazaga*, 884 F. Supp. 2d at 1032; see Markon, *supra* note 4771; Watanabe, *supra* note 4772.

4774. Indictment, *United States v. Niazi*, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009), D.E. 1; see Salvador Hernandez, *Man Lied to Hide Terrorist Links, U.S. Says*, Orange Cnty. Reg., Feb. 21, 2009, at A; Markon, *supra* note 4771 ("Prosecutors said he is the brother-in-law of Osama bin Laden's security coordinator."); Carol J. Williams & Christine Hanley, *Al Qaeda Figure's In-Law Arrested*, L.A. Times, Feb. 21, 2009, at 1.

4775. Docket Sheet, *Niazi*, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009).

4776. Fitzgerald Declaration, *id.* (Sept. 29, 2010), D.E. 39; see Order, *id.* (Sept. 30, 2010), D.E. 40 (granting dismissal); see also Scott Glover, *U.S. Won't Pursue Case Against Niazi*, L.A. Times, Oct. 1, 2010, at 1; Salvador Hernandez, *Muslims Question Tactics of FBI in Tustin Man's Case*, Orange Cnty. Reg., Oct. 9, 2010, at B; Markon, *supra* note 4771.

4777. Complaint, *Monteilh v. FBI*, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010), D.E. 1; see *id.* at 14 ("Mr. Monteilh is informed that his life was in danger as the Muslim extremists had ordered a 'fatwa,' the Romanian Mafia had ordered a 'hit,' the Mexican Mafia had ordered a 'hit,' and the White Supremacists were given a 'green light' on Craig F. Monteilh."); see also *Fazaga*, 884 F. Supp. 2d at 1033; Scott Glover, *Suit by Alleged Informant Says FBI Endangered Life*, L.A. Times, Jan. 23, 2010, at 11; Salvador Hernandez, *Man Who Says He Was Informant Sues FBI*, Orange Cnty. Reg., Jan. 23, 2010, at A; Markon, *supra* note 4771.

4778. Docket Sheet, *Monteilh*, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010).

4779. Minutes, *id.* (Feb. 16, 2011), D.E. 93; see Salvador Hernandez, *Judge Tosses Most of Man's Claims*, Orange Cnty. Reg., Feb. 24, 2011, at B.

4780. Complaint, *Fazaga v. FBI*, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011), D.E. 1; *Fazaga v. FBI*, 885 F. Supp. 2d 978, 980–81 (C.D. Cal. 2012); *Fazaga*, 884 F. Supp. 2d at 1028–30, 1033; see Amended Complaint, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Sept. 13, 2011), D.E. 49; see also Salvador Hernandez, *Suit Alleges FBI Wrongly Spied on Muslims*, Orange Cnty. Reg., Feb. 24, 2011, at B; Shan Li, *FBI Violated the Rights of Muslims, Lawsuit Alleges*, L.A. Times, Feb. 24, 2011, at 3; Jerry Markon, *Lawsuit Alleges FBI Violated Muslims' Freedom of Religion*, Wash. Post, Feb. 23, 2011, at A13;

their action might be related to the earlier FOIA action.⁴⁷⁸¹ Judge Carney accepted transfer to him of the tort case as related to the FOIA case.⁴⁷⁸² One month later, the government notified the court that the Muslim tort case was related to Monteilh's tort case.⁴⁷⁸³ The three Muslims argued that their case was not sufficiently related to Judge Selna's.⁴⁷⁸⁴ Judge Selna declined transfer, because the Muslim tort case was about surveillance injuries to Muslims and Monteilh's case was about post-surveillance injuries to Monteilh.⁴⁷⁸⁵

On August 14, 2012, Judge Carney dismissed a claim against the government in the Muslim tort case based on the Foreign Intelligence Surveillance Act, relying on a decision by the court of appeals issued on August 7 in another case that the government retained sovereign immunity from such claims.⁴⁷⁸⁶

Judge Carney denied the agents' defense of qualified immunity, however, allowing a claim against them of illegal surveillance to go forward.⁴⁷⁸⁷ On February 5, 2014, Magistrate Judge David T. Bristow reported that efforts to settle the claim had been exhausted without success.⁴⁷⁸⁸

Also on August 14, 2012, after a skeptical review of the government's state-secrets privilege, Judge Carney dismissed the Muslims' other claims.⁴⁷⁸⁹

[F]urther litigation of the action would risk or require the disclosure of state secrets related to Operation Flex. More specifically, the Government contends that because Plaintiffs' claims are premised on their core allegation that Defendants conducted an indiscriminate religion-based investigation, any rebuttal against this allegation would risk or require disclosure of privileged information—whom and what the FBI was investigating under Operation Flex and why—in order to establish that the investigation was properly predicated and focused. The Court agrees.⁴⁷⁹⁰

An appeal by the plaintiffs is pending.⁴⁷⁹¹

Jennifer Medina, *Suit Accuses F.B.I. of Spying at Mosques in California*, N.Y. Times, Feb. 25, 2011, at A17.

4781. Notice, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011), D.E. 3.

4782. Order, *id.* (Feb. 24, 2011), D.E. 4.

4783. Notice, *id.* (Mar. 31, 2011), D.E. 7.

4784. Notice, *id.* (Apr. 5, 2011), D.E. 8.

4785. Order, *id.* (Apr. 6, 2011), D.E. 9.

4786. *Fazaga v. FBI*, 885 F. Supp. 2d 978, 982–84 (C.D. Cal. 2012); see *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); *supra* “Warrantless Wiretaps.”

4787. *Fazaga*, 885 F. Supp. 2d at 984–87; see Salvador Hernandez, *Spying at Mosques*, Orange Cnty. Reg., Aug. 15, 2012, at A.

Appeals are pending. Docket Sheet, *Fazaga v. FBI*, No. 12-56874 (Oct. 16, 2012) (noting that the final brief is due on August 17, 2015); Docket Sheet, *Fazaga v. FBI*, No. 12-56867 (Oct. 16, 2012) (same).

4788. Minutes, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Feb. 5, 2014).

4789. *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012); see Hernandez, *supra* note 4787; Victoria Kim, *Spying Suit Against FBI Is Rejected*, L.A. Times, Aug. 15, 2012, at 1.

4790. *Fazaga*, 884 F. Supp. 2d at 1039 (citation omitted).

4791. Docket Sheet, *Fazaga v. FBI*, No. 13-55017 (9th Cir. Jan. 3, 2013) (noting consolidation with appeals from the denial of qualified immunity).

Challenge: Classified Evidence

To assist Judge Carney with these cases, his law clerks received security clearances.⁴⁷⁹² Classified documents were stored in a chambers safe.⁴⁷⁹³ Judge Carney made a deliberate decision to look at the classified materials rarely.⁴⁷⁹⁴

Challenge: Closed Proceedings

To evaluate whether the government had properly responded to FOIA demands, Judge Carney decided to review unredacted versions of the documents produced to the plaintiffs.⁴⁷⁹⁵ Troubled that the unredacted documents showed that the government had not only misled the plaintiffs but had also misled the court about what information the government was withholding from the plaintiffs, Judge Carney presided over a classified ex parte hearing at which the government presented its position on application of FOIA exclusions.⁴⁷⁹⁶

Before Judge Carney issued his sealed order in the FOIA case, the classified information security officer reviewed it for inadvertent inclusion of classified information.⁴⁷⁹⁷

Challenge: Classified Arguments

In response to the plaintiffs' motion for sanctions in the FOIA action, the government filed a redacted brief and submitted to Judge Carney ex parte an unredacted brief.⁴⁷⁹⁸ The court of appeals granted the government's motion for classified ex parte briefing in the sanction appeal.⁴⁷⁹⁹

With its motion to dismiss the Muslim tort action, the government filed notices that it was lodging with Judge Carney a classified brief and a classified declaration.⁴⁸⁰⁰ Three days later, the plaintiffs filed a motion that Judge Carney not examine the classified materials until after a review of the plaintiffs' response to the government's motion and a determination that the ex parte classified lodgings

4792. Interview with Hon. Cormac J. Carney, Oct. 16, 2012.

4793. *Id.*

4794. *Id.*

4795. *Islamic Shura Council of S. Cal. v. FBI*, 278 F.R.D. 538, 540 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1119–20 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1163 (9th Cir. 2011).

4796. Interview with Hon. Cormac J. Carney, Oct. 16, 2012.

4797. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

4798. Sanction Response, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Oct. 24, 2011), D.E. 126; C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4749.

4799. Order, *Islamic Shura Council of S. Cal. v. FBI*, No. 12-55305 (9th Cir. Mar. 25, 2013), D.E. 41.

4800. Notices of Lodging, *Fazaga v. FBI*, No. 8:11-cv-301 (C.D. Cal. Aug. 1, 2011), D.E. 35, 36; see *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1033 (C.D. Cal. 2012).

merit examination.⁴⁸⁰¹ “Plaintiffs argued that such a ruling would prevent the Court from unnecessarily reviewing information that could be highly prejudicial to Plaintiffs and not properly subject to consideration by the Court.”⁴⁸⁰² Judge Carney denied the plaintiffs’ request that he refrain from reviewing the classified submissions.⁴⁸⁰³ He “was confident that [his] independent evaluation would not be compromised by the contents of those submissions.”⁴⁸⁰⁴ The government lodged a supplemental classified declaration after the plaintiffs amended their complaint.⁴⁸⁰⁵

4801. Motion, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 4, 2011), D.E. 39; *Fazaga*, 884 F. Supp. 2d at 1033.

4802. *Fazaga*, 884 F. Supp. 2d at 1033.

4803. Minutes, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 11, 2011), D.E. 46.

4804. *Fazaga*, 884 F. Supp. 2d at 1033.

4805. Notice of Lodging, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Nov. 4, 2011), D.E. 56; *see Fazaga*, 884 F. Supp. 2d at 1034.

Torture Flights

Mohamed v. Jeppesen DataPlan, Inc. (James Ware, N.D. Cal.)

On May 30, 2007, the ACLU filed a civil action in the U.S. District Court for the Northern District of California on behalf of five men who had experienced extraordinary rendition.⁴⁸⁰⁶ According to the complaint, extraordinary rendition “involves the clandestine apprehension and transfer of persons suspected of involvement in terrorist activities to secret detention and interrogation facilities in countries outside the United States, utilizing methods impermissible under United States and international law.”⁴⁸⁰⁷ The court assigned the case to Judge James Ware, who dismissed the action on state-secrets grounds.⁴⁸⁰⁸

Because the action was dismissed without the filing of an answer, the facts are substantially limited to the plaintiffs’ allegations.⁴⁸⁰⁹ Ahmed Agiza, an Egyptian seeking asylum in Sweden, was captured by Swedish authorities, transferred to American custody, and flown to Egypt, where he was subjected to extremely harsh conditions of confinement and then sentenced to fifteen years in Egyptian prison on a military court conviction.⁴⁸¹⁰ Abou Elkassim Britel, a Moroccan-Italian, was detained in Pakistan, transferred to American custody, and flown to Morocco, where he was subjected to extremely harsh conditions of confinement and then sentenced to fifteen years in Moroccan prison.⁴⁸¹¹ Binyam Mohamed, an Ethiopian and legal resident of the United Kingdom, was arrested in Pakistan and then transferred, in turn, to Morocco, Afghanistan, and Guantánamo Bay, where

4806. Complaint, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 5:07-cv-2798 (N.D. Cal. May 30, 2007), D.E. 1; see Judgment at 25, *Husayn v. Poland*, No. 7511/13 (Eur. Ct. H.R. July 24, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047> (holding Poland liable for Guantánamo detainee Abu Zubaydah’s torture by extraordinary rendition); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 121 (2010); John Schwartz, *Claims of Torture Abroad Face Test Monday in Court*, N.Y. Times, Feb. 6, 2009, at A17.

4807. First Amended Complaint at 4, *Mohamed*, No. 5:07-cv-2798 (N.D. Cal. Aug. 1, 2007), D.E. 27; *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008). See generally M. Cherif Bassiouni, *International Extradition* 289–94 (6th ed. 2014); Jonathan Hafetz, *Habeas Corpus After 9/11* 51–59 (2011).

4808. *Mohamed*, 539 F. Supp. 2d 1128; see Schwartz, *supra* note 4806; see Donohue, *supra* note 4806, at 121.

Tim Reagan interviewed Judge Ware for this report in the judge’s chambers on September 24, 2010. Judge Ware retired on August 31, 2012. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

4809. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010); *Mohamed*, 539 F. Supp. 2d at 1131.

4810. *Mohamed*, 614 F.3d at 1074.

4811. *Id.*; *Mohamed*, 539 F. Supp. 2d at 1130–31.

he was subjected to extremely harsh conditions of confinement.⁴⁸¹² Bisher al-Rawi, an Iraqi and legal resident of the United Kingdom, was arrested in Gambia and transferred, in turn, to Afghanistan and Guantánamo Bay, where he was subjected to extremely harsh conditions of confinement.⁴⁸¹³ Mohamed Farag Ahmad Bashmilah, a Yemeni, was arrested in Jordan and transferred, in turn, to Afghanistan and an unknown CIA black site prison, where he was subjected to extremely harsh conditions of confinement.⁴⁸¹⁴ Mohamed, al-Rawi, and Bashmilah were subsequently released.⁴⁸¹⁵

The defendant was Jeppesen DataPlan, Inc., a subsidiary of Boeing with headquarters in San Jose.⁴⁸¹⁶ It allegedly “provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture.”⁴⁸¹⁷ There was evidence that “Jeppesen knew what was going on when it arranged flights described by one of its own officials as ‘torture flights.’”⁴⁸¹⁸

The government intervened to block the suit on state-secrets grounds.⁴⁸¹⁹ Judge Ware determined, on February 13, 2008, that “the very subject matter of this case is a state secret” and dismissed the action.⁴⁸²⁰

On April 28, 2009, a three-judge panel of the court of appeals reversed the dismissal.⁴⁸²¹ On rehearing, however, an en banc panel determined, by a vote of six to five, on September 8, 2010, that “litigating the case to a judgment on the

4812. *Mohamed*, 614 F.3d at 1074; *Mohamed*, 539 F. Supp. 2d at 1130; Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program, at 238–39 (Dec. 3, 2014), available at www.intelligence.senate.gov/study2014/sscistudy1.pdf (reporting also, “In the fall of 2010, the British government awarded Binyam Mohammed a reported £1 million in compensation.”).

4813. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32; see Hafetz, *supra* note 4807, at 46–47.

4814. *Mohamed*, 614 F.3d at 1075; *Mohamed*, 539 F. Supp. 2d at 1131.

4815. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32.

4816. *Mohamed*, 539 F. Supp. 2d at 1129; see Schwartz, *supra* note 4806.

4817. *Mohamed*, 614 F.3d at 1075.

4818. *Id.* at 1095 (Judge Hawkins, dissenting).

4819. *Mohamed*, 539 F. Supp. 2d at 1130, 1132–33; Donohue, *supra* note 4806, at 121.

The government did not intervene in a contract dispute in New York’s state court between Sportsflight, a Long Island aircraft brokerage business, and Richmor Aviation, which provided a plane for Sportsflight’s government contract, apparently a contract for rendition transportation. See *Richmor Aviation, Inc. v. Sportsflight Air, Inc.*, 82 A.D.3d 1423, 918 N.Y.S.2d 806 (2011); Peter Finn & Julie Tate, *Billing Dispute Reveals Details of CIA’s Rendition Flights*, Wash. Post, Sept. 1, 2011, at A1.

4820. *Mohamed*, 539 F. Supp. 2d at 1130, 1134–35.

4821. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009) (opinion by Circuit Judge Michael Daly Hawkins, joined by Circuit Judges Mary M. Schroeder and William C. Canby, Jr.); see Donohue, *supra* note 4806, at 122–23; Carrie Johnson, *Appeals Court Rejects “State Secrets” Claim, Revives Detainee Suit*, Wash. Post, Apr. 29, 2009, at A3; Charlie Savage, *Court Lets Ex-Detainees Proceed with Torture Lawsuit*, N.Y. Times, Apr. 29, 2009, at A15.

merits would present an unacceptable risk of disclosing state secrets.⁴⁸²² The Supreme Court denied certiorari.⁴⁸²³

Challenge: Classified Arguments

To support its motion for dismissal on state-secrets grounds, the government submitted *ex parte* to Judge Ware a classified declaration by the head of the CIA.⁴⁸²⁴ A classified information security officer brought the declaration to Judge Ware's chambers.⁴⁸²⁵ Judge Ware reviewed the declaration privately in his office, with the blinds drawn, while the security officer waited outside.⁴⁸²⁶ The officer said that she would take back the declaration and any notes the judge took, but the judge could get them back at any time.⁴⁸²⁷ Not wanting unknown persons to have access to his notes, the judge did not take notes.⁴⁸²⁸

On appeal, the government submitted to the appellate judges *ex parte* classified briefs and declarations.⁴⁸²⁹ For each judge, a classified information security officer brought the materials to the judge's chambers at the judge's convenience, waited for the judge to finish reviewing them, and took them back, along with any notes the judge took.⁴⁸³⁰ On the day of oral argument, the security officer again provided each judge with that judge's set of materials.⁴⁸³¹

Classified information security officers received advance notice that the appeal would be reheard *en banc*, but they do not share confidential information of this type with the attorneys representing the government.⁴⁸³²

4822. *Mohamed*, 614 F.3d at 1083 (opinion by Circuit Judge Raymond C. Fisher, joined by Chief Circuit Judge Alex Kozinski and Circuit Judges Richard C. Tallman, Johnnie B. Rawlinson, and Consuelo Maria Callahan); *see id.* at 1093 (concurring opinion by Circuit Judge Carlos Bea, finding that the case should be dismissed because its subject matter is a state secret); *cf. id.* at 1093–131 (dissenting opinion by Circuit Judge Hawkins, joined by Circuit Judges Schroeder, Canby, Sidney R. Thomas, and Richard A. Paez); *see* Donohue, *supra* note 4806, at 123; Charlie Savage, *Court Dismisses a Case Asserting Torture by C.I.A.*, N.Y. Times, Sept. 9, 2010, at A1.

4823. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 U.S. ___, 131 S. Ct. 2442 (2011).

4824. *Mohamed*, 614 F.3d at 1076; *Mohamed*, 539 F. Supp. 2d at 1130, 1132; Interview with Hon. James Ware, Sept. 24, 2010.

4825. Interview with Hon. James Ware, Sept. 24, 2010; *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

4826. Interview with Hon. James Ware, Sept. 24, 2010.

4827. *Id.*

4828. *Id.*

4829. *Mohamed*, 614 F.3d at 1084 n.6; Docket Sheet, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. Mar. 31, 2008) (noting the lodging of classified materials with the three-judge panel on August 27, 2008, and with the *en banc* panel on November 13, 2009).

4830. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

4831. *Id.*

4832. *Id.*

Milan

De Sousa v. Department of State (Beryl A. Howell, D.D.C.)

According to news reports and an Italian indictment, the U.S. government apprehended Osama Hassan Mustafa Nasr, an Egyptian also known as Abu Omar, in Milan on February 17, 2003, and then subjected him to extraordinary rendition and torture.⁴⁸³³ On May 14, 2009, Sabrina De Sousa, who worked at the U.S. consulate in 2003, filed a civil action in the U.S. District Court for the District of Columbia seeking enforcement of diplomatic immunity from Italian prosecution.⁴⁸³⁴

Nasr was born in 1963 in Alexandria, Egypt, where he was arrested while studying law in 1988 for giving a sermon critical of the government.⁴⁸³⁵ Unwelcome in Egypt, he migrated over the course of several years to Jordan, Yemen, Pakistan, Albania, Germany, and Italy.⁴⁸³⁶ Italy granted him asylum in 2001.⁴⁸³⁷ He was known as Abu Omar because his second child was a son named Omar.⁴⁸³⁸

Nasr was seized on a walled street called Via Guerzoni as he walked for noon prayers from his apartment to his mosque, the Islamic Cultural Institute on Viale Jenner, and he was transported to Egypt on the following day.⁴⁸³⁹ Nasr's apprehension disrupted Italian prosecutors' criminal investigation of him.⁴⁸⁴⁰

A passerby witnessed Nasr's disappearance.⁴⁸⁴¹ Cell tower detective work yielded a network of suspects.⁴⁸⁴²

4833. *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 96 (D.D.C. 2012); see Ian Shapira, *A Covert Career Cut Short*, Wash. Post, July 12, 2012, at C1.

4834. Complaint, *De Sousa v. Dep't of State*, No. 1:09-cv-896 (D.D.C. May 14, 2009); *De Sousa*, 840 F. Supp. 2d at 96; see Peter Finn, *Ex-Government Worker Sues for Immunity in CIA Rendition Case*, Wash. Post, May 15, 2009, at A16; Steve Hendricks, *A Kidnapping in Milan* 268–69 (2010); Scott Shane, *Woman in Rendition Case Sues for Immunity*, N.Y. Times, May 14, 2009, at A15.

The court permitted De Sousa to list her attorney's address on her complaint instead of her own, as an exception to local rules. Order, *De Sousa*, No. 1:09-cv-896 (D.D.C. May 14, 2009); see D.D.C. L. Civ. R. 5.1(c) (2014); *id.* R. 5.1(e) (West 2011) (former rule section).

4835. See Hendricks, *supra* note 4834, at 35, 48–49.

4836. See *id.* at 49–61.

“For occupation, he founded the Islamic Media Center, which consisted of himself, a computer, and a printer and through which he aspired to become the voice of righteous Islam in Italy. The center's primary output was an occasional newsletter called *Islamic Truth*.” *Id.* at 107.

4837. See *id.* at 92.

4838. See *id.* at 56.

4839. See Stephen Grey & Don Van Natta, *13 with the C.I.A. Sought by Italy in a Kidnapping*, N.Y. Times, June 25, 2005, at A1; Hendricks, *supra* note 4834, at 19–34, 63; Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, Wash. Post, Mar. 13, 2005, at A1.

4840. See Stephen Grey & Elisabetta Povoledo, *Inquiry in 2003 Abduction Rivets Italy*, N.Y. Times, July 8, 2006, at A8; Hendricks, *supra* note 4834, at 112.

4841. See Hendricks, *supra* note 4834, at 113–19.

A Milan judge issued arrest warrants for thirteen Americans, identified as CIA personnel, in June 2005.⁴⁸⁴³ By the end of 2005, arrest warrants were issued for an additional nine.⁴⁸⁴⁴ Two Italian intelligence officers were arrested in 2006; three more ostensive CIA workers, including De Sousa, and an airbase lieutenant colonel were added to the list of targets.⁴⁸⁴⁵ Later, Italy's military intelligence chief was charged.⁴⁸⁴⁶ The twenty-six Americans and five Italians were indicted on February 16, 2007.⁴⁸⁴⁷ The Americans were tried in absentia with court-appointed lawyers.⁴⁸⁴⁸

On November 11, 2006, the *New York Times* reported,

A militant Egyptian cleric who prosecutors say was kidnapped by the Central Intelligence Agency said in a newly published account that he was tortured with electric shocks while he lay on a wet mattress in a Cairo prison and was repeatedly beaten and forced to eat rotten bread in a pitch-black cell, while rats and cockroaches ran over his body.⁴⁸⁴⁹

An Egyptian court ordered Nasr's release on February 11, 2007.⁴⁸⁵⁰

4842. See *id.* at 167–91; see also *id.* at 179 (reporting that a mobile telephone suspected of being involved in the apprehension made two calls to the Virginia suburbs of Washington, D.C., during the time of the apprehension).

De Sousa's mobile telephone "was implicated in the conspiracy rather than the kidnapping proper." *Id.* at 181.

4843. See Grey & Van Natta, *supra* note 4839; Hendricks, *supra* note 4834, at 198; Craig Whitlock & Dafina Linzer, *Italy Seeks Arrest of 13 in Alleged CIA Action*, Wash. Post, June 25, 2005, at A1.

"Never before had an ally of the United States indicted CIA agents for doing their jobs." Hendricks, *supra* note 4834, at 218.

4844. See Brian Wingfield, *3 More Sought in C.I.A. Case*, N.Y. Times, Oct. 1, 2005, at A2; Hendricks, *supra* note 4834, at 198; *Italy Seeks Arrests in Kidnapping Case*, N.Y. Times, Dec. 24, 2005, at A5.

4845. See Stephen Grey & Elisabetta Povoledo, *Italy Arrests 2 in Kidnapping of Imam in '03*, N.Y. Times, July 6, 2006, at A1; Hendricks, *supra* note 4834, at 236–38; Craig Whitlock, *Prosecutors: Italian Agency Helped CIA Seize Cleric*, Wash. Post, July 6, 2006, at A15.

4846. See Ian Fisher & Elisabetta Povoledo, *Italy Seeks Indictments of C.I.A. Operatives in Egyptian's Abduction*, N.Y. Times, Dec. 6, 2006, at A12; Ian Fisher & Elisabetta Povoledo, *Italy's Top Spy Is Expected to Be Indicted in Abduction Case*, N.Y. Times, Oct. 24, 2006, at A3; Peter Kiefer, *Top Intelligence Chiefs Removed*, N.Y. Times, Nov. 21, 2006, at A17.

4847. See Sarah Delaney & Craig Whitlock, *Milan Court Indicts 26 Americans in Abduction*, Wash. Post, Feb. 17, 2007, at A1; Ian Fisher & Mark Mazzetti, *Italians Indict C.I.A. Operatives in '03 Abduction*, N.Y. Times, Feb. 17, 2007, at A1.

4848. See Rachel Donadio, *Italian Court Opens Trial Involving C.I.A. Links*, N.Y. Times, Mar. 12, 2009, at A6; Rachel Donadio, *Italy Convicts 23 Americans, Most Working for C.I.A., of Abducting Muslim Cleric*, N.Y. Times, Nov. 5, 2009, at A15 [hereinafter *Italy Convicts 23 Americans*]; Hendricks, *supra* note 4834, at 240.

4849. Elisabetta Povoledo, *Egyptian Says He Was Tortured After Being Kidnapped in Milan*, N.Y. Times, Nov. 11, 2006, at A7; see also Shapira, *supra* note 4833 (according to Nasr's wife, his genitals were subjected to electric shocks).

4850. See Nora Boustany, *Freed Cleric Is Planning Lawsuit*, Wash. Post, Feb. 13, 2007, at A15; *Egypt Frees Muslim Cleric Seized in 2003*, N.Y. Times, Feb. 12, 2007, at A8.

De Sousa was among twenty-three Americans convicted in November 2009.⁴⁸⁵¹ Italian appellate courts reversed three diplomatic-immunity acquittals in 2013 and 2014.⁴⁸⁵² De Sousa was sentenced to five years in prison.⁴⁸⁵³ The Italian defendants were spared to protect Italy's state secrets.⁴⁸⁵⁴ An appellate court upheld the convictions and increased the sentences for De Sousa and others to seven years.⁴⁸⁵⁵ Italy's highest court upheld the convictions in September 2012.⁴⁸⁵⁶

On February 1, 2013, an intermediate appellate court reversed the diplomatic-immunity acquittals.⁴⁸⁵⁷ Later that month, Italy's military intelligence chief was back on the hook, and the court of appeals sentenced him to ten years.⁴⁸⁵⁸ The Cassation Court, however, had the final say, reversing convictions for the five Italians on February 24, 2014, because the case involved classified information.⁴⁸⁵⁹ Italy pardoned the American lieutenant colonel in April 2013.⁴⁸⁶⁰

Claiming that “[p]reparing a response to this Complaint requires consultation with numerous U.S. officials,” the government requested, on July 14, 2009, a thirty-day extension of time.⁴⁸⁶¹ Judge Ricardo M. Urbina granted the extension and then granted a second extension of two more business days.⁴⁸⁶² The government's August 31 motion to dismiss the complaint argued that requested relief

4851. *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 96 (D.D.C. 2012); see Donadio, *Italy Convicts 23 Americans*, *supra* note 4848; Hendricks, *supra* note 4834, at 273; Shapira, *supra* note 4833; Craig Whitlock, *Italy Convicts 23 Americans*, Wash. Post, Nov. 5, 2009, at A14.

4852. See *Court Convicts 3 Americans in Kidnapping Case*, N.Y. Times, Feb. 2, 2013, at A6 [hereinafter *Court Convicts 3*]; Rachel Donadio, *Judge Links Italy Agency to Abduction of a Cleric*, N.Y. Times, Feb. 2, 2010, at A10; *Guilty Verdicts in Rendition Case*, N.Y. Times, Mar. 12, 2014, at A6; Hendricks, *supra* note 4834, at 273.

4853. *De Sousa*, 840 F. Supp. 2d at 96; see Hendricks, *supra* note 4834, at 273.

4854. See Donadio, *Italy Convicts 23 Americans*, *supra* note 4848; Donadio, *supra* note 4852; Hendricks, *supra* note 4834, at 273 (“the Constitutional Court’s rulings on state secrecy kept [the judge] from considering important evidence against them”).

4855. See Elisabetta Povoledo, *Court Upholds Convictions of Americans in Kidnapping Case*, N.Y. Times, Dec. 16, 2010, at A8.

4856. See Elisabetta Povoledo, *High Court in Italy Backs Convictions for Rendition*, N.Y. Times, Sept. 20, 2012, at A5; Ian Shapira, *Court Upholds Rendition Verdicts*, Miami Herald, Sept. 20, 2012, at 8A.

4857. See *Court Convicts 3*, *supra* note 4852.

4858. See *Ex-Military Spy Chief Sentenced in CIA Case*, Wash. Post, Feb. 13, 2013, at A6 (reporting also, “The court granted a provisional award of \$1.34 million to Abu Omar and \$670,000 to his wife for the suffering they endured.”); Gaia Pianigiani, *Italy Jails Ex-Officials for Rendition*, N.Y. Times, Feb. 13, 2013, at A12.

4859. See *Italy—CIA—Kidnapping*, Malone Telegram, Feb. 25, 2014.

4860. See *Pardon Granted in Rendition Case*, N.Y. Times, Apr. 6, 2013, at A5.

4861. Extension Motion, *De Sousa v. Dep't of State*, No. 1:09-cv-896 (D.D.C. July 14, 2009), D.E. 5.

4862. Extension Order, *id.* (Aug. 27, 2009), D.E. 7; Docket Sheet, *id.* (May 17, 2009); see Extension Motion, *id.* (Aug. 27, 2009), D.E. 6 (“an event occurred yesterday regarding Plaintiff’s claims which has an impact on this litigation and may have resolved at least a portion of the lawsuit”).

Judge Urbina retired on May 31, 2012. Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

“would require this Court to subject to judicial review the exercise of a discretionary right that has consistently been viewed under U.S. and international law as belonging to the state.”⁴⁸⁶³ The court and the parties agreed that opposition to the motion would be due on September 28 and a reply would be due on October 9.⁴⁸⁶⁴

After Judge Urbina granted De Sousa two extensions of time to respond to the government’s motion to dismiss her complaint, the government opposed the third request, so Judge Urbina ordered De Sousa to respond to the motion by December 22 or seek leave to file an amended complaint.⁴⁸⁶⁵ De Sousa amended her complaint on June 4, 2010.⁴⁸⁶⁶ Defendants filed motions to dismiss the amended complaint on August 19.⁴⁸⁶⁷ Judge Urbina granted the parties three extensions of time for De Sousa to respond, finally setting a deadline for December 6.⁴⁸⁶⁸

On November 24,⁴⁸⁶⁹ De Sousa’s attorney filed a request to present to the court in camera, with cleared defense counsel present, possibly classified information pertaining to the case.⁴⁸⁷⁰ On December 1, De Sousa sought another extension of the briefing schedule,⁴⁸⁷¹ and Judge Urbina ordered briefing stayed until further order of the court.⁴⁸⁷²

Judge Beryl A. Howell joined the bench on December 27, 2010, and received assignment of this pending case on January 20, 2011.⁴⁸⁷³ Judge Howell dismissed the case on January 5, 2012.⁴⁸⁷⁴ By the time of Judge Howell’s ruling, De Sousa had dropped her demand for enforcement of diplomatic immunity, and Judge Howell agreed that entitlement to diplomatic immunity is a non-justiciable polit-

4863. Dismissal Motion, *id.* (Aug. 31, 2009), D.E. 8.

4864. Extension Order, *supra* note 4862.

4865. Docket Sheet, *supra* note 4862; see Government Opposition, *De Sousa*, No. 1:09-cv-896 (D.D.C. Nov. 30, 2009), D.E. 13; Extension Motion, *id.* (Nov. 27, 2009), D.E. 12.

4866. Amended Complaint, *id.* (June 4, 2010), D.E. 17; see Order, *id.* (June 4, 2010), D.E. 16 (granting permission to amend the complaint and denying as moot the pending motion to dismiss the original complaint); Amendment Motion, *id.* (Dec. 22, 2009), D.E. 14.

4867. Dismissal Motions, *id.* (Aug. 19, 2010), D.E. 22, 23.

4868. Docket Sheet, *supra* note 4862.

4869. See Motion to Modify the Briefing Schedule, *De Sousa*, No. 1:09-cv-896 (D.D.C. Dec. 1, 2010), D.E. 27.

4870. Motion for In Camera Presentation, *id.* (dated Nov. 8, 2010, filed Jan 18, 2011), D.E. 34-1; *De Sousa v. Dep’t of State*, 840 F. Supp. 2d 92, 99 (D.D.C. 2012).

4871. Extension Motion, *De Sousa*, No. 1:09-cv-896 (D.D.C. Dec. 1, 2010), D.E. 38.

4872. Docket Sheet, *supra* note 4862.

4873. *Id.*; Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html; *De Sousa*, 840 F. Supp. 2d at 99.

Tim Reagan interviewed Judge Howell for this report in the judge’s chambers on November 4, 2013.

4874. *De Sousa*, 840 F. Supp. 2d at 102, 106–16; see *Judge Dismisses Lawsuit in Italian Kidnapping Case*, Wash. Post, Jan. 6, 2012, at A10; Mike Scarcella, *Using Classified Information*, Nat’l L.J., Jan. 9, 2012, at 16.

ical question.⁴⁸⁷⁵ With respect to related due process claims, De Sousa did not allege specific government actions that deprived her of liberty interests.⁴⁸⁷⁶ On October 22, 2012, De Sousa voluntarily dismissed her appeal.⁴⁸⁷⁷

One of De Sousa's codefendants in Italy—the CIA's station chief at the time of Nasr's apprehension—was arrested on July 18, 2013, in Panama at Interpol's request.⁴⁸⁷⁸ He was returned, however, to the United States on the following day.⁴⁸⁷⁹

Reviving a case against Nasr that was interrupted by his abduction, Italy convicted him in absentia of terrorism on December 6, 2013, and sentenced him to six years in prison.⁴⁸⁸⁰

Challenge: Classified Evidence

When Judge Howell assumed responsibility for the case, a primary goal was to move on the motions to dismiss by getting a response from De Sousa.⁴⁸⁸¹

On January 14, 2011, the defendants opposed De Sousa's motion to present classified information to the court: "Plaintiff's request should be denied because the Executive Branch, which holds exclusive responsibility for the protection and control of classified national security information, has not authorized Plaintiff (or her counsel) to disclose classified information for any purpose relating to this civil litigation."⁴⁸⁸² On February 18, De Sousa's attorney completed a six-page reply brief.⁴⁸⁸³ The March 11 public filing includes a few redactions that resulted from a classification review.⁴⁸⁸⁴

At a May 26, status conference, Judge Howell "pronounced herself 'literally speechless' at the government's assertions," according to the *New York Times*.⁴⁸⁸⁵ Because they had received security clearances, it was not surprising that De Sousa and her attorney knew classified information relevant to the case, so the government's position created a substantial challenge for the court: refusing to provide a

4875. *De Sousa*, 840 F. Supp. 2d at 106.

4876. *Id.* at 108–13.

4877. Motion, *De Sousa v. Dept. of State*, No. 12-5064 (D.C. Cir. Oct. 22, 2012); see Dismissal Order, *id.* (Oct. 29, 2012).

4878. See Elisabeth Malkin, Rachel Donadio & Karla Zabudovsky, *Ex-Employee of C.I.A. Held in Abduction*, N.Y. Times, July 19, 2013, at A4; Greg Miller, *Ex-CIA Operative Held in Panama*, Wash. Post, July 19, 2013, at A11.

4879. See Greg Miller & Karen DeYoung, *Ex-CIA Operative Released by Panama*, Wash. Post, July 20, 2013, at A3; Scott Shane, *Former Spy Returns to U.S.*, N.Y. Times, July 20, 2013, at A7.

4880. See *Egyptian Cleric Convicted*, N.Y. Times, Dec. 7, 2013, at A5.

4881. Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4882. Presentation Opposition at 2, *De Sousa v. Dep't of State*, No. 1:09-cv-896 (D.D.C. Jan. 14, 2011), D.E. 33; see *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 99 (D.D.C. 2012).

4883. Reply Brief, *De Sousa*, No. 1:09-cv-896 (D.D.C. dated Feb. 18, 2011, filed Mar. 11, 2011), D.E. 39.

4884. *Id.*; Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4885. Scott Shane, *U.S. Seeks to Withhold Secret Data from Judge*, N.Y. Times, May 27, 2011, at A13.

secure way for De Sousa and her attorney to communicate what they knew to the judge.⁴⁸⁸⁶

Judge Howell ordered De Sousa to respond to the defendants' motions to dismiss the case, and Judge Howell invited De Sousa to indicate how the classified information would be relevant:

[I]n the plaintiff's opposition papers, the plaintiff shall note the specific legal issues for which resolution, in the plaintiff's view, requires the Court to assess facts that implicate classified information. The plaintiff shall identify the need to rely on classified information with respect to any particular claim as precisely as possible without disclosing any classified information.⁴⁸⁸⁷

Judge Howell also ordered the government to provide the plaintiff with logistical support that would permit De Sousa's attorney to prepare briefing on a secure computer so as to prevent inadvertent mishandling of classified information.⁴⁸⁸⁸ The government declined to provide the attorney with logistical support that would protect the attorney from inadvertently referring to classified information in a document prepared on a nonsecure computer.⁴⁸⁸⁹

On June 3, the government provided Judge Howell with an unredacted copy of De Sousa's March 11 reply brief supporting her motion to provide classified information to the court.⁴⁸⁹⁰ "In making this submission, the Government reiterates its position that consideration of classified information in this matter is not necessary, and that Plaintiff and Plaintiff's counsel are prohibited from accessing or disclosing classified information without Executive Branch authorization."⁴⁸⁹¹

Judge Howell ordered the government to explain within one week the reason for every redaction.⁴⁸⁹² Later, she gave the government a two-week extension.⁴⁸⁹³ As it turned out, the explanation included the classified information that De Sousa wanted to present to the judge, but neither the judge nor the government, nor De Sousa or her attorney, knew this at the time.⁴⁸⁹⁴

On July 1, De Sousa moved for a status conference, accusing the government of procedural impropriety: "Instead of using the classification process as a means to ensure the protection from unauthorized or even inadvertent public disclosure

4886. Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4887. Order at 1, *De Sousa*, No. 1:09-cv-896 (D.D.C. May 26, 2011), D.E. 40.

4888. *Id.* at 2.

4889. Interview with Hon. Beryl A. Howell, Nov. 4, 2013; see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 198–200 (2010) (discussing another case in which the attorney was denied resources to prepare classified briefing).

4890. June 3, 2011, Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. June 3, 2011), D.E. 41; Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4891. June 3, 2011, Notice, *supra* note 4890.

4892. Docket Sheet, *supra* note 4862.

4893. *Id.*; see Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. June 24, 2011), D.E. 44; *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 100 (D.D.C. 2012).

4894. Interview with Hon. Beryl A. Howell, Nov. 4, 2013; see Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. Sept. 15, 2011), D.E. 51 ("One item of information . . . has previously been made known to Plaintiff's counsel, pursuant to Executive Branch authorization, in another matter.").

of classified information, the Executive Branch has turned it into a weapon solely to secure a litigation advantage.⁴⁸⁹⁵ Portions are redacted from three of the four footnotes in the public filing of this six-page motion.⁴⁸⁹⁶ The government responded, “Defendants’ motions present purely legal arguments, and Defendants submit that those arguments may be fully addressed without making reference to classified information.”⁴⁸⁹⁷

Judge Howell held a status conference on August 31 in her chambers.⁴⁸⁹⁸ Because the conference was docketed for her courtroom, members of the public, including members of the news media, were in court to observe proceedings that turned out not to be held there.⁴⁸⁹⁹ To avoid the appearance of secret proceedings, had Judge Howell to do it over again she would have followed the chambers conference with an in-court presentation of discussions and outcomes.⁴⁹⁰⁰

At the August 31 status conference, government attorneys informed Judge Howell that there were no precautions she and the court could take that would permit the plaintiff or her attorney to convey classified information to Judge Howell without the defendants’ permission.⁴⁹⁰¹

Judge Howell considered the possibility of ordering the government to disclose the classified information to her, but the plaintiff refused to disclose to the government what information the plaintiff wanted to disclose to the judge.⁴⁹⁰² Moreover, “despite the Court’s requests and the procedures suggested by the Court, the plaintiff has not provided any description, even in broad strokes, of the classified information she seeks to rely upon.”⁴⁹⁰³

Judge Howell determined that if the plaintiff had made a more compelling showing of a need to present to the judge classified information, the judge could have ordered it:

Upon review of the most pertinent authorities, the Court believes that it has the discretion to order disclosure of classified information to the Court in a civil case where the information is material to the resolution of disputed legal issues and where alternatives to reliance upon classified information are inadequate to satisfy the interests of justice.⁴⁹⁰⁴

4895. Status Conference Motion, *De Sousa*, No. 1:09-cv-896 (D.D.C. dated July 1, 2011, filed July 8, 2011), D.E. 45; see *De Sousa*, 840 F. Supp. 2d at 100.

4896. Status Conference Motion, *supra* note 4895.

The government provided Judge Howell with an unredacted copy and explanations for the redactions. Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. Aug. 3, 2011), D.E. 47.

4897. Government Brief, *De Sousa*, No. 1:09-cv-896 (D.D.C. July 25, 2011), D.E. 46.

4898. Docket Sheet, *supra* note 4862; Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4899. Interview with Hon. Beryl A. Howell, Nov. 4, 2013; see Docket Sheet, *supra* note 4862.

4900. Interview with Hon. Beryl A. Howell, Nov. 4, 2013.

4901. *De Sousa v. Dep’t of State*, 840 F. Supp. 2d 92, 100–01 & n.3 (D.D.C. 2012).

4902. *Id.* at 104 n.4.

4903. *Id.* at 105 n.5.

4904. *Id.* at 104.

Section 215

Electronic Frontier Foundation v. Department of Justice (Yvonne Gonzalez Rogers, N.D. Cal.)

The Electronic Frontier Foundation submitted to units of the Department of Justice (DOJ) on June 2, 2011, a Freedom of Information Act (FOIA) request for records reflecting interpretation or use of orders issued by the Foreign Intelligence Surveillance Court (FISC) pursuant to section 215 of the USA PATRIOT Act,⁴⁹⁰⁵ which amended title V of the Foreign Intelligence Surveillance Act (FISA) concerning tangible things.⁴⁹⁰⁶ Having received no records responsive to the request, the foundation filed a civil FOIA action in the Northern District of California on October 26.⁴⁹⁰⁷ On January 18, 2012, the court reassigned the case to Judge Yvonne Gonzalez Rogers, who had joined the bench on November 21, 2011.⁴⁹⁰⁸

Judge Gonzalez Rogers issued on February 16, 2012, a stipulated production schedule specifying three phases of production to the foundation of records responsive to the FOIA request, to be completed by July 1.⁴⁹⁰⁹

In June 2013, news media reported on classified information about the government's application of section 215 that was provided by Edward Snowden.⁴⁹¹⁰ As a result, the government decided to declassify some information about section 215,⁴⁹¹¹ and it sought time in this FOIA action to determine whether declassifica-

4905. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, 115 Stat. 272 (2001).

4906. Complaint at 5, *Electronic Frontier Found. v. Dep't of Justice*, No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; *see also* 50 U.S.C. §§ 1861–1862 (2012).

4907. Complaint, *supra* note 4906; *see* Amended Complaint, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Nov. 3, 2011), D.E. 9.

4908. Reassignment Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Jan. 18, 2012), D.E. 16; *see* www.fjc.gov/history/home.nsf/page/judges.html.

Tim Reagan interviewed Judge Gonzalez Rogers for this report in the judge's chambers on August 21, 2014.

4909. Stipulated Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Feb. 16, 2012), D.E. 22.

4910. Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, *Guardian* (London), June 6, 2013, at 1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, *Wash. Post*, June 6, 2013, at A1; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, *N.Y. Times*, June 7, 2013, at A1; *see* Press Release, Office of the Dir. of Nat'l Intelligence, June 6, 2013, www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information?tmpl=component&format=pdf; *see also infra* "Foreign Intelligence Surveillance Act Litigation."

4911. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/927-draft-document?tmpl=component&

tions would amend the government's responses to the foundation's FOIA requests.⁴⁹¹²

On August 11, Judge Gonzalez Rogers determined that "DOJ has established a proper basis for withholding, in full, the FISC orders and opinions at issue, and for withholding all names of telecommunications providers participating in the Call Records Collection Program However, DOJ has not established that [a legal memorandum] is properly withheld" ⁴⁹¹³ On the one hand, the FISA court opinions contained "no reasonably segregable information."⁴⁹¹⁴ On the other hand, the legal memorandum, which was prepared by the Office of Legal Counsel on whether the census Bureau should turn data over to the NSA, "can no longer be withheld because it has become a controlling statement of the executive branch's legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC."⁴⁹¹⁵

On January 29, 2015, the government voluntarily dismissed its appeal,⁴⁹¹⁶ and the government released the legal memorandum on February 4.⁴⁹¹⁷ The matter of attorney fees remains to be resolved.⁴⁹¹⁸

Challenge: Classified Evidence

The Justice Department informed the court on November 15, 2012, that it had classified records that were otherwise responsive to the foundation's FOIA request.⁴⁹¹⁹ The government stated that it would submit to Judge Gonzalez Rogers a classified declaration for ex parte review in camera.⁴⁹²⁰

The declaration would be lodged with the classified information security officer, who, if the court so permits, would "contact the Court in the near future to ascertain whether the Court has any questions about the procedures [required for handling classified information]."⁴⁹²¹ The notice made clear that the classified information security officer does not report to attorneys representing the gov-

format=pdf; see Frederic J. Frommer, *Government to Declassify Some Court Opinions*, Seattle Times, Sept. 6, 2013, at A3.

4912. Status Report, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. July 12, 2013), D.E. 61; see Opinion at 1–2, *id.* (Aug. 11, 2014), D.E. 90, available at 2014 WL 3945646.

4913. Opinion, *supra* note 4912, at 3; see *id.* at 7–13; see Bob Egelko, *Judge Won't Force U.S. to Release Spying Program Documents*, S.F. Chron., Aug. 12, 2014, at C4.

4914. Opinion, *supra* note 4912, at 7.

4915. *Id.* at 11; see Egelko, *supra* note 4913.

4916. Voluntary Dismissal, *Electronic Frontier Found. v. U.S. Dep't of Justice*, No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

4917. Status Report, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Apr. 9, 2015), D.E. 101.

4918. *Id.*

4919. Letter, *id.* (Nov. 15, 2012), D.E. 39.

4920. *Id.* at 1.

4921. *Id.* at 2.

ernment and “thus serves in a neutral capacity providing security oversight in litigation involving classified information.”⁴⁹²²

Finding, on March 26, 2013, that “[t]he public declarations do not begin to explain why [responsive] legal analysis documents would be so replete with descriptions of intelligence activities, sources and methods that no portions thereof would contain non-exempt information,” Judge Gonzalez Rogers “decline[d] to look to the *in camera* submission without more from the Department of Justice on the public record in this matter.”⁴⁹²³

On April 1, 2014, to support the government’s summary judgment motion following the production of responsive documents in the aftermath of Snowden’s disclosures, the government lodged with the classified information security officer a classified declaration.⁴⁹²⁴ Following her review of this declaration and other summary judgment filings, Judge Gonzalez Rogers ordered the government to produce for her *ex parte* review various withheld classified orders and opinions of the FISA court.⁴⁹²⁵ That same day, the government lodged with the classified information security officer redacted versions of the FISA court filings as they had been provided to Congress.⁴⁹²⁶

On July 24, Judge Gonzalez Rogers ordered an additional *ex parte* production.⁴⁹²⁷ The government complied that day.⁴⁹²⁸

Judge Gonzalez Rogers’s chambers are in Oakland, and the courthouse there does not have a Sensitive Compartmented Information Facility (SCIF), which is required for storing sensitive compartmented information, a type of classified information involving sources and methods and therefore requiring extra protections.⁴⁹²⁹ For this case, classified information was presented to the judge either in chambers by the classified information security officer or by the judge’s visiting the court’s SCIF in San Francisco.⁴⁹³⁰

Challenge: Orders and Opinions

For this case, Judge Gonzalez Rogers relied heavily on her law clerk to prepare initial drafts of orders and opinions, because the law clerk did not have a security

4922. *Id.* at 2–3.

4923. Order, *id.* (Mar. 26, 2013), D.E. 49.

4924. Notice of Lodging, *id.* (Apr. 1, 2014), D.E. 78.

4925. Order, *id.* (June 13, 2014), D.E. 85; *see* Opinion, *supra* note 4912, at 2.

4926. Notice of Lodging, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. June 16, 2014), D.E. 86.

4927. Order, *id.* (July 24, 2014), D.E. 88; *see* Opinion, *supra* note 4912, at 2.

4928. Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. July 25, 2014), D.E. 89.

4929. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 3, 22–23 (Federal Judicial Center, 2d ed. 2013).

4930. Interview with Hon. Yvonne Gonzalez Rogers, Aug. 21, 2014.

clearance and had not seen any classified information.⁴⁹³¹ This process ensured that the orders would not inadvertently disclose anything classified.⁴⁹³²

On one occasion, Judge Gonzalez Rogers had to travel to San Francisco to refresh her memory about classified submissions to draft an order.⁴⁹³³

4931. *Id.*

4932. *Id.*

4933. *Id.*

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT AND ARTICLE III COURTS

The importance of both judicial independence and national security was brought into especially sharp focus following surveillance disclosures by Edward Snowden in 2013. The following chapter summarizes both recent and historical litigation concerning the Foreign Intelligence Surveillance Act.

Previous chapters focused on how individual judges managed specific cases or collections of cases. The following chapter is different in that it focuses on a litigation topic as it arose in many cases over several years, and it also illustrates both legal and case-management challenges that judges face in national security litigation.

Foreign Intelligence Surveillance Act Litigation

The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) was signed by President Carter on October 25, 1978.⁴⁹³⁴ The eleven sections of FISA's title I became chapter 36, sections 1801 through 1811, of the U.S. Code's title 50 on war and national defense. FISA's title II included conforming amendments, and title III concerned the effective date.

FISA provides for court orders authorizing “electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information [involving] the acquisition of communications of [a] United States person.”⁴⁹³⁵ Foreign powers include foreign governments, foreign factions, and international terrorists.⁴⁹³⁶ Use of FISA-derived evidence in court requires notice to the person against whom the evidence is used.⁴⁹³⁷

FISA orders are issued by a FISA court, sometimes referred to as the Foreign Intelligence Surveillance Court or FISC, that originally consisted of seven district judges from seven circuits appointed by the Chief Justice for nonrenewable seven-year terms.⁴⁹³⁸

Physical Searches

In 1980, President Carter's second Attorney General, Benjamin Civiletti, adopted a policy of seeking FISA court permission for some physical searches in service of foreign intelligence, searches that are sometimes called black bag jobs.⁴⁹³⁹ William French Smith, President Reagan's first Attorney General, submitted a black bag petition to the FISA court on June 3, 1981, asking the court to deny the petition and rule that the court did not have jurisdiction over such petitions.⁴⁹⁴⁰ Presiding

4934. Pub. L. 95-511, 92 Stat. 1783 (1978). *See generally* James G. Carr & Patricia L. Bellia, *The Law of Electronic Surveillance* 461–532 (2015); David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* (2d ed. 2012); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 *Harv. J. L. & Pub. Pol'y* 757 (2014).

4935. FISA § 102(b), 50 U.S.C. § 1802(b) (2012).

4936. *Id.* § 101(a), 50 U.S.C. § 1801(a).

4937. *Id.* § 106(a), 50 U.S.C. § 1806(a).

4938. Pub. L. 95-511, §§ 103(a), (d), 92 Stat. 1788. *See generally* Elizabeth Goitein & Faiza Patel, *What Went Wrong with the FISA Court* (Brennan Ctr. for Justice 2015), *available at* www.brennancenter.org/sites/default/files/analysis/What_Went_Wrong_With_The_FISA_Court.pdf; Bruce Moyer, *The Most Powerful Court You Have Never Heard Of*, *Fed. Law.*, Mar. 2015, at 6.

4939. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 *Am. U. L. Rev.* 1, 78 (2000); Charlie Savage, *Takeover* 40 (2007).

4940. Brief, *In re Physical Search*, No. 81-____ (FISA Ct. June 3, 1981), *reprinted in* S. Rep. No. 97-280, App. B (1981), *available at* www.intelligence.senate.gov/pdfs97th/97280.pdf.

Judge George L. Hart, Jr., District of the District of Columbia, acceded to the government's request in the court's first public opinion.⁴⁹⁴¹ Expressing a judgment in which all judges on the court concurred, Judge Hart observed that the text of FISA applied only to electronic surveillance.⁴⁹⁴²

In 1994, FISA was amended to extend the FISA court's jurisdiction to include physical searches for foreign intelligence purposes.⁴⁹⁴³ The new provisions became FISA's title III,⁴⁹⁴⁴ and provisions on effective dates became title IV.

FISA Expansion

In 1998, the FISA court's jurisdiction was further expanded to include pen registers, trap and trace devices, and business records, creating new titles IV⁴⁹⁴⁵ and V⁴⁹⁴⁶ and moving effective date provisions to title VI.⁴⁹⁴⁷

The USA PATRIOT Act was signed by President George W. Bush on October 26, 2001.⁴⁹⁴⁸ It relaxed the standard for issuing a FISA order from "the purpose of the surveillance is to obtain foreign intelligence information" to require that only "a significant purpose" be foreign intelligence.⁴⁹⁴⁹ The act also expanded the FISA court from seven to eleven district judges, of whom at least three must reside within twenty miles of D.C.⁴⁹⁵⁰ (The FISA Amendments Act of 2008 clarified that the eleven judges must come from "at least" seven circuits.⁴⁹⁵¹)

Section 215 of the Patriot Act expanded FISA's title V for business records to include "any tangible things."⁴⁹⁵² Before the Patriot Act, FISA provided for FISA court orders issued to the FBI "authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or an investigation concerning international terrorism."⁴⁹⁵³ The Patriot Act authorized the FISA court to assist the FBI by issuing "an order requiring the production of any tangible things (including books, records, papers, documents, and other

4941. Opinion, *In re Physical Search*, No. 81-___ (FISA Ct. June 11, 1981), reprinted in S. Rep., *supra* note 4940.

4942. *Id.*

4943. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. 103-359, § 807, 108 Stat. 3423, 3443-53 (1994).

4944. 50 U.S.C. §§ 1821-1829 (2012) (subchapter II).

4945. *Id.* §§ 1841-1846 (subchapter III, on pen registers and trap and trace devices).

4946. *Id.* §§ 1861-1862 (subchapter IV, on business records).

4947. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. 105-272, §§ 601-603, 112 Stat. 2396, 2404-12 (1998); see Donohue, *supra* note 4934, at 797 (reporting that the 1998 amendments were triggered by the 1995 Oklahoma City bombing).

4948. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, 115 Stat. 272 (2001).

4949. *Id.* § 218, 115 Stat. 291; see 50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B).

4950. *Id.* § 208, 115 Stat. 283; see 50 U.S.C. § 1803(a)(1).

4951. Pub. L. 110-261, § 109, 122 Stat. 2436, 2464 (2008); see 50 U.S.C. § 1803(a)(1).

4952. Pub. L. 107-56, § 215, 115 Stat. 287-88; see 50 U.S.C. §§ 1861-1862.

4953. 50 U.S.C. § 1861(a) (2000) (emphasis added).

items) for an investigation to obtain foreign intelligence information not concerning a United States person or *to protect against international terrorism* or clandestine intelligence activities.”⁴⁹⁵⁴

FISA imposes on the government a requirement for “minimization procedures” to protect persons from unnecessary violations of privacy.⁴⁹⁵⁵ Over the years, the FISA court exercised oversight over minimization procedures:

In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used *sub rosa* for criminal investigations, the Court routinely approved the use of information screening “walls” proposed by the government in its applications. Under the normal “wall” procedures, where there were separate intelligence and criminal *investigations*, or a single counter-espionage investigation with overlapping intelligence and criminal *interests*, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney-client intercepts occurred, Justice Department lawyers in [the Office of Intelligence Policy and Review] acted as the “wall.” In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, this Court became the “wall” so that FISA information could not be disseminated to criminal prosecutors without the Court’s approval. In some cases where this Court was the “wall,” the procedures seemed to have functioned as provided in the Court’s orders; however, in an alarming number of instances, there have been troubling results.

...

In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications. . . .

...

In virtually every instance, the government’s misstatements and omissions in FISA applications and violations of the Court’s orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors.⁴⁹⁵⁶

Following the attacks of September 11, 2001, the government proposed relaxed minimization procedures, but all seven members of the court agreed that some of the changes were “designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes*, instead of being consistent

4954. *Id.* § 1861(a)(1) (2001) (emphasis added).

4955. *Id.* §§ 1801(h), 1821(4) (2012).

4956. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620–21 (FISA Ct. 2002).

with the need of the United States to obtain, produce, and disseminate *foreign intelligence information*.”⁴⁹⁵⁷ One of the court’s concerns was that the government would be able to circumvent probable-cause requirements for criminal investigations by characterizing the investigations as for foreign intelligence.⁴⁹⁵⁸ So the court modified the submitted minimization procedures.⁴⁹⁵⁹

FISA requires the Chief Justice to appoint three district or circuit judges to a FISA court of review to hear government appeals from FISA court rulings.⁴⁹⁶⁰ Hearing its very first appeal, the court of review overruled the FISA court’s modifications to the government’s minimization procedures.⁴⁹⁶¹ “The FISA court’s decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an Article III court.”⁴⁹⁶²

Warrantless Wiretaps

On December 16, 2005, the *New York Times* reported that President Bush had secretly authorized in 2002 a program of surveillance that excluded the FISA court from surveillance approval, although the surveillance included international communications with people in the United States.⁴⁹⁶³ *USA Today* reported on May 11, 2006, that telephone companies were cooperating with government surveillance in possible violation of FISA.⁴⁹⁶⁴ Many civil suits against the government and against telephone companies followed these revelations.⁴⁹⁶⁵

4957. *Id.* at 623.

4958. *Id.* at 624 (quotation marks omitted).

4959. *Id.* at 625–27.

4960. 50 U.S.C. § 1803(b) (2012).

4961. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

“Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL) as *amici curiae*.” *Id.* at 719 (footnote omitted).

4962. *Id.* at 731.

4963. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y. Times*, Dec. 16, 2005, at A1.

4964. Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, *USA Today*, May 11, 2006, at 1A.

“President Bush authorized the NSA to (1) collect the contents of certain international communications, a program that was later referred to as the [terrorist surveillance program], and (2) collect in bulk non-content information, or ‘metadata,’ about telephone and Internet communications.” Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 16 (July 2, 2014) [hereinafter Second Privacy Board Report], available at www.pclob.gov/All%20Documents/Report%20on%20the%20Section%20702%20Program/PCLOB-Section-702-Report.pdf.

4965. *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); Docket Sheet, *In re NSA Telecomm. Records Litig.*, No. 3:06-md-1791 (N.D. Cal. Aug. 14, 2006).

Judges were divided in these cases on whether the plaintiffs had standing to challenge the government program.⁴⁹⁶⁶

Congress amended FISA to provide the telephone companies with retroactive immunity.⁴⁹⁶⁷ The Intelligence Reform and Terrorism Prevention Act of 2004 moved FISA's title VI on effective dates to title VII and added a new title VI on requirements for reporting FISA court statistics to Congress.⁴⁹⁶⁸ The FISA Amendments Act of 2008 (FAA) substituted a new title VII providing "additional procedures regarding certain persons outside the United States."⁴⁹⁶⁹ Subject to FISA court approval or exigent circumstances, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."⁴⁹⁷⁰ A new title VIII granted the telephone companies retroactive civil immunity.⁴⁹⁷¹

On January 10, 2007, while the warrantless wiretap litigation was pending, the FISA court issued two negotiated classified orders that resulted in the government's no longer circumventing the FISA court in the surveillance program at issue.⁴⁹⁷²

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. As a result of the new orders, any electronic surveillance that was conducted as part of the [terrorist surveillance program] is now being conducted subject to the approval of the FISA Court.⁴⁹⁷³

4966. See *supra* "Warrantless Wiretaps."

4967. See *In re* NSA Telecomm. Records Litig., 671 F.3d 881 (9th Cir. 2011), *affg* *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009), *cert. denied*, 568 U.S. ____, 133 S. Ct. 421 (2012); see Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38Harv. J.L. & Pub. Pol'y117, 137 (2014).

4968. Pub. L. 108-458, § 6002, 118 Stat. 3638, 3743-44 (2004); see 50 U.S.C. § 1871 (2012) (subchapter V); see also Donohue, *supra* note 4967, at 138-39.

4969. Pub. L. 110-261, § 101(a), 122 Stat. 2436, 2437 (2008); see 50 U.S.C. §§ 1881-1881g (subchapter VI).

4970. Pub. L. 110-261, § 101(a), 122 Stat. 2438; see 50 U.S.C. § 1881a; see also Second Privacy Board Report, *supra* note 4964, at 19-24.

4971. Pub. L. 110-261, §§ 201-202, 122 Stat. 2467-71; see 50 U.S.C. §§ 1885-1885c (subchapter VII).

4972. Government Motion for Summary Judgment, Ex. A, Elec. Frontier Found. v. Dep't of Justice, No. 1:07-cv-403 (D.D.C. May 11, 2007), D.E. 7; see Government Brief, *In re* ____, No. ____ (FISA Ct. Dec. 13, 2006), available at www.dni.gov/files/documents/1212/Memo%20of%20Law%20as%20filed%2012%2013%202006%20-%2012-11%20Redacted.pdf (redacted brief making the case for the orders).

4973. Redacted Declaration of NSA Director at 3, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175.

In January 2007, the FISC issued orders authorizing the government to conduct certain electronic surveillance of telephone and Internet communications carried over listed communication facilities where, among other things, the *government* made a probable cause determina-

The Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) on February 27 in the District of Columbia seeking disclosure of the orders.⁴⁹⁷⁴ Judge Thomas F. Hogan ruled on August 14 that the orders satisfied the national defense, statutory, and law enforcement FOIA exemptions.⁴⁹⁷⁵

On August 9, the ACLU filed a motion directly with the FISA court for public release of the orders.⁴⁹⁷⁶ FISA Court Judge John D. Bates, District of Columbia, denied the ACLU its requested relief.⁴⁹⁷⁷ “Other courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception.”⁴⁹⁷⁸

The Director of National Intelligence released redacted versions of the two helpful orders on December 12, 2014.⁴⁹⁷⁹ Judge Malcolm J. Howard, Eastern District of North Carolina, issued on January 10, 2007, one order covering surveillance of Americans⁴⁹⁸⁰ and another order covering foreign surveillance.⁴⁹⁸¹

Partially declassified declarations released on December 21, 2013, provided some details about the two helpful FISA court orders:

On January 10, 2007, the FISA Court issued two orders authorizing the Government to conduct certain electronic surveillance that had been occurring under the [surveillance program]. . . . [T]he orders consisted of a [redacted] and a Foreign Telephone and Email Order, which authorized, *inter alia*, electronic surveillance of telephone and Internet communications carried over particularly listed facilities when the Government determines that there is probable cause to believe that (1) one of the communicants is a member or agent of al Qaeda or an associated terrorist organization, and (2) the communication is to or from a foreign country (*i.e.*, a one-end foreign communication to or from the United States). The telephone numbers and email addresses to be targeted under the

tion regarding one of the communicants, and the email addresses and telephone numbers to be tasked were reasonably believed to be used by persons located outside the United States.

Second Privacy Board Report, *supra* note 4964, at 17.

4974. Complaint, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007), D.E. 1.

4975. Opinion, *id.* (Aug. 14, 2007), D.E. 17; *see Elec. Frontier Found. v. Dep’t of Justice*, 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a motion for reconsideration based on new revelations by news media).

4976. Motion, *In re Certain Orders*, No. Misc. 07-1 (FISA Ct. Aug. 9, 2007), *available at* www.aclu.org/files/images/asset_upload_file968_31228.pdf; *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007).

4977. *In re Court Records*, 526 F. Supp. 2d at 497.

4978. *Id.* at 488.

4979. Press Release, Office of the Dir. of Nat’l Intelligence, Dec. 12, 2014, www.odni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11,-2001?tmpl=component&format=pdf.

4980. Order, *In re Various Known and Unknown Agents*, No. ____ (FISA Ct. Jan. 10, 2007), *available at* www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%20-%2012-11%20-%20Redacted.pdf.

4981. Order, *In re* ____, No. ____ (FISA Ct. Jan. 10, 2007), *available at* www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%2012-11%20-%20Redacted.pdf.

Foreign Telephone and Email Order were further limited to those that the NSA reasonably believes are being used by persons *outside* the United States.⁴⁹⁸²

On April 3, 2007, Judge Roger Vinson, Northern District of Florida, was on FISA court duty, and he narrowed the government's ability to make probable cause determinations without FISA court approval.⁴⁹⁸³

Statutory Enhancement of Surveillance Authority

President Bush signed the Protect America Act on August 5, 2007.⁴⁹⁸⁴ The act was a six-month modification of FISA that excluded from FISA's coverage electronic "surveillance directed at a person reasonably believed to be located outside of the United States."⁴⁹⁸⁵ The act specified a procedure for the FISA court to enforce a directive by the Director of National Intelligence or the Attorney General to a communication service provider for compensated assistance in "the acquisition of foreign intelligence information" concerning "persons reasonably believed to be located outside the United States."⁴⁹⁸⁶

The FISA Court of Review's Second Published Opinion

On August 22, 2008, the FISA court of review, in its second published opinion, affirmed an order of compliance issued by the FISA court.⁴⁹⁸⁷ Reviewing the constitutionality of the directives, the court held "that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be lo-

4982. Classified Alexander Declaration at 15, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. May 25, 2007), *available, as redacted, at* www.dni.gov/files/documents/1220/NSA%20Alexander%202007%20Shubert%20Declaration.pdf.

4983. Opinion, *In re* ___, No. ___ (FISA Ct. Apr. 3, 2007), *available at* www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-%20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf; *see* Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12.

Two subsequent FISA court opinions by Judge Vinson were redacted and released on January 26, 2015, in response to an action by the *New York Times* to enforce a request under the Freedom of Information Act. Opinion, No. ___ (FISA Ct. Aug. 27, 2007); Opinion, No. ___ (FISA Ct. May 31, 2007); <https://s3.amazonaws.com/s3.documentcloud.org/documents/1509488/nyt-savage-foia-fisc-may-august-2007-orders.pdf> (both opinions); Docket Sheet, *N.Y. Times Co. v. U.S. Dep't of Justice*, No. 1:14-cv-3948 (S.D.N.Y. June 3, 2014); *see* Charlie Savage, *Collection of Foreigners' Data Began Before Congress Backed It, Papers Show*, N.Y. Times, Jan. 28, 2015, at 13.

4984. Pub. L. 110-55, § 2, 52 Stat. 552 (2007); *see* Jacob Sommer, *FISA Authority and Blanket Surveillance*, Litigation, Spring 2014, at 40, 44.

4985. Pub. L. 110-55, § 2, FISA § 105A, 50 U.S.C. § 1805a (2007); *see* Second Privacy Board Report, *supra* note 4964, at 19; Donohue, *supra* note 4967, at 135-37.

4986. Pub. L. 110-55, §§ 2-3, FISA §§ 105B-105C, 50 U.S.C. §§ 1805b-1805c (2007).

4987. *In re* Directives, 551 F.3d 1004 (FISA Ct. Rev. 2008); *see* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 158-59 (2010); Sommer, *supra* note 4984, at 40-41.

cated outside the United States.⁴⁹⁸⁸ The court determined that the directives satisfied the Fourth Amendment's reasonableness requirement.⁴⁹⁸⁹

Yahoo! complied with the directives.⁴⁹⁹⁰ On June 14, 2013, it filed a motion with the FISA court to make public the lower court's opinion and to make public Yahoo!'s identity.⁴⁹⁹¹ Presiding Judge Reggie B. Walton, District of the District of Columbia, after consultation with the other FISA court judges, issued an order on July 15 that the government review the opinion for redaction of classified information.⁴⁹⁹² In response to the motion, the government stated that Yahoo!'s identity could be declassified and that the government had no objection to publication of unclassified portions of the opinion and the case file.⁴⁹⁹³

On September 11, 2014, the Director of National Intelligence posted on the Internet forty-eight documents including 1,283 pages:⁴⁹⁹⁴ the FISA court opinion,⁴⁹⁹⁵ a less redacted version of the FISA court of review's opinion,⁴⁹⁹⁶ and many

4988. *In re Directives*, 551 F.3d at 1012; see Second Privacy Board Report, *supra* note 4964, at 90.

4989. *In re Directives*, 551 F.3d at 1012–15; see Donohue, *supra* note 4967, at 137. See generally Jacob Sommer, *FISA Authority and Blanket Surveillance: A Gatekeeper Without Opposition*, 40 Litig. 40 (2014).

4990. *In re Directives*, 551 F.3d at 1008; see Craig Timberg & Christopher Ingraham, *Fines in NSA Dispute Might Have Bankrupted Yahoo*, Wash. Post, Sept. 16, 2014, at A13.

4991. Motion, *In re Directives*, No. 105B(g) 07-1 (FISA Ct. June 14, 2013), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-1.pdf.

4992. Order, *id.* (July 15, 2013), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-3.pdf.

4993. Government Response, *id.* (June 14, 2013), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-2.pdf; see Order, *id.* (Oct. 22, 2013), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-4.pdf (noting the status of the classification review).

4994. Press Release. Office of the Dir. of Nat'l Intelligence, Sept. 11, 2014, www.odni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1109-statement-by-the-office-of-the-director-of-national-intelligence-and-the-u-s-department-of-justice-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation?tmpl=component&format=pdf [hereinafter Sept. 11, 2014, DNI Press Release]; see Government Supplemental Response, *In re Directives to Yahoo!, Inc.*, No. 105B(g) 07-1 (FISA Ct. Dec. 12, 2014), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-5.pdf; see also Vinu Goel & Charlie Savage, *Threat of Daily Fine Shows Government's Aggressive Push for Data*, N.Y. Times, Sept. 12, 2014, at B1; Craig Timberg, *U.S. Threat Led Yahoo to Relent*, Wash. Post, Sept. 12, 2014, at A1; Danny Yadron, *Yahoo Faced Big U.S. Fines*, Wall St. J., Sept. 12, 2014, at B1.

4995. Opinion, *In re Directives to Yahoo!, Inc.*, No. 105B(g) 07-1 (FISA Ct. Apr. 25, 2008), available at www.dni.gov/files/documents/0909/Memorandum%20Opinion%2020080425.pdf (redacted); see Order, *id.* (Sept. 11, 2014), available at www.lawfareblog.com/wp-content/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf (ordering the unsealing of declassified portions of the opinion).

A more redacted version of this opinion was also included in the release. www.dni.gov/files/documents/0909/Redacted%20Memo%20Opinion%20and%20Order%2020080425.pdf.

4996. Opinion, *In re Directives to Yahoo!, Inc.*, No. 08-1 (FISA Ct. Rev. Aug. 22, 2008), available at www.dni.gov/files/documents/0909/FISC%20Merits%20Opinion%2020080822.pdf (redacted).

documents from the two case files. A redacted transcript of argument before the FISA court of review was released on November 17.⁴⁹⁹⁷ Additional documents were released in March 2015.⁴⁹⁹⁸

Challenges to the FISA Amendments Act

The ACLU initiated litigation on the FISA Amendments Act on the day that the Act was signed.⁴⁹⁹⁹

The ACLU filed a motion with the FISA court for access to the court's rulings on the constitutionality of the Act's provisions.⁵⁰⁰⁰ On August 27, 2008, Judge Mary A. McLaughlin, Eastern District of Pennsylvania, denied the motion.⁵⁰⁰¹

The ACLU also filed an action in the Southern District of New York challenging the Act's constitutionality.⁵⁰⁰² 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.⁵⁰⁰³ A panel of the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.⁵⁰⁰⁴ En banc rehearing was denied by a vote of six to six.⁵⁰⁰⁵ In *Clapper v. Amnesty International USA*,⁵⁰⁰⁶ however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.

Concerns by Senators Wyden and Udall

On May 26, 2011, Senators Ron Wyden and Mark Udall warned that the Justice Department's secret interpretation of surveillance authorized by the Patriot Act

4997. Transcript, *In re Directives to Yahoo!, Inc.*, No. 08-1 (FISA Ct. Rev. June 19, 2008), available at www.dni.gov/files/documents/1118/19%20June%202008%20FISCR%20PAA%20Hearing%20Transcript%20-%20Declassified%20FINAL.pdf; see Release of Oral Argument Transcript from the Protect America Act Litigation by the Office of the Director of National Intelligence and the U.S. Department of Justice, Nov. 17, 2014, <http://icontherecord.tumblr.com/tagged/declassified>.

4998. Notice, *In re Directives* (FISA Ct. Mar. 4, 2015), available at www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Notice-1.pdf; <http://icontherecord.tumblr.com/tagged/declassified> (Mar. 3, 2015); see Motion for Enlargement of Time, Electronic Frontier Found. v. Dep't of Justice, No. 1:14-cv-760 (D.D.C. Mar. 4, 2015), D.E. 13 (noting the release of eight out of eleven FOIA documents).

4999. See *Jameel Jaffer, Bob Litt, and William Banks Debate FISA*, Lawfare Podcast 101, Nov. 22, 2014, available at www.lawfareblog.com/2014/11/lawfare-podcast-episode-101-jameel-jaffer-bob-litt-and-william-banks-debate-fisa/ (noting that the ACLU filed an action 45 minutes after the statute was signed into law).

5000. Motion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. July 10, 2008), available at www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

5001. Opinion, *id.* (Aug. 27, 2008), available at 2008 WL 9487946.

5002. Complaint, *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

5003. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

5004. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

5005. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011).

5006. 568 U.S. ___, 133 S. Ct. 1138 (2013).

did not comport with the Act's text and would trouble citizens.⁵⁰⁰⁷ On June 22, Charlie Savage, a reporter for the *New York Times*, submitted a FOIA request to the Department for a report referenced by Senators Wyden and Udall.⁵⁰⁰⁸ The reporter and the *Times* filed a complaint to enforce the request in the Southern District of New York on October 5.⁵⁰⁰⁹

On October 26, the ACLU filed an action in the same district to enforce a May 31 FOIA "Request for the release of any and all records concerning the government's interpretation or use of Section 215" of the Patriot Act, which amended FISA's title V on business records and other tangible things.⁵⁰¹⁰ The case was immediately referred to Judge William H. Pauley as related to the *Times* case, over which Judge Pauley was presiding.⁵⁰¹¹

After an in camera review of the report, Judge Pauley ruled on May 17, 2012, that it was properly withheld.⁵⁰¹² In 2013⁵⁰¹³ and 2014,⁵⁰¹⁴ the government released to the ACLU additional documents concerning section 215. Judge Kaplan decided to review in camera other documents—FISA court orders and opinions—to resolve the government's FOIA obligations as to them,⁵⁰¹⁵ and he determined that they were properly withheld.⁵⁰¹⁶

On July 20, 2012, *Wired* posted online a story that the FISA court had ruled on at least one occasion that the government had applied the FISA Amendment Act unconstitutionally.⁵⁰¹⁷ The report derived from a July 20 letter to Senator Ron Wyden from the Office of the Director of National Intelligence granting the senator permission to make three statements, including that "on at least one occasion the Foreign Intelligence Surveillance Court held that some collection carried out pursuant to the [FISA] Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment."⁵⁰¹⁸ According to the letter,

5007. *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 312–13 (S.D.N.Y. 2012); see Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, *N.Y. Times*, May 27, 2011, at A17.

5008. *N.Y. Times Co.*, 872 F. Supp. 2d at 313; Complaint at 6, *N.Y. Times Co. v. U.S. Dep't of Justice*, No. 1:11-cv-6990 (S.D.N.Y. Oct. 5, 2011), D.E. 1 [hereinafter *New York Times* Complaint].

5009. *New York Times* Complaint, *supra* note 5008, at 8.

5010. Complaint, *ACLU v. FBI*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 1; *N.Y. Times Co.*, 872 F. Supp. 2d at 313.

5011. Docket Sheet, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011).

5012. *N.Y. Times Co.*, 872 F. Supp. 2d at 315, 318.

5013. *ACLU*, Section 215 of the Patriot Act—FOI, www.aclu.org/national-security/section-215-patriot-act-foia; Letters, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 74, 78.

5014. Letter, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. July 9, 2014), D.E. 101.

5015. *ACLU v. FBI*, 59 F. Supp. 3d 584 (S.D.N.Y. 2014).

5016. Opinion, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Mar. 31, 2015), D.E. 117, available at 2015 WL 1566775.

5017. Spencer Ackerman, *U.S. Admits Surveillance Violated Constitution At Least Once*, *Wired*, July 20, 2012, Danger Room, www.wired.com/dangerroom/2012/07/surveillance-spirit-law/.

5018. Letter from Kathleen Turner, director of legislative affairs, to Senator Ron Wyden, July 20, 2012 [hereinafter Turner Letter], available at www.wired.com/images_blogs/dangerroom/2012

The text that you have asked us to review concerns classified opinions of the Foreign Intelligence Surveillance Court (FISC). . . . However, . . . the Director of National Intelligence (DNI), has determined, as an exercise of his discretion, “that the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.” Accordingly, the DNI has taken the exceptional step of declassifying your proposed text and the other information contained in this letter.⁵⁰¹⁹

The Director’s office asked the Senator to report also, “The government has remedied these concerns and the FISC has continued to approve the collection as consistent with the statute and reasonable under the Fourth Amendment.”⁵⁰²⁰

On August 30, the Electronic Frontier Foundation filed a FOIA complaint in the District of Columbia to enforce a July 26 FOIA request for any FISA court opinion supporting Senator Wyden’s statement.⁵⁰²¹ In an April 1, 2013, motion for summary judgment, the government argued that it was properly withholding from the plaintiff a FISA court order otherwise responsive to the FOIA request, and only the FISA court could authorize its publication anyway.⁵⁰²² On May 21, the plaintiff sought from the FISA court permission for the government to release the order.⁵⁰²³ On June 12, Presiding Judge Walton determined that FISA court rules did not prohibit disclosure of the order.⁵⁰²⁴

Judge Bates’s Concerns

The FOIA court order at issue in the Electronic Frontier Foundation’s FOIA action was an October 3, 2011, opinion by FISA Court Presiding Judge Bates.⁵⁰²⁵ The government publicly released a redacted version of the opinion on August 21, 2013.⁵⁰²⁶ FISA’s section 702, enacted as part of the FAA, provides for FISA

/07/2012-07-20-OLA-Ltr-to-Senator-Wyden-ref-Declassification-Request.pdf; see Ryan Lizza, *State of Deception*, New Yorker, Dec. 16, 2013, at 48, 60.

5019. Turner Letter, *supra* note 5018, at 1–2.

5020. *Id.* at 2.

5021. Complaint, *Electronic Frontier Found. v. Dep’t of Justice*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; *Electronic Frontier Found. v. Dep’t of Justice*, 57 F. Supp. 3d 54, 55–57 (D.D.C. 2014); see Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

5022. Government Summary Judgment Brief at 26, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Apr. 1, 2013), D.E. 11.

5023. Motion, *In re Motion for Consent to Disclosure of Court Records*, No. Misc. 13-1 (FISA Ct. June 12, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Motion-1.pdf.

5024. Order, *Id.* (June 12, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf and 2013 WL 5460051.

5025. Summary Judgment Motion at 1, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Oct. 2, 2013), D.E. 19 [hereinafter Oct. 2, 2013, *EFF* Summary Judgment Motion]; see Second Privacy Board Report, *supra* note 4964, at 30–31. See generally Donohue, *supra* note 4967, at 190–94, 259–63.

5026. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011) [hereinafter Oct. 3, 2011, *Bates Opinion*], attached at Ex. A, Oct. 2, 2013, *EFF* Summary Judgment Motion, *supra* note 5025, also available at www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional

court approval of surveillance programs “targeting . . . persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”⁵⁰²⁷ Judge Bates held that aspects of some NSA surveillance violated the Fourth Amendment’s reasonableness requirement.⁵⁰²⁸

The Court’s review of the targeting and minimization procedures submitted with the April 2011 Submissions is complicated by the government’s recent revelation that NSA’s acquisition of Internet communications through its upstream collection under Section 702 is accomplished by acquiring Internet “transactions,” which may contain a single, discrete communication, or multiple discrete communications [multi-communication transactions or MCTs], including communications that are neither to, from, nor about targeted facilities. . . .

. . .

In sum, NSA’s collection of MCTs results in the acquisition of a very large number of Fourth Amendment-protected communications that have no direct connection to any targeted facility and thus do not serve the national security needs underlying the Section 702 collection as a whole. Rather than attempting to identify and segregate the non-target, Fourth-Amendment protected information promptly following acquisition, NSA’s proposed handling of MCTs tends to maximize the retention of such information and hence to enhance the risk that it will be used and disseminated.⁵⁰²⁹

Judge Bates expressed concern that the government’s clarifying revelation while the application for Judge Bates’s approval was pending was “the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.”⁵⁰³⁰

On November 30, Judge Bates ruled that “the government has adequately corrected the deficiencies identified in the October 3 Opinion.”⁵⁰³¹

and 2011 WL 10945618; *Electronic Frontier Found.*, 57 F. Supp. 3d at 57; see Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans’ Emails*, Miami Herald, Aug. 22, 2013, at 3A; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

On November 19, 2013, the government posted on the webpage for the Director of National Intelligence pages of the opinion with a substantially less redacted footnote 14. www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf.

5027. FISA § 702(a), 50 U.S.C. § 1881a(a) (2012); see Second Privacy Board Report, *supra* note 4964, at 1 (“Under the . . . program implemented under Section 702 of the Foreign Intelligence Surveillance Act (“FISA”), the government collects the contents of electronic communications, including telephone calls and emails, where the target is reasonably believed to be a non-U.S. person [footnote omitted] located outside the United States.”). See generally Donohue, *supra* note 4967, at 139–42.

5028. Oct. 3, 2011, Bates Opinion, *supra* note 5026, at 78–80.

5029. *Id.* at 15.

5030. *Id.* at 16 n.14; see *Klayman v. Obama*, 957 F. Supp. 2d 1, 19 (D.D.C. 2013).

5031. Opinion at 2 (FISA Ct. Nov. 30, 2011), available at www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-040.pdf and 2011 WL 10947772.

Presiding over the Electronic Frontier Foundation's FOIA action, Judge Amy Berman Jackson reviewed Judge Bates's unredacted opinion and ordered the government to provide additional justifications for some redactions.⁵⁰³² The government responded by removing some redactions; Judge Jackson determined that the less redacted opinion complied with FOIA.⁵⁰³³

Litigation Following Snowden's Revelations

In January 2013, Edward Snowden, who worked in Hawaii for an NSA contractor, contacted documentarian Laura Poitras, who lived in Berlin, because he was interested in disclosing what he believed to be improper surveillance practices.⁵⁰³⁴ Poitras brought into the loop journalists Glenn Greenwald, a reporter for the London *Guardian* living in Rio de Janeiro, and Barton Gellman, formerly a reporter for the *Washington Post*, living in New York.⁵⁰³⁵ Snowden turned to Poitras after Greenwald's cool response to Snowden's December 2012 efforts to interest him.⁵⁰³⁶

On June 1, Poitras and Greenwald flew to Hong Kong to meet Snowden.⁵⁰³⁷ The *Guardian* insisted that one of its veteran journalists, Ewen MacAskill, accompany the other two.⁵⁰³⁸ Snowden transferred to the journalists files containing classified information about NSA surveillance programs.⁵⁰³⁹ The impact of Snow-

5032. Docket Sheet, *Electronic Frontier Found. v. Dep't of Justice*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012) (June 11, 2014, minute order); *Electronic Frontier Found. v. Dep't of Justice*, 57 F. Supp. 3d 54, 58–59 (D.D.C. 2014).

5033. *Electronic Frontier Found.*, 57 F. Supp. 3d 54.

5034. See Ken Auletta, *Freedom of Information*, *New Yorker*, Oct. 7, 2013, at 46, 52; Suzanna Andrews, Bryan Burrough & Sarah Ellison, *The Snowden Saga*, *Vanity Fair*, May 2014, at 152, 154; Michael Gurnow, *The Edward Snowden Affair* 31–33 (2014); George Packer, *The Holder of Secrets*, *New Yorker*, Oct. 20, 2014, at 50, 55–56.

5035. Glenn Greenwald, *No Place to Hide* 10–16 (2014); see Andrews et al., *supra* note 5034, at 154, 164, 196–97; Auletta, *supra* note 5034, at 52; Gurnow, *supra* note 5034, at 33–40.

5036. Greenwald, *supra*, note 5035, at 7–14, 81–82; see Andrews et al., *supra* note 5034, at 154, 163; Gurnow, *supra* note 5034, at 22, 34, 37–38; Luke Harding, *The Snowden Files* 66–69 (2014).

Snowden “had explicitly avoided *The New York Times*, due to the paper's decision to delay publication for nearly a year of its 2005 story detailing the N.S.A.'s Bush-era warrantless wiretapping.” Andrews et al., *supra* note 5034, at 202.

5037. Greenwald, *supra*, note 5035, at 24–33 (noting that they arrived Sunday night, June 2); see Auletta, *supra* note 5034, at 52; Gurnow, *supra* note 5034, at 40–41; Harding, *supra* note 5036, at 6–13, 78–83. See generally James Bamford, *The Most Wanted Man in the World*, *Wired*, Sept. 2014, at 87.

5038. Greenwald, *supra*, note 5035, at 24–27, 61–62; see Andrews et al., *supra* note 5034, at 154–55; Gurnow, *supra* note 5034, at 40; Harding, *supra* note 5036, at 81–82.

5039. See Citizenfour (Praxis Films 2014); Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, *Wash. Post*, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, *Guardian* (London), June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, *Guardian* (London), June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, *N.Y. Times*, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, *Wash. Post*, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster*

den's revelations resulted in his being the first runner-up as *Time* magazine's person of the year for 2013.⁵⁰⁴⁰ The *Guardian* and the *Washington Post* won public-service Pulitzer Prizes.⁵⁰⁴¹

In June 2013, the FISA court created a public docket website for selected matters brought by private parties; the website was later expanded to include other declassified filings.⁵⁰⁴²

On June 10, the ACLU filed a motion with the FISA court for release of orders approving the newly disclosed surveillance programs,⁵⁰⁴³ and the ACLU filed a civil action in the Southern District of New York on the following day challenging the constitutionality of the programs.⁵⁰⁴⁴ The New York court assigned the case there to Judge Pauley as related to the 2011 FOIA actions by the *New York Times* and the ACLU.⁵⁰⁴⁵ On November 20, 2013, FISA Court Judge F. Dennis Saylor IV, District of Massachusetts, ordered the government to explain why no part of a February 19 opinion by the FISA court could be released.⁵⁰⁴⁶

Story, N.Y. Times, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1. See generally David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. Nat'l Sec. L. & Pol'y 209 (2014).

5040. Michael Scherer, *Edward Snowden: The Dark Prophet*, Time, Dec. 23, 2013, at 78.

5041. See Paul Farhi, *Washington Post Wins Pulitzer Prize for NSA Spying Revelations*, Wash. Post, Apr. 15, 2014, at A1; Ravi Somaiya, *Pulitzer Prizes Awarded for Coverage of N.S.A. Secrets and Boston Bombing*, N.Y. Times, Apr. 15, 2014, at A18.

5042. www.fisc.uscourts.gov/public-filings (remodeled approximately May 1, 2014); see Peter Wallsten, Carol D. Leonnig & Alice Crites, *Rare Scrutiny for a Court Used to Secrecy*, Wash. Post, June 23, 2012, at A1.

The Director of National Intelligence has posted on the Internet additional FISA court filings. E.g., Primary Order, *In re Tangible Things*, No. BR 14-67 (FISA Ct. Mar. 28, 2014) (Judge Rosemary M. Collyer), available at www.dni.gov/files/documents/0627/BR_14-67_Primary_Order.pdf; Press Release, Office of the Dir. of Nat'l Intelligence, June 27, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1085-joint-statement-from-the-odni-and-the-doj-on-the-declassification-of-renewal-of-collection-under-section-501-offisa?tmpl=component&format=pdf; Sept. 11, 2014, DNI Press Release, *supra* note 4994; Primary Order, *In re Tangible Things*, No. BR 09-19 (FISA Ct. Dec. 16, 2009) (Judge Reggie B. Walton), available at www.dni.gov/files/documents/0708/BR%2009-19%20Primary%20Order.pdf; Primary Order, *In re Tangible Things*, No. BR 09-15 (FISA Ct. Oct. 30, 2009) (Judge Reggie B. Walton), available at www.dni.gov/files/documents/0708/BR%2009-15%20Primary%20Order.pdf; Primary Order, *In re Tangible Things*, No. BR 09-09 (FISA Ct. July 9, 2009) (Judge Reggie B. Walton), available at www.dni.gov/files/documents/0708/BR%2009-09%20Primary%20Order.pdf.

5043. Motion, *In re Orders Issued by This Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-2 (FISA Ct. June 10, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Motion-1.pdf and www.aclu.org/files/assets/fisc_unsealing_motion.pdf.

5044. Complaint, *ACLU v. Clapper*, No. 1:13-cv-3994 (S.D.N.Y. June 11, 2013), D.E. 1.

5045. Assignment Notice, *ACLU*, No. 1:13-cv-3994 (S.D.N.Y. June 14, 2013), D.E. 2; see *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012); Section 215 of the Patriot Act—FOI, *supra* note 5013.

5046. Order, *In re Section 215 Orders*, No. Misc. 13-2 (FISA Ct. Nov. 20, 2013), available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-5.pdf> and 2013 WL 5460064.

On December 20, the government submitted to Judge Saylor a proposed redacted opinion for public release.⁵⁰⁴⁷ After discussions with court staff on January 23, 2014, the government agreed on February 6 to release a less redacted opinion.⁵⁰⁴⁸ On August 7, Judge Saylor approved the government's redactions as achieving "the basic objective sought by the movants: disclosure of the Court's legal reasoning, to the extent that it can reasonably be segregated from properly classified facts."⁵⁰⁴⁹

The government submitted the redacted opinion to Judge Saylor on August 27.⁵⁰⁵⁰ In the six-page opinion, Judge Bates addressed the "difficult question [of] whether the [surveillance] application shows reasonable grounds to believe that the investigation of [the target] is not being conducted solely upon the basis of activities protected by the first amendment."⁵⁰⁵¹ Judge Bates was satisfied: "According to the application, the government is investigating [the target] not only on the basis of his own personal words and conduct (which, as noted, suggest sympathy toward, if not support of, international terrorism), but also on the basis of the admitted or suspected [redacted]."⁵⁰⁵²

On November 7, 2013, the ACLU filed a motion with the FISA court "to unseal its opinions addressing the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act."⁵⁰⁵³ ProPublica filed a similar motion on November 12.⁵⁰⁵⁴ On December 5, Presiding Judge Walton granted permission for the Reporters Committee for Freedom of the Press and twenty-five other media organizations to file an amicus curiae brief.⁵⁰⁵⁵

Because of FOIA actions by the ACLU and the Electronic Frontier Foundation, the Director of National Intelligence released 1,040 pages of documents, in-

5047. Submission, *id.* (Dec. 20, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-6.pdf.

5048. Submission, *id.* (Feb. 6, 2014), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-3.pdf.

5049. Order, *id.* (Aug. 7, 2014), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf.

5050. Submission, *id.* (Aug. 27, 2014), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opinion-1.pdf.

5051. Opinion at 4, *In re Application of the FBI*, No. BR 13-25 (FISA Ct. Feb. 19, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%2013-25%20Opinion-1.pdf.

5052. *Id.* at 5.

5053. Motion, *In re FISA Court Opinions*, No. Misc. 13-8 (FISA Ct. Nov. 7, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf.

5054. Motion, *In re Release of Court Records*, No. Misc. 13-9 (FISA Ct. Nov. 12, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-09%20Motion-2.pdf ("opinions that appear to underlie the government's collection of telephone metadata").

5055. Order, *In re FISA Court Opinions*, No. Misc. 13-8 (FISA Ct. Dec. 5, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6.pdf; see Brief, *id.* (Nov. 26, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Brief-2.pdf.

cluding several FISA court documents, on November 18, 2013.⁵⁰⁵⁶ Two long and redacted opinions granted “authority for the [NSA] to collect information regarding e-mail and certain other forms of Internet communications under the pen register and trap and trace provisions of [FISA].”⁵⁰⁵⁷ In the press release, the Director stated that the surveillance program granted authority by these opinions had been discontinued for lack of effectiveness pursuant to an evaluation begun in 2011.⁵⁰⁵⁸ Additional documents were released in August 2014.⁵⁰⁵⁹

The first opinion is eighty-seven pages by Judge Colleen Kollar-Kotelly, with a redacted date of issue.⁵⁰⁶⁰ The *Washington Post*, however, concluded, “Although the date was blacked out, the opinion appeared to be the order that placed the NSA’s Internet metadata program under court supervision in July 2004, according to an NSA inspector general report leaked this year by former NSA contractor Edward Snowden.”⁵⁰⁶¹ According to Judge Kollar-Kotelly, “This application seeks authority for a much broader type of collection than other pen register/trap and trace applications and therefore presents issues of first impression. For that reason it is appropriate to explain why the Court concludes that the application should be granted as modified herein.”⁵⁰⁶²

5056. Press Release, Office of the Dir. of Nat’l Intelligence, Nov. 18, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-nov [hereinafter Nov. 18, 2013, DNI Press Release]; ACLU, NSA Documents Released to the Public Since June 2013, www.aclu.org/nsa-documents-released-public-june-2013; see Ellen Nakashima & Greg Miller, *Intelligence Director Releases About 1,000 Pages of Documents*, Wash. Post, Nov. 19, 2013, at A5.

5057. Opinion at 1, No. PR/TT ___ (FISA Ct. ___) [hereinafter Kollar-Kotelly PR/TT Opinion], available at www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; see Opinion, No. PR/TT ___ (FISA Ct. ___) [hereinafter Bates PR/TT Opinion], available at www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

5058. Nov. 18, 2013, DNI Press Release, *supra* note 5056; see also Laura K. Donohue, *FISA Reform*, 10 I/S: J. of L. & Pol’y 599, 604 (2014) (“The program appears to have operated until December 2011, when it was discontinued for failure to deliver sufficient operational value to the NSA.”); Donohue, *supra* note 4967, at 127–28.

5059. Press Release, Office of the Dir. of Nat’l Intelligence, Aug. 11, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1099-newly-declassified-documents-regarding-the-now-discontinued-nsa-bulk-electronic-communications-metadata-pursuant-to-section-401-of-the-foreign-intelligence-surveillance-act?tmpl=component&format=pdf (including links to forty-three documents totaling 990 pages on the NSA’s discontinued pen register and trap and trace program, including three documents previously released on November 18, 2013, one of which—orders in FISA Ct. No. BR 09-05—was rereleased with slightly fewer redactions); see Status Report, *Electronic Privacy Info. Ctr. v. Dep’t of Justice*, No. 1:13-cv-1961 (D.D.C. Aug. 8, 2014), D.E. 20 (noting the August 7, 2014, production of documents to the plaintiff); *Electronic Privacy Info. Ctr. v. Dep’t of Justice*, 15 F. Supp. 3d 32 (D.D.C. 2014) (denying a preliminary injunction).

5060. Kollar-Kotelly PR/TT Opinion, *supra* note 5057.

5061. Nakashima & Miller, *supra* note 5056.

5062. Kollar-Kotelly PR/TT Opinion, *supra* note 5057, at 1–2.

“[B]ased on the plain meaning of the applicable definitions, the proposed collection involves a form of both pen register and trap and trace surveillance.”⁵⁰⁶³ Additionally, Judge Kollar-Kotelly found that “such an interpretation would promote the purpose of Congress in enacting and amending FISA regarding the acquisition of non-content addressing information.”⁵⁰⁶⁴ The surveillance program comports with the Fourth Amendment because “there is no reasonable expectation of privacy under the Fourth Amendment in the meta data to be collected.”⁵⁰⁶⁵ Additionally, “The weight of authority supports the conclusion that Government information-gathering that does not constitute a Fourth Amendment search or seizure will also comply with the First Amendment when conducted as part of a good-faith criminal investigation.”⁵⁰⁶⁶

On the expiration of Judge Kollar-Kotelly’s authorization of the email metadata surveillance program, Judge Bates considered an “application to re-initiate in expanded form” such surveillance.⁵⁰⁶⁷ In his 117-page opinion, Judge Bates discussed many violations of surveillance restrictions that the government had disclosed.⁵⁰⁶⁸ “The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection.”⁵⁰⁶⁹ So, Judge Bates’s approval of the surveillance came with some modifications.⁵⁰⁷⁰

On June 18 and 19, 2013, respectively, Google and Microsoft sought permission from the FISA court to disclose aggregate statistics on FISA orders that they had received.⁵⁰⁷¹ Yahoo!, Facebook, and LinkedIn filed similar motions in September.⁵⁰⁷² Apple joined the litigation as an amicus curiae in November.⁵⁰⁷³ On

5063. *Id.* at 16–17.

5064. *Id.* at 18.

5065. *Id.* at 59.

5066. *Id.* at 66.

5067. Bates PR/TT Opinion, *supra* note 5057, at 1.

5068. *Id.* at 9–22; see Devlin Barrett, *Surveillance Court Judge Criticized NSA “Overcollection” of Data*, Wall St. J., Aug. 12, 2014, at A4.

5069. Bates PR/TT Opinion, *supra* note 5057, at 72.

5070. *Id.* at 117.

5071. Motion, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-4 (FISA Ct. June 19, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-04%20Motion-10.pdf; Motion, *In re* Motion for Declaratory Judgment of Google Inc.’s First Amendment Right to Publish Aggregate Information About FISA Orders, No. Misc. 13-3 (FISA Ct. June 18, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Motion-10.pdf.

5072. Motion, *In re* Motion for Declaratory Judgment That LinkedIn Corp. May Report Aggregate Data Regarding FISA Orders, No. Misc. 13-7 (FISA Ct. Sept. 17, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-07%20Motion-3.pdf; Motion, *In re* Motion for Declaratory Judgments to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-6 (FISA Ct. Sept. 9, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-06%20Motion-3.pdf; Motion, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-5 (FISA Ct. Sept. 9, 2013), available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-05%20Motion-12.pdf.

January 27, 2014, the government settled the motions by granting permission to the carriers to report the number of FISA orders received in bands of 250, or in bands of 1,000 if broken down into category of FISA order.⁵⁰⁷⁴

The Electronic Privacy Information Center filed a petition for a writ of mandamus with the Supreme Court on July 8, 2013, seeking review of a leaked FISA court order requiring Verizon to provide the NSA with telephony metadata for all communications in which at least one party is within the United States.⁵⁰⁷⁵ On July 19, the day that the leaked order expired, the Director of National Intelligence reported that the FISA court had renewed authorization for NSA's "telephony metadata collection program."⁵⁰⁷⁶ The Supreme Court denied mandamus review on November 18.⁵⁰⁷⁷

The Electronic Frontier Foundation had filed a FOIA complaint in the Northern District of California on October 26, 2011, to enforce a June 2 FOIA request for records concerning the government's interpretation of the Patriot Act's section 215, which amended FISA's title V on tangible things.⁵⁰⁷⁸ In response to that suit and the ACLU's 2011 FOIA suit in the Southern District of New York, and in light of Snowden's revelations, the government released on September 10, 2013, fourteen previously classified documents, with redactions.⁵⁰⁷⁹ Eight of the

5073. Amicus Curiae Brief, Nos. Misc. 13-3 through 13-7 (FISA Ct. Nov. 5, 2013), *available at* www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Brief-1.pdf; Order, *id.* (Nov. 13, 2013) (granting leave to file the brief), *available at* www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Order-15.pdf.

5074. Notice, Nos. Misc. 13-3 to 13-7 (FISA Ct. Jan. 27, 2014), *available at* www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Notice.pdf; Dismissal Stipulation, *id.* (Jan. 27, 2014), *available at* www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Action.pdf; *see* <http://googleblog.blogspot.ca/2014/02/shedding-some-light-on-foreign.html> (public report by Google); http://blogs.technet.com/b/microsoft_on_the_issues/archive/2014/02/03/providing-additional-transparency-on-us-government-requests-for-customer-data.aspx (Microsoft); <http://yahoo.tumblr.com/post/75496314481/more-transparency-for-u-s-national-security-requests> (Yahoo); <http://newsroom.fb.com/News/797/Facebook-Releases-New-Data-About-National-Security-Requests> (Facebook); http://help.linkedin.com/app/answers/detail/a_id/41878 (LinkedIn); *see also* Timothy B. Lee, *Tech Firms Publicize Data on NSA Requests*, Wash. Post, Feb. 4, 2014, at A9; Zoe Tillman, *Tech Companies Reach Deal in Data Fight*, Nat'l L.J., Feb. 3, 2014, at 21; U.S., *Web Firms Reach Deal*, Miami Herald, Jan. 28, 2014, at 3A.

5075. Petition, *In re* Electronic Privacy Info. Ctr., No. 13-58 (U.S. July 8, 2013); *see* Primary Order, *In re* FBI Application for an Order Requiring the Production of Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), *available at* www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf and 2013 WL 5460137.

5076. Press Release, Office of the Dir. of Nat'l Intelligence, July 19, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata?tmpl=component&format=pdf; *see* Joby Warrick, *NSA Cellphone Surveillance Program Renewed, Officials Say*, Wash. Post, July 20, 2013, at A2.

5077. *In re* Electronic Privacy Info. Ctr., 571 U.S. ___, 134 S. Ct. 638 (2013).

5078. Complaint, Electronic Frontier Found. v. Dep't of Justice, No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; *see* Amended Complaint, *id.* (Nov. 3, 2011), D.E. 9.

5079. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/927-draft-document (providing links

documents are FISA court orders—a 2006 order by Judge Howard, a 2008 opinion by Judge Walton, and six 2009 orders and opinions by Judge Walton—and two of the documents are government submissions to the FISA court.

The released documents illustrate the FISA court’s supervision, through its business records or BR docket, of telecommunication metadata surveillance. They also include concerns by Judge Walton that government surveillance was departing from approved procedures:

In summary, since January 15, 2009, it has finally come to light that the FISC’s authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses BR metadata. This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government’s submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systematically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.⁵⁰⁸⁰

The Court is deeply troubled by the incidents [disclosed by the government], which have occurred only a few weeks following the completion of an “end to end review” by the government of NSA’s procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court’s orders going forward.⁵⁰⁸¹

to the documents); see Paul Elias, *Records: Officials Abused Spying Program*, Miami Herald, Sept. 11, 2013, at 1A; Siobhan Gorman & Devlin Barrett, *NSA Admits It Violated Privacy Rules*, Wall St. J., Sept. 11, 2013, at A3; Carol D. Leonnig, *Judge Questioned NSA Program*, Wash. Post, Sept. 12, 2013, at A3; Ellen Nakashima, Julie Tate & Carol Leonnig, *NSA Broke Privacy Rules for 3 Years, Documents Say*, Wash. Post, Sept. 11, 2013, at A1; Scott Shane, *N.S.A. Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009*, N.Y. Times, Sept. 11, 2003, at A14.

5080. Order at 10–11, *In re Production of Tangible Things*, No. BR 08-13 (FISA Ct. Mar. 2, 2009), available at 2009 WL 9150913; see *Klayman v. Obama*, 957 F. Supp. 2d 1, 18–19 & n.23 (D.D.C. 2013).

On January 15, 2009, the Department of Justice notified the Court in writing that the government has been querying the business records acquired pursuant to Docket BR 08-13 in a manner that appears to the Court to be directly contrary to the [court’s] Order and directly contrary to the sworn attestations of several Executive Branch officials.

Order at 2, *In re Production of Tangible Things*, No. BR 08-13 (FISA Ct. Jan. 28, 2009), available at 2009 WL 9157881; see Lizza, *supra* note 5018, at 56.

5081. Order at 4, *In re FBI Application*, No. BR 09-13 (FISA Ct. Sept. 25, 2009), available at 2009 WL 9150896.

[T]he Court . . . continues to be concerned about the likelihood that these queries could reveal communications of United States person users of the telephone identifier who are not the subject of FBI investigations.⁵⁰⁸²

A version of one document released on March 28, 2014, with considerably fewer redactions than in the September 2013 release, revealed Judge Walton’s specific concerns about the NSA’s general counsel’s oversight of pen register and trap and trace surveillance:

The court is gravely concerned . . . that NSA analysts, cleared and otherwise, have generally *not* adhered to the dissemination restrictions proposed by the government, repeatedly relied upon by the Court in authorizing the collection of the PR/TT metadata, and incorporated into the Court’s orders in this matter [redacted] as binding on NSA. Given the apparent widespread disregard of these restrictions, it seems clear that NSA’s Office of General Counsel has failed to satisfy its obligation to ensure that all analysts with access to information derived from the PR/TT metadata “receive appropriate training and guidance regarding the querying standard set out in paragraph c. above, *as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of such information.*” Docket No. PR/TT [redacted] Order at 11 (emphasis added).⁵⁰⁸³

On January 17, 2014, the Director of National Intelligence released twenty-four redacted orders in twenty BR cases before the FISA court in 2006 through 2011.⁵⁰⁸⁴ The orders are periodic approvals of a program to collect “all call detail records or ‘telephony metadata’” for periods typically a few days short of ninety days, ranging from eighty-four days to eighty-nine days, but sometimes for shorter periods—forty-two, fifty-seven, or sixty-four days—and once for a longer period—115 days. The orders do not cover the period from July 10, 2009, to February 26, 2010. In addition to Judges Kollar-Kotelly, Bates, Howard, Vinson, and Walton, orders were signed by Judges Frederick J. Scullin, Jr., Northern District of New York; Robert C. Broomfield, District of Arizona; Nathaniel M. Gorton, District of Massachusetts; and James B. Zagel, Northern District of Illinois.

In the Northern District of California FOIA action, Judge Yvonne Gonzalez Rogers decided on June 13, 2014, that she would review *in camera* and *ex parte* five FISA court orders and opinions “to assure that the agency is complying with its obligations to disclose non-exempt material.”⁵⁰⁸⁵ “The evidence in the record

5082. Order at 6, *In re* FBI Application, No. BR 09-15 (FISA Ct. Nov. 5, 2009), *available at* 2009 WL 9150915.

5083. Order at 6, *In re* Production of Tangible Things, No. BR 09-06 (FISA Ct. June 22, 2009), *available at* www.dni.gov/files/documents/0328/101.%20Order%20and%20Supplemental%20Order.Redacted%2020140327.pdf.

5084. DNI Clapper Declassifies Additional Documents Regarding Collection Under Section 401 of the Foreign Intelligence Surveillance Act, Jan. 17, 2014, *available at* www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1001-dni-clapper-declassifies-additional-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act (including links to the twenty-four orders).

5085. Order at 3, *Electronic Frontier Found. v. Dep’t of Justice*, No. 4:11-cv-5221 (N.D. June 13, 2014), D.E. 85 [hereinafter June 13, 2014, N.D. Cal. *EFF* Order]; *see supra* “Section 215.”

shows that some documents, previously withheld in the course of this litigation and now declassified, had been withheld in their entirety when a disclosure of reasonably segregable portions of those documents would have been required.”⁵⁰⁸⁶

On August 11, Judge Gonzalez Rogers determined that the government “has established a proper basis for withholding, in full, the FISC orders and opinions at issue.”⁵⁰⁸⁷ Judge Gonzalez Rogers, however, found that the plaintiffs were entitled to a memorandum from the Office of Legal Counsel to the Department of Commerce, which was “prepared to aid the Department of Commerce in determining its legal obligations with respect to disclosure of census information to federal law enforcement of national security officers,” concluding that “it can no longer be withheld because it has become a controlling statement of the executive branch’s legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC.”⁵⁰⁸⁸ The government voluntarily dismissed an appeal.⁵⁰⁸⁹

Also pending before Judge Gonzalez Rogers is a new action by Twitter partially challenging the government’s restrictions on what Twitter can disclose about its providing to the government customer information pursuant to FISA and in response to national security letters.⁵⁰⁹⁰

Smith and Jones

On September 17, 2013, the FISA court released a public redacted version of an August 22 opinion by FISA Judge Claire V. Eagan, Northern District of Oklahoma, holding in an ex parte application for surveillance authorization that the FBI’s obtaining a large volume of telephony metadata was consistent with the Fourth Amendment as interpreted by the Supreme Court in 1979 in *Smith v. Maryland*.⁵⁰⁹¹

5086. June 13, 2014, N.D. Cal. *EFF* Order, *supra* note 5085, at 2.

5087. Opinion at 3, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Aug. 11, 2014), D.E. 90, available at 2014 WL 3945646; *id.* at 7 (“The FISC orders are properly withheld to protect intelligence sources and methods used by the government to gather intelligence data. . . . [B]ased upon the Court’s review, the documents must be withheld in full and contain no reasonably segregable information.”).

5088. *Id.* at 10–13.

5089. Voluntary Dismissal, *Electronic Frontier Found. v. U.S. Dep’t of Justice*, No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

5090. Complaint, *Twitter, Inc. v. Holder*, No. 4:14-cv-4480 (N.D. Cal. Oct. 7, 2014), D.E. 1; see Ellen Nakashima, *Twitter Sues Justice Department Over Ability to Disclose Surveillance Orders*, Wash. Post, Oct. 8, 2014, at A5; Ellen Nakashima, *U.S. Seeks to Dismiss Twitter Lawsuit*, Wash. Post, Jan. 11, 2015, at A6.

5091. Opinion, *In re* FBI Application for Tangible Things, No. BR 13-109 (FISA Ct. Aug. 29, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf and 2013 WL 5741573 (amending an August 22, 2013, opinion to correct numbering errors among the footnotes); see Order, *id.* (Aug. 29, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-3.pdf (Judge Eagan’s order amending her opinion to renumber foot-

In *Smith*, the Supreme Court held by a vote of five to three that installation and use of a pen register, to record the numbers dialed on a specific telephone, was not a search because it did not violate reasonable expectations of privacy.⁵⁰⁹² In 1975, a robbery victim reported “threatening and obscene phone calls from a man identifying himself as the robber.”⁵⁰⁹³ Michael Lee Smith was identified as a suspect, so “the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at [his] home.”⁵⁰⁹⁴ Justice Blackmun, writing on behalf of himself, Chief Justice Burger, and Justices White, Rehnquist, and Stevens, reasoned that “All subscribers realize . . . that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills.”⁵⁰⁹⁵ In dissent, Justice Stewart responded, “The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment.”⁵⁰⁹⁶ He concluded, “I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in [*Katz v. United States*].”⁵⁰⁹⁷ Justice Marshall, also in dissent, and joined by Justice Brennan, observed, “Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”⁵⁰⁹⁸

On October 18, the FISA court released a public redacted October 11 opinion by FISA Judge McLaughlin that adopted Judge Eagan’s analysis.⁵⁰⁹⁹ Judge McLaughlin also addressed the Supreme Court’s 2012 case, *United States v. Jones*.⁵¹⁰⁰

In *Jones*, Justice Scalia concluded for the court, in an opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, that installation

notes); Order, *id.* (Aug. 23, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%202013-109%20Order-2.pdf (presiding judge’s order for a classification review upon Judge Eagan’s sua sponte request for publication of her opinion); see also *Smith v. Maryland*, 442 U.S. 735 (1979).

5092. *Smith*, 442 U.S. at 736 & n.1, 745–46.

5093. *Id.* at 737.

5094. *Id.*

5095. *Id.* at 742.

5096. *Id.* at 746 (Justice Stewart, dissenting).

5097. *Id.* at 747; see *Katz v. United States*, 389 U.S. 347 (1967).

5098. *Smith*, 442 U.S. 749 (Justice Marshall, dissenting).

5099. Opinion at 3, *In re* FBI Application for Tangible Things, No. BR 13-158 (FISA Ct. Oct. 11, 2013) [hereinafter McLaughlin Opinion], available at www.fisc.uscourts.gov/sites/default/files/BR%202013-158%20Memorandum-1.pdf; see Order, *id.* (Oct. 15, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%202013-158%20Order-1.pdf (presiding judge’s order for a classification review upon Judge McLaughlin’s sua sponte request for publication of her opinion).

5100. McLaughlin Opinion, *supra* note 5099, at 4–6; see *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945 (2012).

of a GPS tracking device on a vehicle to monitor the vehicle's movements is a Fourth Amendment search because it is a trespass onto property.⁵¹⁰¹

Concurring, Justice Sotomayor observed, "Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property."⁵¹⁰² Respecting *Smith*, she observed further,

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.⁵¹⁰³

Concurring in the judgment, Justice Alito wrote for himself and Justices Ginsburg, Breyer, and Kagan that they "would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."⁵¹⁰⁴ Respecting older precedents, Justice Alito observed, "In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical."⁵¹⁰⁵

Judge McLaughlin decided that the concerns expressed by the concurring justices in *Jones* did not suggest a conclusion in the telephony surveillance applications, because non-content metadata are not the same as location information.⁵¹⁰⁶

On December 18, 2013, Judge McLaughlin granted a motion by the Center for National Security Studies to submit an amicus curiae brief on whether FISA authorizes the collection of telephony metadata in bulk.⁵¹⁰⁷

Judge Zagel endorsed the analyses of Judges Eagan and McLaughlin in a June 19, 2014, FISA court opinion.⁵¹⁰⁸

Conflicting Rulings on Surveillance Constitutionality

On June 6, Larry Klayman and two other persons filed a class action in the U.S. District Court for the District of the District of Columbia against the government and Verizon challenging the newly disclosed surveillance methods.⁵¹⁰⁹ Five days

5101. *Jones*, 565 U.S. at ___, 132 S. Ct. at 949–50.

5102. *Id.* at ___, 132 S. Ct. at 954 (Justice Sotomayor, concurring).

5103. *Id.* at ___, 132 S. Ct. at 957 (citations omitted).

5104. *Id.* at ___, 132 S. Ct. at 958 (Justice Alito, concurring in the judgment).

5105. *Id.* at ___, 132 S. Ct. at 963.

5106. McLaughlin Opinion, *supra* note 5099, at 5.

5107. Order, *In re* FBI Application for Tangible Things, No. BR 13-158 (FISA Ct. Dec. 18, 2013), available at www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf.

5108. Opinion, *In re* Production of Tangible Things, No. BR-14-96 (FISA Ct. June 19, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf.

5109. Complaint, *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C. June 6, 2013), D.E. 1; *Klayman v. Obama*, 957 F. Supp. 2d 1, 7, 11 (D.D.C. 2013); see Second Amended Complaint, *Klayman*, No. 1:13-cv-851 (D.D.C. Nov. 23, 2013), D.E. 37; Amended Complaint, *id.* (June 9, 2013), D.E. 4; see also Jerry Markon, *Classified Programs Challenged in Court*, Wash. Post, July 16, 2013, at A1; James

later, an overlapping collection of four individuals filed a similar action against the government and ten other telecommunication companies.⁵¹¹⁰ On December 16, Judge Richard J. Leon granted the plaintiffs a preliminary injunction against bulk metadata collection.⁵¹¹¹

Judge Leon found that the plaintiffs had standing, because “[t]he Government . . . describes the advantages of bulk collection in such a way as to convince me that plaintiffs’ metadata—indeed *everyone’s* metadata—is analyzed, manually or automatically.”⁵¹¹² Judge Leon found the metadata collection constituted an unreasonable search, despite the Supreme Court’s 1979 decision in *Smith*:

In *Smith*, the Supreme Court was actually considering whether local police could collect one person’s phone records for calls made after the pen register was installed and for the limited purpose of a small-scale investigation of harassing phone calls. The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.

...
... I cannot imagine a more “indiscriminate” and “arbitrary invasion” than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on “that degree of privacy” that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware “the abridgment of freedom of the people by gradual and silent encroachments by those in power,” would be aghast.⁵¹¹³

Moreover, “the Government does *not* cite a single instance in which analysis of the NSA’s bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature.”⁵¹¹⁴

Judge Leon stayed his injunction pending appeal.⁵¹¹⁵ While the district court case otherwise moved forward,⁵¹¹⁶ the prevailing plaintiffs unsuccessfully sought a writ of certiorari from the Supreme Court so that the high court could quickly

Risen, *Privacy Group to Ask Supreme Court to Stop N.S.A.’s Phone Spying Program*, N.Y. Times, July 8, 2013, at A9.

The plaintiffs voluntarily dismissed Verizon as a defendant on January 31, 2014. Stipulation, *Klayman*, No. 1:13-cv-851 (D.D.C. Jan. 31, 2014), D.E. 75; see Third Amended Complaint, *id.* (Feb. 10, 2014), D.E. 77.

5110. Complaint, *Klayman v. Obama*, No. 1:13-cv-881 (D.D.C. June 11, 2013), D.E. 1; see Markon, *supra* note 5109; *Klayman*, 957 F. Supp. 2d at 7 n.1, 11.

5111. *Klayman*, 957 F. Supp. 2d 1.

5112. *Id.* at 26–29.

5113. *Id.* at 33, 42 (citation omitted).

5114. *Id.* at 40.

5115. *Id.* at 10, 43.

5116. Docket Sheet, *Klayman v. Obama*, No. 1:13-cv-881 (D.D.C. June 11, 2013); Docket Sheet, *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C. June 6, 2013).

consider the plaintiffs' concerns.⁵¹¹⁷ The plaintiffs filed a third related case, a class action, in the district court on January 23, 2014.⁵¹¹⁸ The injunction appeals were heard on November 4.⁵¹¹⁹

Judge Pauley issued a conflicting opinion on December 27, 2013.⁵¹²⁰ Judge Pauley's opinion includes two important observations: (1) "[T]he Government acknowledged that it has collected metadata for substantially every telephone call in the United States since May 2006."⁵¹²¹ (2) "This blunt tool only works because it collects everything. Such a program, if unchecked, imperils the civil liberties of every citizen."⁵¹²² Judge Pauley determined that *Smith* compelled a decision in favor of the government.⁵¹²³ An appeal was heard on September 2, 2014.⁵¹²⁴

On June 3, 2014, Judge B. Lynn Winmill dismissed a complaint filed in the District of Idaho alleging that comprehensive metadata collection violates the Fourth Amendment.⁵¹²⁵ Judge Winmill relied on *Smith*, circuit law, and Judge Pauley's decision.⁵¹²⁶ Judge Winmill urged, however, that "Judge Leon's decision should serve as a template for a Supreme Court opinion."⁵¹²⁷ An expedited appeal was heard on December 8.⁵¹²⁸

5117. *Klayman v. Obama*, 572 U.S. ___, 134 S. Ct. 1795 (2014) (denying certiorari).

5118. Complaint, *Klayman v. Obama*, No. 1:14-cv-92 (D.D.C. Jan. 23, 2014), D.E. 1; see Notice of Related Case, *id.* (Jan. 24, 2014), D.E. 2.

5119. Docket Sheets, *Klayman v. Obama*, No. 14-5016 and 14-5017 (D.C. Cir. Jan. 15, 2014) (cross-appeals); Docket Sheets, *Klayman v. Obama*, Nos. 14-5004 and 14-5005 (D.C. Cir. Jan. 9, 2014) (appeals); [www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/\\$file/14-5004.mp3](http://www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/$file/14-5004.mp3) (audio recording of oral argument); see Devlin Barrett, *NSA Data Collection Gets Day in Court*, Wall St. J., Nov. 1, 2014, at A5; Ellen Nakashima & Victoria St. Martin, *Privacy of Phone Records Debated*, Wash. Post, Nov. 5, 2014, at A2; Zoe Tillman, *D.C. Circuit Readies for NSA Case*, Nat'l L.J., Oct. 13, 2014, at 37.

5120. *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013); see Adam Liptak & Michael S. Schmidt, *Judge Upholds N.S.A.'s Bulk Collection of Data on Calls*, N.Y. Times, Dec. 30, 2013, at A1; Andrew Ramonas, Todd Ruger & Tony Mauro, *Courts Join NSA Fight*, Nat'l L.J., Jan. 6, 2014, at 1; Jennifer Smith & Jacob Gershman, *Judge Backs the NSA's Surveillance*, Wall St. J., Dec. 28, 2013, at A1; Sari Horwitz, *Judge: NSA's Action Lawful*, Wash. Post, Dec. 28, 2013, at A1.

5121. *ACLU*, 959 F. Supp. 2d at 735.

5122. *Id.* at 730.

5123. *Id.* at 749–52.

5124. Docket Sheet, *ACLU v. Clapper*, No. 14-42 (2d Cir. Jan. 6, 2014); www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance (video recording of oral argument); see Ellen Nakashima, *Appeals Court Hears Arguments on NSA's Call-Data Collection*, Wash. Post, Sept. 3, 2014, at A5.

5125. *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); see Complaint, *Smith v. Obama*, No. 2:13-cv-257 (D. Idaho June 12, 2013), D.E. 1; see also David Cole, *Cd'A Attorneys Sue Obama Over NSA Surveillance*, Coeur d'Alene Press, June 13, 2013, at 4A; Markon, *supra* note 5109; Betsy Z. Russell, *CdA Woman's Lawsuit Over NSA Data Tossed*, Spokane Spokesman-Review, June 4, 2014, at 6A.

5126. *Smith*, 24 F. Supp. 3d at 1007–08.

5127. *Id.* at 1009.

5128. Docket Sheet, *Smith v. Obama*, No. 14-35555 (9th Cir. July 1, 2014); Order, *id.* (July 14, 2014), D.E. 20 (granting an expedited appeal); www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006844 (video recording of oral argument).

District court rulings remain pending elsewhere.

On July 16, 2013, a collection of eighteen organizations, including the First Unitarian Church of Los Angeles, Greenpeace, the California Association of Federal Firearms Licensees, and the National Organization for the Reform of Marijuana Laws, filed a complaint against the government in the Northern District of California alleging “an illegal and unconstitutional program of dragnet electronic surveillance.”⁵¹²⁹ Judge Jeffrey S. White accepted the case as related to the warrantless wiretap litigation, over which he presided.⁵¹³⁰

Senator Rand Paul filed an action in the District of the District of Columbia challenging bulk surveillance on February 18, 2014.⁵¹³¹ Another action was filed in El Paso on February 5.⁵¹³²

Data Retention

In a January 3, 2014, FISA court order, Judge Hogan specified that the metadata authorized for collection by his order must be destroyed within five years of collection.⁵¹³³ On March 7, Judge Walton denied⁵¹³⁴ a February 25 motion by the government to extend the five-year limit to permit the government to comply with evidence-preservation obligations in the civil suits challenging the legality of broad metadata surveillance pursuant to section 215.⁵¹³⁵ “Extending the period of retention for these voluminous records increases the risk that information about United States persons may be improperly used or disseminated.”⁵¹³⁶ “Further,

5129. Complaint, *First Unitarian Church of L.A. v. NSA*, No. 4:13-cv-3287 (N.D. Cal. July 16, 2013), D.E. 1; see Second Amended Complaint, *id.* (Aug. 20, 2014), D.E. 119; Amended Complaint, *id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations); see also Bob Egelko, *Suit Seeks Limit on Government Data Collection*, S.F. Chron., July 16, 2013, at D1.

5130. Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7.

5131. Complaint, *Paul v. Obama*, No. 1:14-cv-262 (D.D.C. Feb. 18, 2014), D.E. 3; Amended Complaint, *id.* (Mar. 26, 2014), D.E. 17; see also Dana Milbank, *In Rand Paul’s NSA Sideshow, a Plaintiffs’ Tiff*, Wash. Post, Feb. 20, 2014, at A2.

The court of appeals dismissed as frivolous appeals from denials of intervention by a pro se litigant in Senator Paul’s case and Klayman’s cases. Orders, Nos. 14-5207 to 14-5209 and 14-5212 (D.C. Cir. Mar. 4, 2015).

5132. Complaint, *Perez v. Clapper*, No. 3:14-cv-50 (W.D. Tex. Feb. 5, 2014), D.E. 1; see Third Amended Complaint, *id.* (Oct. 31, 2014), D.E. 26; Second Amended Complaint, *id.* (Sept. 12, 2014), D.E. 21; Amended Complaint, *id.* (May 27, 2014), D.E. 12.

5133. Order at 14, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Jan. 3, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-02%20Order-2.pdf.

5134. Opinion, *id.* (Mar. 7, 2014) [hereinafter Mar. 7, 2014, FISA Ct. Opinion], available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-1.pdf; see Corrected Notice, *Smith v. Obama*, No. 2:13-cv-257 (D. Idaho. Mar. 8, 2014), D.E. 20; Notice, *ACLU v. Clapper*, No. 1:13-cv-3994 (S.D.N.Y. Mar. 8, 2014), D.E. 79; Notice, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 7, 2014), D.E. 85; Notice, *Paul*, No. 1:14-cv-262 (D.D.C. Mar. 7, 2014), D.E. 14.

5135. Motion, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Feb. 25, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

5136. Mar. 7, 2014, FISA Ct. Opinion, *supra* note 5134, at 6.

there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved⁵¹³⁷

Plaintiffs in the San Francisco post-Snowden challenge before Judge White responded to Judge Walton's Friday decision with a Monday motion for a temporary restraining order enjoining the government "from destroying any evidence relevant to the claims at issue in this action, including but not limited to prohibiting the destruction of any telephone metadata or 'call detail' records."⁵¹³⁸ Judge White ordered a response from the government by 2:00 that afternoon⁵¹³⁹ and then ordered the data retained, pending further hearing on the issue set for March 19.⁵¹⁴⁰

On Wednesday, March 12, Judge Walton issued an order permitting the government to comply with Judge White's order.⁵¹⁴¹ Judge White issued a permanent preservation order on March 21.⁵¹⁴²

Judge Walton scolded the government for failing to inform him of preservation orders remaining in effect from the multidistrict warrantless wiretap litigation that had been transferred to Judge White; the existence of these orders was brought to Judge Walton's attention by the plaintiffs in Judge White's cases.⁵¹⁴³ "As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* proceedings."⁵¹⁴⁴ In response to Judge Walton's order that the government explain its behavior,⁵¹⁴⁵ the government acknowledged on April 2 that it should have behaved differently, with "the benefit of hindsight," but it "has always understood [the warrantless wiretap litigation] to be limited to certain pres-

5137. *Id.* at 8–9.

5138. Evidence Preservation Motion, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 10, 2014), D.E. 86.

At a subsequent hearing, a plaintiffs' attorney acknowledged the irony: "It's a very strange position to be in, to be arguing for the preservation for the very records we think they shouldn't have gotten in the first place." Transcript at 14, *id.* (Mar. 19, 2014, filed Mar. 20, 2014), D.E. 101.

5139. Order, *id.* (Mar. 10, 2014), D.E. 87; see Government Response, *id.* (Mar. 10, 2014), D.E. 88.

5140. Order, *id.* (Mar. 10, 2014), D.E. 89.

5141. Order, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 12, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

5142. Preservation Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 21, 2014), D.E. 103, also filed as Ex., Notice, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 27, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-4.pdf; see Bob Egelko, *S.F. in Spotlight as Legal Battles Over NSA Widen*, S.F. Chron., Mar. 22, 2014, at A1.

On June 6, 2014, Judge White denied plaintiffs a preservation order respecting section 702 claims in the earlier warrantless wiretap actions on a finding that the complaint did not encompass a challenge to section 702. Transcript at 50–53, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. June 6, 2014, filed Aug. 5, 2014), D.E. 275; Minutes, *id.* (June 6, 2014), D.E. 246.

5143. Opinion, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 21, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-3.pdf.

5144. *Id.* at 8.

5145. *Id.* at 9–10.

identially authorized intelligence collection activities outside FISA.”⁵¹⁴⁶ The government advised, “no additional corrective action on the part of the Government or this Court is necessary.”⁵¹⁴⁷ A deputy assistant attorney general provided additional clarifying information one week later.⁵¹⁴⁸

Meanwhile, on March 20, Judge Rosemary M. Collyer denied Verizon’s challenge to the legality of Judge Hogan’s January 3 telephony metadata surveillance order, concluding, “this Court finds Judge Leon’s analysis in *Klayman* to be unpersuasive.”⁵¹⁴⁹

The Privacy and Civil Liberties Oversight Board

The Privacy and Civil Liberties Oversight Board, “an independent bipartisan agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007,” issued a report on January 23, 2014, concluding that surveillance authorized by the FISA court violated FISA.⁵¹⁵⁰ Although the Privacy Board was established in 2007, all five members were not appointed by the President and confirmed by the Senate until May 7, 2013, shortly before the Snowden revelations.⁵¹⁵¹ The report analyzed the legality of surveil-

5146. Response at 1–2, *id.* (Apr. 2, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Response-2.pdf.

5147. *Id.* at 2.

5148. Letter, *id.* (Apr. 9, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-6.pdf.

5149. Opinion, *id.* (Mar. 20, 2014), available at www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion%20and%20Order-1.pdf; see Ellen Nakashima, *Court Rejects Challenge to NSA Program*, Wash. Post, Apr. 26, 2014, at A3; Charlie Savage, *Phone Company Bid to Keep Data from N.S.A. Is Rejected*, N.Y. Times, Apr. 26, 2014, at A13.

5150. Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (Jan. 23, 2014) [hereinafter First Privacy Board Report], available at www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf; see www.pclob.gov/; Pub. L. 110-53, § 801(a), 121 Stat. 266, 352–58 (2007), as amended, 42 U.S.C. § 2000ee (2013); see also Donohue, *supra* note 5058, at 613–14; Siobhan Gorman & Jared A. Favole, *Watchdog Urges NSA to End Phone Program*, Wall St. J., Jan. 24, 2014, at A4; Ellen Nakashima, *Board: NSA Phone Program Should End*, Wash. Post, Jan. 23, 2014, at A4; Todd Ruger, *Privacy Board Divided Over NSA Program*, Nat’l L.J., Jan. 27, 2014, at 15; Charlie Savage, *Watchdog Report Says N.S.A. Program Is Illegal and Should End*, N.Y. Times, Jan. 23, 2014, at A14.

5151. First Privacy Board Report, *supra* note 5150, at 3–4; see Jeremy W. Peters, *G.O.P. Delays On Nominees Raise Tension*, N.Y. Times, May 12, 2013, at A1; see also 42 U.S.C. § 2000ee(h)(1) (2013) (“The Board shall be composed of a full-time chairman and 4 additional members, who shall be appointed by the President, by and with the advice and consent of the Senate.”).

Members of the Board shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party.

42 U.S.C. § 2000ee(h)(2); see First Privacy Board Report, *supra* note 5150, at 3.

lance conducted pursuant to FISA’s title V on business records and other tangible things, as expanded by section 215 of the Patriot Act.⁵¹⁵²

There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk—potentially encompassing all telephone calling records across the nation—they cannot be regarded as “relevant” to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of turning over records already in their possession)—an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.

In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders.⁵¹⁵³

Two board members dissented from the majority’s conclusion that the section 215 surveillance program violates FISA.⁵¹⁵⁴

The board issued a report on the use of FISA’s section 702 on July 2, 2014.⁵¹⁵⁵ “[T]he Board has found no evidence of intentional abuse.”⁵¹⁵⁶ The board concluded that section 702 could be used constitutionally:

In the Board’s view, the core of this program—acquiring the communications of specifically targeted foreign persons who are located outside the United States, upon a belief that those persons are likely to communicate foreign intelligence, using specific communications identifiers, subject to FISA court-approved targeting rules that have proven to be accurate in targeting persons outside the United States, and subject to multiple layers of rigorous oversight—fits within the totality of the circumstances test for reasonableness as it has been defined by the courts to date.

...

5152. First Privacy Board Report, *supra* note 5150, at 8; see Second Privacy Board Report, *supra* note 4964, at 2.

5153. First Privacy Board Report, *supra* note 5150, at 10; see Electronic Communications Privacy Act, Pub. L. 99-508, 100 Stat. 1948 (1986), *relevant sections as amended*, 18 U.S.C. §§ 2701–2712 (2013).

5154. First Privacy Board Report, *supra* note 5150, at 208–18.

5155. Second Privacy Board Report, *supra* note 4964; see Ellen Nakashima, *Panel: NSA Program That Targets Foreigners Is Lawful*, Wash. Post, July 2, 2014, at A13; David E. Sanger, *U.S. Privacy Panel Backs N.S.A.’s Internet Tapping*, N.Y. Times, July 3, 2014, at A11; Ali Watkins, *Panel: Little Wrong with NSA Surveillance*, Miami Herald, July 3, 2014, at 3A.

5156. Second Privacy Board Report, *supra* note 4964, at 2.

[Some features of the program, however,] push the entire program close to the line of constitutional reasonableness. At the very least, too much expansion in the collection of U.S. persons' communications or the uses to which those communications are put may push the program over the line.⁵¹⁵⁷

New Notices to Criminal Defendants

In 2013, the Justice Department revised its policy on notice to criminal defendants of FISA surveillance to bring its behavior in line with representations previously made by the Solicitor General to the Supreme Court in *Clapper v. Amnesty International USA*.⁵¹⁵⁸

The issue in *Clapper* was standing to challenge the constitutionality of FISA's section 702, which is section 1881a of the U.S. Code's title 50. The plaintiffs argued "that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged."⁵¹⁵⁹ The Court observed that "if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."⁵¹⁶⁰ Solicitor General Donald B. Verrilli, Jr., said in his reply brief, "the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance."⁵¹⁶¹

On learning, subsequent to the Snowden revelations, that Justice Department practice did not conform to the government's representations in *Clapper*, Solicitor General Verrilli persuaded the department that the proper course was to provide defendants with section 702 surveillance notice.⁵¹⁶² On December 24, 2013, the Justice Department informed senators who had inquired about the issue,

Based on a recent review, the Department has determined that information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both

5157. *Id.* at 96–97.

5158. 568 U.S. ___, 133 S. Ct. 1138 (2013); see Donohue, *supra* note 4967, at 245–52; Human Rights Watch, *Illusion of Justice* 102–03 (2014).

5159. *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, ___, 133 S. Ct. 1138, 1154 (2013).

5160. *Id.*

5161. Reply Brief at 15, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (U.S. Oct. 17, 2012), available at www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1025_pet_reply.authcheckdam.pdf; see Transcript at 4, *id.* (Oct. 29, 2012), available at www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf (referring to "notice that the government intends to introduce information in a proceeding against" an aggrieved person).

5162. See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 17, 2013, at A3; see also Donohue, *supra* note 4967, at 245–50 ("The government is required, prior to legal proceedings, to notify the aggrieved person and the court (or other authority), that information is to be disclosed or used.").

Title I and Title VII should be given in appropriate cases with respect to the same information. Based on this determination, the government has provided notice concerning Section 702-derived information in two criminal cases.⁵¹⁶³

On October 17, 2013, the ACLU filed a complaint in the Southern District of New York based on a March 29, FOIA request for “records related to the government’s use of evidence derived from surveillance authorized by the FISA Amendments Act.”⁵¹⁶⁴ After examining withheld documents in camera and ex parte, Judge Gregory H. Woods ruled on March 3, 2015, that five documents were properly withheld pursuant to the deliberative process privilege, but the government’s search had been improperly narrow.⁵¹⁶⁵

Historically, federal courts have frequently reviewed FISA evidence concerning criminal defendants to determine whether any of the evidence was discoverable as helpful to the defense⁵¹⁶⁶ and whether any FISA evidence should be suppressed.⁵¹⁶⁷ Courts have also found prosecutions based on FISA evidence to be constitutional.⁵¹⁶⁸

5163. Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Mark Udall, Dec. 24, 2013, available at www.documentcloud.org/documents/1159182-122413-doj-response.html.

5164. Complaint, ACLU v. U.S. Dep’t of Justice, No. 1:13-cv-7347 (S.D.N.Y. Oct. 17, 2013), D.E. 1; see Donohue, *supra* note 4967, at 250.

5165. ACLU v. U.S. Dep’t of Justice, ___ F. Supp. 3d ___, 2015 WL 892245 (S.D.N.Y. 2015); see 5 U.S.C. § 552(b)(5) (2013).

5166. United States v. Amawi, 695 F.3d 457, 474–75 (6th Cir. 2012), *affg* 531 F. Supp. 2d 832 (N.D. Ohio 2008); United States v. El-Mezain, 664 F.3d 467, 563–70 (5th Cir. 2011); United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984), *affg* United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982); United States v. Belfield, 692 F.2d 141, 146–47 (D.C. Cir. 1982); United States v. Thomson, 752 F. Supp. 75, 78 (W.D.N.Y. 1990); United States v. Spanjol, 720 F. Supp. 55 (E.D. Pa. 1989).

5167. United States v. Aldawsari, 740 F.3d 1015, 1017–19 (5th Cir. 2014); United States v. Campa, 529 F.3d 980, 988–89, 993–94 (11th Cir. 2009); United States v. Ning Wen, 477 F.3d 896, 897 (7th Cir. 2006); United States v. Dumeisi, 424 F.3d 566, 578–79 (7th Cir. 2005); United States v. Damrah, 412 F.3d 618, 623–25 (6th Cir. 2005); United States v. Hammoud, 381 F.3d 316, 331–34 (4th Cir. 2004) (en banc), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005); United States v. Squillacote, 221 F.3d 542, 552–54 (4th Cir. 2000); United States v. Johnson, 952 F.2d 565, 571–73 (1st Cir. 1991); United States v. Isa, 923 F.2d 1300 (8th Cir. 1991); United States v. Badia, 827 F.2d 1458, 1462–64 (11th Cir. 1987); United States v. Ott, 827 F.2d 473 (9th Cir. 1987); United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987); *Duggan*, 743 F.2d at 76–80; United States v. Mahamud, 838 F. Supp. 2d 881 (D. Minn. 2012); United States v. Sherifi, 793 F. Supp. 2d 751 (E.D.N.C. 2011), *aff’d sub nom.* United States v. Hassan, 742 F.3d 104, 137 (4th Cir. 2014); United States v. Warsame, 547 F. Supp. 2d 982 (D. Minn. 2008); United States v. Mubayyid, 521 F. Supp. 2d 125, 131–41 (D. Mass. 2007); United States v. Rosen, 447 F. Supp. 2d 538, 547–53 (E.D. Va. 2006); United States v. Abdel Rachman, 861 F. Supp. 247 (S.D.N.Y. 1994); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982).

5168. *Ning Wen*, 477 F.3d at 897–99; United States v. Duka, 671 F.3d 329, 342–47 (3d Cir. 2011); United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010), *affg* 531 F. Supp. 2d 299 (D. Conn. 2008); United States v. Stewart, 590 F.3d 93, 126–29 (2d Cir. 2009); *Isa*, 923 F.2d 1300; United States v. Posey, 864 F.2d 1487, 1490–91 (9th Cir. 1989) (noting, “As an initial matter, we think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular

According to the *New York Times* on February 26, 2014, the government had filed section 702 notices in three cases.⁵¹⁶⁹

Jamshid Muhtorov

The FBI arrested Jamshid Muhtorov at Chicago's O'Hare Airport on January 21, 2012, interrupting his trip to Turkey.⁵¹⁷⁰ He was indicted in the District of Colorado, and the court assigned his case to Judge John L. Kane.⁵¹⁷¹

The government filed a section 702 notice on October 25, 2013.⁵¹⁷² Briefing by the parties is in progress.⁵¹⁷³

Mohamed Osman Mohamud

Mohamed Osman Mohamud was convicted on January 31, 2013, of an attempt to use a weapon of mass destruction for attempting to detonate a car bomb, which was a fake provided by the FBI in a sting, at Portland, Oregon's November 26, 2010, Christmas tree lighting ceremony.⁵¹⁷⁴ Judge Garr M. King presided over the case.⁵¹⁷⁵

surveillance *against him* violated the Fourth Amendment.”); *United States v. Pelton*, 835 F.2d 1067, 1074–75 (4th Cir. 1987); *Cavanagh*, 807 F.2d 787; *Duggan*, 743 F.2d at 71–76; *Belfield*, 692 F.2d at 148–49; *Mahamud*, 838 F. Supp. 2d at 888–89; *Warsame*, 547 F. Supp. 2d at 992–97; *Mubayyid*, 521 F. Supp. 2d at 135–41; *United States v. Benkahla*, 437 F. Supp. 2d 541, 554–55 (E.D. Va. 2006); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997); *Falvey*, 540 F. Supp. 1306; *see Damrah*, 412 F.3d at 625 (“FISA has uniformly been held to be consistent with the Fourth Amendment”); *Johnson*, 952 F.2d at 573 (noting, “We suspect . . . that appellants have waived this claim for purposes of their appeal.”).

5169. Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, *N.Y. Times*, Feb. 26, 2014, at A3; *see* Donohue, *supra* note 4967, at 251–52.

5170. *See* Bruce Finley & Felisa Cardona, “*I Knew Him as a Good Guy, Praying*,” *Denver Post*, Jan. 31, 2012, at 1A; *see also* Complaint, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 19, 2012), D.E. 1; Partially Translated Complaint, *id.* (Feb. 6, 2012), D.E. 22 (Russian translation).

5171. Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012) D.E. 5; Translated Indictment, *id.* (Feb. 6, 2012), D.E. 21 (Russian translation); *see* Second Superseding Indictment, *id.* (Mar. 22, 2012), D.E. 59; Superseding Indictment, *id.* (Mar. 20, 2012), D.E. 50.

5172. FISA Notice, *id.* (Oct. 25, 2013), D.E. 457; *see* *ACLU v. U.S. Dep’t of Justice*, ___ F. Supp. 3d ___, ___, 2015 WL 892245 (S.D.N.Y. 2015) (p.4 of opinion filed at S.D.N.Y. No. 1:13-cv-7347, D.E. 35); Charlie Savage, *U.S. Prosecutors Cite Warrantless Wiretaps*, *N.Y. Times*, Oct. 27, 2013, at 21.

5173. Docket Sheet, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012); *see* Transcript at 8–9, *id.* (Nov. 15, 2013, filed Dec. 20, 2013), D.E. 487 (noting Judge Kane’s amenability to participation by amici curiae).

5174. Verdict, *United States v. Mohamud*, No. 3:10-cr-475 (D. Or. Jan. 31, 2013), D.E. 428; *United States v. Mohamud*, 941 F. Supp. 2d 1303, 1307 (D. Or. 2013) (denying motions for acquittal or a new trial); Opinion at 3, *United States v. Mohamud*, No. 3:10-cr-475 (D. Or. June 24, 2014), D.E. 517 [hereinafter *Mohamud* Section 702 Opinion], available at 2014 WL 2866749; *see* Indictment, *Mohamud*, No. 3:10-cr-475 (D. Or. Nov. 29, 2010), D.E. 2; *see also* Colin Miner, Liz Robbins & Erik Eckholm, *F.B.I. Says Oregon Suspect Planned “Grand” Attack*, *N.Y. Times*, Nov. 28, 2010, at A1.

5175. Docket Sheet, *Mohamud*, No. 3:10-cr-475 (D. Or. Nov. 29, 2010).

On November 19, 2013, before Mohamud had been sentenced, the government filed a section 702 notice.⁵¹⁷⁶ On June 24, 2014, Judge King denied Mohamud's motions for a new trial.⁵¹⁷⁷

Clearly a lot of time has passed, but otherwise suppression and a new trial would put defendant in the same position he would have been in if the government notified him of the § 702 surveillance at the start of the case. Moreover, the government has apparently changed its practice in making this type of notification, so dismissal is not needed as a deterrence.⁵¹⁷⁸

Judge King rejected various constitutional challenges to FISA's new title VII, section 702 in particular. Respecting separation of powers, "[r]eview of § 702 surveillance applications is as central to the mission of the judiciary as the review of search warrants and wiretap applications."⁵¹⁷⁹ With respect to the Fourth Amendment, "§ 702 surveillance falls within the foreign intelligence exception to the warrant requirement."⁵¹⁸⁰ Mohamud's "communications were collected incidentally during intelligence collection targeted at one or more non-U.S. persons outside the United States."⁵¹⁸¹ Acknowledging the issue as presenting "a very close question," Judge King concluded that a warrant was not required for the examination of evidence incidentally collected on Mohamud.⁵¹⁸² Finally,

I made a careful de novo, ex parte review of the § 702 applications and conclude the certification required by 50 U.S.C. § 1881a(g)(2)(A) [FISA § 702(g)(2)(A)] was in place. I also find that the government agents followed appropriate targeting and minimization procedures. Thus I conclude the § 702 surveillance at issue here was lawfully conducted.⁵¹⁸³

On October 1, Judge King sentenced Mohamud to thirty years in prison.⁵¹⁸⁴ An appeal is pending.⁵¹⁸⁵

5176. FISA Notice, *id.* (Nov. 19, 2013), D.E. 486; *Mohamud* Section 702 Opinion, *supra* note 5174, at 3; see Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A15.

In briefing, the government acknowledged that the notice was untimely. Government Discovery Opposition Brief at 9 n.5, 12, *Mohamud*, No. 3:10-cr-475 (D. Or. Feb. 13, 2014), D.E. 491.

5177. *Mohamud* Section 702 Opinion, *supra* note 5174; see Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15.

5178. *Mohamud* Section 702 Opinion, *supra* note 5174, at 8.

5179. *Id.* at 18; see Savage, *supra* note 5177 ("The constitutionality of the 2008 law had never been tested in court before Judge King's ruling.").

5180. *Mohamud* Section 702 Opinion, *supra* note 5174, at 27.

5181. *Id.* at 25.

5182. *Id.* at 42–45.

5183. *Id.* at 47.

5184. Judgment, *United States v. Mohamud*, No. 3:10-cr-475 (D. Or. Oct. 3, 2014), D.E. 524; Transcript at 56, *id.* (Oct. 1, 2015, filed Dec. 8, 2014), D.E. 529; see Nigel Duara, *Ore. Man Caught in Bomb-Plot Sting Gets 30-Year Term*, Bos. Globe, Oct. 2, 2014, at A8.

5185. Docket Sheet, *United States v. Mohamud*, No. 14-30217 (9th Cir. Oct. 14, 2014) (noting that the answering brief is due on June 12, 2015).

Agron Hasbajrami

On January 16, 2013, Agron Hasbajrami received a sentence of fifteen years in prison from Judge John Gleeson, Eastern District of New York, on a plea of guilty to charges of providing material support to terrorism.⁵¹⁸⁶ Five days after the September 8, 2011, indictment, the government filed a notice that the government had collected FISA evidence against Hasbajrami.⁵¹⁸⁷

On February 24, 2014, the government informed Hasbajrami that the FISA evidence against him was obtained pursuant to orders based on section 702 FISA evidence.⁵¹⁸⁸ “In the government’s view, this supplemental notification does not afford you a basis to withdraw your plea or to otherwise attack your conviction or sentence because you expressly waived those rights, as well as the right to any additional disclosures from the government, in your plea agreement.”⁵¹⁸⁹

Judge Gleeson ruled on October 2 that Hasbajrami could withdraw his guilty plea, because, “When the government provided FISA notice without FAA notice, Hasbajrami was misled about an important aspect of his case.”⁵¹⁹⁰ Trial is set for July 13, 2015.⁵¹⁹¹

Reaz Qadir Khan

A fourth case arose in April 2014.

A grand jury in the District of Oregon returned a sealed indictment against Reaz Qadir Khan on December 27, 2012, for providing advice and financial assistance to Ali Jaleel and his family; Jaleel perished in a suicide attack against Pakistan’s Inter-Services Intelligence headquarters in Lahore on May 27, 2009.⁵¹⁹² Khan, who worked at Portland’s wastewater treatment plant, was arrested on March 5, 2013.⁵¹⁹³ The court assigned Khan’s case to Judge Michael W. Mosman.⁵¹⁹⁴

5186. Judgment, *United States v. Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Jan. 16, 2013), D.E. 45; see Superseding Indictment, *id.* (Jan. 26, 2012), D.E. 20; Indictment, *id.* (Sept. 8, 2011), D.E. 1; see also Mosi Secret, *15-Year Sentence in Terror Case*, N.Y. Times, Jan. 9, 2013, at A22.

5187. FISA Notice, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Sept. 13, 2011), D.E. 9.

5188. Letter, *id.* (Feb. 24, 2014), D.E. 65 [hereinafter Feb. 24, 2014, *Hasbajrami* Letter]; see Ellen Nakashima, *No Warrant, Inmate Is Told*, Wash. Post, Feb. 26, 2014, at A4; Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3.

5189. Feb. 24, 2014, *Hasbajrami* Letter, *supra* note 5188, at 2.

5190. Opinion, *Hasbajrami v. United States*, No. 1:13-cv-6852 (E.D.N.Y. Oct. 2, 2014), D.E. 30, available at 2014 WL 4954596 (noting that withdrawal of the plea was against advice of counsel); see Barrett, *supra* note 5119.

5191. Docket Sheet, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Sept. 8, 2011) (April 14, 2015, minutes).

5192. Indictment, *United States v. Khan*, No. 3:12-cr-659 (D. Or. Dec. 27, 2012), D.E. 1.

5193. Arrest Warrant, *id.* (Mar. 6, 2013), D.E. 11; see Helen Jung, *Indictment Ties Portland Man to Pakistan Attack*, Oregonian, Mar. 6, 2013.

5194. Docket Sheet, *Khan*, No. 3:12-cr-659 (D. Or. Dec. 28, 2012) [hereinafter D. Or. *Khan* Docket Sheet].

On the day that Khan was arrested, the government filed a notice that it would use against the defendant evidence collected pursuant to FISA.⁵¹⁹⁵ On April 3, 2014, just over one year later, the government filed a notice that evidence against Khan was acquired pursuant to FISA's section 702.⁵¹⁹⁶ Judge Mosman scheduled FISA motions for hearing on July 27, 2015.⁵¹⁹⁷ On June 17, 2014, Judge Mosman ruled that his 2013 appointment to the FISA court⁵¹⁹⁸ did not require recusal.⁵¹⁹⁹

The case was resolved by a plea agreement filed on February 13, 2015.⁵²⁰⁰

Adel Daoud

Litigation over section 702 arose in a fifth case because it was championed by Senator Dianne Feinstein on December 27, 2012, as a success story for the FISA Amendments Act.⁵²⁰¹

Adel Daoud was arrested in Chicago on September 14, 2012, for attempting to bomb a bar with a fake bomb provided by the FBI.⁵²⁰² The court assigned the case to Judge Sharon J. Coleman.⁵²⁰³ The government filed a notice on September 18 that it would use against Daoud evidence derived pursuant to FISA.⁵²⁰⁴ On May 22, 2013, Daoud filed a motion for clarification from the government whether the FISA evidence against Daoud derived from traditional pre-FAA FISA surveillance or FAA FISA surveillance, often referred to as section 702 FISA surveillance.⁵²⁰⁵ The government responded on June 12 that “the information the government intends to use was acquired pursuant to a traditional FISA order . . . as opposed to a Section 702 Order.”⁵²⁰⁶ In sur-reply on August 8, the government said that it would “provide notice to the defense and this Court if the government intended to use in this case any information obtained or derived from surveil-

5195. Notice, *Khan*, No. 3:12-cr-659 (D. Or. Mar. 5, 2013), D.E. 7.

5196. Notice, *id.* (Apr. 3, 2014), D.E. 59.

5197. Litigation Schedule, *id.* (Dec. 22, 2014), D.E. 175.

5198. www.fisc.uscourts.gov/current-membership.

5199. D. Or. Khan Docket Sheet, *supra* note 5194 (D.E. 91); see Motion, *Khan*, No. 3:12-cr-659 (D. Or. May 5, 2014), D.E. 73; Transcript at 26–28, *id.* (Apr. 25, 2014, filed June 12, 2014), D.E. 89 (oral order, in an abundance of caution, by Judge Mosman to Khan's attorneys for briefing on reasons for Judge Mosman's recusal).

5200. Plea Agreement, *Khan*, No. 3:12-cr-659 (D. Or. Feb. 13, 2015), D.E. 187; Superseding Information, *id.* (Feb. 13, 2015), D.E. 182.

5201. See Ellen Nakashima, *NSA Surveillance Questioned in Plot Case*, Wash. Post, June 22, 2013, at A2.

5202. *United States v. Daoud*, 755 F.3d 479, 480 (7th Cir. 2014); Minutes, *United States v. Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 15, 2012), D.E. 2; see Michael Schwirtz & Marc Santora, *Chicago-Area Teenager Accused of Terrorism Plot*, N.Y. Times, Sept. 16, 2012, at 20; Annie Sweeney, Dawn Rhodes & Ryan Haggerty, *FBI: Car Bomb Plan Foiled*, Chi. Trib., Sept. 16, 2012, at 4. See generally Human Rights Watch, *Illusion of Justice* 6, 28–30, 192–93 (2014).

5203. Docket Sheet, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 20, 2012).

5204. Notice, *id.* (Sept. 18, 2012), D.E. 9; *Daoud*, 755 F.3d at 480.

5205. FISA Clarification Motion, *Daoud*, No. 1:12-cr-723 (N.D. Ill. May 22, 2013), D.E. 43.

5206. FISA Clarification Motion Response, *id.* (June 12, 2013), D.E. 46.

lance authorized under Title VII of FISA . . . as to which the defendant is an aggrieved person.”⁵²⁰⁷ On the following day, Daoud’s attorneys moved to examine and suppress all FISA evidence because “there is no indication that the prerequisites for a FISA warrant were present in this case.”⁵²⁰⁸

On January 29, 2014, Judge Coleman ruled that Daoud’s secured counsel should be able to review FISA application materials pertaining to Daoud’s case.⁵²⁰⁹

Here, counsel for defendant Daoud has stated on the record that he has top secret SCI (sensitive compartmented information) clearance. Assuming that counsel’s clearances are still valid and have not expired, top secret SCI clearance would allow him to examine the classified FISA application material, if he were in the position of the Court or the prosecution. Furthermore, the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances. The government’s only response at oral argument was that it has never been done. That response is unpersuasive where it is the government’s claim of privilege to preserve national security that triggered this proceeding. Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel. Upon a showing by counsel, that his clearance is still valid, this Court will allow disclosure of the FISA application materials subject to a protective order consistent with procedures already in place to review classified materials by the court and cleared government counsel.

While this Court is mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense, in this case, the Court finds that the disclosure may be necessary. This finding is not made lightly, and follows a thorough and careful review of the FISA application and related materials. The Court finds however that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding. The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 743 (1967). Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. “The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984).⁵²¹⁰

5207. FISA Clarification Motion Sur-Reply, *id.* (Aug. 8, 2013), D.E. 49.

5208. FISA Suppression Motion at 2, *id.* (Aug. 9, 2013), D.E. 52.

5209. Opinion, *id.* (Jan. 29, 2014), D.E. 92 [hereinafter Jan. 29, 2014, N.D. Ill. *Daoud* Opinion], available at 2014 WL 321384; *Daoud*, 755 F.3d at 481; see Andrew Grossman, *Lawyers Win Right to See Secret Court Files*, Wall St. J., Jan. 30, 2014, at A5; Jason Meisner, *Defense to Get Terrorism Files*, Chi. Trib., Jan. 30, 2014, at 11; Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance Program*, Wash. Post, Jan. 30, 2014, at A13; Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A13.

5210. Jan. 29, 2014, N.D. Ill. *Daoud* Opinion, *supra* note 5209, at 4–5.

On June 4, 2014, the court of appeals—Circuit Judges Richard A. Posner, Michael S. Kanne, and Ilana Diamond Rovner—heard the government’s appeal from Judge Coleman’s order granting Daoud’s attorneys access to FISA application materials.⁵²¹¹ Following a public argument, the court held a closed ex parte session with the government.⁵²¹² Daoud’s attorneys were not notified in advance that the court would hold part of the proceeding ex parte.⁵²¹³

Because of an error by court staff, the public argument was not recorded as it should have been.⁵²¹⁴ Court staff members misinterpreted security precautions for the ex parte session as a signal that the public session should not be recorded.⁵²¹⁵ The ex parte session was recorded by a cleared court reporter, however.⁵²¹⁶ The court agreed to ask the government to approve a redacted transcript for defense counsel’s use.⁵²¹⁷ Attached to a motion to remove some redactions, the defense filed the redacted transcript on the public docket.⁵²¹⁸

To remedy the recording error the court ordered a second argument session at the beginning of the following week.⁵²¹⁹ Daoud was represented by a different attorney at the second argument.⁵²²⁰

At the second argument, Judges Posner and Rovner explained to the defense attorney that the purpose of the ex parte proceeding was to provide the court with an opportunity to cross-examine the government about the government’s representations to the court.⁵²²¹ At the closed proceeding, the government assured the court that Senator Feinstein’s comment about Daoud “was not meant to be understood as a statement that the FAA was used in this case.”⁵²²² Following the ex parte proceeding, the court issued a “Classified *Ex Parte* Order Requiring Additional Submission from the Government.”⁵²²³

5211. United States v. Daoud, 755 F.3d 479 (7th Cir. 2014); Docket Sheet, United States v. Daoud, No. 14-1284 (7th Cir. Feb. 11, 2014) [hereinafter 7th Cir. *Daoud* Docket Sheet]; see Jason Meisner, *Secret Appeals Hearing Held*, Chi. Trib., June 5, 2014, at 12.

5212. *Daoud*, 755 F.3d at 479 n.*; 485; see Defendant’s Objection, *Daoud*, No. 14-1284 (7th Cir. June 8, 2014); see also Meisner, *supra* note 5211.

5213. See Defendant’s Objection, *supra* note 5212; see also Meisner, *supra* note 5211.

5214. *Daoud*, 755 F.3d at 479 n.*; see Jason Meisner, *Court Didn’t Record Terror Case Arguments*, Chi. Trib., June 6, 2014, at 4.

5215. See Meisner, *supra* note 5214.

5216. *Daoud*, 755 F.3d at 479 n.*; see Meisner, *supra* note 5214.

5217. *Daoud*, 755 F.3d at 485; 7th Cir. *Daoud* Docket Sheet, *supra* note 5211; http://media.ca7.uscourts.gov/sound/external/rs.14-1284.14-1284_06_09_2014.mp3 [hereinafter June 9, 2014, 7th Cir. Oral Argument].

5218. Transcript Motion, United States v. Daoud, No. 14-1284 (7th Cir. June 25, 2014).

5219. *Daoud*, 755 F.3d at 479 n.*; Orders, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014); see Jason Meisner, *Court Will Redo Terror Case Oral Arguments*, Chi. Trib., June 7, 2014, at 4.

5220. 7th Cir. *Daoud* Docket Sheet, *supra* note 5211.

5221. June 9, 2014, 7th Cir. Oral Argument, *supra* note 5217; see *Daoud*, 755 F.3d at 485; see also Steve Schmadeke, *Attorney, Judge Trade Shots in Terror Case*, Chi. Trib., June 10, 2014, at 9.

5222. Transcript at 7, attached to Transcript Motion, *supra* note 5218.

5223. Order, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014) (cover page).

On June 16, the court of appeals reversed Judge Coleman’s discovery order, because she had not adequately established Daoud’s attorneys’ “need to know” the classified FISA application materials.⁵²²⁴

The court of appeals also ruled that the investigation of Daoud did not violate FISA.⁵²²⁵ The court determined that Senator Feinstein had not identified Daoud’s case as an FAA success story; the court concluded that Senator Feinstein meant to list thwarted attacks as evidence of needed vigilance, only some of which were FAA success stories.⁵²²⁶

Daoud’s jury trial is set to begin on July 27, 2015.⁵²²⁷

The Qazi Brothers

Raees Alam Qazi and Sheheryar Alam Qazi, brothers who were born in Pakistan and who became naturalized U.S. citizens, were indicted on November 30, 2012, in the Southern District of Florida for a plot to use a weapon of mass destruction somewhere in the United States.⁵²²⁸ On December 6, the government filed notices that it would use FISA evidence against the defendants.⁵²²⁹

On April 22, 2013, the defendants moved for notice whether any of the FISA evidence was obtained pursuant to the FAA.⁵²³⁰ The defendants observed that their capture also was championed by Senator Feinstein as an FAA success.⁵²³¹ On May 6, Magistrate Judge John J. O’Sullivan granted the defendants’ motion so that they could challenge the lawfulness of any FAA surveillance, as promised by *Clapper*.⁵²³²

On September 5, 2014, Judge O’Sullivan issued a report and recommendation advising (1) that after “a thorough *in camera*, *ex parte* review of the classified Foreign Intelligence Surveillance Act (“FISA”) materials, the undersigned respect-

5224. *Daoud*, 755 F.3d at 484, *cert. denied*, 574 U.S. ___, 135 S. Ct. 1456 (2015); see Ellen Nakashima, *Landmark Surveillance Disclosure Order Reversed*, Wash. Post, June 17, 2014, at A2.

5225. *Daoud*, 755 F.3d at 485.

5226. *United States v. Daoud*, 761 F.3d 678, 682–83 (7th Cir. 2014).

5227. Minutes, *United States v. Daoud*, No. 1:12-cr-723 (N.D. Ill. Oct. 8, 2014), D.E. 130.

5228. Indictment, *United States v. Qazi*, No. 0:12-cr-60298 (S.D. Fla. Nov. 30, 2012), D.E. 1; see Scott Hiaasen, *Broward Brothers Held on Terror Charges*, Miami Herald, Dec. 1, 2012, at 1B.

5229. Notice, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Dec. 6, 2012), D.E. 10 (Sheheryar); Notice, *id.* (Dec. 6, 2012), D.E. 9 (Raees).

5230. Amended FAA Motion, *id.* (Apr. 22, 2013), D.E. 67 (motion by Sheheryar); see Order, *id.* (Apr. 24, 2013), D.E. 73 (granting Raees permission to join Sheheryar’s motion).

5231. Amended FAA Motion, *supra* note 5230, at 3–4.

5232. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. May 6, 2013), D.E. 77; see Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 16, 2013, at A11.

I would like to have someone here maybe, you know, from the Solicitor General’s Office who took the position in front of the Supreme Court that, “Hey, Supreme Court, don’t rule on this now because, you know, these people don’t have standing,” but some day there is going to be somebody who is going to have standing, and they are going to be able to come before the Supreme Court, and now we have got some folks here who may have standing, but you don’t want to tell them they have standing.

Transcript at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. July 26, 2013, filed July 30, 2013), D.E. 129 (remarks by Judge O’Sullivan).

fully recommends that the defendants' motions to disclose FISA materials and to suppress evidence of FISA intercepts be DENIED⁵²³³ and (2) because "the government does not intend to introduce or otherwise use or disclose evidence obtained or derived from FAA surveillance,"⁵²³⁴ deciding the constitutionality of the FAA would be an impermissible advisory opinion.⁵²³⁵

District Judge Beth Bloom adopted Judge O'Sullivan's opinion.⁵²³⁶ The Qazis pleaded guilty to some counts of a superseding indictment on March 12, 2015.⁵²³⁷

Moalin, Mohamud, Doreh, and Taalil

Judge Jeffrey T. Miller, Southern District of California, denied a new trial motion on November 14, 2013, a motion based in part on postconviction Snowden revelations.⁵²³⁸ "Here, when Defendant Moalin used his telephone to communicate with third parties, whether in Somalia or the United States, he had no legitimate expectation of privacy in the telephone numbers dialed."⁵²³⁹

The defendants were indicted in San Diego late in 2010 for sending money to support Al-Shabaab in Somalia.⁵²⁴⁰ A jury found them guilty on February 22, 2013.⁵²⁴¹ Appeals are pending.⁵²⁴²

Director Clapper's Letter

James Clapper, the Director of National Intelligence, provided Senator Wyden with a letter on March 28, 2014, explaining that "NSA sought and obtained the authority to query information collected under Section 702 of the Foreign Intelligence and Surveillance Act (FISA), using U.S. person identifiers," and "[t]hese

5233. Redacted Report and Recommendation at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Sept. 5, 2014), D.E. 245 [hereinafter Sept. 5, 2014, *Qazi* Redacted Report and Recommendation]; see Redacted Report and Recommendation, *id.* (Sept. 3, 2014, filed Sept. 19, 2014), D.E. 250 (showing the locations in the document of the redactions).

5234. Sept. 5, 2014, *Qazi* Redacted Report and Recommendation, *supra* note 5233, at 9.

5235. *Id.* at 17.

5236. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Oct. 29, 2014), D.E. 259.

5237. Plea Agreement, *id.* (Mar. 12, 2015), D.E. 283 (Sheheryar Alam Qazi); Plea Agreement, *id.* (Mar. 12, 2015), D.E. 282 (Sheheryar Alam Qazi); Docket Sheet, *id.* (Nov. 30, 2012) (D.E. 280, minutes); see Factual Basis, *id.* (Mar. 12, 2015), D.E. 284; Superseding Indictment, *id.* (Jan. 15, 2015), D.E. 267.

5238. Amended Opinion, *United States v. Moalin*, No. 3:10-cr-4246 (S.D. Cal. Nov. 18, 2013), D.E. 388, available at 2013 WL 6079518.

5239. *Id.* at 12; see *Smith v. Maryland*, 442 U.S. 735 (1979).

5240. Indictment, *United States v. Mohamud*, No. 3:10-cr-4645 (S.D. Cal. Nov. 19, 2010), D.E. 1; Indictment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Oct. 22, 2010), D.E. 1; see Second Superseding Indictment, *id.* (June 8, 2012), D.E. 147; Superseding Indictment, *id.* (Jan. 14, 2011), D.E. 38.

5241. Jury Verdict, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Feb. 22, 2013), D.E. 303.

5242. Docket Sheet, *United States v. Mohamud*, No. 14-50051 (9th Cir. Feb. 7, 2014) (Taalil, noting that the reply brief is due on November 16, 2015); Docket Sheet, *United States v. Doreh*, No. 13-50580 (9th Cir. Dec. 2, 2013); Docket Sheet, *United States v. Mohamud*, No. 13-50578 (9th Cir. Nov. 29, 2013) (Mohamud); Docket Sheet, *United States v. Moalin*, No. 13-50572 (9th Cir. Nov. 26, 2013).

queries were performed pursuant to minimization procedures approved by the FISA Court as consistent with the statute and the Fourth Amendment.”⁵²⁴³

Reform

On December 12, 2013, the President’s Review Group on Intelligence and Communications Technologies issued a 303-page report presenting forty-six recommendations for surveillance reform.⁵²⁴⁴ One month later, Judge Bates, who served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015, submitted to Congress a report on behalf of the judiciary urging moderation in any reforms that would substantially change the work of the FISA court.⁵²⁴⁵

At a televised address to the Justice Department on January 17, 2014, President Obama announced that he was “ordering a transition that will end the Section 215 Bulk metadata program as it currently exists, and establish a mechanism that preserves the capabilities we need without the government holding this bulk metadata.”⁵²⁴⁶

Among the ordered changes, the President decided that the NSA’s extensive database of who has called whom now “can be queried only after a judicial find-

5243. Letter from James R. Clapper to Senator Ron Wyden, Mar. 28, 2014, *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/1100298/unclassified-702-response.pdf>; *see* Ellen Nakashima, *Clapper Confirms Warrantless Searches by NSA*, Wash. Post, Apr. 2, 2014, at A3; Charlie Savage, *Letter Tells of Searches for Emails and Calls*, N.Y. Times, Apr. 2, 2014, at A20.

5244. Liberty and Security in a Changing World (Dec. 12, 2013), *available at* www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; *see* Donohue, *supra* note 5058, at 611–12; Siobhan Gorman, *Panel Pushes Revamp of NSA*, Wall St. J., Dec. 13, 2013, at A1; Siobhan Gorman, Devlin Barrett & Carol E. Lee, *Obama Urged to Curb NSA Spying*, Wall St. J., Dec. 19, 2013, at A1; Ellen Nakashima & Ashkan Soltani, *Panel Urges New Curbs on Surveillance by U.S.*, Wash. Post, Dec. 19, 2013, at A1; David E. Sanger, *Obama Panel Said to Urge N.S.A. Curbs*, N.Y. Times, Dec. 13, 2013, at A1; David E. Sanger & Charlie Savage, *Obama Is Urged to Sharply Curb N.S.A. Data Mining*, N.Y. Times, Dec. 19, 2013, at A1.

5245. Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, *available at* www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=70bed5e2-c28f-4f3c-ad94-7cb6d647f328; Letter from John D. Bates to Senator Dianne Feinstein, Jan. 13, 2014, *available at* www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=3bcc8fbc-d13c-4f95-8aa9-09887d6e90ed; *see* Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. Times, Jan. 15, 2014, at A1; Ellen Nakashima, *Judges Oppose Secret-Court Changes*, Wash. Post, Jan. 15, 2014, at A3; Mike Scarcella, *FISA Judges’ Concerns*, Nat’l L.J., Jan. 20, 2014, at 16; *see also* Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

5246. Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014 [hereinafter President’s Jan. 17, 2014, Remarks], *available at* www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence; *see* Anita Kumar, *Days Later, Obama’s Speech on Surveillance Perplexes*, Miami Herald, Jan. 23, 2014, at 3A; Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. Times, Jan. 18, 2014, at A1; Carol E. Lee & Siobhan Gorman, *Obama Shakes Up Surveillance Program*, Wall St. J., Jan. 18, 2014, at A1; Ellen Nakashima & Greg Miller, *Obama Moves to Rein in Surveillance: Orders Limits on Phone Data*, Wash. Post, Jan. 18, 2014, at A1.

ing or in the case of a true emergency.”⁵²⁴⁷ On February 6, the Director of National Intelligence reported that the FISA court had approved such a change in procedures.⁵²⁴⁸

President Obama ordered the Attorney General and the intelligence community to present by March 28 alternatives to the NSA’s maintaining the metadata database.⁵²⁴⁹ On March 25, newspapers reported that a proposal in development would cease the government’s bulk harvesting of metadata and rely on individual orders for metadata customarily held by telecommunication companies.⁵²⁵⁰

The House of Representatives’ Permanent Select Committee on Intelligence proposed to the House on May 8 a Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet Collection, and Online Monitoring Act (USA FREEDOM Act), which would modify the NSA’s surveillance authority.⁵²⁵¹ Judge Bates, on May 13, asked that the committee’s report include another letter by him on behalf of the judiciary recommending that Congress not impose on the FISA court “a permanent institution of a public advocate or impose[e] an adversarial process in the general run of cases” or create a requirement for public summaries of secret FISA court opinions, because summaries in the absence of access to the originals could be misleading.⁵²⁵² Judge Bates expressed similar sentiments in an August 5 letter to Senate Judiciary Committee Chair Patrick Leahy, explaining that while occasional amicus curiae participation in FISA court proceedings could be helpful, a special advocate would interfere with the court’s special ex parte relationship with the government.⁵²⁵³

5247. President’s Jan. 17, 2004, Remarks, *supra* note 5246.

5248. FISC Approves Government’s Request to Modify Telephony Metadata Program, Feb. 6, 2014, <http://icontherecord.tumblr.com/post/75842023946/fisc-approves-governments-request-to-modify>.

5249. President’s Jan. 17, 2004, Remarks, *supra* note 5246.

5250. Ellen Nakashima, *Bill Will Target NSA Phone Program*, Wash. Post, Mar. 25, 2014, at A3; Charlie Savage, *Obama Will Seek Limits for N.S.A. on Call Records*, N.Y. Times, Mar. 25, 2014, at A1; see Andrews et al., *supra* note 5034, at 203.

5251. 160 Cong. Rec. D486 (May 8, 2014); see Ellen Nakashima, *NSA Reform Measure to Move to House Floor*, Wash. Post, May 9, 2014, at A3; Charlie Savage, *House Panel Passes Bill to Replace N.S.A. Program*, N.Y. Times, May 9, 2014, at A17; see also <http://sensenbrenner.house.gov/legislation/theusafreedomact.htm> (information on the bill by Representative Jim Sensenbrenner).

5252. Letter from John D. Bates to Representative Mike Rogers, May 13, 2014, *available at* <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HR3361commrep.pdf>; see Committee Report for H.R. 3361, *available at* <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HR3361commrep.pdf>. See generally *The Case For and Against a FISA Advocate*, Lawfare Podcast No. 79 (June 14, 2014), *available at* www.lawfareblog.com/2014/06/lawfare-podcast-episode-79-the-case-for-and-against-a-fisa-advocate/.

5253. Letter from John D. Bates to Senator Patrick J. Leahy, Aug. 5, 2014, *available at* www.lawfareblog.com/wp-content/uploads/2014/08/08-05-2014-Leahy.pdf; see Siobhan Gorman, *Federal Judge Blasts Bill to Revamp Surveillance*, Wall St. J., Aug. 7, 2014, at A2.

On August 14, 2014, the Ninth Circuit’s Chief Circuit Judge Alex Kozinski, ex officio a member of the Judicial Conference of the United States, wrote to Senator Leahy to state, “I was not aware of Director Bates’s letter before it was sent, nor did I receive a copy afterwards. I first learned of the letter this past weekend when a copy was sent to me by a distinguished law professor.” Letter from

As of April 2015, Congress had not passed the USA FREEDOM Act.⁵²⁵⁴

Additional Recent Cases

Pending in the Southern District of New York is a FOIA action by the *New York Times* for NSA inspector general reports on FISA surveillance.⁵²⁵⁵ Pending in the District of Maryland is a suit against the NSA by nine organizations, including Wikimedia, Human Rights Watch, Amnesty International, and *The Nation* magazine.⁵²⁵⁶

Alex Kozinski to Senator Patrick J. Leahy, Aug. 14, 2014, *available at* http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html. Judge Kozinski concluded, “I have serious doubts about the views expressed by Judge Bates. Insofar as Judge Bates’s August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so.” *Id.*

Retired District Judge Nancy Gertner, District of Massachusetts, opposed Judge Bates’s letter in a *National Law Journal* op-ed on September 22. Nancy Gertner, Op-Ed, *One Voice on Surveillance Doesn’t Make a Chorus*, Nat’l L.J., Sept. 22, 2014, at 34.

On November 18, retired District Judge Michael B. Mukasey, Southern District of New York, who also was President George W. Bush’s third Attorney General, co-authored with Michael V. Hayden, a former director of both the NSA and the CIA, a newspaper column opposing the USA FREEDOM Act. Michael V. Hayden & Michael B. Mukasey, Op-Ed, *NSA Reform That Only ISIS Could Love*, Wall St. J., Nov. 18, 2014, at A19; *see* Ellen Nakashima & Ed O’Keefe, *NSA Reform Measure’s Shifting Fortunes*, Wash. Post, Nov. 20, 2014, at A2.

5254. *See* Siobhan Gorman & Michael R. Crittenden, *Senate Blocks NSA Data Collection Measure*, Wall St. J., Nov. 19, 2014, at A5; Ellen Nakashima & Ed O’Keefe, *Legislation on Reforming NSA Surveillance Fails to Advance in Senate*, Wash. Post, Nov. 19, 2014, at A4; Charlie Savage & Jeremy W. Peters, *Move to Restrict Data Collection Blocked by G.O.P.*, N.Y. Times, Nov. 19, 2014, at A1; Cat Zakrzewski, *Debate Over NSA Expected to Reignite in New Congress*, Bos. Globe, Nov. 20, 2014, at A13.

5255. Complaint, *N.Y. Times Co. v. NSA*, No. 1:15-cv-2383 (S.D.N.Y. Mar. 31, 2015), D.E. 1.

5256. Complaint, *Wikimedia Found. v. NSA*, No. 1:15-cv-662 (D. Md. Mar. 10, 2015), D.E. 1; *see The Surveillance Stream*, On the Media (WNYC radio broadcast Mar. 20, 2015), *available at* www.onthemedial.org/story/surveillance-stream/ (interview with Professor Stephen Vladeck).

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