

Terrorism-Related Cases: Special Case-Management Challenges

Case Studies

Robert Timothy Reagan
Federal Judicial Center

March 26, 2008

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

Table of Contents

Table of Challenges.....	vii
Table of Judges	ix
Introduction	1
First World Trade Center Bombing	
<i>United States v. Salameh (Kevin Thomas Duffy, S.D.N.Y.) and United States v. Abdel Rahman (Michael B. Mukasey, S.D.N.Y.)</i>	2
<i>Challenge: Court Security</i>	18
<i>Challenge: Jury Security</i>	18
<i>Challenge: Classified Evidence</i>	18
American Embassy Bombings in Kenya and Tanzania	
<i>United States v. El-Hage (Leonard B. Sand and Kevin Thomas Duffy, S.D.N.Y.)</i>	20
<i>Challenge: Attorney–Client Contacts</i>	28
<i>Challenge: Mental Deterioration During Detention</i>	29
<i>Challenge: Jury Security</i>	30
<i>Challenge: Court Security</i>	30
<i>Challenge: Witness Security</i>	30
<i>Challenge: Religious Accommodation</i>	31
<i>Challenge: Classified Evidence</i>	31
<i>Challenge: Subpoenaing a Cabinet Officer</i>	32
A Would-Be Spy	
<i>United States v. Regan (Gerald Bruce Lee, E.D. Va.)</i>	33
<i>Challenge: Classified Evidence</i>	34
Overtaken Convictions in Detroit	
<i>United States v. Koubriti (Gerald E. Rosen, E.D. Mich.)</i>	36
<i>Challenge: Jury Security</i>	40
<i>Challenge: Sanctioning a Cabinet Officer</i>	41
<i>Challenge: Classified Evidence</i>	42
Twentieth Hijacker	
<i>United States v. Moussaoui (Leonie M. Brinkema, E.D. Va.)</i>	43
<i>Challenge: Court Security</i>	51
<i>Challenge: Jury Security</i>	52
<i>Challenge: Classified Evidence</i>	52
<i>Challenge: Classified Arguments</i>	53
<i>Challenge: Closed Proceedings</i>	54
<i>Challenge: Terrorist Communications</i>	56
American Taliban	
<i>United States v. Lindh (T.S. Ellis III, E.D. Va.)</i>	58
<i>Challenge: Protected National Security Information</i>	60
<i>Challenge: Classified Evidence</i>	62
<i>Challenge: Interviewing Guantánamo Bay Detainees</i>	62

<i>Challenge: Witness Security</i>	63
Actions for September 11 Damages	
<i>In re Terrorist Attacks on September 11, 2001 (Richard Conway Casey and George B. Daniels, S.D.N.Y.) and In re September 11 Litigation and related actions (Alvin K. Hellerstein, S.D.N.Y.)</i>	64
<i>Challenge: Service of Process on International Terrorists</i>	77
<i>Challenge: Discovery of Sensitive Security Information</i>	78
Lackawanna Terrorists	
<i>United States v. Goba (William M. Skretny and H. Kenneth Schroeder, Jr., W.D.N.Y.)</i>	80
<i>Challenge: Classified Evidence</i>	84
<i>Challenge: Court Security</i>	84
<i>Challenge: Religious Accommodation</i>	84
A Plot to Kill President Bush	
<i>United States v. Abu Ali (Gerald Bruce Lee, E.D. Va.)</i>	85
<i>Challenge: Examination of Foreign Witnesses and Witness Security</i>	86
<i>Challenge: Classified Evidence</i>	87
<i>Challenge: Classified Arguments</i>	88
Paintball Terrorists	
<i>United States v. Royer and United States v. Al-Timimi (Leonie M. Brinkema, E.D. Va.), United States v. Chandia (Claude M. Hilton, E.D. Va.), and United States v. Benkahla (James C. Cacheris, E.D. Va.)</i>	89
<i>Challenge: Classified Evidence</i>	95
<i>Challenge: Closed Proceedings</i>	96
<i>Challenge: Classified Arguments</i>	96
<i>Challenge: Attorney–Client Contacts</i>	97
<i>Challenge: Religious Accommodation</i>	97
Mistaken Rendition	
<i>El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)</i>	98
<i>Challenge: Classified Arguments</i>	99
Hamas Funding	
<i>United States v. Abu Marzook (Amy St. Eve, N.D. Ill.)</i>	101
<i>Challenge: Foreign Government Evidence</i>	108
<i>Challenge: Witness Security</i>	108
<i>Challenge: Classified Evidence</i>	109
<i>Challenge: Classified Arguments</i>	111
<i>Challenge: Classified Opinion</i>	111
<i>Challenge: Jury Security</i>	111
Giving State Secrets to Lobbyists	
<i>United States v. Franklin (T.S. Ellis III, E.D. Va.)</i>	112
<i>Challenge: Classified Evidence</i>	115
<i>Challenge: Subpoenaing a Cabinet Officer</i>	115
<i>Challenge: Classified Orders</i>	116

<i>Challenge: Closed Proceedings</i>	116
Lodi Terrorists	
<i>United States v. Hayat (Garland E. Burrell, Jr., E.D. Cal.)</i>	117
<i>Challenge: Classified Evidence</i>	121
Warrantless Wiretaps	
<i>Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and related actions (Vaughn R. Walker, N.D. Cal.); Al Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.); ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.); Terkel v. AT&T and related actions (Matthew F. Kennelly, N.D. Ill.); Center for Constitutional Rights v. Bush (Gerard E. Lynch, S.D.N.Y.); Electronic Privacy Information Center v. Department of Justice and related action (Henry H. Kennedy, Jr., D.D.C.); and Electronic Frontier Foundation v. Department of Justice (Thomas F. Hogan, D.D.C.)</i>	124
<i>Challenge: Classified Evidence</i>	143
<i>Challenge: Classified Arguments</i>	146
<i>Challenge: Classified Opinion</i>	157
<i>Challenge: Redacting Secrets</i>	157
<i>Challenge: Court-Appointed National Security Expert</i>	158

Table of Challenges

Attorney–Client Contacts	28, 97
Cabinet Officer Considerations	
Sanctioning a Cabinet Officer	41
Subpoenaing a Cabinet Officer	32, 115
Information Protection	
Classified Arguments	53, 88, 95, 96, 99, 111, 146
Classified Evidence	18, 31, 34, 42, 52, 62, 84, 87, 95, 109, 115, 121, 143
Classified Orders and Opinions	111, 116, 157
Closed Proceedings	54, 96, 116
Court-Appointed National Security Expert	158
Discovery of Sensitive Security Information	78
Interviewing Detainees	62
Protected National Security Information	60
Redacting Secrets	157
Foreign Evidence	
Examination of Foreign Witnesses	86
Foreign Government Evidence	108
Mental Deterioration During Detention	29
Physical Security	
Court Security	18, 30, 51, 84
Jury Security	18, 30, 40, 52, 111
Witness Security	30, 86, 108
Religious Accommodation	31, 84, 97
Terrorist Contacts	
Service of Process on International Terrorists	77
Terrorist Communications	56

Table of Judges

Batchelder, Alice M. (6th Cir.)	124
Brinkema, Leonie M. (E.D. Va.)	43, 89
Burrell, Garland E., Jr. (E.D. Cal.)	117
Cacheris, James C. (E.D. Va.)	89
Casey, Richard Conway (S.D.N.Y.)	64
Daniels, George B. (S.D.N.Y.)	64
Duffy, Kevin Thomas (S.D.N.Y.)	2, 20
Duncan, Allyson K. (4th Cir.)	98
Ellis, T.S., III (E.D. Va.)	58, 98, 112
Gibbons, Julia Smith (6th Cir.)	124
Gilman, Ronald Lee (6th Cir.)	124
Gregory, Roger L. (4th Cir.)	43
Hawkins, Michael Daly (9th Cir.)	124
Hellerstein, Alvin (S.D.N.Y.)	64
Hilton, Claude M. (E.D. Va.)	89
Hogan, Thomas F. (D.D.C.)	124
Kennedy, Henry H., Jr. (D.D.C.)	124
Kennelly, Matthew F. (N.D. Ill.)	124
King, Garr M. (D. Or.)	124
King, Robert B. (4th Cir.)	98
Lee, Gerald Bruce (E.D. Va.)	33, 85
Lynch, Gerard E. (S.D.N.Y.)	124
McKeown, M. Margaret (9th Cir.)	124
Motz, Diana Gribbon (4th Cir.)	85
Mukasey, Michael B. (S.D.N.Y.)	2
Pregerson, Harry (9th Cir.)	124
Rosen, Gerald E. (E.D. Mich.)	36
St. Eve, Amy (N.D. Ill.)	101
Sand, Leonard B. (S.D.N.Y.)	20
Schroeder, H. Kenneth, Jr. (W.D.N.Y.)	80
Shedd, Dennis W. (4th Cir.)	98
Skretny, William M. (W.D.N.Y.)	80
Taylor, Anna Diggs (E.D. Mich.)	124
Traxler, William B., Jr. (4th Cir.)	85
Walker, Vaughn R. (N.D. Cal.)	124

Wilkins, William W. (4th Cir.)	43
Wilkinson, J. Harvie, III (4th Cir.)	85
Williams, Karen J. (4th Cir.)	43

Introduction

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

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

This "Case Studies" document includes background factual information about these high-profile cases as well as descriptions of the judges' challenges and solutions. The challenges and solutions are summarized in a separate "Problems and Solutions" document. The information presented is based on a review of case files and news media accounts and on interviews with the judges.

First World Trade Center Bombing

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

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

The Bombing of the World Trade Center

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. See Mitchell, *supra* note 17.

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

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

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

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

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

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

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

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

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

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

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

Bilal Alkaysi turned himself in on March 24, 1993,³⁰ and a second superseding indictment added him as a defendant on April 7.³¹ Because evidence against him was weaker than evidence against the others, his prosecution was severed.³² On May 9, 1994, he pleaded guilty to an immigration violation and agreed to be deported.³³ Judge Duffy sentenced him on July 13 to 20 months in prison, which was four months more than the time already served.³⁴

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

Jury selection in the trial against Salameh, Ayyad, Abouhalima, and Ajaj began on September 14.³⁸ The court issued 5,000 extra jury summonses to assemble a jury pool for the case.³⁹ Opening arguments began on October 5.⁴⁰ The jury be-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

gan its deliberations on February 23, 1994, and convicted the defendants on March 4.⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plots to Bomb New York Landmarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

67. *Id.*

68. *Id.* at 107.

69. *Id.*

70. *Id.*

71. *Id.* at 105.

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

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

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

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

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

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

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

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

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

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

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

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

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

80. See Mitchell, *supra* note 79.

81. See *id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In June 1994, Siddig Ali obtained substitute counsel to help him try to cooperate with the government, but the government decided in August not to strike a deal.¹⁰⁸ The substitute counsel asked to be relieved as Siddig Ali's attorney, because his knowledge of Siddig Ali's proffers to the government would constrain what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.¹⁰⁹ The government objected.¹¹⁰ Judge Mukasey

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

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

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

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

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

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

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

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

104. See Tabor, *supra* note 4.

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

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

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

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

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

ruled that Kunstler and Kuby could no longer represent Siddig Ali.¹¹¹ Judge Mukasey also ruled that the Kunstler firm's prior representations of Siddig Ali and Nosair had now created conflicts of interest with its representation of el-Gabrownly so serious as to disqualify it from representing el-Gabrownly as well.¹¹² Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.¹¹³

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

Opening statements commenced on January 30.¹¹⁷ Judge Mukasey found it helpful—necessary even—to charge the jury with applicable law at the beginning of the case, between opening statements and presentation of evidence.¹¹⁸ For example, it was important for the jury to understand up front that seditious conspiracy did not necessarily include an intent to overthrow the government.¹¹⁹ As was his general practice, Judge Mukasey permitted jurors to take notes.¹²⁰

On February 6, Siddig Ali pleaded guilty, agreed to be a witness for the government, and asked God to forgive him for his acts, which he admitted were

110. *Id.* at 267–68.

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

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

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

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

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

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

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

Gross, *supra* note 26, at 22–23.

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

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

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

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

120. *Id.*

wrong.¹²¹ He was sentenced to 11 years in prison on October 15, 1999, on a finding that he provided the government with extensive assistance in the case.¹²²

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

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

On October 1, 1995, the jury convicted el-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.¹²⁸ On January 17, 1996, Judge Mukasey sentenced Abdel Rahman and Nosair to life in prison and sentenced the other eight defendants as follows: el-Gabrowny to 57 years; Alvarez, Elhassan, Hampton-El, and Saleh to 35 years; Amir Abdelgani and Khallafalla to 30 years; and Fadil Abdelghani to 25 years.¹²⁹

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a slight reconsideration of el-Gabrowny's sentence.¹³⁰

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.¹³¹ There, he launched a conspiracy to bomb U.S. airliners serving routes in Southeast Asia.¹³²

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

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

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

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

125. *Id.*

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

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

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

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

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

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

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

To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.¹³³ On December 11, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.¹³⁴ 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.¹³⁵

Yousef and his high school friend Abdul Hakim Murad were burning chemicals in their Manila apartment on January 6, 1995, and they accidentally started a fire that resulted in a visit from Philippine police officers and discovery of the plot to bomb planes.¹³⁶

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.¹³⁷ 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.¹³⁸

Philippine authorities arrested Shah on January 11, but he escaped.¹³⁹ He was recaptured by Malaysian authorities in December 1995 and flown to New York on December 12.¹⁴⁰

Yousef fled the Philippines but was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.¹⁴¹ He was transported to the Southern District of New York on February 8.¹⁴² En route, he confessed to an intention to topple one of the World Trade Center towers into the other.¹⁴³

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

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

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

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

136. *Yousef*, 327 F.3d at 79, 81; see Mckinley, *supra* note 20; Philip Shenon, *Broad Terror Campaign Is Foiled by Fire in Kitchen, Officials Say*, N.Y. Times, Feb. 12, 1995, at 1; Temple-Raston, *supra* note 132, at 24; Wren, *supra* note 1.

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

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

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

140. *Yousef*, 327 F.3d at 79, 82; see McKinley, *supra* note 139.

141. The 9/11 Commission Report 148 (2004); *Yousef*, 327 F.3d at 79, 81–82; *United States v. Yousef*, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); see Johnston, *supra* note 20; Mckinley, *supra* note 20; Temple-Raston, *supra* note 132, at 24; Wren, *supra* note 1.

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

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

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.¹⁴⁴ 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.¹⁴⁵ Yousef and Judge Duffy agreed that he would do this.¹⁴⁶ All three defendants were convicted on September 5, the fourth day of deliberation.¹⁴⁷

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.¹⁴⁸ This time, Yousef let a lawyer represent him.¹⁴⁹ Both were convicted on November 12.¹⁵⁰

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.¹⁵¹ At his sentencing, Yousef proclaimed, "I am a terrorist and I am proud of it."¹⁵² Judge Duffy sentenced Ismoil on April 3, 1998, to 240 years in prison; and the judge sentenced Murad on May 15, 1998, to life plus 60 years.¹⁵³ The court of appeals affirmed the convictions and sentences on April 4, 2003.¹⁵⁴

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

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

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

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

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

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

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

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

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

152. *See Weiser*, *supra* note 151.

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

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

Challenge: Court Security

Security was tight in these trials. One downside of tight security in a criminal prosecution is the message it sends to the jury that the defendants might be dangerous. In the trial for conspiracy to bomb airplanes, Judge Duffy had to dismiss the first 75 prospective jurors because they indicated they would be influenced by heavy court security.¹⁵⁵

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors' protection.¹⁵⁶ To protect the jurors' safety and anonymity, they did not report directly to the courthouse but to secret locations from which marshals transported them to court.¹⁵⁷ When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.¹⁵⁸

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.¹⁵⁹ 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.¹⁶⁰

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.¹⁶¹

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).¹⁶² Judge Mukasey kept the exhibits in a safe while he considered whether

155. See *Judge Dismisses*, *supra* note 144.

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

157. Mukasey Preliminary Voir Dire, *supra* note 156; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007.

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

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

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

161. Mukasey Preliminary Voir Dire, *supra* note 156; see Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

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

they had to be produced.¹⁶³ He ruled which exhibit had to be disclosed to the defendants, ordered that it not be disclosed to anyone else by the defendants, and ordered that all of the exhibits be kept under seal with the court security officer.¹⁶⁴

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

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

American Embassy Bombings in Kenya and Tanzania

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

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania on August 7, 1998, killing 224 people, including 12 Americans.¹⁶⁵

The Bombing in Kenya

Pakistani authorities arrested Mohammed Sadiq Odeh on the day of the bombings for traveling with a fraudulent passport,¹⁶⁶ and he quickly became a suspect in the Nairobi bombing.¹⁶⁷ Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12, 1998, as another suspect in the bombing.¹⁶⁸ Al-'Owhali admitted driving the bomb to the embassy in Kenya.¹⁶⁹ Later that month the suspects were moved to New York,¹⁷⁰ and they were indicted on October 7.¹⁷¹ The

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

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

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

166. *United States v. Bin Laden*, 132 F. Supp. 2d 198 (S.D.N.Y. 2001); see Raymond Bonner, *Pakistan Arrests Two New Suspects in Embassy Blasts*, N.Y. Times, Aug. 19, 1998, at A1; Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6 [hereinafter *Tanzania Charges*].

167. 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.

168. *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.

169. See Johnston, *supra* note 168.

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.

170. *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.

United States decided to seek the death penalty against al-'Owhali but not Odeh.¹⁷²

The government identified Haroun Fazil as another suspect in the Nairobi bombing.¹⁷³ It is believed that he drove a pickup truck to lead the vehicle carrying the bomb to the embassy.¹⁷⁴ The government offered a \$2 million reward for information leading to his arrest, but he has not been apprehended.¹⁷⁵

On September 16, 1998, Wadih el-Hage, a 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.¹⁷⁶ 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.¹⁷⁷ On October 7, charges against him were broadened to include conspiracy to kill American citizens.¹⁷⁸

171. United States v. Bin Laden, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); see United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000) (noting first court appearance on Oct. 8, 1998).

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

173. 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*].

174. See Weiser, *2 New Suspects*, *supra* note 173; Weiser, *Angry Record*, *supra* note 173.

175. See Weiser, *2 New Suspects*, *supra* note 173; Weiser, *Angry Record*, *supra* note 173; 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*].

176. United States v. El-Hage, 213 F.3d 74, 77 (2d Cir. 2000); *Bin Laden*, 91 F. Supp. 2d at 606; *Bin Laden*, 92 F. Supp. 2d at 231; Docket Sheet, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998) [hereinafter S.D.N.Y. *El Hage* Docket Sheet]; see Lyman, *supra* note 165; Weiser, *2 New Suspects*, *supra* note 173; 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.").

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

177. *El-Hage*, 213 F.3d at 77; *Bin Laden*, 91 F. Supp. 2d at 605–07 (noting that el-Hage appeared before the grand jury on Sept. 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176 (noting criminal complaint filed on Sept. 17, 1998); see Lyman, *supra* note 165; Weiser, *2 New Suspects*, *supra* note 173.

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.¹⁷⁹

In October 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.¹⁸⁰

The Bombing in Tanzania

On September 21, 1998, the government of Tanzania charged Mustafa Mahmoud Said Ahmed and Rashid Saleh Hemed with the bombing of the American embassy in Dar es Salaam.¹⁸¹ Tanzania dropped charges against Ahmed in March 2000.¹⁸² After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.¹⁸³

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.¹⁸⁴ His attorney admitted at trial that K.K. Mohamed helped assemble the bomb.¹⁸⁵ The United States decided to seek the death penalty

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).

178. *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.

179. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; 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 176, 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*].

180. See Benjamin Weiser, *Judge Rejects Guilty Plea in Bomb Plot*, N.Y. Times, Oct. 25, 2000, at B1.

181. See Bonner, *Tanzania Charges*, *supra* note 166; 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).

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

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

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

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

185. See Hirsch, *supra* note 165, 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

against him.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

A Larger Plot

Mamdouh Mahmud Salim, Osama bin Laden's finance manager, was suspected of organizing the embassy bombings and was arrested in Munich, Germany, on September 16, 1998.¹⁸⁹ German authorities handed him over to the U.S. government on December 20 on condition that he not face the death penalty.¹⁹⁰ He first appeared before the district court on December 21.¹⁹¹ The government charged him with four broad conspiracy counts.¹⁹²

Khalid al-Fawwaz, who was apparently al-Qaeda's leader in Britain and who ran al-Qaeda's media operations, was arrested by British authorities in September 1998.¹⁹³ On June 19, 1999, the U.S. government indicted him for having a hand in the 1998 bombings.¹⁹⁴ At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdul Bary on July 11,

October 5 and 6, 1999, Khalfan Mohamed admitted to playing a role in the August 7, 1998, bombing of the American Embassy in Dar es Salaam.”).

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

186. *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting June 27, 2000, filing of death penalty notice); *United States v. Bin Laden*, 126 F. Supp. 2d 256 (S.D.N.Y. 2000) (denying a claim that death penalty certification was race-based); see Weiser, *Faking Illness*, *supra* note 172; Weiser, *2d Death Penalty*, *supra* note 172.

187. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; see Hirsch, *supra* note 165, 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”).

188. *Bin Laden*, 156 F. Supp. 2d 359; see Hirsch, *supra* note 165, at 228–29.

189. *United States v. Bin Laden*, 160 F. Supp. 2d 670, 674 (S.D.N.Y. 2001); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176 (noting Sept. 14, 1998, complaint and arrest warrant against Salim); see Benjamin Weiser, *Judge Orders Embassy Bomb Suspect Held Without Bail*, N.Y. Times, Dec. 22, 1998, at B6 [hereinafter *Held Without Bail*]; Benjamin Weiser, *U.S. Says Bin Laden Aide Tried to Get Nuclear Material*, N.Y. Times, Sept. 26, 1998, at A3 [hereinafter *Nuclear Material*].

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

190. *Bin Laden*, 156 F. Supp. 2d at 370; see Weiser, *Held Without Bail*, *supra* note 189.

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

192. See Weiser, *Held Without Bail*, *supra* note 189; Weiser, *Nuclear Material*, *supra* note 189 (reporting the unsealing of charges on Sept. 25, 1998).

193. 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 173; Weiser, *Deliver Aide*, *supra* note 179.

194. See Jacobs, *supra* note 193.

1999.¹⁹⁵ Britain's House of Lords ruled on December 17, 2001, that these three suspects could be extradited to the United States.¹⁹⁶

Ali A. Mohamed, a former sergeant in the U.S. Army, who previously was a major in Egypt's army, was secretly charged with al-Qaeda conspiracies in September 1998.¹⁹⁷ He was formally indicted on May 19, 1999, after he refused to cooperate in the tracking down of Osama bin Laden, and he first appeared in court on May 27.¹⁹⁸ On October 20, 2000, he agreed to plead guilty.¹⁹⁹

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.²⁰⁰ He was held in secret for more than four months before charges against him were made public.²⁰¹ Eventually he pleaded guilty²⁰² and was sentenced to 10 years and one month in prison.²⁰³

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.²⁰⁴ Because Salim's attorneys were witnesses,

195. David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6.

196. See Warren Hoge, *Court Approves Extraditions in Bombings of U.S. Embassies*, N.Y. Times, Dec. 18, 2001.

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

198. United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see Benjamin Weiser, *Indicted Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. Times, June 5, 1999, at A3 (reporting that Mohamed was also known as Abu Omar); Weiser, *U.S. Charges Ex-Soldier*, *supra* note 175.

199. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; see Benjamin Weiser, *Bin Laden Linked to Embassy Blast by an Ex-Soldier*, N.Y. Times, Oct. 21, 2000, at A1.

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

200. 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*].

201. See Weiser, *Qaeda Member*, *supra* note 200; Weiser, *Held Secretly*, *supra* note 200.

202. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176 (noting Jan. 31, 2003, guilty plea); see Weiser, *Qaeda Member*, *supra* note 200.

203. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; see Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of 10 years).

204. 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 court discontinued their representation of Salim and severed his prosecution from the other defendants' trial, which was scheduled to begin only two months later.²⁰⁵ Both Salim and K.K. Mohamed were transferred to other jails,²⁰⁶ but only Salim was charged with the stabbing.²⁰⁷ The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.²⁰⁸

Salim pleaded guilty on April 3, 2002, to attempted murder.²⁰⁹ Judge Batts sentenced him to 32 years in prison.²¹⁰ Salim's appeal is pending.²¹¹

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*].

205. *Bin Laden*, 160 F. Supp. 2d at 673; see Hirsch, *supra* note 165, at 213; Weiser, *Quandary*, *supra* note 204.

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

207. *Bin Laden*, 160 F. Supp. 2d at 673; see Weiser, *Escape Plan*, *supra* note 204.

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 204.

208. *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.

209. *Salim*, 287 F. Supp. 2d at 259; S.D.N.Y. *Salim* Docket Sheet, *supra* note 208; see Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

210. S.D.N.Y. *Salim* Docket Sheet, *supra* note 208 (also noting ordered restitution of \$4,722,820); see Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004, at B3 (reporting that Judge Batts had to eject the victim from the court for disruptive behavior); see *Salim*, 287 F. Supp. 2d 250 (finding facts for sentence calculation).

211. Docket Sheet, *United States v. Salim*, No. 04-2643 (2d Cir. May 10, 2004) [hereinafter 2d Cir. *Salim* Docket Sheet] (noting that the appeal is set for argument the week of May 12, 2008); see Docket Sheet, *United States v. Salim*, No. 04-3200 (2d Cir. filed June 4, 2004, closed Apr. 1, 2005) (government's cross-appeal).

The appeal was interrupted by a limited remand in which the district court determined that the sentence should not be amended in light of *United States v. Booker*, 543 U.S. 220 (2005) (decided Jan. 12, 2005). 2d Cir. *Salim* Docket Sheet, *supra* (noting Apr. 1, 2005, limited remand); S.D.N.Y. *Salim* Docket Sheet, *supra* note 208 (noting Nov. 7, 2005, decision that the sentence should not be changed).

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.²¹² With the help of a juror questionnaire, Judge Sand screened a jury pool of 1,302 people.²¹³ Opening arguments began a month later, on February 5.²¹⁴ Both Arabic and Kiswahili interpreters were required.²¹⁵

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.²¹⁶ The pins helped the 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.²¹⁷

Closing arguments began on May 1,²¹⁸ and the jury began its deliberations on May 10.²¹⁹ All four defendants were convicted of all charges on May 29.²²⁰

Judge Sand granted al-'Owhali and K.K. Mohamed separate death penalty hearings.²²¹ 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, 2001.²²² On June 12, the jury announced that it

212. 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 176; see Benjamin Weiser, *First Day of Jury Selection in U.S. Embassy Bombings*, N.Y. Times, Jan. 3, 2001, at B3; see also Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 1 (2007) (describing the case as “the United States of America’s first comprehensive attempt to prosecute the growing menace of Islamic extremism in a court of law”).

213. Leonard B. Sand, United States v. El Hage: Juror Questionnaire (Jan. 3, 2001); 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.

214. *Bin Laden*, 156 F. Supp. 2d at 363.

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

216. See Hirsch, *supra* note 165, at 72.

217. See *id.* at 72–73.

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

219. See *Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; Hirsch, *supra* note 165, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

220. United States v. Bin Laden, 160 F. Supp. 2d 670, 673 n.5 (S.D.N.Y. 2001); United States v. Bin Laden, 156 F. Supp. 2d 359, 361, 363 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; see Weiser, *4 Guilty*, *supra* note 172 (reporting also that none of the defendants testified); Hirsch, *supra* note 165, at 179–80.

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

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

222. See Hirsch, *supra* note 165, at 186; Benjamin Weiser, *Jury Weighs Death Penalty for Bomber*, N.Y. Times, June 6, 2001, at B4.

was deadlocked, which meant that al-'Owhali would be imprisoned for life without the possibility of release.²²³ The jury began to deliberate on K.K. Mohamed's sentence on July 5²²⁴ and announced their deadlock on July 10.²²⁵

On October 18, 2001, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.²²⁶ Because of the intervening and nearby attacks on September 11, 2001, court security on the day of sentencing was substantially enhanced.²²⁷

Further Proceedings

On January 23, 2002, Judge Kevin Thomas Duffy took over for Judge Sand with respect to further proceedings in prosecutions for the embassy bombings.²²⁸

All four defendants appealed their convictions,²²⁹ but K.K. Mohamed withdrew his appeal.²³⁰

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

223. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; see Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. Times, June 13, 2001, at A1 (reporting that 10 jurors concluded that execution would make the defendant a martyr and that five jurors decided that life in prison would be the greater punishment); Hirsch, *supra* note 165, 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; Weiser, *Jury Torn*, *supra* note 220.

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

225. *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).

226. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; see Weiser, *supra* note 223.

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

227. See Hirsch, *supra* note 165, at 244; Weiser, *supra* note 223 (“The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.”).

228. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 176; see *Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 165, at 258.

229. Docket Sheet, *United States v. Mohamed*, No. 01-1571 (2d Cir. Nov. 1, 2001) [hereinafter 2d Cir. *Mohamed* Docket Sheet] (appeal by Mohamed); Docket Sheet, *United States v. Odeh*, No.

After the trial, the New York Times published an article based on interviews with nine of the 12 jurors.²³¹ 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.²³² The court of appeals denied the defendants' motion that the appeal be stayed and the case remanded to the district court to determine whether revelations in the story necessitated a new trial.²³³

The appeals by Odeh, al-'Owhali, and el-Hage were heard on December 10, 2007.²³⁴

Challenge: Attorney–Client Contacts

The detained defendants were cut off from virtually all communications.²³⁵ 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.²³⁶ 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.²³⁷

01-1553 (2d Cir. Oct. 24, 2001) (appeal by Odeh); Docket Sheet, *United States v. El Hage*, No. 01-1550 (2d Cir. Oct. 25, 2001) (appeal by el Hage); Docket Sheet, *United States v. Al-'Owhali*, No. 01-1535 (2d Cir. Oct. 19, 2001) [hereinafter 2d Cir. *Al-'Owhali* Docket Sheet] (lead case, appeal by al-'Owhali); see Weiser, *Jury Torn*, *supra* note 220.

230. 2d Cir. *Mohamed* Docket Sheet, *supra* note 229 (noting a Jan. 21, 2004, order that the appeal was withdrawn with prejudice); see Benjamin Weiser, *3 Seek Retrial in Bombing of Embassies*, N.Y. Times, Jan. 23, 2004, at B4.

231. Weiser, *Jury Torn*, *supra* note 220 (reporting that one juror could not be found and two jurors declined interviews).

232. *Id.*; see Weiser, *supra* note 230; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1 [hereinafter *Jury Behavior*].

233. 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 229 (noting the Mar. 12, 2003, denial of a Jan. 15, 2003, motion for a limited remand); see Weiser, *Jury Behavior*, *supra* note 232 (reporting on the filing of the motion); but see 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 229 (noting a May 25, 2005, granting of a motion to hold the appeal in abeyance until resolution of el Hage's motion for a new trial).

234. 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 229 (noting that the appeal was heard by Circuit Judges Wilfred Feinberg, Jon O. Newman, and José A. Cabranes); see Benjamin Weiser, *War vs. Terrorism Debate in Embassy Bomb Appeal*, N.Y. Times, Dec. 11, 2007, at B3.

235. *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*].

236. See Weiser, *Suspects Isolated*, *supra* note 235; Weiser, *Judge to Hear Complaints*, *supra* note 235; Weiser, *Rules Violate Rights*, *supra* note 235.

237. *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.

Attorney–client communications also were impaired by the fact that defense counsel could not discuss classified evidence with their clients because the defendants did not have security clearances.²³⁸

Challenge: Mental Deterioration 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.²³⁹ Marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge the judge.²⁴⁰ Approximately six months later, a psychiatrist reported that el-Hage’s solitary confinement was seriously impairing his mental health.²⁴¹ 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.²⁴²

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage’s possessions and privileges.²⁴³ According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.²⁴⁴ However, two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness.²⁴⁵ Judge Sand decided that the expert opinions were well founded and that el-Hage was competent to stand trial.²⁴⁶

238. *United States v. Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001) (holding that prohibiting defense counsel from discussing classified evidence with defendants did not violate the defendants’ Sixth Amendment rights).

239. *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*].

240. *See Weiser, Suspect Avows Innocence*, *supra* note 239; Weiser, *Suspect Charges*, *supra* note 239.

As a result of this incident, defendants were shackled when they were in court. Interview with Hon. Leonard B. Sand, June 25, 2007.

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

242. *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 241.

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

244. *See id.*

245. *See Weiser, Faking Illness*, *supra* note 172.

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

Challenge: Jury Security

Judge Sand decided to close jury selection and use an anonymous jury, but not sequester the jury.²⁴⁷

On Monday, Feb. 5, 2001, the first day of the trial, the 12 jurors and six alternates met at a secret location in Midtown Manhattan and were driven to court by armed federal marshals. Safety concerns were paramount for the jurors, who were not sequestered. The jury room was guarded by marshals and was checked each morning by bomb-sniffing dogs. But there was always the unexpected. One day, jurors said, they were startled when someone climbed through the window. It turned out to be a workman looking to use the bathroom.²⁴⁸

Challenge: Court Security

Persons entering the courtroom had to pass through a metal detector and sign a log book stating their purpose in attending the trial.²⁴⁹

The defendants were shackled to the floor under the table.²⁵⁰ To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out.²⁵¹ And, for this trial, there was no “all rise” when the judge entered.²⁵² Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.²⁵³

Challenge: Witness Security

The first witness to testify at the trial was Jamal Ahmed al-Fadl, 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.”²⁵⁴ He had been under U.S. protection in an undisclosed location for five years after pleading guilty to a conspiracy charge in a secret proceeding in the Southern District of New York.²⁵⁵ “In 1996, Mr. Fadl fled [al-Qaeda] after he embezzled about \$110,000 from one of Mr. bin Laden’s companies, eventually walk-

247. See Feuer, *supra* note 213; Gross, *supra* note 26, at 21–22; Weiser, *supra* note 212; Weiser, *Jury Torn*, *supra* note 220; 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”).

248. Weiser, *Jury Torn*, *supra* note 220.

249. See Hirsch, *supra* note 165, at 71.

250. Interview with Hon. Leonard B. Sand, June 25, 2007; see Gross, *supra* note 26, at 15 & n.54; Hirsch, *supra* note 165, at 78.

251. Interview with Hon. Leonard B. Sand, June 25, 2007; see Hirsch, *supra* note 165, at 78.

252. See Hirsch, *supra* note 165, at 78.

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

254. See Hirsch, *supra* note 165, 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; 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*].

Al-Fadl is related by marriage to al-Nalfi. See Weiser, *Qaeda Member*, *supra* note 200; Weiser, *Held Secretly*, *supra* note 200; Weiser, *Qaeda Informer*, *supra*.

255. See Weiser, *Ex-Aide*, *supra* note 254; Weiser, *Qaeda Informer*, *supra* note 254.

ing into an American embassy in Africa and offering his services in the fight against al-Qaeda.”²⁵⁶

Al-Fadl’s identity was not revealed to defense counsel until four days before his scheduled testimony, and a protective order forbade counsel from revealing his identity to their clients until the day before al-Fadl appeared in court.²⁵⁷ Judge Sand forbade courtroom artists from sketching al-Fadl’s face.²⁵⁸

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client’s religious beliefs.²⁵⁹ When the client mentioned that he believed a martyr would be rewarded with thirteen virgins, the attorney suggested that having thirteen fathers-in-law would be more of a punishment.²⁶⁰

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.²⁶¹

Challenge: Classified Evidence

In order to have access to classified evidence, defense counsel had to have security clearances.²⁶² Initially the attorneys 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.²⁶³ The court ruled that a security clearance requirement did not violate the defendants’ Sixth Amendment right to counsel.²⁶⁴

Defense counsel could not discuss classified evidence with their clients, because the defendants did not have security clearances.²⁶⁵

Judge Sand’s law clerks had security clearances.²⁶⁶

256. Weiser, *Qaeda Informer*, *supra* note 254; *see* The 9/11 Commission Report 109 (2004) (“Jamal Ahmed al Fadl walked into a U.S. embassy in Africa, established his bona fides as a former senior employee of Bin Ladin, and provided a major breakthrough of intelligence on the creation, character, direction, and intentions of al Qaeda.”).

257. *See* Hirsch, *supra* note 165, at 109.

258. *See id.*

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

260. *Id.*

261. *See* Hirsch, *supra* note 165, at 78.

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

263. *See id.*

264. *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); *see* Gross, *supra* note 26, at 13.

265. *United States v. Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001); Leonard B. Sand, *United States v. El Hage: Protective Order ¶ 15* (July 29, 1999); *see* Gross, *supra* note 26, at 12.

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

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of Al-'Owhali's trial.²⁶⁷ It was reported that, "The lawyers . . . said they want[ed] to question Dr. Albright about 'her knowledge of the number of Iraqi children dying as a direct consequence of the United States enforcement of United Nations sanctions following the gulf war.'"²⁶⁸ Judge Sand agreed to sign the subpoena,²⁶⁹ but on the government's motion he quashed it.²⁷⁰ Al-'Owhali presented at trial as a substitute for her live testimony a *60 Minutes* interview with Secretary Albright.²⁷¹ Al-'Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.²⁷²

267. See Hirsch, *supra* note 165, 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*].

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

269. See *Subpoena for Albright*, *supra* note 267.

270. See Weiser, *supra* note 268.

271. See Hirsch, *supra* note 165, at 196.

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

A Would-Be Spy

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

On August 23, 2001, federal agents arrested Brian Patrick Regan, a resident of Bowie, Maryland, and a retired master sergeant of the U.S. Air Force, at Dulles International Airport, aborting his trip to Zurich.²⁷³ 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.²⁷⁴ 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).²⁷⁵ Regan was indicted on October 23, 2001,²⁷⁶ and superseding indictments were filed on February 14²⁷⁷ and July 24, 2002.²⁷⁸ The government filed a notice of intent to seek the death penalty on April 19, 2002.²⁷⁹ The court assigned the case to Judge Gerald Bruce Lee.²⁸⁰

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

274. *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).

275. *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 273.

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 273. 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.

276. *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 274.

277. *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 274.

278. *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 274.

279. *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 274; see *Going to Trial*, *supra* note 273.

280. Docket Sheet, *supra* note 274; see *U.S. Prosecutors Reconsider, Back Delay in Espionage Suspect's Trial*, *L.A. Times*, Apr. 25, 2002, at 25 [hereinafter *Prosecutors Reconsider*]; *Would-Be Spy Given Life in Prison*, *L.A. Times*, Mar. 21, 2003, at 29 [hereinafter *Life in Prison*].

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

On February 20, 2003, a jury convicted Regan of trying to sell secrets to Iraq and China, but acquitted him of trying to sell secrets to Libya.²⁸¹ The jury rejected the death penalty on February 24,²⁸² and Regan was sentenced on March 20 to life in prison without the possibility of parole.²⁸³ 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.²⁸⁴

Regan also agreed to disclose what he had done with classified information.²⁸⁵ 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.²⁸⁶ These containers held coded descriptions of the locations of 19 buried bundles of classified documents—20,000 pages, five compact discs, and five videotapes—hidden in Pocahontas State Park in Virginia and Patapsco Valley State Park in Maryland.²⁸⁷

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.²⁸⁸ The defendant and his attorneys were given access to the classified information and a computer in a Sensitive Compartmented Information Facility (SCIF) located in the courthouse.²⁸⁹

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

281. Docket Sheet, *supra* note 274; 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 280.

282. Docket Sheet, *supra* note 274; see Meyer, *supra* note 281; Rosenblatt, *supra* note 273; *The Week That Was*, Balt. Sun, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 280.

283. Docket Sheet, *supra* note 274; see Rosenblatt, *supra* note 273; *Life in Prison*, *supra* note 280.

284. See *Life in Prison*, *supra* note 280.

285. See Rosenblatt, *supra* note 273.

286. See *id.*

287. See *id.*

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

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

289. *Regan*, 281 F. Supp. 2d at 800–01; see Reagan, *supra* note 162, at 19 (describing SCIFs).

Defense experts also had to obtain security clearances to examine classified documents. See *Prosecutors Reconsider*, *supra* note 280.

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.²⁹⁰

Discovered in Regan's jail cell were apparently typewritten letters to his wife and children and a page of code.²⁹¹ These documents appeared to concern the locations of hidden classified information.²⁹² The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.²⁹³ Judge Lee allowed a search, but established special procedures to preserve the attorney-client privilege and work-product protection.²⁹⁴

In order to avoid any claims that the Government has had access to defense counsel's pre-trial preparation, the Court is not going to allow the United States Attorney or the Federal Bureau of Investigation to conduct the search. Rather the Court is going to refer this matter to a United States Magistrate Judge to supervise the process of securing the defense's SCIF computer hard drives and disks for imaging and their return to counsel. The United States Magistrate Judge will work with a court selected neutral computer expert with proper security clearances to image the Defendant's computer hard drives and to search for the enumerated four items: (1) two letters to Anette Regan; (2) letters or memoranda to his children; and (3) a page of code composed of letters and numbers. All of the items listed above will be attached to the court's Order, UNDER SEAL. If these items are found on the hard drive, then the computer expert will provide this information in electronic and hard copy to the United States Magistrate Judge for review. The United States Magistrate Judge is directed to report the computer expert's findings to all counsel and the District Judge. CIPA Court Security Officer Christine K. Gunning 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.²⁹⁵

290. *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").

291. *Id.* at 800, 807.

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

293. *Id.* at 799-800.

294. *Id.* at 800.

295. *Id.* at 806-07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 274.

Overtured Convictions in 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.²⁹⁶ Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.²⁹⁷ Agents found fraudulent identification documents in the name of Youssef Hmimssa, a former roommate, who had asked them to hold the documents for him.²⁹⁸ Koubriti and Hannan admitted that they knew that the documents were fraudulent.²⁹⁹ They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.³⁰⁰ Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.³⁰¹ Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.³⁰² Abdel Ilah Elmardoudi, the alleged ringleader in Chicago, also was indicted on March 27.³⁰³ On August 28, 2002, the government

296. *United States v. Koubriti*, 305 F. Supp. 2d 723, 724–25, 727 (E.D. Mich. 2003) (sanctioning Attorney General John Ashcroft for false and public statements about the case in violation of the court’s gag order); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003) (agreeing to partially close the juror voir dire); *United States v. Koubriti*, 199 F. Supp. 2d 656, 658–59 (E.D. Mich. 2002) (denying motions to suppress evidence acquired during the search of the apartment); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001) (denying bond release pending trial); 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.

297. *Koubriti*, 305 F. Supp. 2d at 727; *Koubriti*, 199 F. Supp. 2d at 660–61; *Koubriti*, 2001 WL 1525270, at *1.

Two days later, al-Marabh was arrested in Burbank, Illinois. See Shenon & Van Natta, *supra* note 296; 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.

298. *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 296; Shenon & Van Natta, *supra* note 296; Van Natta, *supra* note 296.

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

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

301. *Koubriti*, 199 F. Supp. 2d at 658; *Koubriti*, 2001 WL 1525270, at *1 n.2; see Danny Hakim, *Informer Is Cited as the Key to Unlocking a Terrorist Cell*, N.Y. Times, Aug. 30, 2002, at A10; Shenon & Van Natta, *supra* note 296; Van Natta, *supra* note 296.

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

303. *Koubriti*, 199 F. Supp. 2d at 658 n.1; see *United States v. Elmardoudi*, 501 F.3d 935, 937–38 (8th Cir. 2007); see also Hakim, *supra* note 297.

added charges against the defendants for material support of terrorism.³⁰⁴ The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Gerald E. Rosen.³⁰⁵

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.³⁰⁶ On September 9, 2005, he was sentenced to more than six years in prison for document fraud.³⁰⁷

This was a high-profile case that had received some national press coverage and a lot of local press coverage.³⁰⁸ The court selected 280 prospective jurors for the case, and the judge greeted them on March 18, 2003, with a speech disclosing the case on which they might serve and welcoming them to their opportunity to provide civic service.³⁰⁹

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.³¹⁰ Based on answers to this questionnaire, the court and the attorneys were able to sort the potential jurors into three groups: (1) apparently suitable, (2) possibly suitable, and (3) not suitable.³¹¹ Jurors were questioned individually, beginning with those "apparently suitable," in random order, and a jury was selected from the approximately 65–80 potential jurors in that group.³¹²

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

304. *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.

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

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

306. *Koubriti*, 305 F. Supp. 2d at 734; see also *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.

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

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

309. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 305 (noting voir dire from Mar. 18, 2003, to Mar. 26, 2003); Gerald E. Rosen, *United States v. Koubriti: Preliminary Voir Dire* (Mar. 18, 2003) (text of speech); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

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

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

312. *Id.*

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.³¹³

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.³¹⁴ The defendant moved for a mistrial, but the government maintained that the document was not material.³¹⁵ Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.

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 complexity of critical evidence that provided important foundations for the prosecution's case.³¹⁶

Judge Rosen concluded that "the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view."³¹⁷

As a result, at the request of both the government and the defense, on September 2, 2004, the court dismissed the terrorism charges against Koubriti and Elmardoudi and ordered a new trial on the fraudulent-document charges against

313. *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 United States v. Elmardoudi*, 501 F.3d 935, 938 (8th Cir. 2007); *see also* Hakim, *supra* note 306; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10.

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

314. *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).

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

316. *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.").

317. *Id.* at 681; *see* Hakim, *supra* note 305 (quoting text).

The prosecutor and a government witness were acquitted of wrongdoing in a criminal trial. Docket Sheet, *United States v. Convertino*, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006) (noting Oct. 31, 2007, jury verdict of not guilty); *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.

Koubriti, Elmardoudi, and Hannan.³¹⁸ The government elected not to pursue further the charges tried.³¹⁹

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.³²⁰ Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of time served and deportation to Morocco.³²¹ Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.³²²

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.³²³ The court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,³²⁴ and

318. *Koubriti*, 509 F.3d at 748; *Koubriti*, 336 F. Supp. 2d at 682; see *Elmardoudi*, 501 F.3d at 938 & n.4; see also Hakim, *supra* note 305; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15.

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

320. *Koubriti*, 509 F.3d at 748; Fourth Superseding Indictment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Dec. 15, 2004); see *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 296. 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 296.

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

322. *Koubriti*, 509 F.3d 746 (resolving *United States v. Koubriti*, No. 06-1937 (6th Cir. June 30, 2006) by holding that a retrial after a mistrial is not double jeopardy); *Koubriti*, 435 F. Supp. 2d 666.

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

In their first motion for summary judgment, the defendants noted that “[w]hile incarcerated in the Wayne County Jail Plaintiff was deemed a level 4 security risk by the U.S. Marshals, and as such, was placed in a ‘super max’ security cell block.” Defs.’ Summ. J. Mot. at 1, *id.* (July 25, 2006).

Between September 17, 2001 until August of 2003, Plaintiff Koubriti was incarcerated in the Wayne County Jail, and per level 4 “super max” security protocol, Plaintiff Koubriti was sentenced 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.

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

the case settled.³²⁵ Koubriti then sued his prosecutors for malicious prosecution, and the case is pending.³²⁶

Elmardoudi was sentenced by the U.S. District Court for the District of Minnesota to 51 months in prison in a separate prosecution for trafficking in fraudulent telephone calling cards,³²⁷ and he was sentenced by the U.S. District Court for the Northern District of Iowa to 60 months in prison for fraudulent use of Social Security numbers.³²⁸

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."³²⁹ Jurors did not come directly to the courthouse in the morning.³³⁰ Instead, they assembled at a secret location and were driven to the courthouse in a van.³³¹ Someone found out about the secret location and called the jury room with a death threat.³³² On the following day, someone called the Detroit News with a death threat concerning the judge.³³³ The marshals changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.³³⁴

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.³³⁵ Jury selection was conducted behind closed doors.³³⁶ Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.³³⁷ Judge Rosen notes that it was very important to

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

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

327. *United States v. Elmardoudi*, 501 F.3d 935, 937, 940 (8th Cir. 2007) (describing the crime as "'shoulder surfing,' that is, surreptitiously memorizing other people's calling card and credit card numbers at the Minneapolis-St. Paul airport and then passing the numbers on to other people who used them to pay for telephone calls."), *cert. denied*, ___ U.S. ___, 128 S. Ct. 926 (Jan. 7, 2008); Am. Sentencing J., *United States v. Elmardoudi*, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006).

328. Judgment, *United States v. Elmardoudi*, No. 1:06-cr-112 (N.D. Iowa Mar. 14, 2008); Indictment, *id.* (Aug. 16, 2006); see *Elmardoudi*, 501 F.3d at 937.

Elmardoudi has appealed. Notice of Appeal, *United States v. Elmardoudi*, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006).

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

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

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

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

336. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Eggen & Lengel, *supra* note 335.

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

make sure that the jury clerk knew that the names and addresses of the jurors were confidential.³³⁸

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued “a public and formal judicial admonishment of the Attorney General.”³³⁹

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.³⁴⁰ 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.”³⁴¹ In addition, during the trial, the Attorney General commented favorably at a press conference on the credibility of the cooperating codefendant’s testimony.³⁴²

On the day before the grand jury handed down the second superseding indictment adding terrorism charges for the first time, Fox News announced the forthcoming indictment in sufficient detail as to suggest the indictment had been improperly leaked.³⁴³ On the following day, MSNBC News presented improperly leaked evidence against the defendants.³⁴⁴ The Attorney General’s responsibility for these leaks remained unclear.³⁴⁵

The defendants moved for sanctions against the Attorney General on August 28, 2003.³⁴⁶ 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.”³⁴⁷ In response, the Attorney General stated that he regretted making the statements and acknowledged that they were mistakes, but said that they were entirely inadvertent.³⁴⁸

338. *Id.*

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

340. *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.”).

341. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; *see* Shenon & Van Natta, *supra* note 296 (reporting on the Attorney General’s news conference).

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

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

343. *Id.* at 731.

344. *Id.* at 732.

345. *Id.* at 725 n.1.

346. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 305.

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

348. *Id.* at 737–38; *see* Schmitt, *supra* note 339.

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.³⁴⁹ Criminal contempt proceedings against a sitting Cabinet officer would require extraordinary procedures and implicate serious constitutional issues.³⁵⁰ Because the record did not suggest willful violation of the court's order, Judge Rosen decided that confronting these difficulties would not be necessary.³⁵¹ But because the Attorney General did violate the court's order on two occasions, Judge Rosen decided to formally admonish him.³⁵²

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.³⁵³ Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and use of the CIA's evidence.³⁵⁴ Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.³⁵⁵

Review of classified evidence in Detroit required the court to (1) establish a Sensitive Compartmented Information Facility (SCIF)³⁵⁶ and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.³⁵⁷

A SCIF is a secure, windowless room in which documents are stored in independently locked file drawers.³⁵⁸ The room was created by security officers for the Justice Department, and then the court programmed the codes for access.³⁵⁹ Only chambers staff with security clearances may enter this SCIF.³⁶⁰

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

350. *Id.* at 726, 742, 752–57.

351. *Id.* at 726, 748–57.

352. *Id.* at 725–26, 757–65; *see* Schmitt, *supra* note 339.

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

354. *Id.*

355. *Id.*; *see* Reagan, *supra* note 162, at 19 (describing SCIFs).

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

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

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

358. Rosen, *supra* note 305, at 105; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

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

360. *Id.*

Twentieth Hijacker

United States v. Moussaoui
(*Leonie M. Brinkema, E.D. Va.*)³⁶¹

On September 11, 2001, four hijacked commercial jumbo jets were crashed in New York, Virginia, and Pennsylvania, killing nearly 3,000 people, including 19 suspected hijackers.³⁶² 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.³⁶³ The fourth plane crashed near Shanksville, Pennsylvania, apparently after passengers thwarted the hijackers' plan to strike a strategic target—perhaps the Capitol.³⁶⁴ This plane apparently had only four hijackers aboard.³⁶⁵ Just a few days later, it was reported that Zacarias Moussaoui may have been intended to be the twentieth hijacker.³⁶⁶

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.³⁶⁷ Three days earlier, he had begun instruction at the Pan Am International Flight Academy.³⁶⁸ It was initially reported that he aroused suspicion when he

361. An appeal was heard by Fourth Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory.

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

363. See Grunwald, *supra* note 362; 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 362.

364. The 9/11 Commission Report 244 (2004); see Grunwald, *supra* note 362; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; *New Theory*, *supra* note 363; Schmemmann, *supra* note 362.

365. 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 363; Longman, *supra* note 364; *New Theory*, *supra* note 363.

366. Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. Times, Sept. 21, 2001, at B1; David Peterson, *Mother Says Extremists Brainwashed Her Son*, Minneapolis-St. Paul Star Trib., Sept. 20, 2001, at 9A (reporting that the French newsmagazine *L'Express* speculated online on Sept. 19, 2001, that Moussaoui might be the twentieth hijacker).

367. 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*, 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 Johnston & Shenon, *supra* note 363; Peterson, *supra* note 366.

368. The 9/11 Commission Report 246–47, 273 (2004); see Johnston & Shenon, *supra* note 365.

One of the three instructors who alerted authorities to suspicion concerning Moussaoui received a \$5 million reward in 2008. See *Reward in Moussaoui Case*, N.Y. Times, Jan. 25, 2008; *Two Others Seek Reward in Moussaoui Case*, N.Y. Times, Jan. 26, 2008.

expressed an interest in steering a jumbo jet but not in taking off or landing.³⁶⁹ But the *Washington Post* reported in November that the director of the FBI told federal prosecutors at a closed-door meeting that initial reports of Moussaoui's not wanting to learn how to take off or land were inaccurate, and Moussaoui no longer was thought to be intended as the twentieth hijacker; he was thought to have been intended for a later attack.³⁷⁰

Moussaoui was born in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.³⁷¹ He moved to London in 1990, and then moved back to France in 1997.³⁷² By the time he entered the United States on a student visa, French authorities already suspected him of terrorist ties.³⁷³ He trained at the Airman Flight School in Norman, Oklahoma, where his performance was judged poor.³⁷⁴

During this time, he apparently had a telephone call with Ramzi Muhammad Abdullah bin al-Shibh, a roommate of Mohamed Atta in Hamburg, Germany.³⁷⁵ 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.³⁷⁶ Bin al-Shibh also apparently

369. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, Wash. Post, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 365; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, Wash. Post, Sept. 22, 2001, at A20.

370. Dan Eggen, *Yemeni Fugitive Linked to Hijackers*, Wash. Post, Nov. 15, 2001, at A20; *see* Bin al-Shibh Dep. Op. at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 10, 2003), available at 2003 WL 21263699 ("he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda"); Philip Shenon, *F.B.I. Chief Says Failed Sept. 11 Hijackers May Remain at Large*, N.Y. Times, Nov. 17, 2001, at B5.

In 2004, the 9/11 Commission reported that 9/11 conspirator "Khallad believes [Khalid Sheikh Mohammed] wanted between four and six operators per plane. KSM states that al Qaeda had originally planned to use 25 or 26 hijackers but ended up with only the 19." The 9/11 Commission Report 235 (2004).

371. *See* Daley, *supra* note 366; Schmidt & Romano, *supra* note 369.

372. *See* Daley, *supra* note 366.

373. *See* Grimaldi, *supra* note 369 (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.

374. 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); *see* Daley, *supra* note 366; Timothy Dwyer & Jerry Markon, *Flight Instructor Recalls Unease with Moussaoui*, Wash. Post, Mar. 10, 2006, at A2; Johnston & Shenon, *supra* note 365; Schmidt & Romano, *supra* note 369.

375. The 9/11 Commission Report 162 (2004) (Atta and Bin al-Shibh moved in with hijacker Marwan al-Shehhi in April 1998); *see* James Risen, *U.S. Says Suspect Tied to 9/11 and Qaeda Is Captured in Raid*, N.Y. Times, Sept. 14, 2002, at A1; John 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).

376. The 9/11 Commission Report 5 (2004) (Atta was "the only terrorist on board trained to fly a jet"); *see* Johnston & Shenon, *supra* note 365; Risen, *supra* note 376; Tagliabue, *supra* note 376.

wired Moussaoui \$14,000.³⁷⁷ Ramzi bin al-Shibh was also known as Ramzi Omar, and he too came to be suspected as the intended twentieth hijacker,³⁷⁸ but he was repeatedly denied a visa to enter the United States.³⁷⁹ He was captured in Karachi, Pakistan, on the eve of the first anniversary of the September 11 attacks.³⁸⁰

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.³⁸¹

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.³⁸² Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court immediately appointed three attorneys to represent him.³⁸³ The court assigned the case to Judge Leonie M. Brinkema.³⁸⁴

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.”³⁸⁵ Judge Brinkema, with the consent of Moussaoui’s lawyer, entered a plea of not guilty.³⁸⁶ Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.³⁸⁷

377. The 9/11 Commission Report 246, 273 (2004); see Johnston & Shenon, *supra* note 363.

378. See *New Theory*, *supra* note 363; Risen, *supra* note 376; Shenon, *supra* note 370; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

379. The 9/11 Commission Report 161, 168, 225 (2004) (reporting that Bin al-Shibh could not persuade immigration officials that he would return home); see Michael Moss, *A Traveler with Strong Views on the Right Kind of Islam and No Fear of Sharing Them*, N.Y. Times, Dec. 12, 2001, at B6.

380. See Kamran Khan & Peter Finn, *Pakistanis Detail Capture of Key 9/11 Suspect*, Wash. Post, Sept. 15, 2002, at A1; Walter Pincus, *Binalshibh Said to Provide “Useful Information,”* Wash. Post., Oct. 4, 2002, at A17; Risen, *supra* note 376.

381. See Johnston & Shenon, *supra* note 365.

382. Indictment, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001); United States v. Moussaoui, 483 F.3d 220, 223 n.1 (4th Cir. 2007); see Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, Wash. Post, Dec. 12, 2001, at A1; Johnston & Shenon, *supra* note 363.

383. Complex Case Order at 1, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) (recognizing four capital counts), available at 2001 WL 1887910; see Johnston & Shenon, *supra* note 363; David Johnston & Benjamin Weiser, *Government’s Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

384. Docket Sheet, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) [hereinafter E.D. Va. Docket Sheet]; see Philip Shenon & Neil A. Lewis, *Unpredictable Judge for Terrorism Suspect*, N.Y. Times, Dec. 26, 2001, at B6.

Tim Reagan interviewed Judge Brinkema for this report in the judge’s chambers on January 5, 2007, and by telephone on March 26, 2008.

385. 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.

386. E.D. Va. Docket Sheet, *supra* note 384; see Copeland, *supra* note 385; Johnston, *supra* note 385.

387. Complex Case Order, *supra* note 383, at 3 (setting a deadline of Mar. 29, 2002); Death Penalty Notice, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Mar. 28, 2002);

At a hearing on April 22 concerning Moussaoui's conditions of confinement, the defendant raised his hand and, when recognized by Judge Brinkema, began a 50-minute diatribe on Islam and the U.S. government's conspiracy to kill him.³⁸⁸ He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.³⁸⁹ 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.³⁹⁰

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.³⁹¹ On June 13, Judge Brinkema granted Moussaoui's motion to represent himself, keeping appointed counsel as standbys.³⁹²

The government filed a superseding indictment on June 19,³⁹³ and at the arraignment six days later Moussaoui tried to plead no contest.³⁹⁴ 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.³⁹⁵

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.³⁹⁶ So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.³⁹⁷ 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

Moussaoui, 483 F.3d at 223–24 n.1; see Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. Times, Mar. 29, 2002, at A20.

388. See Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

389. *United States v. Moussaoui*, 333 F.3d 509, 512–13 (4th Cir. 2003); see Mot. Proceed Pro Se, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 25, 2002) (handwritten motion dated Apr. 22, 2002); Shenon, *supra* note 388.

390. Mental Health Evaluation Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2002), available at 2002 WL 1311722; see Shenon, *supra* note 388.

391. See Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11.

392. Pro Se Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 14, 2002), available at 2002 WL 1311738; *Moussaoui*, 333 F.3d at 513; see Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

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

394. Order Denying No-Contest Plea, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 9, 2002), available at 2002 WL 1587025; see Neil A. Lewis, *Defendant in Sept. 11 Plot Accuses Judge of Trickery*, N.Y. Times, June 26, 2002, at A18.

395. Order Denying No-Contest Plea, *supra* note 394; E.D. Va. Docket Sheet, *supra* note 384; see Lewis, *supra* note 394.

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

397. Second Superseding Indictment, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 16, 2002); *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); see Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

knowledge and participated in Al Qaeda.”³⁹⁸ Judge Brinkema decided to give him a week to reconsider his guilty plea.³⁹⁹ 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.⁴⁰⁰

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.⁴⁰¹ Judge Brinkema postponed the trial indefinitely to permit the government to appeal.⁴⁰² The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.⁴⁰³ 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.”⁴⁰⁴ After oral argument on June 3 before U.S. Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,⁴⁰⁵ 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.⁴⁰⁶

398. See Philip Shenon, *9/11 Defendant in Guilty Plea*, N.Y. Times, July 19, 2002, at A1.

399. See Shenon, *supra* note 398.

400. E.D. Va. Docket Sheet, *supra* note 384; see Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

401. Bin al-Shibh Dep. Op., *supra* note 370, at 16–17 (“The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant’s behalf—both as to guilt and potential punishment.”); Bin al-Shibh Deposition Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Jan. 31, 2003); *Moussaoui*, 382 F.3d at 458; United States v. Moussaoui, 333 F.3d 509, 513 (4th Cir. 2003); E.D. Va. Docket Sheet, *supra* note 384; see 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.”).

402. Order Vacating Trial Date, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Feb. 12, 2003), available at 2003 WL 402249; see 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.

403. United States v. Moussaoui, No. 03-4162, 2003 WL 1889018 (4th Cir. Apr. 14, 2003); *Moussaoui*, 382 F.3d at 458; see Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

404. Bin al-Shibh Substitution Op. at 6, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. May 15, 2003), available at 2003 WL 21277161; *Moussaoui*, 382 F.3d at 458–59; see 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.

405. *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.

406. *Moussaoui*, 333 F.3d at 512, 514, 517 (resolving *In re* United States, No. 03-4261 (4th Cir. Mar. 17, 2003) (mandamus); United States v. Moussaoui, No. 03-4162 (4th Cir. Feb. 12, 2003) (appeal)); *Moussaoui*, 382 F.3d at 459; see Neil A. Lewis, *Bush Officials Lose Round in*

On August 29, Judge Brinkema ordered the government to provide Moussaoui deposition access to Khalid Sheikh Mohammed—regarded as the mastermind of the September 11 attacks—and Mustafa Ahmed al-Hawsawi—regarded as the paymaster for the September 11 attacks—as well.⁴⁰⁷ Mohammed and al-Hawsawi had been captured in Pakistan on February 27.⁴⁰⁸ 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.⁴⁰⁹

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.⁴¹⁰ 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.⁴¹¹ Judge Gregory dissented in part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.⁴¹²

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.⁴¹³ The govern-

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.

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.

407. Mohammed and al-Hawsawi Dep. Op., *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2003), available at 2003 WL 22258213; *Moussaoui*, 382 F.3d at 459; see 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 Mohammed's nephew. The 9/11 Commission Report 73, 145 (2004). "According to KSM, he started to think about attacking the United States after Yousef returned to Pakistan following the 1993 World Trade Center bombing." *Id.* at 153.

408. See Schmidt, *supra* note 407.

409. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 481–82, 487 (E.D. Va. 2003); *Moussaoui*, 382 F.3d at 459–60; see Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

410. *Moussaoui*, 382 F.3d at 462–63.

411. *Id.* at 456–57, 479–82; see Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5.

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 Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005; Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3.

412. *Moussaoui*, 382 F.3d at 483–89 (Gregory, concurring in part and dissenting in part); see Markon, *supra* note 411.

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

ment prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.⁴¹⁴ 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."⁴¹⁵ Noting that Judge Brinkema judged the summaries accurate reflections of the reports, the court of appeals ruled that the summaries "provide an adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony."⁴¹⁶

Meanwhile, on November 14, 2003, Judge Brinkema decided that because of his frequent inappropriate filings Moussaoui could no longer proceed pro se.⁴¹⁷ Seventeen months later, on April 22, 2005, one month after the Supreme Court denied his petition for a writ of certiorari, Moussaoui pleaded guilty to a conspiracy to kill Americans, but denied involvement in the September 11 attacks.⁴¹⁸

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.⁴¹⁹ Jury selection began on February 6, 2006.⁴²⁰ The court sent summonses to more than 1,000 residents within the district's Alexandria division.⁴²¹ Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than 500 potential jurors filled out.⁴²²

414. *Id.*

415. *Id.* at 478.

416. *Id.* at 479.

417. Order Vacating Pro Se Status at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 14, 2003); *Moussaoui*, 382 F.3d at 460 n.6; see Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Philip Shenon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

418. Plea Statement, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2005); *United States v. Moussaoui*, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see 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.

"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.

419. 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).

420. E.D. Va. Docket Sheet, *supra* note 384; see Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

421. Interview with Hon. Leonie M. Brinkema, Mar. 26, 2007.

422. Trial Conduct Order 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006); Leonie M. Brinkema, *United States v. Moussaoui*: Jury Questionnaire (Feb. 6, 2006); Interview with Hon. Leonie M. Brinkema, Mar. 26, 2007; see Jerry Markon, *Terrorism Jury Faces Slew of Questions*, Wash. Post, Nov. 29, 2006, at B1.

Opening statements began on March 6.⁴²³ 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 2001.⁴²⁴ Proceedings were not publicly televised, but they were broadcast to viewing sites in Manhattan, Central Islip, Boston, Philadelphia, Newark, and Alexandria for family members of September 11 victims.⁴²⁵

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.⁴²⁶ Judge Brinkema ruled that the coached witnesses could not testify.⁴²⁷

The trial continued and jurors began to deliberate on Wednesday, March 29.⁴²⁸ After a weekend break,⁴²⁹ on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.⁴³⁰ On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,⁴³¹ returning a verdict of life in prison on Wednesday, May 3.⁴³² After inter-

423. E.D. Va. Docket Sheet, *supra* note 384; see Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14..

424. See Lewis, *supra* note 423; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

425. See Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006); 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).

426. See 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.

427. Second Aviation Witness Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006); First Aviation Witness Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 14, 2006); see 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.

428. E.D. Va. Docket Sheet, *supra* note 384; see Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

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

430. Phase 1 Jury Verdict, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 3, 2006); see 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.

431. E.D. Va. Docket Sheet, *supra* note 384; see Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

432. Phase 2 Jury Verdict, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 3, 2006); *United States v. Moussaoui*, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. Times, May 4, 2006, at A1; Jerry

views with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.⁴³³

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.⁴³⁴ Judge Brinkema denied his motion,⁴³⁵ and an appeal is pending.⁴³⁶

Challenge: Court Security

Security was enhanced at Moussaoui's arraignment.⁴³⁷ Moussaoui arrived before 6:00 a.m., while it was still dark.⁴³⁸ Marshals surrounded the courthouse, and extra metal detectors were stationed at the courtroom.⁴³⁹ 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.⁴⁴⁰

At subsequent appearances also, extra marshals guarded the courthouse.⁴⁴¹ It was reported that the courthouse had never seen such a level of security.⁴⁴²

Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, Wash. Post, May 4, 2006, at A1.

433. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1.

434. Mot. to Withdraw Plea, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); see Neil A. Lewis, *Moussaoui's Move to Recant Guilty Plea Is Denied*, N.Y. Times, May 9, 2006, at A18; Jerry Markon, *Moussaoui Fails in Bid to Withdraw 9/11 Guilty Plea*, Wash. Post, May 9, 2006, at A16.

According to Moussaoui's affidavit,

16. I was extremely surprised when the jury did not return a verdict of death because I knew that it was the intention of the American justice system to put me to death.

17. I had thought that I would be sentenced to death based on the emotions and anger toward me for the deaths on September 11 but after reviewing the jury verdict and reading how the jurors set aside their emotions and disgust for me and focused on the law and the evidence that was presented during the trial, I came to understand that the jury process was more complex than I assumed.

18. Because I now see that it is possible that I can receive a fair trial even with Americans as jurors and that I can have the opportunity to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001, I wish to withdraw my guilty plea and ask the Court for a new trial to prove my innocence of the September 11 plot.

Moussaoui Aff. at 3, Mot. to Withdraw Plea, *supra*.

435. Order Denying Plea Withdrawal, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); see Lewis, *supra* note 434; Markon, *supra* note 434.

436. Docket Sheet, *United States v. Moussaoui*, No. 06-4494 (4th Cir. May 15, 2006).

437. See Copeland, *supra* note 385; Johnston, *supra* note 385.

438. See Copeland, *supra* note 385; see also Brooke A. Masters, *Alexandria's Logistical Juggling Act*, Wash. Post, Mar. 14, 2002 ("High-risk prisoners are being transported between the jail and the courthouse at night or in the early morning, and the streets are shut down to minimize the risks.").

439. See Johnston, *supra* note 385.

440. See Copeland, *supra* note 385.

441. See Masters, *supra* note 438.

Challenge: Jury Security

Judge Brinkema used an anonymous jury.⁴⁴³ Jurors assembled in a secret location and were driven to the courthouse.⁴⁴⁴ The court set up a special room for the jurors to eat lunch away from the public.⁴⁴⁵ They were never permitted to be in the building unsupervised.⁴⁴⁶

Judge Brinkema observes that it is important to work cooperatively with the marshals while maintaining ultimate responsibility.⁴⁴⁷

Challenge: Classified Evidence

Classified materials require extraordinary procedures, but Judge Brinkema tries to keep procedures as normal as possible.⁴⁴⁸ She requires all of her law clerks and other staff members to qualify for top-secret security clearances.⁴⁴⁹

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.⁴⁵⁰

Moussaoui himself was not supposed to have access to classified information.⁴⁵¹ But, in June and July of 2002, the government inadvertently included classified materials among documents produced to Moussaoui.⁴⁵² On August 22, the

442. See Libby Copeland & Richard Leiby, *The Moussaoui Circus Extends Its Run*, Wash. Post, July 26, 2002 (“This is the most security we’ve ever had to use here at the courthouse since it opened in 1996,” said John Clark, acting U.S. marshal for the Eastern District of Virginia.”).

443. Trial Conduct Order 1, *supra* note 422; see Markon, *supra* note 422.

444. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. Protective Order & Mem. of Understanding, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002).

451. Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 23, 2002), available at 2002 WL 1987964.

As the Government strenuously argues, the defendant's repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and 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 418; Philip Shenon, *U.S. Gave Secrets to Terror Suspect*, N.Y. Times, Sept. 27, 2002, at A1.

Standby counsel, but not Moussaoui, also were granted access to “sensitive security information,” which is secret—but not classified—information related to transportation security. See 49 C.F.R. § 1520.5(a); Tom Jackman, *Moussaoui's Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

452. Letter (Aug. 22, 2002) [hereinafter Aug. 22, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 26,

government wrote to Judge Brinkema stating that two documents produced to Moussaoui had mistakenly not been classified and asking that a “walled-off FBI team” search Moussaoui’s cell to retrieve the documents.⁴⁵³ (To accommodate the *pro se* defendant’s access to documents in this case, Moussaoui was eventually given three cells.⁴⁵⁴)

Judge Brinkema denied the FBI search.

[G]iven the massive amounts of material produced in this case, there is a significant danger than any agents sent to Mr. Moussaoui’s cell would have to rummage through all of his materials. That would risk serious intrusions into his *pro se* work product, which a “walled off” FBI team would not solve.

But Judge Brinkema did permit the Marshal’s Service to search Moussaoui’s cells for the two documents plus an additional five that the government identified in the interim as improperly produced.⁴⁵⁵ Of the seven searched for, five were found.⁴⁵⁶ By the following week, the government presented to Judge Brinkema a list of 43 improperly produced documents.⁴⁵⁷ 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.⁴⁵⁸ Eventually, the documents were retrieved and properly classified.⁴⁵⁹

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.⁴⁶⁰

Challenge: Classified Arguments

District Court for the Eastern District of Virginia

Moussaoui’s appointed standby attorneys had security clearances; to ensure that they did not inadvertently put classified information into the public record, Judge

2002), available at 2002 WL 32001771; Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see* Shenon, *supra* note 451.

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.

453. Aug. 22, 2002, Letter, *supra* note 452; *see* Shenon, *supra* note 451.

454. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

455. *See* Letter (Aug. 29, 2002) [hereinafter Aug. 29, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *supra* note 452.

456. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see* Aug. 29, 2002, Letter, *supra* note 455; Shenon, *supra* note 451.

457. *See* Letter (Sept. 5, 2002) [hereinafter Sept. 5, 2002, Letter], attached to Classified Document Retrieval Unsealing Order, *supra* note 452; Shenon, *supra* note 451.

458. *See* Dan Eggen, *FBI Failed to Classify Reports Before Moussaoui Had Them*, Wash. Post, Sept. 28, 2002, at A8.

459. Classified Document Retrieval Unsealing Order, *supra* note 452, at 1.

460. Order Rescheduling Trial, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 30, 2002), available at 2002 WL 32001785; *see* Philip Shenon, *Judge Agrees to New Delay in Trial in Conspiracy Case*, N.Y. Times, Oct. 1, 2002, at A20.

Brinkema established a procedure in which they submitted filings to the court security officer, who was given 48 hours to identify any classified information that had to be redacted from the public record.⁴⁶¹ These filings could not be shared with Moussaoui, who did not have a security clearance, until they had been reviewed by the security officer.⁴⁶² Unredacted filings containing classified information were filed with the security officer rather than the clerk.⁴⁶³ The government was responsible for classification reviews of its filings.⁴⁶⁴

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, the briefs were filed with the court security officer under seal.⁴⁶⁵ Some information about their contents, however, were reported in the *Washington Post*.⁴⁶⁶ In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs were filed with the court security officer under seal and redacted briefs were filed in the public record.⁴⁶⁷

Court of Appeals for the Fourth Circuit

The court of appeals' clerk's office anticipated that it was likely to eventually receive an appeal in Moussaoui's case, and classified information would be part of the court record.⁴⁶⁸ So the clerk's office (1) created a Sensitive Compartmented Information Facility (SCIF)—an especially secure storage facility suitable for storing sensitive compartmented information and other classified information—and (2) began the process of obtaining security clearances for several staff members.⁴⁶⁹

The court's judges meet in regular session in Richmond six times a year. There is a safe in the court's SCIF for the Moussaoui case, with a separate drawer allocated to each judge.⁴⁷⁰ Cleared court staff members can bring classified documents from the SCIF to judges' Richmond chambers for review while the judges are in Richmond.⁴⁷¹ Judge Gregory's home chambers is in Richmond, so cleared court staff members can bring him classified documents from the Rich-

461. Classified Filing Order, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Oct. 3, 2002); see *Moussaoui Motions to Be Cleared*, *Wash. Post*, Oct. 4, 2002, at A15 [hereinafter *Moussaoui Motions*].

462. Classified Filing Order, *supra* note 461, at 2; see *Moussaoui Motions*, *supra* note 461.

463. Classified Filing Order, *supra* note 461, at 2–3.

464. Classified Filing Order, *supra* note 461, at 2; see *Moussaoui Motions*, *supra* note 461.

465. Docket Sheet, *United States v. Moussaoui*, No. 03-4162 (4th Cir. Feb. 12, 2003) [hereinafter 4th Cir. *Moussaoui* Feb. 12, 2003, Docket Sheet]; see Jerry Markon, *U.S. Filed Terror Briefs in Secrecy*, *Wash. Post*, Mar. 15, 2003, at A6 (“legal specialists said they could recall virtually no other examples of the government’s filing an entire set of legal briefs under seal”).

466. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, *Wash. Post*, Apr. 2, 2003, at A7.

467. Docket Sheet, *United States v. Moussaoui*, No. 03-4792 (4th Cir. Oct. 7, 2003) [hereinafter 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet].

468. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

469. *Id.*; see Reagan, *supra* note 162, at 19 (describing SCIFs).

470. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

471. *Id.*

mond SCIF even when the court is not in session. Judge Wilkins has chambers in Greenville, South Carolina, and the courthouse there has a SCIF.⁴⁷² Judge Williams has chambers in Orangeburg, South Carolina, which is approximately 50 miles south of Columbia. Either court security officers bring classified documents to her chambers in Orangeburg for her review while they are there, or she travels to Columbia, where the FBI has a SCIF.⁴⁷³

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.⁴⁷⁴ Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.⁴⁷⁵ 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 court security officer who notified the court.⁴⁷⁶ The court docketed it as filed with the court security officer, who had it reviewed for classified information and then sent a redacted copy to the court for public filing.⁴⁷⁷ Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.⁴⁷⁸

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.⁴⁷⁹ Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.⁴⁸⁰ The court denied the petition.⁴⁸¹

The court is preparing a larger SCIF in Richmond, suitable for working and meeting in addition to storage.⁴⁸²

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.

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.⁴⁸³ But on a motion by news media to hold the oral argument in open court, the panel that would ultimately hear the

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.*

481. 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet, *supra* note 467 (noting denial of rehearing on Oct. 13, 2004).

482. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

483. 4th Cir. *Moussaoui* Feb. 12, 2003, Docket Sheet, *supra* note 465 (noting Mar. 24, 2003, grant of motion to seal argument); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Jerry Markon, *Moussaoui Hearing Closed to Public*, Wash. Post, Mar. 25, 2003, at A2.

appeal decided to bifurcate the argument: A public oral argument was held followed by a closed oral argument concerning classified information.⁴⁸⁴ The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.⁴⁸⁵ The court ordered that a redacted transcript of the closed argument be made available to the public within five business days of the court reporter's submission of the transcript to the government, which was required within 24 hours of the argument.⁴⁸⁶ A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.⁴⁸⁷

The appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions was also bifurcated between public oral arguments and closed oral arguments.⁴⁸⁸

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.⁴⁸⁹ The court initially filed these documents under seal.⁴⁹⁰ 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.⁴⁹¹ 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.⁴⁹²

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.⁴⁹³ 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.

484. Argument Closure Op., *Moussaoui*, No. 03-4162 (4th Cir. May 13, 2002) (order by Circuit Judges William W. Wilkins, H. Emory Widener, Jr., and Paul V. Niemeyer), available at 65 Fed. Appx. 881, 2003 WL 21076836; 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.

485. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

486. Argument Closure Op., *supra* note 484, at 17.

487. See Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, Wash. Post, June 13, 2003, at A9.

488. 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet, *supra* note 467; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

489. E.D. Va. Docket Sheet, *supra* note 384.

490. Pro Se Order, *supra* note 392, at 1.

491. *Id.* at 2.

492. Pro Se Filings Unsealing Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. June 17, 2002), available at 2002 WL 1311764.

493. Letter, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Aug. 22, 2002) (portions redacted); see Philip Kennicott, *A Window on the Mind of Moussaoui*, Wash. Post, July 25, 2002, at C1 (reporting on the contents of Moussaoui's filings).

Because he has been warned numerous times that such writing would have to stop, the defendant may no longer hide behind his *pro se* status to avoid being held to appropriate pleading practice. Further, we find that the record supports the United States' concern that the defendant, who is charged with conspiracy to commit acts of terrorism transcending national boundaries among other offenses, is attempting to use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement.⁴⁹⁴

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."⁴⁹⁵ She sealed several, but not all, recent filings.⁴⁹⁶ 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."⁴⁹⁷

On motion from news media, and after observing that "the defendant has filed fewer pleadings and has significantly toned down his inappropriate rhetoric," Judge Brinkema modified her order so that all *pro se* filings would be sealed for 10 days to give the government an opportunity "to advise the Court in writing whether the pleading should remain under seal or be unsealed with or without redactions."⁴⁹⁸

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.⁴⁹⁹

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.⁵⁰⁰ 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."⁵⁰¹

494. Pro Se Filings Sealing Order at 3, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), available at 2002 WL 1990900.

495. *Id.* at 4.

496. *Id.* at 3–4.

497. *Id.* at 4 n.3.

498. Pro Se Filings Sealing Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Sept. 27, 2002) [hereinafter Sept. 27, 2002, Pro Se Filings Sealing Order], available at 2002 WL 32001783; see *News Media Win Ruling in Terror Trial*, N.Y. Times, Sept. 28, 2002, at A11.

499. Sept. 27, 2002, *Pro Se Filings Sealing Order*, *supra* note 498, at 4 n.1.

500. Videotape Production Order at 1, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Nov. 5, 2002), available at 2002 WL 32001775; see Philip Shenon, *Court Papers Show Moussaoui Seeks Access to Captured Al Qaeda Members*, N.Y. Times, Nov. 1, 2002, at A20.

501. Videotape Production Order, *supra* note 500.

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.⁵⁰² Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.⁵⁰³ Lindh⁵⁰⁴ was shot in the upper thigh during the uprising, and he denied involvement in Spann’s death.⁵⁰⁵ Lindh and several dozen other surviving Taliban troops were recaptured on December 1, 2001, when the Northern Alliance flooded them out of a basement.⁵⁰⁶

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.⁵⁰⁷ He arrived in the Eastern District of Virginia for trial eight days later.⁵⁰⁸ An indictment filed on February 5 added related charges as well as a

502. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002); see Dan Eggen & Brooke A. Masters, *U.S. Won’t Seek Death for Walker*, Wash. Post, Jan. 16, 2002, at A1; David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y. Times, Jan. 16, 2002, at A1; Fredrick Kunkle, *Lindh Never Betrayed Homeland, Parents Say*, Wash. Post, July 16, 2002, at A10; Brooke A. Masters & Patricia Davis, *Walker’s Long Trip Ends at Alexandria Jail*, Wash. Post, Jan. 24, 2002, at A13.

503. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; see Eggen & Masters, *supra* note 502; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 502; Kunkle, *supra* note 502; Vernon Loeb, *U.S. Soldiers Recount Smart Bomb’s Blunder*, Wash. Post, Feb. 2, 2002, at A15; Romero & Temple-Raston, *supra* note 212, at 91–92; Rene Sanchez, *John Walker’s Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

504. 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.

505. *Lindh*, 227 F. Supp. 2d at 569; see Eggen & Masters, *supra* note 502; Johnston, *supra* note 502; see also Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Romero & Temple-Raston, *supra* note 212, at 92–93.

506. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; see Johnston, *supra* note 502; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 503; Romero & Temple-Raston, *supra* note 212, at 94.

Also captured was Yasser Esam Hamdi. See John Mintz & Brooke A. Masters, *U.S.-Born Detainee May End Up in Va*, Wash. Post, Apr. 5, 2002, at A3; Romero & Temple-Raston, *supra* note 212, 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 212, at 144, 191 (reporting on *Hamdi*).

507. Docket Sheet, *United States v. Lindh*, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002); see Eggen & Masters, *supra* note 502; Johnston, *supra* note 502; Masters & Davis, *supra* note 502; Romero & Temple-Raston, *supra* note 212, at 140 & fig. 7.

508. See Masters & Davis, *supra* note 502.

firearms charge.⁵⁰⁹ The court assigned the case to Judge T.S. Ellis III.⁵¹⁰ Lindh pleaded not guilty on February 13.⁵¹¹ 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.⁵¹²

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.⁵¹³ John Walker Lindh was raised a Catholic, but he decided to convert to Islam at 16, taking the name Suleyman.⁵¹⁴ At 18, he moved to Yemen to study Arabic and then moved to Bannu, Pakistan, to attend a madrassah.⁵¹⁵

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.⁵¹⁶ He arrived on the Taliban's front line on September 6, 2001.⁵¹⁷

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.⁵¹⁸ Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.⁵¹⁹ Other photos apparently were destroyed.⁵²⁰

509. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); Docket Sheet, *supra* note 507; see Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 212, at 139.

510. Docket Sheet, *supra* note 507; see Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 212, at 142.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

511. Docket Sheet, *supra* note 507; see Masters, *supra* note 510.

512. 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.

513. See Kunkle, *supra* note 502; Loeb, *supra* note 506; 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 212, at 13, 15; Sanchez, *supra* note 503.

514. See Eggen & Masters, *supra* note 502 (reporting that Lindh took the name Suleyman al-Faris); Kunkle, *supra* note 502; Loeb, *supra* note 506; Nieves, *supra* note 513 (reporting that Lindh took the name Suleyman al-Lindh); Romero & Temple-Raston, *supra* note 212, at 16 (reporting that "Suleyman" is equivalent to "Solomon"); Sanchez, *supra* note 503.

515. See Eggen & Masters, *supra* note 502; Loeb, *supra* note 506; Romero & Temple-Raston, *supra* note 212, at 17–19 (reporting that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 503.

516. See Eggen & Masters, *supra* note 502; Loeb, *supra* note 506; Nieves, *supra* note 513; Romero & Temple-Raston, *supra* note 212, 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 503.

517. See Romero & Temple-Raston, *supra* note 212, at 24.

518. See Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9; Romero & Temple-Raston, *supra* note 212, at 111 & fig. 5.

519. See Masters, *supra* note 518; Romero & Temple-Raston, *supra* note 212, at 114 (reporting that the obscenity was "shithead").

520. See Masters, *supra* note 518; Romero & Temple-Raston, *supra* note 212, at 114.

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.⁵²¹ To protect Brosnahan's law firm's employees from harm, Brosnahan kept the firm's name off of the case.⁵²²

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.⁵²³ 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.⁵²⁴

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.⁵²⁵ All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.⁵²⁶ On October 4, Judge Ellis imposed the statutory maximum of consecutive ten-year terms on each charge, a sentence to which the parties had agreed.⁵²⁷ Lindh tearfully admitted making a mistake by joining the Taliban.⁵²⁸ Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.⁵²⁹

Challenge: Protected National Security Information

Early in the prosecution, the government determined that it had to disclose to the defendant "reports of interviews of detainees captured in Afghanistan and elsewhere who may have knowledge of al Qaeda or who may have been members of that organization and who are housed primarily at Guantanamo Bay, Cuba."⁵³⁰ The reports were regarded as "unclassified information vital to national security."⁵³¹ 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.⁵³²

521. See Eggen & Masters, *supra* note 502; Romero & Temple-Raston, *supra* note 212, at 94, 111–14, 136–37.

522. See *Nation in Brief*, Wash. Post, Feb. 2, 2002, at A26.

523. See Masters, *supra* note 510; Romero & Temple-Raston, *supra* note 212, at 140–41 (reporting that the government brought Spann's family to the courthouse).

524. See Brooke A. Masters, *Prosecutors Concede Limits of Their Case Against Lindh*, Wash. Post, Apr. 2, 2002, at A11.

525. *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); Docket Sheet, *supra* note 507; see Jackman, *supra* note 503; Kunkle, *supra* note 502; Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. Times, July 16, 2002; Romero & Temple-Raston, *supra* note 212, at 188.

526. *Lindh*, 227 F. Supp. 2d at 566; see Jackman, *supra* note 503; Lewis, *supra* note 525; Romero & Temple-Raston, *supra* note 212, at 188–89.

527. *Lindh*, 227 F. Supp. 2d at 571–72; Docket Sheet, *supra* note 507; see *Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 503; Romero & Temple-Raston, *supra* note 212, at 12, 189–90.

528. See *Apologetic Lindh*, *supra* note 527; Romero & Temple-Raston, *supra* note 212, at 189.

529. *Lindh*, 227 F. Supp. 2d at 572.

530. *United States v. Lindh*, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002).

531. *Id.* at 742.

532. *Id.* at n.2.

Judge Ellis granted the government's motion for a protective order.⁵³³

[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.⁵³⁴

Judge Ellis rejected the government's proposal that defense investigators and expert witnesses be pre-screened before information contained in the redacted reports could be disclosed to them.⁵³⁵ Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.⁵³⁶

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.⁵³⁷

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."⁵³⁸

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."⁵³⁹

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).

533. *Lindh*, 198 F. Supp. 2d at 744.

534. *Id.* at 742.

535. *Id.*

536. *Id.* at 742–43; *see id.* at 743 (noting that "defendant will be at liberty to disclose information from the redacted interview reports to investigators and expert witnesses who are not pre-screened by, or known to, the government").

537. *Id.* at 742–43.

538. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974184 (E.D. Va. May 6, 2002).

539. *Lindh*, 198 F. Supp. 2d at 743.

Challenge: Classified Evidence

In order to determine what evidence the government had to produce to the defendant, Judge Ellis had to review a substantial amount of classified material.⁵⁴⁰ It was stored in the court's Sensitive Compartmented Information Facility (SCIF).⁵⁴¹

Judge Ellis's career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.⁵⁴² The chambers has a rule requiring classified documents to be within eyesight at all times.⁵⁴³ Even a law clerk's brief trip outside chambers requires taking the classified documents securely along.⁵⁴⁴ But classified materials are *never* taken home.⁵⁴⁵

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.⁵⁴⁶ 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.⁵⁴⁷

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.⁵⁴⁸

Defense counsel submitted questions for each detainee to the firewall attorneys.⁵⁴⁹ The firewall attorneys could object to any questions, and the court would resolve any objections on sealed noticed filings.⁵⁵⁰ Approved questions were submitted to interrogators who interwove the questions into the interrogations.⁵⁵¹ Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.⁵⁵² Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.⁵⁵³

Judge Ellis monitored the procedure to ensure that it protected Lindh's rights to a defense.⁵⁵⁴

540. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

541. *Id.*; see Reagan, *supra* note 162, at 19 (describing SCIFs).

542. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

543. *Id.*

544. *Id.*

545. *Id.*

546. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1298601 at *1 (E.D. Va. May 30, 2002); see Masters, *supra* note 505; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

547. *Lindh*, 2002 WL 1298601 at *1–2; Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Masters, *supra* note 505.

548. *Lindh*, 2002 WL 1298601 at *1 & n.1.

549. *Id.* at *1.

550. *Id.*

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*; see Masters, *supra* note 505.

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.⁵⁵⁵ To protect the witness by shielding the witness's identity, the courtroom was outfitted with special draperies and screens.⁵⁵⁶ 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.⁵⁵⁷

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.⁵⁵⁸ 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.⁵⁵⁹

555. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; *see* Jackman, *supra* note 503; Lewis, *supra* note 525; Romero & Temple-Raston, *supra* note 212, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing).

556. 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 503; Lewis, *supra* note 525.

557. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

558. *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.

559. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

Actions for September 11 Damages
In re Terrorist Attacks on September 11, 2001
(Richard Conway Casey and George B. Daniels,
S.D.N.Y.) and In re September 11 Litigation and
related actions (Alvin K. Hellerstein, S.D.N.Y.)

Actions for damages resulting from the terrorist attacks on September 11, 2001, include a couple dozen actions against the terrorists and a few thousand actions against airlines, airport security companies, and property managers.

Actions Against the Terrorists

On September 4, 2002, 318 survivors of the September 11, 2001, attacks on the United States filed in the U.S. District Court for the Southern District of New York a 91-page civil complaint for damages resulting from the attacks.⁵⁶⁰ The plaintiffs were 44 persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.⁵⁶¹ The 141 defendants were (1) the “Al Qaeda Islamic Army” and 38 affiliated persons and entities, including Osama bin Laden; (2) the 19 deceased hijackers and Zacarias Moussaoui; (3) the Taliban and Muhammad Omar; (4) the Republic of Iraq and 15 affiliated persons and entities, including Saddam Hussein; and 64 “entities or individuals who provided financial or other support to Al Qaeda and its terrorist activities.”⁵⁶²

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.⁵⁶³ On September 10, the plaintiffs amended their complaint to include 300 estates and 51 individuals as plaintiffs.⁵⁶⁴ On the same day, four other actions were filed against similar defendants.⁵⁶⁵

560. Compl., *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 4, 2002) [hereinafter *Ashton Compl.*]; see 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.

561. *Ashton Compl.*, *supra* note 560.

562. *Id.*; *id.* at 29; see Coyle, *supra* note 560.

563. Docket Sheet, *Beyer v. Al Qaeda Islamic Army* No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); see Coyle, *supra* note 560; Kelley, *supra* note 560.

564. First Am. Compl., *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002).

565. Docket Sheet, *Bauer v. Al Qaeda Islamic Army*, No. 1:02-cv-7236 (S.D.N.Y. Sept. 10, 2002) (action by one individual and two estates); Docket Sheet, *Burlingame v. Bin Laden*, No. 1:02-cv-7230 (S.D.N.Y. Sept. 10, 2002) (action by 114 individuals and estates); Docket Sheet, *Mayore Estates, L.L.C. v. Al Qaeda Islamic Army*, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002) (action by the owners of a building across the street from the World Trade Center); Docket Sheet, *Schneider v. Al Qaeda Islamic Army*, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002) (action by 6 estates).

All six actions were consolidated before Judge Allen G. Schwartz in the Southern District of New York,⁵⁶⁶ and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.⁵⁶⁷ The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.⁵⁶⁸

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.⁵⁶⁹

On December 9, 2003, the Judicial Panel on Multidistrict Litigation joined the consolidated action with three other actions in the Southern District of New York⁵⁷⁰ and two actions in the District of Columbia,⁵⁷¹ creating *In re Terrorist Attacks on September 11, 2001*⁵⁷² in the U.S. District Court for the Southern District of New York.⁵⁷³

The first panel-added New York case was a class action filed on September 11, 2002, by three named plaintiffs against Osama bin Laden, Saddam Hussein, the Taliban, and 98 other defendants.⁵⁷⁴ The second New York case was filed on July 8, 2003, by an estate against the same 399 defendants as were named in the

566. Consolidation Order, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002).

567. Consolidated Master Compl., *id.* (Mar. 6, 2003) [hereinafter Consolidated *Ashton* Master Compl.].

568. Reassignment Notice, *id.* (Apr. 16, 2003). The action was reassigned to Judge George B. Daniels after Judge Casey's March 22, 2007, death. Reassignment Notice, *id.* (Apr. 17, 2007); *see* *Obit., Richard Conway Casey, 74, Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

Tim Reagan interviewed Owen Smith, Judge Casey's law clerk from June 2006 through the transition of Judge Casey's cases, by telephone on May 17, 2007, and in Mr. Smith's office on June 26, 2007.

569. Sixth Am. Consolidated Master Compl., *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Fifth Am. Consolidated Master Compl., *id.* (Sept. 20, 2004); Fourth Am. Consolidated Master Compl., *id.* (Mar. 10, 2004); Third Am. Consolidated Master Compl., *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 5, 2003); Second Am. Consolidated Master Compl., *id.* (Aug. 13, 2003); First Am. Consolidated Master Compl., *id.* (Aug. 1, 2003).

570. 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).

571. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), refiled as *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *Havlish v. Bin-Laden*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), refiled as *Havlish v. Bin-Laden*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 11, 2003); *see Seven Families Sue bin Laden and Others for Billions*, N.Y. Times, Feb. 20, 2002, at A11 (reporting on the original filing of *Havlish*).

572. Docket Sheet, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003).

573. *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); *see* Consolidation and Transfer Mot., *In re Terrorist Attacks on Sept. 11, 2001*, No. 1570 (J.P.M.L. dated Aug. 7, 2003), filed in *Havlish*, No. 1:02-cv-305 (D.D.C. Aug. 11, 2003).

574. Compl., *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); *see also* Am. Compl., *id.* (Aug. 22, 2003) (same parties).

consolidated master complaint in the first consolidated action.⁵⁷⁵ The third New York case also was filed on July 8, 2003—by four estates against 222 defendants similar to the list in the original complaint in the first-filed action of the original consolidation.⁵⁷⁶

The first panel-added District of Columbia case was a class action filed on February 19, 2002, by seven estates against 167 defendants: Osama bin Laden; the Taliban; the countries of Afghanistan, Iran, and Iraq; the 19 hijackers and Zacarias Moussaoui; and more than 100 persons and entities identified by the government as global terrorists.⁵⁷⁷ An amended complaint listed 85 plaintiff estates and 27 defendants, omitting the “global terrorists.”⁵⁷⁸

The second District of Columbia case was based on a complaint filed on August 15, 2002, against 100 alleged financial supporters of the terrorist attacks on September 11, 2001.⁵⁷⁹ Listed as plaintiffs were 407 named estates, 37 named individuals, 73 “Doe” estates (specific estates given pseudonyms), nine “Doe” individuals (specific individuals given pseudonyms), and 159 additional “Doe” plaintiffs (identified as John and Jane Doe 42 through 200).⁵⁸⁰ Ultimately the case had 4,779 listed plaintiffs and 205 defendants.⁵⁸¹ By the time this case had been in-

575. Compl., *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); see Consolidated *Ashton* Master Compl., *supra* note 567. The case was designated as related to the original consolidation and assigned to Judge Casey on Aug. 13, 2003. *Salvo* Docket Sheet, *supra* note 570.

576. Compl., *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003); see *Ashton* Compl., *supra* note 560. The case was designated as related to the original consolidation and assigned to Judge Casey on August 18, 2003. Assignment Notice, *York*, No. 1:03-cv-5493 (S.D.N.Y. Aug. 18, 2003); Docket Sheet, *id.* (July 8, 2003). The plaintiffs voluntarily dismissed this action as duplicative of the consolidation on March 22, 2004. Dismissal, *id.* (Mar. 22, 2004).

577. Class Action Compl., *Havlish*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002).

578. Second Am. Compl., *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Sept. 7, 2006), also filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 7, 2006); see Am. Compl., *Havlish*, No. 1:02-cv-305 (D.D.C. May 3, 2002) (listing 55 plaintiff estates and 20 defendants).

579. Compl., *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett* Compl.]; see Coyle, *supra* note 560.

580. D.D.C. *Burnett* Compl., *supra* note 579.

581. Pls.’ Addition of Parties, *id.* (Dec. 30, 2003) (adding two defendants); Pls.’ Addition and Removal of Parties, *id.* (Dec. 19, 2003) (adding 224 plaintiffs and removing eight plaintiffs and one defendant); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (Nov. 14, 2003, dismissal of two defendants); Pls.’ Fourth Addition and Removal of Defs., *Burnett*, No. 1:02-cv-1616 (D.D.C. Oct. 27, 2003) (removing one defendant); Pls.’ Addition and Removal of Parties, *id.* (Sept. 10, 2003) (adding 207 plaintiffs and removing three plaintiffs); Pls.’ Addition and Removal of Parties, *id.* (Sept. 5, 2003) (adding 489 plaintiffs and removing 11 plaintiffs); Pls.’ Third Addition and Removal of Defs., *id.* (Aug. 22, 2003) (removing six defendants); Pls.’ Addition and Removal of Parties, *id.* (Aug. 1, 2003) (adding 550 plaintiffs and removing one plaintiff); Pls.’ Second Addition and Removal of Parties, *id.* (May 23, 2003) (adding 375 plaintiffs and removing three plaintiffs); Pls.’ Second Addition and Removal of Defs., *id.* (May 2, 2003) (adding 27 defendants and removing one defendant); Pls.’ Addition and Removal of Parties, *id.* (Feb. 21, 2003) (adding 245 plaintiffs and nine defendants and removing seven plaintiffs and 11 defendants); Third Am. Compl., *id.* (Nov. 22, 2002) (listing as plaintiffs 1,785 named estates, 799 named individuals, 129 Doe estates, nine Doe individuals, and 5,000 additional Doe plaintiffs, and listing 189 defendants); Am. Compl., *id.* (Sept. 4, 2002); see Jennifer Senior, *A Nation unto Himself*, N.Y. Times, Mar. 14, 2004, at 636.

cluded in the multidistrict consolidation, its plaintiffs already had filed a similar complaint in the Southern District of New York,⁵⁸² which was added to the multidistrict consolidation as a tag-along case on March 10, 2004,⁵⁸³ and then voluntarily dismissed as duplicative on February 12, 2008.⁵⁸⁴

Also consolidated as tag-along cases were one case filed in the District of the District of Columbia and three cases filed in the Southern District of New York: (1) an action filed on August 20, 2003, by the estate and four survivors of the World Trade Center's chief of security against 73 defendants, including Iraq, al-Qaeda, and the 19 September 11 hijackers;⁵⁸⁵ (2) an action filed on September 10, 2003, by 29 insurance companies against al-Qaeda and 524 alleged supporters;⁵⁸⁶ (3) an action filed on September 10, 2003, by 28 estates and 27 individuals against the defendants listed in the original consolidation's third amended master complaint;⁵⁸⁷ and (4) an action filed on October 30, 2003, by three insurance companies against Saudi Arabia and Syria.⁵⁸⁸

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

582. Compl., *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); *see id.* at 265 (stating that the action "is commenced in this Court solely as a prophylactic measure to protect 9/11 victims whose rights have been threatened by certain New York workers' compensation insurance carriers and in the event that subject matter jurisdiction is lacking in the District of Columbia action"); *see also* Am. Compl., *id.* (Sept. 3, 2003).

583. Docket Sheet, *id.* (Aug. 1, 2003).

584. Notice of Voluntary Dismissal, *id.* (Feb. 12, 2008).

The New York action was filed as a jurisdictional precaution, but the complaint was never served. Status Conference, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 26, 2007) (representation by a plaintiff's attorney).

585. Compl., *O'Neill v. Republic of Iraq*, No. 1:03-cv-1766 (D.D.C. Aug. 20, 2003); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Jan. 27, 2004); *see also* First Consolidated Compl., *id.* (naming 109 defendants), filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Third Am. Compl., *O'Neill v. Republic of Iraq*, No. 1:04-cv-1076 (S.D.N.Y. June 7, 2005) (naming 108 defendants); Second Am. Compl., *id.* (Dec. 30, 2004) (naming 112 defendants); First Am. Compl., *id.* (Sept. 28, 2004) (naming 80 defendants); Docket Sheet, *id.* (Feb. 10, 2004) (noting multidistrict consolidation on Feb. 9, 2004).

It was reported that John O'Neill was an FBI expert on the terrorist plans of Osama bin Laden and al-Qaeda who was forced out of the FBI a few months before the September 11, 2006, attacks. *Frontline: The Man Who Knew* (PBS television broadcast Oct. 3, 2002).

586. Compl., *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on Mar. 10, 2004). At the time of consolidation, the complaint was amended to include 41 plaintiffs. First Am. Compl., *id.* (Mar. 10, 2004); *see also* *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765, 780 n.2 (S.D.N.Y. 2005) ("forty-one insurance companies that have paid and reserved claims in excess of \$4.5 billion as a result of the September 11 attacks").

587. Compl., *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on Mar. 10, 2004).

588. Docket Sheet, *Vigilant Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:03-cv-8591 (S.D.N.Y. Oct. 30, 2003) (noting multidistrict consolidation on Nov. 12, 2003, which appears to be an error).

March 10, 2004, against Saudi Arabia, Syria, and Sudan,⁵⁸⁹ and 38 alleged financial supporters of the September 11 terrorists.⁵⁹⁰ Another seven cases were filed in August and September of 2004: (1) on August 6, 2004, an insurance company filed an action against 495 defendants;⁵⁹¹ (2) on September 1, 2004, six insurance companies filed an action against 426 defendants;⁵⁹² (3) on September 2, 2004, Cantor Fitzgerald filed an action against 88 defendants;⁵⁹³ (4) on September 10, 2004, 10 insurance companies filed an action against Saudi Arabia and Syria;⁵⁹⁴ (5) on September 10, 2004, 10 World Trade Center businesses filed an action against 201 defendants;⁵⁹⁵ (6) on September 10, 2004, the World Trade Center property managers filed an action against 201 defendants;⁵⁹⁶ (7) on September 10, 2004, plaintiffs filed a complaint against Riggs Bank for failure to notice suspicious financial transactions that aided the September 11 terrorists, and they amended their complaint on March 24, 2005, to name 1,233 individuals and 1,117 estates as plaintiffs.⁵⁹⁷

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.⁵⁹⁸ On September 21, 2005,

589. Class Action Compl., *O'Neill v. Kingdom of Saudi Arabia*, No. 1:04-cv-1922 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Apr. 4, 2004); *see also* First Am. Compl., *id.*, filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

590. Class Action Compl., *O'Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Apr. 4, 2004); *see also* First Am. Compl., *id.* (naming 95 defendants), filed in *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

591. Compl., *New York Marine and Gen. Ins. Co. v. Al Qaida*, No. 1:04-cv-6105 (S.D.N.Y. Aug. 6, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004); *see also* Second Am. Compl., *id.* (Sept. 30, 2005) (listing 419 defendants); First Am. Compl., *id.* (Dec. 23, 2004) (listing 478 defendants).

592. Compl., *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004); *see also* Second Am. Compl., *id.* (420 defendants); First Am. Compl., *id.* (434 defendants); *see also* Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, *N.Y. Times*, Sept. 9, 2004, at B1.

593. Compl., *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004); *see also* Am. Compl., *id.* (Sept. 10, 2004).

594. Compl., *Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:04-cv-7216 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 21, 2004).

595. Compl., *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004).

596. Compl., *World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on Sept. 29, 2004).

597. Am. Compl., *Vadhan v. Riggs Nat'l Corp.*, No. 1:04-cv-7281 (S.D.N.Y. Mar. 24, 2005); *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting multidistrict consolidation on Oct. 15, 2004).

598. *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *see also* Order of Dismissal, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. May

Judge Casey dismissed additional Saudi royals and other defendants.⁵⁹⁹ The dismissals became final on January 10, 2006,⁶⁰⁰ and the plaintiffs appealed.⁶⁰¹

5, 2005) (applying the Jan. 18, 2005, ruling to dismiss all claims in all cases against the Kingdom of Saudi Arabia, members of its royal family, and the Al Rajhi Banking and Investment Corp.).

599. *In re Terrorist Attacks* on Sept. 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); see Mark Hamblett, *Saudi Charity Dropped from Suit over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

600. Judgment, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006); see *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2006 WL 708149 (S.D.N.Y. Mar. 20, 2006) (explaining that Judge Casey decided to certify appeals for defendants dismissed on Rule 12(b)(1) or 12(b)(2) grounds but not defendants dismissed on Rule 12(b)(6) grounds).

601. There were 18 appeals heard on Jan. 18, 2008, by Chief Circuit Judge Dennis Jacobs, Circuit Judge José A. Cabranes, and District Judge Eric N. Vitaliano of the Eastern District of New York, sitting by designation:

1. An appeal by plaintiffs in the original consolidation against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-319 (2d Cir. Jan. 23, 2006); see Notice of Appeal, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Jan. 11, 2006).
2. An appeal by plaintiffs in the second District of Columbia action against members of Saudi Arabia's royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-657 (2d Cir. Feb. 9, 2006); see Notice of Appeal, *Burnett*, No. 1:03-cv-9849 (S.D.N.Y. Feb. 2, 2006).
3. Seven appeals by insurance companies against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-477 (2d Cir. Jan. 30, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-458 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-453 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-442 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-436 (2d Cir. Jan. 27, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-487 (2d Cir. Jan. 25, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-321 (2d Cir. Jan. 24, 2006); see Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Saudi Arabia); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Mohamed); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against the Saudi High Commission); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Crown Prince Sultan); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Naif); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Turki); Notice of Appeal, *Federal Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Jan. 17, 2006) (appeal against Prince Salman).
4. An appeal by three insurance companies against Saudi Arabia: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-461 (2d Cir. Jan. 30, 2006); see Notice of Appeal, *Vigilant Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:03-cv-8591 (S.D.N.Y. Jan. 17, 2006).
5. Two appeals by survivors of the World Trade Center's security chief: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-398 (2d Cir. Jan. 25, 2006); Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-397 (2d Cir. Jan. 25, 2006); see Notice of Appeal, *O'Neill v. Kingdom of Saudi Arabia*, No. 1:04-cv-1922 (S.D.N.Y. Jan. 13, 2006) (appeal against Saudi Arabia); Notice of Appeal, *O'Neill v. Kingdom of*

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.⁶⁰²

Actions Against Domestic Defendants

Meanwhile the U.S. District Court for the Southern District of New York has been handling several thousand lawsuits against airlines, airport security companies, and property managers for damages resulting from the September 11, 2001, terrorist attacks and their aftermath.

On September 22, 2001, the President signed the Air Transportation Safety and System Stabilization Act.⁶⁰³ Title IV of the Act creates a “September 11th Victim Compensation Fund of 2001”⁶⁰⁴ to “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as

Saudi Arabia, No. 1:04-cv-1923 (S.D.N.Y. Jan. 13, 2006) (appeal against Prince Mohammed).

6. An appeal by an insurance company against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-693 (2d Cir. Feb. 13, 2006); *see* Notice of Appeal, *New York Marine & General Ins. Co. v. Al Qaida*, No. 1:04-cv-6105 (S.D.N.Y. Feb. 9, 2006).
7. An appeal by six insurance companies against members of Saudi Arabia’s royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-674 (2d Cir. Feb. 10, 2006); *see* Notice of Appeal, *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Feb. 8, 2006).
8. An appeal by Cantor Fitzgerald against Saudi Arabia and members of its royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-473 (2d Cir. Feb. 1, 2006); *see* Notice of Appeal, *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Jan. 27, 2006).
9. An appeal by other insurance companies against Saudi Arabia: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-348 (2d Cir. Jan. 25, 2006); *see* Notice of Appeal, *Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:04-cv-7216 (S.D.N.Y. Jan. 17, 2006).
10. An appeal by World Trade Center businesses against members of Saudi Arabia’s royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-702 (2d Cir. Feb. 14, 2006); *see* Notice of Appeal, *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Feb. 9, 2006).
11. An appeal by the World Trade Center property managers against members of Saudi Arabia’s royal family: Docket Sheet, *In re Terrorist Attacks* on Sept. 11, 2001, No. 06-700 (2d Cir. Feb. 9, 2006); *see* Notice of Appeal, *World Trade Ctr. Properties LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Feb. 9, 2006).

602. Reassignment Notice, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Apr. 17, 2007); *see* Obit., *supra* note 568.

Tim Reagan attended Judge Daniels’ first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

603. 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230; *see In re Sept. 11 Litig.*, 236 F.R.D. 164, 166 (S.D.N.Y. 2006); *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 279 (S.D.N.Y. 2003); *see* Jill Schachner Chanen & Margaret Graham Tebo, *Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

604. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 401, 115 Stat. 230.

a result of the terrorist-related aircraft crashes of September 11, 2001.”⁶⁰⁵ The Attorney General appointed Kenneth Feinberg as a special master to administer the fund.⁶⁰⁶ 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,⁶⁰⁷ and after promulgation of the regulations the deadline became December 22, 2003.⁶⁰⁸ The Act required plaintiffs to elect either recovery from the fund or recovery by civil action.⁶⁰⁹ The Act also established exclusive jurisdiction in the Southern District of New York for civil actions,⁶¹⁰ except for actions against the terrorists and their supporters.⁶¹¹

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.⁶¹² The court assigned the case to Judge Alvin K. Hellerstein.⁶¹³

605. *Id.* § 403; see *United States v. Moussaoui*, 483 F.3d 220, 225 n.4 (4th Cir. 2007); *Schneider v. Feinberg*, 345 F.3d 135, 138–39 (2d Cir. 2003); *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *Colaio*, 262 F. Supp. 2d at 278–79.

606. *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 603, 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 603, at 59.

607. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(a)(3), 115 Stat. 230; see *Schneider*, 345 F.3d at 139.

608. 28 C.F.R. § 104.62; see *Colaio*, 262 F. Supp. 2d at 278–79, 281; see also 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 407, 115 Stat. 230 (providing for promulgation of implementing regulations no later than 90 days after enactment of the Act); Hartocollis, *supra* note 606.

609. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(c)(3)(B), 115 Stat. 230; see *Schneider*, 345 F.3d at 139; *Colaio*, 262 F. Supp. 2d at 279; see also Hartocollis, *supra* note 606 (describing parents of an 11-year-old girl killed when American Flight 77 struck the Pentagon as having “to choose between what they perceived as a minimal award from a federal fund set up to compensate victims or calling one of the many lawyers who had sent what [the mother] calls ‘advertising packages’ and filing a lawsuit.”).

610. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230; see *Moussaoui*, 483 F.3d at 225 n.4; *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004); *Colaio*, 262 F. Supp. 2d at 279; Chanen & Tebo, *supra* note 603, at 59.

611. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(c), 115 Stat. 230; see also *id.*, Pub. L. No. 107-71, 115 Stat. 646 (also exempting from exclusive jurisdiction “civil actions to recover collateral source obligations”).

612. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001).

613. *Id.*; see Hartocollis, *supra* note 606.

For this report, Tim Reagan interviewed Judge Hellerstein and his law clerk Brian Sutherland in the judge’s chambers on June 25, 2007, and interviewed Judge Hellerstein at a district judges’ workshop in Redondo Beach, California, on March 12, 2008.

During the first six months of 2002, 12 additional actions were filed by estates of passengers,⁶¹⁴ estates of workers in the World Trade Center,⁶¹⁵ and operators of businesses in the World Trade Center⁶¹⁶ against the airlines that operated the hijacked flights⁶¹⁷ and the companies providing security for their departures.⁶¹⁸

614. Docket Sheet, *Miller v. American Airlines, Inc.*, No. 1:02-cv-3676 (S.D.N.Y. May 14, 2002) (action by the estate of American Flight 11 passenger David Angell, a television screenwriter, against American Airlines and Globe Aviation Services); Docket Sheet, *Koutny v. United Airlines, Inc.*, No. 1:02-cv-2802 (S.D.N.Y. Apr. 12, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *Miller v. United Airlines, Inc.*, No. 1:02-cv-1728 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security); Docket Sheet, *Sweeney v. United Airlines, Inc.*, No. 1:02-cv-1727 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *Lopez v. United Airlines, Inc.*, No. 1:02-cv-458 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA); Docket Sheet, *O'Hare v. United Airlines, Inc.*, No. 1:02-cv-456 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security); Docket Sheet, *Doe v. American Airlines, Inc.*, No. 1:02-cv-454 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, voluntarily dismissed on Mar. 28, 2002); Docket Sheet, *Debeuneure v. American Airlines, Inc.*, No. 1:02-cv-452 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, dismissed as settled on May 16, 2006).

615. Docket Sheet, *Pitt v. American Airlines, Inc.*, No. 1:02-cv-4365 (S.D.N.Y. June 11, 2002) (action by the estate of an employee of Cantor Fitzgerald in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Dec. 31, 2003); Docket Sheet, *Smithwick v. American Airlines, Inc.*, No. 1:02-cv-2669 (S.D.N.Y. Apr. 8, 2002) (action by the estate of a worker in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Dec. 20, 2002).

616. Docket Sheet, *Tower Computer Servs., Inc. v. American Airlines, Inc.*, No. 1:02-cv-3295 (S.D.N.Y. Apr. 30, 2002) (action by the operators of a business in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on Nov. 5, 2004); Docket Sheet, *World Trade Farmers v. United Air Lines, Inc.*, No. 1:02-cv-2987 (S.D.N.Y. Apr. 18, 2002) (action by the operators of a business at the World Trade Center against United Airlines, American Airlines, Globe Aviation Services, and Huntleigh USA).

617. 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).

618. Argenbright Security provided security for United Airlines at Dulles International Airport, near Washington, D.C., which affected American Flight 77, and at Newark International Airport, which affected United Flight 93. The 9/11 Commission Report 3–4 (2004). Globe Aviation Services provided security for American Airlines at Logan International Airport in Boston, which affected American Flight 11, and Huntleigh USA provided security for United Airlines at Logan International Airport in Boston, which affected United Flight 175. The 9/11 Commission Report 2 (2004).

Damages for passengers in international travel are specified by the Warsaw Convention, which entitles their survivors to a minimum of 100,000 “special drawing rights” (equivalent to \$153,078 on July 30, 2007) and an opportunity to prove additional damages if the airline cannot prove it took all reasonable measures to prevent the incident. *In re Sept. 11 Litig.*, 500 F. Supp. 2d 356 (S.D.N.Y. 2007).

On June 20, 2002, the government initiated a motion to intervene to ensure that transportation “sensitive security information” (SSI) would be protected in these lawsuits.⁶¹⁹ The court granted the government’s motion and ordered the cases consolidated.⁶²⁰

Over the next four months (July through October 2002), 120 additional cases were filed.⁶²¹ On November 1, 2002, Judge Hellerstein ordered the consolidation of “all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the [Air Transportation Safety and System Stabilization Act] against any defendant (including defendants airlines and airline security companies), except for alleged hijackers or terrorists” and established a master docket case entitled *In re September 11 Litigation*.⁶²²

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.⁶²³ After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.⁶²⁴

The plaintiffs filed five master complaints on December 11, 2002—four pertaining to personal injuries arising from the crash of each plane and one pertaining

619. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (docket entry 10, dated June 26, 2002).

620. Order, *Mariani*, No. 1:01-cv-11628 (S.D.N.Y. July 25, 2002); see Benjamin Weiser, *Ruling Favors Limited Access to 9/11 Data*, N.Y. Times, July 13, 2002, at B1; Benjamin Weiser, *Security Cited in Proposals on Lawsuits from Sept. 11*, N.Y. Times, Sept. 20, 2002, at B5.

621. 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.

622. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); see Docket Sheet, *id.*; see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167, 168 n.3 (S.D.N.Y. 2006).

623. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Dec. 2, 2003); Order, *id.* (Nov. 21, 2003); Order, *id.* (July 23, 2003); Order, *Mulligan v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6885 (S.D.N.Y. Sept. 6, 2002); *In re Sept. 11 Litig.*, 236 F.R.D. at 166–67; see Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. Times, Sept. 4, 2002, at B3.

624. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Feb. 20, 2004).

Subsequently the court resolved the suspense docket for cleanup and aftermath cases. Order, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Mar. 15, 2004); Corrective Order, *id.* (Mar. 3, 2004).

to property damage and business interruption.⁶²⁵ Both the court and the plaintiffs' executive committee established publicly accessible Internet webpages to post information about the litigation and selected court filings.⁶²⁶

By February 11, 2003, an additional 38 cases had been filed.⁶²⁷ 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.⁶²⁸ Cases in the first group remained part of the original master docket, and cases in the second group were assigned to a new master docket case entitled *In re World Trade Center Disaster Site Litigation*.⁶²⁹

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.⁶³⁰ Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.⁶³¹

625. Docket Sheet, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); see Fourth Am. Compl., *id.* (Sept. 14, 2007) (concerning American Flight 11 from Boston to Los Angeles, which crashed into One World Trade Center); Fourth Am. Compl. *id.* (Aug. 1, 2007) (concerning American Flight 77 from Dulles to Los Angeles, which crashed into the Pentagon); Third Am. Compl., *id.* (Aug. 1, 2007) (concerning United Flight 93 from Newark to San Francisco, which crashed in Pennsylvania); Fourth Am. Compl., *id.* (Sept. 14, 2007) (concerning United Flight 175 from Boston to Los Angeles, which crashed into Two World Trade Center); Fourth Am. Compl., *id.* (Jan. 18, 2005) (concerning property injuries).

626. See <http://www.nysd.uscourts.gov/sept11litigation.htm> (the court's website); <http://www.sept11tortlitigation.com/index.html> (the plaintiffs' website).

627. 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.

628. Case Management Order, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

629. See Docket Sheet, *In re World Trade Ctr.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 168 n.3 (S.D.N.Y. 2006).

Judge Hellerstein denied the government defendants' motions to dismiss on immunity grounds, *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006), and ruled that this denial was not appealable, *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134 (S.D.N.Y. 2007), but the court of appeals agreed to stay the litigation pending appeal, Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 07-185 (2d Cir. Mar. 9, 2007) (also dismissing a mandamus motion as moot); see Docket Sheet, *In re World Trade Ctr. Disaster Site Litig.*, No. 06-5324 (noting that oral arguments were heard on Oct. 1, 2007, before Circuit Judges Sonia Sotomayor, Richard C. Wesley, and Jon O. Newman). After oral arguments, the court of appeals lifted the stay, but the appeal remains pending. *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167 (2d Cir. 2007).

630. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

631. *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004).

Judge Hellerstein ruled that World Trade Center liability insurance policies did not include defense costs, except for one policy that would come into effect once \$265 million in damages had

By the end of June 2003, another 13 cases had been filed; eight of these were consolidated in the cleanup master docket,⁶³² and the other five were consolidated in the attacks master docket.⁶³³

Cleanup cases were filed in state court against the City of New York, the Port Authority of New York and New Jersey, or both, and were removed to federal court.⁶³⁴ The Southern District of New York's exclusive jurisdiction applies to suits for damages "resulting from or relating to" the terrorist attacks.⁶³⁵ Judge Hellerstein determined that with respect to actions in New York, his court's exclusive jurisdiction applied to injuries at the World Trade Center site from the time of the crashes on September 11, 2001, until the search for survivors ceased on September 29, 2001.⁶³⁶ 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.⁶³⁷

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.⁶³⁸ Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands to state court are not reviewable.⁶³⁹ But the appellate court reviewed some plaintiffs' cross-appeals of Judge Hellerstein's denials of their remand motions and affirmed.⁶⁴⁰ The court noted that its reasoning implied that the remands were improper, be-

been paid. *In re* Sept. 11th Liab. Ins. Coverage Cases, 458 F. Supp. 2d 104 (S.D.N.Y. 2006). Judge Hellerstein resolved this part of the litigation by sanctioning insurance companies \$1,250,000 for denying coverage and by dismissing the action. *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (sanctions); Judgment, *Zurich American Ins. Co.*, No. 1:03-cv-332 (S.D.N.Y. July 23, 2007); Order, *id.* (Jan. 18, 2007) (dismissal). Appeals are pending. Notices of Appeal, *Zurich American Ins. Co.*, No. 1:03-cv-332 (S.D.N.Y. Feb. 13, 23 & 28 & Mar. 6, 2007).

632. 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.

633. The cases were assigned the following docket numbers: 03-cv-1016, 03-cv-1040, 03-cv-2004, 03-cv-2104, 03-cv-2621, 03-cv-2622, 03-cv-2684, and 03-cv-3999.

634. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003).

635. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230.

636. *In re* World Trade Ctr., 270 F. Supp. 2d at 361, 380–85.

Judge Hellerstein previously remanded two cleanup cases that were never consolidated with the other September 11 damages cases described here. *Spagnuolo v. Port Auth. of N.Y. & N.J.*, 245 F. Supp. 2d 519 (S.D.N.Y. 2003) (remanding *Spagnuolo v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6360 (S.D.N.Y. Aug. 9, 2002)); *Graybill v. City of New York*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding *Graybill v. City of New York*, No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); see *In re* World Trade Ctr., 270 F. Supp. 2d at 365.

637. *In re* World Trade Ctr., 270 F. Supp. 2d at 361, 380–85.

638. *Id.* at 380–81.

639. *In re* WTC Disaster Site, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005); see 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."); see also *id.* § 1443 (providing for removal of certain civil rights cases).

640. *In re* WTC Disaster Site, 414 F.3d at 357, 371–81.

cause Judge Hellerstein's temporal and geographic distinctions had no basis in the Act.⁶⁴¹ 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.⁶⁴² So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.⁶⁴³

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*.⁶⁴⁴ The court created a fourth master docket case called *In re World Trade Center Lower Manhattan Disaster Site Litigation* on August 9, 2005, for claimed injuries outside the immediate World Trade Center area.⁶⁴⁵

In time, several 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)*.⁶⁴⁶

By July 2007, of the 95 actions included in the original master docket, 53 had settled and one was dismissed.⁶⁴⁷ Judge Hellerstein limited attorney fees, at least

641. *Id.* at 380–81 ("we have noted our agreement with cross-appellants' contention that there was no appropriate basis for the district court's conclusion that their claims should be retained while those of plaintiffs who asserted claims of respiratory injury suffered at sites other than the World Trade Center site or after Sept. 29, 2001, were to be remanded."); see Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

642. *In re WTC Disaster Site*, 414 F.3d at 381.

643. 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).

644. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 14, 2005); see Docket Sheet, *id.* (Mar. 21, 2005); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167 n.1, 168 n.3 (S.D.N.Y. 2006).

On March 14, 2007, the U.S. Court of Appeals for the Fourth Circuit ruled that a different district court hearing the case of *United States v. Moussaoui*, see *supra*, "Twentieth Hijacker," did not have the power to grant the plaintiffs in these cases access to discovery produced to a criminal defendant in the other court. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007).

645. Case Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Aug. 8, 2005); see Master Compl., *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. June 11, 2007); Docket Sheet, *id.* (Aug. 9, 2005); see also *In re Sept. 11 Litig.*, 236 F.R.D. at 168 n.3.

646. Case Management Order, *In re Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-103 (S.D.N.Y. Mar. 28, 2007); see Docket Sheet, *Id.* (Mar. 28, 2007).

647. *In re Sept. 11 Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); see Hartocollis, *supra* note 606.

among those cases settling during early phases, to 15% of settlement.⁶⁴⁸ 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.⁶⁴⁹ Judge Hellerstein believed that this would help the plaintiffs and defendants in all of the remaining cases assess the value of their claims.⁶⁵⁰ But all six cases settled before damages trials were held.⁶⁵¹

Challenge: Service of Process on International Terrorists

Plaintiffs in the actions against terrorists were faced with unusual service difficulties. Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.⁶⁵²

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.⁶⁵³ The court agreed.⁶⁵⁴

The plaintiffs proposed that the government serve process on defendants in their custody.⁶⁵⁵ The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.⁶⁵⁶ 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

648. *E.g.*, Order Concerning Settlement, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. Aug. 9, 2007), available at 2007 WL 2298352; Order Concerning Settlement, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. June 29, 2007); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

649. Opinion, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), available at 2007 WL 1965559; Order, *id.* (July 2, 2007).

650. Opinion at 4, *id.* (July 5, 2007), available at 2007 WL 1965559; Interview with Hon. Alvin K. Hellerstein, June 25, 2007; *see* Hartocollis, *supra* note 606 (reporting that, "The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.").

651. Settlement Order, *Wilson v. American Airlines*, No. 2:03-cv-6968 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Shontere v. AMR Corp.*, No. 2:03-cv-6966 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Ambrose v. American Airlines*, No. 1:02-cv-7150 (S.D.N.Y. Nov. 1, 2007); Settlement Order, *Driscoll v. Argenbright Security, Inc.*, No. 1:02-cv-7912 (S.D.N.Y. Sept. 17, 2007); Settlement Order, *Carstanjen v. UAL Corp.*, No. 1:02-cv-7153 (S.D.N.Y. Sept. 17, 2007); Settlement Order, *O'Hare v. United Airlines*, No. 1:02-cv-456 (S.D.N.Y. Sept. 17, 2007).

After most of the cases in the original master docket had settled, Judge Hellerstein closed the original master docket and transferred the remaining cases to the master docket for property damage cases. Order Transferring Cases, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. Mar. 19, 2008); Interview with Hon. Alvin K. Hellerstein, Mar. 12, 2008.

652. *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570, 2004 WL 1348996 (S.D.N.Y. June 14, 2004).

One process server was killed trying to serve process in Saudi Arabia. Interview with Owen Smith, law clerk to Hon. Richard Conway Casey, May 17, 2007.

653. *In re* Terrorist Attacks, No. 1:03-md-1570, 2004 WL 1348996, at *2.

654. *Id.*

655. *Id.*

656. *Id.*

had in custody those defendants it had not publicly acknowledged holding.⁶⁵⁷ The court ruled that service by publication would be effective for those individuals whom the government did not serve.⁶⁵⁸

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.⁶⁵⁹ 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.⁶⁶⁰

Challenge: Discovery of Sensitive Security Information

Litigation claiming inadequate security required discovery concerning security procedures. But the government decided that the Transportation Security Administration (TSA) should screen discovery for “sensitive security information” (SSI), which is secret information related to transportation security.⁶⁶¹ This slowed substantially the progress of the litigation.⁶⁶²

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.⁶⁶³ It took the TSA two years to screen the discovery.⁶⁶⁴ The plaintiffs noticed depositions of the defendants for April 2006.⁶⁶⁵ TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.⁶⁶⁶ 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.⁶⁶⁷ Judge Hellerstein was sympathetic to the defendants’ position.

Given the uncertainty of what is properly classifiable as SSI, and TSA’s own changes of attitudes regarding prior classifications, the task of objecting and instructing is beyond the jurisdictional competence of defense counsel, particularly in light of the client’s interests in fully responding to proper questions. Thus, the only lawyers who have the obliga-

657. *Id.* at *1–*3. The government acknowledged custody of 10 of the 23 defendants who the plaintiffs claimed were in the government’s custody. *Id.* at *2.

658. *Id.* at *2–*3.

659. *Id.* at *3.

660. *Id.* at *3 & n.2.

661. Regulations provide the following definition:

SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

49 C.F.R. § 1520.5(a); see *In re Sept. 11 Litig.*, 236 F.R.D. 164, 169 (S.D.N.Y. 2006).

662. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

663. *In re Sept. 11 Litig.*, 236 F.R.D. at 167.

664. *Id.*

665. *Id.* at 169.

666. *Id.* at 165–66, 169.

667. *Id.* at 166, 169.

tion 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.⁶⁶⁸

Judge Hellerstein ruled that the depositions be conducted with only cleared counsel and witnesses present, that TSA be granted 30 days to redact the transcript, and that the original be filed under seal.⁶⁶⁹ 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."⁶⁷⁰ 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."⁶⁷¹ So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.⁶⁷²

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.⁶⁷³ So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.⁶⁷⁴ 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 2006.⁶⁷⁵

668. *Id.* at 173.

669. *Id.* at 173–74.

670 *In re* Sept. 11 Litig., 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

671. *Id.* at 410.

672. *Id.*

673. Order, *In re* Sept. 11 Litig., No. 1:21-mc-97, at 1 (S.D.N.Y. June 5, 2006).

674. *Id.* at 1–2.

675. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

Lackawanna Terrorists

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.⁶⁷⁶ The men, who were all American citizens, were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.⁶⁷⁷ The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.⁶⁷⁸ 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.⁶⁷⁹

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.⁶⁸⁰ Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.⁶⁸¹ In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yassein Taher, Mukhtar al-Bakri, Shafel Mosed, and Faysal Galab.⁶⁸²

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.⁶⁸³ The sermon, and Derwish's encouragement, persuaded the "Lackawanna Six" to travel to Afghanistan to train for jihad.⁶⁸⁴ They told their families and friends, however, that they would go to Pakistan for religious study.⁶⁸⁵

676. See *Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) [hereinafter *Sleeper Cell*]; Michael Powell, *No Choice but Guilty*, Wash. Post, July 29, 2003, at A1; Matthew Purdy & Lowell Bergman, *Where the Trail Led*, N.Y. Times, Oct. 12, 2003, at 11; Temple-Raston, *supra* note 132, at 153.

677. See *United States v. Goba*, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Sleeper Cell*, *supra* note 676; Powell, *supra* note 676; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, N.Y. Times, May 20, 2003, at A17; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 4.

678. See *Sleeper Cell*, *supra* note 676; Powell, *supra* note 676; Purdy & Bergman, *supra* note 676.

679. See Powell, *supra* note 676; Purdy, *supra* note 677; Purdy & Bergman, *supra* note 676; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. Times, Oct. 22, 2002, at A19.

680. See *Sleeper Cell*, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 31–32, 44–46.

681. See Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 37.

682. See Temple-Raston, *supra* note 132, at 44–45.

683. See Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 81–87.

684. See *Sleeper Cell*, *supra* note 676; Temple-Raston, *supra* note 132, at 88–89.

685. See *Sleeper Cell*, *supra* note 676; Powell, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 89.

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28, 2001.⁶⁸⁶ Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.⁶⁸⁷ 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.⁶⁸⁸ Shortly after arriving, however, the men began to look for opportunities to leave.⁶⁸⁹

Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June 2001; Goba returned in August.⁶⁹⁰

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.⁶⁹¹ Bahraini authorities arrested him from his wedding bed on September 9, 2002.⁶⁹² The other five men were arrested back home on September 13 and 14, on a criminal complaint for material support of terrorism.⁶⁹³

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 16.⁶⁹⁴ 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.⁶⁹⁵

All pretrial matters in criminal cases are referred to magistrate judges in this district.⁶⁹⁶ On September 18 through 20, Judge Schroeder held a detention hearing

686. *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 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 94.

687. *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 676; Powell, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 94.

688. *See* Powell, *supra* note 676; Temple-Raston, *supra* note 132, at 88–89, 99–109.

689. *See* *Sleeper Cell*, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 110–25.

690. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; *see id.* at 211; *Sleeper Cell*, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 129.

691. *See* Temple-Raston, *supra* note 132, at 7.

692. *See* *Sleeper Cell*, *supra* note 676; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Purdy & Bergman, *supra* note 676; Santora, *supra* note 679; Temple-Raston, *supra* note 132, at 1, 3, 154, 205.

693. *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 676; Powell, *supra* note 676; Santora, *supra* note 679; Temple-Raston, *supra* note 132, at 160–61.

694. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 693.

Tim Reagan interviewed Judge Schroeder for this report in the judge's chambers on October 31, 2007.

695. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 693; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

696. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

in the court's large ceremonial courtroom.⁶⁹⁷ 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.⁶⁹⁸ Public picketers also occupied space in the plaza and around the courthouse; a popular picket read, "Jail, No Bail."⁶⁹⁹ Judge Schroeder strove to provide the government and the defendants with a fair and peaceful hearing, mindful that the world was watching how we treated criminal defendants.⁷⁰⁰ Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.⁷⁰¹

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.⁷⁰² Told that supporters were willing to post \$600,000 bond per defendant, Judge Schroeder set Alwan's bail at \$600,000.⁷⁰³ But Alwan was unable to post such an amount after all, so he remained detained.⁷⁰⁴

The six men were indicted on October 21.⁷⁰⁵ The court assigned the case to District Judge William M. Skretny for trial.⁷⁰⁶

A significant obstacle to the men's defense was the government's refusal, for national-security reasons, to allow them to seek interviews with Derwish and al-Dosari.⁷⁰⁷ This matter, however, was not presented to the court.⁷⁰⁸

697. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 693; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

698. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

699. *Id.*

700. *Id.*

701. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 693; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

702. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 693; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

703. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 693; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

704. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

705. *Goba*, 240 F. Supp. 2d at 244; *see Purdy & Bergman*, *supra* note 676; Santora, *supra* note 679; Temple-Raston, *supra* note 132, at 193.

706. *Goba* Docket Sheet, *supra* note 693.

Tim Reagan interviewed Judge Skretny for this report in Judge Schroeder's chambers on October 31, 2007, following a private interview with Judge Schroeder.

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002. Docket Sheet, *United States v. Elbaneh*, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002). He traveled to Yemen instead of returning from Afghanistan and became one of the FBI's 26 most-wanted terrorism suspects. *See Sleeper Cell*, *supra* note 676; Temple-Raston, *supra* note 132, 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*]. He was surrendered to Yemeni authorities in May 2007, who agreed not to extradite him to the U.S. *See Temple-Raston*, *supra* note 132, at 254; *U.S. Fugitive*, *supra*; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

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.⁷⁰⁹ Galab, the first to plead, was sentenced to the shortest term—seven years.⁷¹⁰ Mosed and Taher each were sentenced to eight years; Alwan was sentenced to nine and one-half years.⁷¹¹ Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.⁷¹² As a reward for subsequent assistance in other prosecutions, Goba's sentence was reduced to nine years.⁷¹³

It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.⁷¹⁴

Derwish apparently was killed on November 3, 2002, in a U.S. military action in Yemen.⁷¹⁵ Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.⁷¹⁶ He attempted suicide four times while there.⁷¹⁷ The government released him to Saudi Arabia on July 16, 2007.⁷¹⁸

707. See Temple-Raston, *supra* note 132, at 189, 193.

708. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

709. Goba Docket Sheet, *supra* note 693; see Temple-Raston, *supra* note 132, at 198–205.

710. Goba Docket Sheet, *supra* note 693; see David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 132, at 198–99.

711. Goba Docket Sheet, *supra* note 693; see David Staba, *Last in Group Gets Sentence for Aiding Al Qaeda*, N.Y. Times, Dec. 18, 2003, at A41 (reporting a sentence of nine and one-half years for Alwan); David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. Times, Dec. 10, 2003, at A28 (reporting a sentence of eight years for Mosed); David Staba, *Qaeda Trainee Is Sentenced to 8-Year Term*, N.Y. Times, Dec. 5, 2003, at A32 [hereinafter *Qaeda Trainee*] (reporting a sentence of eight years for Taher); Temple-Raston, *supra* note 132, at 199.

712. Sentence Reduction Order at 1, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Dec. 14, 2007); Goba Docket Sheet, *supra* note 693; see United States v. Goba, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); Purdy & Bergman, *supra* note 676 (reporting that Goba and al-Bakri were the only two who finished training); David Staba, *Judge Questions Sentence in al Qaeda Case*, N.Y. Times, Dec. 11, 2003, at A37 (reporting a sentence of ten years for Goba); Staba, *Qaeda Trainee*, *supra* note 711 (reporting a sentence of ten years for al-Bakri); Temple-Raston, *supra* note 132, at 199.

Al-Bakri was the last to plead. See Purdy, *Sixth Man Pleads*, *supra* note 677.

713. Amended Judgment, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Jan. 3, 2008); Sentence Reduction Order, *supra* note 712; see Order, *id.* (Jan. 7, 2008) (denying Goba's motion for a further reduction of sentence).

714. Powell, *supra* note 676 (“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 132, at 200 (“The threat was unspoken . . .”).

715. See Sleeper Cell, *supra* note 676; Powell, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 195–98, 249–50, 252.

716. See Sleeper Cell, *supra* note 676; Powell, *supra* note 676; Purdy & Bergman, *supra* note 676; Temple-Raston, *supra* note 132, at 139–40, 148.

717. See Temple-Raston, *supra* note 132, at 247–49.

718. See *id.* at 252.

Challenge: Classified Evidence

As a precaution in case Judge Schroeder was called upon to review classified evidence, security officers discreetly performed a background check on him.⁷¹⁹ Article III judges are automatically cleared to see classified evidence, but magistrate judges are not.⁷²⁰

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.⁷²¹ Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.⁷²²

Challenge: Court Security

For this high-profile terrorism prosecution, the marshals established extra security at the courthouse doors.⁷²³ The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.⁷²⁴ During the days of pleas and sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.⁷²⁵

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.⁷²⁶ But the defendants' pleas before Judge Skretny were taken by affirmation.⁷²⁷

719. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

720. 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.

721. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

722. *Id.*

723. Interview with Hon. William M. Skretny, Oct. 31, 2007.

724. *Id.*; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

725. Interview with Hon. William M. Skretny, Oct. 31, 2007.

726. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

727. 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.)⁷²⁸

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding al-Qaeda.⁷²⁹ Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.⁷³⁰

Abu Ali, whose parents are Jordanian, was born in Houston, Texas, and raised in Falls Church, Virginia.⁷³¹ 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.⁷³² In 2002, he went to Saudi Arabia to attend the University of Medina.⁷³³ He reportedly had significant contacts with al-Qaeda.⁷³⁴ He was arrested in Saudi Arabia on June 8, 2003, as part of an investigation of the May 2003 Riyadh bombings.⁷³⁵ He was held in Saudi Arabia until February 21, 2005, when he was transported back to the United States following a February 3 indictment for conspiracy to establish terrorist operations.⁷³⁶ The indictment later was expanded to include conspiracy to kill the President.⁷³⁷ Although sentencing guidelines would dictate a life sentence, the

728. The appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

729. Sentencing Order at 1 & n.1, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006); see Caryle Murphy, *Man Given 30 Years in Plot Against Bush*, Wash. Post, Mar. 30, 2006, at A3; David Stout, *American Is Sentenced to 30 Years in Terror Case*, N.Y. Times, Mar. 30, 2006, at A18.

730. 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 729; Stout, *supra* note 729; see also Gerald Bruce Lee, *United States v. Abu Ali: Juror 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.

731. Sentencing Order, *supra* note 729; see Paul Bradley, *Prosecutors Say Terror Suspect Lied*, Rich. Times-Dispatch, Feb. 24, 2005, at A5; Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32; Murphy, *supra* note 729; Stout, *supra* note 729.

Abu Ali's father is a computer analyst for Saudi Arabia's embassy. See Isikoff, *supra*.

732. Sentencing Order, *supra* note 729, 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.

733. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005); Sentencing Order, *supra* note 729, at 12; see Meyer, *supra* note 732; Stout, *supra* note 729.

734. Isikoff, *supra* note 731; Mowbray, *supra* note 732.

735. *Abu Ali*, 395 F. Supp. 2d at 341, 344, 367, 384; see Bradley, *supra* note 731; Isikoff, *supra* note 731; Murphy, *supra* note 729; Stout, *supra* note 729.

736. *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 731; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 729.

737. *Abu Ali*, 396 F. Supp. 2d at 704.

court sentenced him on March 29, 2006, to 30 years in prison followed by 30 years of supervised release.⁷³⁸ Appeals were heard on June 21, 2007.⁷³⁹

Abu Ali argued unsuccessfully that he was tortured while held in Saudi Arabia, resulting in an inadmissible confession.⁷⁴⁰

Challenge: Examination of Foreign Witnesses and Witness Security

To decide whether Abu Ali's confession should be suppressed, Judge Lee arranged for seven days of video depositions of the prison guards in Saudi Arabia.⁷⁴¹ Because the identities of prison guards in Saudi Arabia are secret,⁷⁴² the Saudi government would not permit the guards to come to the United States to testify.⁷⁴³ There also is the risk that dangerous groups in Saudi Arabia would object to the guards' cooperation with an American prosecution.⁷⁴⁴

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.⁷⁴⁵ A live video feed was established between Saudi Arabia and the U.S., and the judge, additional counsel for both sides, and the court reporter were in Alexandria.⁷⁴⁶ 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.⁷⁴⁷

738. Sentencing Order, *supra* note 729; *see* Stout, *supra* note 729.

It was reported that Abu Ali was sent to the "Super Max" prison in Florence, Colorado. Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to "Superjail,"* London Times, June 20, 2006, at 8.

739. Docket Sheet, United States v. Abu Ali, No. 06-4521 (4th Cir. May 22, 2006) (appeal by the government); Docket Sheet, United States v. Abu Ali, No. 06-4334 (4th Cir. Apr. 10, 2006) (appeal by the defendant); *see* Larry O'Dell, *Torture Alleged in Bush-Plot Case*, Rich. Times-Dispatch, June 24, 2007, at B3.

740. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; *see* Bradley, *supra* note 731; Isikoff, *supra* note 731; Markon & Priest, *supra* note 736; Meyer, *supra* note 732; Murphy, *supra* note 729.

Portions of the confession can be viewed on MSNBC's website: <http://www.msnbc.msn.com/id/10266654/> (click on "launch").

741. *Abu Ali*, 395 F. Supp. 2d at 344; Order at 2, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005) [hereinafter E.D. Va. Sept. 16, 2005, Order]; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* David H. Laufman, *Terror Trials Work*, L. Times, Nov. 5, 2007, at 58 (op-ed by a prosecuting attorney in the case) ("for the first time, the Saudi government permitted Saudi security officers (including a general) to testify in an American criminal proceeding and to face rigorous cross-examination by defense attorneys—even though the officers would have to answer questions about Saudi interrogation methods said to violate international human rights standards").

742. E.D. Va. Sept. 16, 2005, Order, *supra* note 741; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006. The Saudi domestic security service is called the *Mabahith*. E.D. Va. Sept. 16, 2005, Order, *supra*.

743. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 741, at 2.

744. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 741, at 5.

745. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

746. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

747. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

Portions of the deposition were put into evidence at a suppression hearing, in addition to live testimony from FBI agents (who had interviewed the guards when Abu Ali was transported from Saudi Arabia to the United States), expert witnesses, and other percipient witnesses.⁷⁴⁸ The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.⁷⁴⁹ So the split-screen video deposition evidence was played to the jury as well.⁷⁵⁰

Saudi guards testified pseudonymously.⁷⁵¹ 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.⁷⁵²

Taking the video depositions of foreign witnesses was challenging for several reasons.⁷⁵³ First, there was a time-zone challenge.⁷⁵⁴ Second, a secure communication line was necessary, and the availability of a secure line was not reliable.⁷⁵⁵ Third, the heat in Saudi Arabia sometimes caused technical difficulties.⁷⁵⁶

Judge Lee acknowledges something he would do differently if he had it to do over: He would send at least one more interpreter.⁷⁵⁷ One interpreter was not enough, because, at the very least, interpreters need breaks.⁷⁵⁸

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali's trial was classified.⁷⁵⁹ Classified evidence was stored in the court's Sensitive Compartmented Information Facility (SCIF).⁷⁶⁰ The defendant's first attorney was denied a security clearance, so Abu Ali hired an attorney who already had one.⁷⁶¹ Only one of Abu Ali's attorneys, and not the defendant, was allowed to see classified evidence.⁷⁶²

748. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

749. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

750. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

751. *Abu Ali*, 395 F. Supp. 2d at 344; E.D. Va. Sept. 16, 2005, Order, *supra* note 741, at 4–5; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

752. E.D. Va. Sept. 16, 2005, Order, *supra* note 741, at 4, 7, 9–10; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

753. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

754. *Id.*

755. *Id.*

756. *Id.*

757. *Id.*

758. *Id.*

759. *Id.*

760. *Id.*

761. *Id.*

762. *Id.*

Challenge: Classified Arguments

In the pending appeal, part of the record and part of the briefing were classified.⁷⁶³ Classified materials were filed through the court security officer.⁷⁶⁴ Part of oral argument was conducted in closed session.⁷⁶⁵

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."⁷⁶⁶ The court also ordered that the court 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."⁷⁶⁷

During the pending appeal, 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.⁷⁶⁸

763. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see, e.g.*, Order, United States v. Abu Ali, Nos. 06-4334 & 06-4521 (4th Cir. Nov. 27, 2006) [hereinafter 4th Cir. Classified Briefing Order] (accepting for filing classified portions of the appellant's brief and joint appendix); Docket Sheet, *Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) (noting Abu Ali's filing of a classified supplemental brief on Mar. 5, 2007, and a classified supplemental appendix on Mar. 6, 2007, and noting the government's filing of a classified supplemental brief and a classified supplemental appendix on April 27, 2007); Docket Sheet, *Abu Ali*, No. 06-4334 (4th Cir. Apr. 10, 2006) (same).

764. 4th Cir. Classified Briefing Order, *supra* note 763.

An "under seal, in camera, ex parte notice" was filed in the district court on April 27, 2007. Docket Sheet, United States v. Abu Ali, No. 06-4521 (4th Cir. May 22, 2006) (noting that an original document was filed with the court security officer).

765. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* O'Dell, *supra* note 739.

766. Order at 2, United States v. Abu Ali, Nos. 06-4334 & 06-4521 (4th Cir. Aug. 29, 2007).

767. *Id.* at 1–2.

768. E.D. Va. Docket Sheet, *supra* note 730.

Paintball Terrorists

United States v. Royer and United States v. Al-Timimi
(*Leonie M. Brinkema, E.D. Va.*), *United States v.*
Chandia (Claude M. Hilton, E.D. Va.), and *United*
States v. Benkahla (James C. Cacheris, E.D. Va.)

On June 27, 2003, the United States began arresting and charging 11 men who had been playing paintball to train for jihad since 2000 in Spotsylvania County, Virginia, about 60 miles south of Washington, D.C.⁷⁶⁹ The indictment listed 32 terrorism counts.⁷⁷⁰ In sum, six defendants pleaded guilty; the court acquitted two defendants and convicted three defendants at bench trials before Judge Leonie M. Brinkema in the Eastern District of Virginia.⁷⁷¹ One related case was prosecuted before Judge Brinkema,⁷⁷² and another related case was prosecuted before Judge Claude M. Hilton.⁷⁷³

Nine defendants are American citizens, and three served in the U.S. military.⁷⁷⁴ At core, they were charged with conspiracy, in violation of the Neutrality Act,⁷⁷⁵ to support Lashkar-e-Taiba (LET), a terrorist group that opposes Indian

769. *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); Docket Sheet, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. June 25, 2003) [hereinafter *Royer* Docket Sheet]; see Eric Lichtblau, *Group of Muslims Charged With Plotting Against India*, N.Y. Times, June 28, 2003, at A7; Jerry Markon, “Virginia Jihad” Defendant Sentenced, S.J. Mercury News, Aug. 26, 2006, at A7; Milton Viorst, *The Education of Ali al-Timimi*, Atlantic Monthly, June 2006, at 69, 77.

770. *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).

771. *Khan*, 461 F.3d at 485–86; *Khan*, 309 F. Supp. 2d 789; *Chandia*, 514 F.3d at 370; see Paul Bradley, *Lengthy Sentences for Two in “VA Jihad,”* Rich. Times-Dispatch, June 16, 2004, at B1; Jerry Markon, “Va. Jihad” Case Hailed As Key in War on Terror, Wash. Post, June 8, 2006, at A3; Markon, *supra* note 769; Larry O’Dell, *Court Hears Appeal of Jihad Cases*, Rich. Times-Dispatch, May 26, 2006, at B10.

Tim Reagan interviewed Judge Brinkema for this report in the judge’s chambers on January 5, 2007.

772. Docket Sheet, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter E.D. Va. *Al-Timimi* Docket Sheet].

773. Docket Sheet, *United States v. Chandia*, No. 1:05-cr-401 (E.D. Va. Sept. 14, 2005) [hereinafter E.D. Va. *Chandia* Docket Sheet].

Ahmed Omar Abu Ali apparently was at one time a suspect in the paintball case. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005); see Isikoff, *supra* note 731. Subsequently he was tried for other crimes. See *supra*, “A Plot to Kill President Bush.”

774. See Lichtblau, *supra* note 769.

775. 18 U.S.C. § 960.

rule over Kashmir.⁷⁷⁶ The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.⁷⁷⁷

Judge Brinkema tried four defendants in one bench trial,⁷⁷⁸ acquitting one on February 20, 2004,⁷⁷⁹ and convicting three on March 4.⁷⁸⁰ The convicted defendants were sentenced on June 15, 2004,⁷⁸¹ and were resentenced on July 29, 2005,⁷⁸² in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.⁷⁸³

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.⁷⁸⁴ Khan spent time at an LET training camp in Pakistan.⁷⁸⁵ 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.⁷⁸⁶ Beginning in 1999, LET's primary focus was combating India's control in Kashmir.⁷⁸⁷ But the court found that the defendants' participation in the LET training camps was to prepare to fight against the United States in Afghanistan on behalf of the Taliban.⁷⁸⁸ At the training camp, Khan fired an AK-47 antiaircraft gun and a rocket-propelled grenade.⁷⁸⁹ By December 2001, the United States had substantially defeated the Taliban⁷⁹⁰ and declared LET a terrorist organization.⁷⁹¹ Khan returned to the United States that month.⁷⁹² 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.⁷⁹³ Judge Brinkema found Khan guilty of conspiracy, conspiracy to levy war against the United States, conspiracy to contribute

776. *Khan*, 461 F.3d at 484; see Lichtblau, *supra* note 769; Markon, *supra* note 769; Mary Beth Sheridan, *Hardball Tactics in an Era of Threats*, Wash. Post, Sept. 3, 2006, at A1.

The name of the group means "army of the pure." Brendan Smith, *Chandia Challenges Law on Terror Group*, L. Times, Oct. 29, 2007, at 10. It was designated a terrorist organization in 2001 after a deadly attack on India's parliament building in New Delhi. *Id.*

777. *United States v. Khan*, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); see also Lichtblau, *supra* note 769.

778. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 309 F. Supp. 2d at 796.

779. *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*].

780. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827.

781. *Royer Docket Sheet*, *supra* note 769; see Bradley, *supra* note 771.

782. *Khan*, 461 F.3d at 486; *Royer Docket Sheet*, *supra* note 769.

783. 543 U.S. 220 (2005) (decided Jan. 12, 2005).

784. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; see Bradley, *supra* note 771; Sheridan, *supra* note 776.

785. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807.

786. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

787. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; see Sheridan, *supra* note 776.

788. *Khan*, 309 F. Supp. 2d at 810.

789. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

790. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

791. *Khan*, 309 F. Supp. 2d at 812.

792. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

793. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14.

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.⁷⁹⁴

Judge Brinkema convicted Seifullah Chapman, a former Marine and police officer residing in Alexandria, Virginia, of five counts and sentenced him to 65 years in prison.⁷⁹⁵ Chapman also spent time at the LET training camp in Pakistan.⁷⁹⁶ In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LET member.⁷⁹⁷ 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.⁷⁹⁸

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,⁷⁹⁹ 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.⁸⁰⁰ Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded for resentencing,⁸⁰¹ Judge Brinkema reimposed the same 52-month sentence, determining that she had not clearly articulated her reasons for the downward departure the first time.⁸⁰² The government appealed again,⁸⁰³ but withdrew the appeal⁸⁰⁴ in light of the Supreme Court's holding on December 10, 2007, in *Gall v. United States*, that even sentences outside Sentenc-

794. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820, 821, 823, 826–27, 827; *Royer* Docket Sheet, *supra* note 769 (noting a court verdict against Masoud Ahmad Khan on Mar. 4, 2004).

795. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 803, 816; *see* Bradley, *supra* note 771; Markon, *supra* note 771; Sheridan, *supra* note 776. The original sentence of 85 years was reduced to 65 years on July 29, 2005. *Royer* Docket Sheet, *supra* note 769 (July 29, 2005, minute entry).

796. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811.

797. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13.

798. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 824, 826, 827; *Royer* Docket Sheet, *supra* note 769 (noting a court verdict against Seifullah Chapman on Mar. 4, 2004).

799. *Khan*, 309 F. Supp. 2d at 796, 803, 814; *see* Bradley, *supra* note 771. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 769 (July 29, 2005, minute entry).

800. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 769 (noting a court verdict against Hammad Abdur-Raheem on Mar. 4, 2004).

801. *Khan*, 461 F.3d at 483, 498–501; *see* Jerry Markon, *Resentencing Is Ordered for “Jihad” Defendant*, Wash. Post, Sept. 2, 2006, at B5.

802. Tr., *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. Aug. 16, 2007, filed Aug. 14, 2006) [hereinafter *Royer* Aug. 16, 2007, Tr.]; *Royer* Docket Sheet, *supra* note 769 (noting resentencing on Aug. 16, 2007). Resentencing was delayed by a petition to the Supreme Court for certiorari, which the Court denied on May 21, 2007. Docket Sheet, *Chapman v. United States*, No. 06-9398 (U.S. Feb. 12, 2007).

803. Docket Sheet, *United States v. Abdur-Raheem*, No. 07-4941 (4th Cir. Oct. 2, 2007).

804. Gov't Mot. to Dismiss, *id.* (Dec. 18, 2007).

ing Guidelines are reviewed for abuse of discretion.⁸⁰⁵ Abdur-Raheem was released on November 30, 2007.⁸⁰⁶

The court of appeals affirmed the convictions of Khan, Chapman, and Abdur-Raheem.⁸⁰⁷

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem, of Arlington, Virginia.⁸⁰⁸

Randall Todd Royer pleaded guilty to and was sentenced on April 9, 2004, to 20 years in prison for using firearms and explosives in relation to a crime of violence.⁸⁰⁹ 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.⁸¹⁰

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to 15 years in prison.⁸¹¹ Al-Hamdi attended an LET training camp in Pakistan.⁸¹²

Yong Ki Kwon, who resided in Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-half years in prison.⁸¹³ After Kwon cooperated with the government, his sentence was reduced to three years and two months.⁸¹⁴ He is now out of prison.⁸¹⁵ Kwon attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.⁸¹⁶

805. Gall v. United States, ___ U.S. ___, 128 S. Ct. 586 (2006).

806. <http://www.bop.gov>; see Royer Aug. 16, 2007, Tr., *supra* note 802 (noting expected release date of Dec. 1, 2007).

807. *Khan*, 461 F.3d 477 (resolving *United States v. Khan*, No. 04-4519 (4th Cir. July 15, 2004) (appeal of Khan's original conviction and sentence)); *United States v. Chapman*, No. 04-4520 (4th Cir. July 15, 2004) (appeal of Chapman's original conviction and sentence); *United States v. Abdur-Raheem*, No. 04-4521 (4th Cir. July 15, 2004) (appeal of Abdur-Raheem's original conviction and sentence); *United States v. Khan*, No. 05-4811 (4th Cir. Aug. 10, 2005) (appeal of Khan's post-*Booker* resentencing); *United States v. Chapman*, No. 05-4818 (4th Cir. Aug. 10, 2005) (appeal of Chapman's post-*Booker* resentencing); *United States v. Abdur-Raheem*, No. 05-4893 (4th Cir. Sept. 2, 2005) (government's appeal of Abdur-Raheem's sentence)); see Markon, *supra* note 801; Sheridan, *supra* note 776.

The Supreme Court denied petitions for certiorari on May 21, 2007. Docket Sheet, *Chapman*, No. 06-9398 (U.S. Dec. 28, 2006); Docket Sheet, *Khan v. United States*, No. 06-1116 (U.S. Feb. 12, 2007).

808. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; see *Judge Acquits*, *supra* note 779.

809. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 769; see Sheridan, *supra* note 776.

810. *Khan*, 309 F. Supp. 2d at 796, 808.

811. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer* Docket Sheet, *supra* note 769; see Sheridan, *supra* note 776.

812. *Khan*, 309 F. Supp. 2d at 807, 811.

813. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

814. *Royer* Aug. 16, 2007, Tr., *supra* note 802; *Royer* Docket Sheet, *supra* note 769 (noting a reduction-of-sentence order on Feb. 24, 2006); see Sheridan, *supra* note 776.

815. See Viorst, *supra* note 769, at 77.

816. *Khan*, 309 F. Supp. 2d at 811.

Khwaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-quarter years in prison.⁸¹⁷ After Hasan cooperated with the government, his sentence was reduced to three years and one month.⁸¹⁸ He is now out of prison.⁸¹⁹ Hasan attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.⁸²⁰

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to 10 and one-half years in prison.⁸²¹ After he cooperated with the government, his sentence was reduced to three years and two months.⁸²²

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.⁸²³ After he cooperated with the government, his sentence was reduced to one year and 11 months.⁸²⁴

Judge Brinkema also acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.⁸²⁵ Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.⁸²⁶ Judge Brinkema found that Benkahla attended an LET training camp, but not at a time when LET was designated a terrorist organization and not at a place in Afghanistan under Taliban control, as alleged in the indictment.⁸²⁷ 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 2004.⁸²⁸ His Fifth Amendment right not to testify was removed by a grant of use immunity, which would prevent the government from prosecuting him for

817. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 769.

818. *Royer* Aug. 16, 2007, Tr., *supra* note 802; *Royer Docket Sheet*, *supra* note 769 (noting a reduction-of-sentence order on Feb. 24, 2006).

819. *See Viorst*, *supra* note 769, at 77; *see also Sheridan*, *supra* note 776 (reporting that Hasan spent less than three years in jail).

820. *Khan*, 309 F. Supp. 2d at 811.

821. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer Docket Sheet*, *supra* note 769.

822. *Royer* Aug. 16, 2007, Tr., *supra* note 802; *Royer Docket Sheet*, *supra* note 769 (Aug. 26, 2005, reduction of sentence for Muhammed Aatique); *see Sheridan*, *supra* note 776.

823. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 769; *see Sheridan*, *supra* note 776.

824. *Royer* Aug. 16, 2007, Tr., *supra* note 802.

825. *Khan*, 461 F.3d at 485; *United States v. Benkahla*, 437 F. Supp. 2d 541, 544–46 (E.D. Va. 2006); *Khan*, 309 F. Supp. 2d at 796 n.2; *Royer Docket Sheet*, *supra* note 769; *see Matthew Barakat, Va. Man Convicted of Lying in Terror Probe*, *Rich. Times-Dispatch*, Feb. 6, 2007, at B2.

826. *Benkahla*, 437 F. Supp. 2d at 544–45.

827. *Id.* at 545–46; *see Matthew Barakat, Jihadist Suspect on Trial*, *Rich. Times-Dispatch*, Jan. 30, 2007, at B2 [hereinafter *Jihadist Suspect*]; *Barakat*, *supra* note 825.

828. *United States v. Benkahla*, 501 F. Supp. 2d 748, 750–51 (E.D. Va. 2007); *Mem. Op.* at 1–3, *United States v. Benkahla*, No. 1:06-cr-9, (E.D. Va. Oct. 2, 2006), available at 2006 WL 2871234 [hereinafter *Benkahla Dismissal Denial*]; *see Barakat, Jihadist Suspect*, *supra* note 827.

truthful revelations.⁸²⁹ He denied attending any training camp, and he denied using any firearms.⁸³⁰ On February 9, 2006, he was indicted for perjury during his grand jury testimony and for obstruction of justice.⁸³¹ On July 13, the indictment was expanded to charge him for false statements to the FBI.⁸³² He was convicted on February 5, 2007, in a jury trial before Judge James C. Cacheris, who sentenced him on July 24, to ten years and one month in prison.⁸³³ An appeal is pending.⁸³⁴

Ali al-Timimi was regarded as the paintballers' spiritual leader.⁸³⁵ 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.⁸³⁶ He was sentenced in 2005 to life in prison on an April 26, 2005, conviction of soliciting others to wage war against the United States and providing services to the Taliban.⁸³⁷ His pending appeal to the U.S. Court of Appeals for the Fourth Circuit was interrupted by a remand to the district court on April 25, 2006, for a determination of whether the prosecution of al-Timimi relied on undisclosed surveillance.⁸³⁸

Al-Timimi was born in the United States to Iraqi immigrants.⁸³⁹ His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.⁸⁴⁰ When al-Timimi was a teenager, his family spent some time in Saudi

829. *Benkahla*, 437 F. Supp. 2d at 544 n.1 & 555; *Benkahla*, 501 F. Supp. 2d at 750 n.1; see Barakat, *supra* note 825.

830. *Benkahla*, 437 F. Supp. 2d at 544–45; see Barakat, *supra* note 825.

831. *Benkahla*, 437 F. Supp. 2d at 544; Docket Sheet, *Benkahla*, No. 1:06-cr-9 (E.D. Va. Feb. 9, 2006) [hereinafter E.D. Va. *Benkahla* Docket Sheet]; see Jerry Markon, *Va. "Jihad" Probe Sees New Charge*, Wash. Post, Fe. 23, 2006, at B4.

832. *Benkahla* Dismissal Denial, *supra* note 828, at 1, 3–4; E.D. Va. *Benkahla* Docket Sheet, *supra* note 831.

833. *Benkahla*, 501 F. Supp. 2d at 751, 762; E.D. Va. *Benkahla* Docket Sheet, *supra* note 831; see Barakat, *supra* note 825; Jerry Markon, *10-Year Sentence for Perjury*, Wash. Post, July 25, 2007, at B5.

834. Docket Sheet, *United States v. Benkahla*, No. 07-4778 (4th Cir. Aug. 9, 2007) (noting tentative calendaring of oral argument for the week of April 11, 2008).

835. See Markon, *supra* note 771; Markon, *supra* note 769; Viorst, *supra* note 769, at 69, 79.

836. *United States v. Chandia*, 514 F.3d 365, 369 (4th Cir. 2008); *United States v. Khan*, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004).

837. *Chandia*, 514 F.3d at 369 n.1; see Markon, *supra* note 771; Markon, *supra* note 769; Viorst, *supra* note 769, 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.").

To select jurors for his trial, Judge Brinkema used a juror questionnaire. See Leonie M. Brinkema, *United States v. Al-Timimi: Juror Questionnaire* (Mar. 28, 2005).

838. Order, *United States v. Al-Timimi*, No. 05-4761 (4th Cir. Apr. 25, 2006) [hereinafter *Al-Timimi* Remand Order]; Tr., *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Jan. 16, 2007, filed May 17, 2007) [hereinafter *Al-Timimi* Jan. 16, 2007, Tr.]; see E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772 (noting May 19, 2006, reopening of district court case); see also Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

839. See Viorst, *supra* note 769, at 69.

840. See Sheridan, *supra* note 776; Viorst, *supra* note 769, at 69.

Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Islam.⁸⁴¹ A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.⁸⁴²

On June 6, 2006, a jury convicted Ali Asad Chandia, a former personal assistant to al-Timimi, of aiding LET by supplying them with paintballs and other equipment.⁸⁴³ Judge Hilton sentenced him to 15 years in prison on August 25, 2006, applying a terrorism sentencing enhancement.⁸⁴⁴ The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in this case.⁸⁴⁵ 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.⁸⁴⁶ Chandia is a Pakistani citizen who taught third grade at an Islamic school called the al-Huda School in College Park, Maryland.⁸⁴⁷ Although linked to the paintballers, he did not actually play the game.⁸⁴⁸

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.⁸⁴⁹ 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.⁸⁵⁰

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

841. See Sheridan, *supra* note 776; Viorst, *supra* note 769, at 72.

842. See Viorst, *supra* note 769, at 73.

843. United States v. Chandia, 514 F.3d 365, 370 (4th Cir. 2008); see Matthew Barakat, *Teacher Convicted of Aiding Terror Group*, Cincinnati Post, June 7, 2006, at A9; Jerry Markon, *Final Defendant Guilty in "Va. Jihad,"* Wash. Post, June 7, 2006, at A12 [hereinafter *Final Defendant*]; Markon, *supra* note 771; Markon, *supra* note 769; Sheridan, *supra* note 776; Smith, *supra* note 776 ("Chandia provided material support to LET by paying \$622 to ship 50,000 paintballs to Pakistan.").

844. *Chandia*, 514 F.3d at 370–71; E.D. Va. *Chandia* Docket Sheet, *supra* note 773; see Markon, *supra* note 769.

845. E.D. Va. *Chandia* Docket Sheet, *supra* note 773.

846. *Chandia*, 514 F.3d at 369, 375–77 (resolving United States v. Chandia, No. 06-4997 (4th Cir. Sept. 26, 2006)); see E.D. Va. *Chandia* Docket Sheet, *supra* note 773 (noting resentencing scheduled for Apr. 18, 2008).

847. See Barakat, *supra* note 843; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 843; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing Profiles of Accused Jihad Network Member*, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 776.

848. *Chandia*, 514 F.3d at 373; see Barakat, *supra* note 843.

849. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772 (noting the filing of a sealed motion on Dec. 23, 2004, and the filing of a CIPA notice on Dec. 29, 2004.).

850. *Id.*

government may have undisclosed intercepts of either the appellant or various individuals material to his trial.”⁸⁵¹

A problem that developed for the court in determining whether all relevant intercepts 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 information about intercepts.⁸⁵²

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.⁸⁵³ Another sealed hearing was held on January 16, 2007, and its transcript was unsealed seven months later.⁸⁵⁴ On July 23 and August 9, 2007, al-Timimi filed sealed motions, which the court denied on August 24, 2007.⁸⁵⁵

Challenge: Classified Arguments

On November 7, 2007, 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.”⁸⁵⁶ A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.⁸⁵⁷ 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.⁸⁵⁸

851. *Al-Timimi* Remand Order, *supra* note 838, at 1; *see* E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772 (referring to warrants under the Foreign Intelligence Surveillance Act).

852. Tr., *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. July 21, 2006, filed July 24, 2006) [hereinafter *Al-Timimi* July 21, 2006, Tr.].

853. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772 (noting the unsealing of the transcript on Aug. 14, 2006); *see* Matthew Barakat, *Eavesdropping Did Not Taint Case*, Rich. Times-Dispatch, July 22, 2006, at B8.

Appearing at the hearing were four attorneys and a special agent for the government and one attorney for al-Timimi. *Al-Timimi* July 21, 2006, Tr., *supra* note 852. 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.*

854. *Al-Timimi* Jan. 16, 2007, Tr., *supra* note 838; E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772 (noting the unsealing of the transcript on Aug. 16, 2007).

By the time of this hearing, both defense attorneys had obtained secret clearances. *Al-Timimi* Jan. 16, 2007, Tr., *supra* note 838.

855. *Id.*

856. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 772.

857. *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.

858. *See* Lichtblau, *supra* note 857; Markon, *supra* note 857.

Challenge: Attorney–Client Contacts

The court of appeals also noted in its 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.”⁸⁵⁹

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.⁸⁶⁰ Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.⁸⁶¹

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.⁸⁶² Therefore, Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.⁸⁶³

859. *Al-Timimi* Remand Order, *supra* note 838, at 1.

It was reported that “authorities” obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 769, at 78.

860. *Al-Timimi* July 21, 2006, Tr., *supra* note 852.

861. *Al-Timimi* Docket Sheet, *supra* note 772; *Al-Timimi* July 21, 2006, Tr., *supra* note 852.

862. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

863. *Id.*

Mistaken Rendition

*El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)*⁸⁶⁴

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claims that the U.S. Central Intelligence Agency abducted him on December 31, 2003, while he was on vacation in Macedonia and imprisoned him for five months as part of its extraordinary rendition program and then abandoned him in Albania after realizing that it had apprehended the wrong person.⁸⁶⁵ El-Masri's captors thought he was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.⁸⁶⁶ It apparently took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.⁸⁶⁷

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.⁸⁶⁸

El-Masri's complaint, which he filed on December 6, 2005, alleges that he was beaten, stripped, sodomized with a foreign object, and then flown to Kabul, Afghanistan, where he was imprisoned in the "Salt Pit" for another four

864. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

865. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006); see Compl. at 1–2, 7–17, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005), available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; see also David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. Times, Apr. 23, 2005, at A3; 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*]; *The Passionate Eye: CIA's Secret War* (CBC television broadcast Oct. 15, 2006); Dana Priest, *The Wronged Man*, Wash. Post, Nov. 29, 2006, at C1; Romero & Temple-Raston, *supra* note 212, at 66–69; Don Van Natta, Jr., & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11.

866. See Van Natta & Mekhennet, *supra* note 865.

867. See Johnston, *supra* note 865; Lewis, *Man Held*, *supra* note 865.

868. *El-Masri*, 479 F.3d 296 (resolving *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006)); see *id.* at 310 ("virtually any conceivable response to El-Masri's allegations would disclose privileged information"); *El-Masri*, 437 F. Supp. 2d at 539, 541 (district court's dismissal); see also Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. Times, Mar. 3, 2007, at A6; Lewis, *Man Held*, *supra* note 865; Lewis, *Mistakenly Abducted*, *supra* note 865; Priest, *supra* note 865.

months.⁸⁶⁹ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.⁸⁷⁰ According to Judge Ellis,

Following his abduction, El-Masri alleges the Macedonia authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. . . .

. . . El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon.⁸⁷¹

It took four days for el-Masri to find his wife and children.⁸⁷² It was reported that el-Masri received very little psychiatric treatment for the trauma he experienced until he was indefinitely committed to a psychiatric institution following his setting fire to a supermarket in Ulm, Germany, on May 17, 2007.⁸⁷³

On January 31, 2007, it was reported that a German court issued arrest warrants for 13 CIA operatives who participated in el-Masri's abduction.⁸⁷⁴

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

869. *El-Masri*, 437 F. Supp. 2d at 533; Compl., *supra* note 865, at 8–14; *see also* James Risen, State of War 30 (2006) ("CIA sources say that Salt Pit is in Afghanistan and is used to house low-level prisoners."); Romero & Temple-Raston, *supra* note 212, at 69 (describing the Salt Pit as "a secret U.S.-run prison just north of Kabul" and noting that the suit was filed on a day that Rice, now Secretary of State, arrived in Berlin for a visit with Chancellor Angela Merkel).

870. Docket Sheet, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005) [hereinafter E.D. Va. *El-Masri* Docket Sheet].

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

871. *El-Masri*, 437 F. Supp. 2d at 532–34; *see* Compl., *supra* note 865, at 7, 14–16; *see also* Johnston, *supra* note 865; Van Natta & Mekhennet, *supra* note 865.

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.

872. *See* Van Natta & Mekhennet, *supra* note 865.

873. *See* Souad Mekhennet, *Ex-C.I.A. Detainee Held in Arson Attack*, N.Y. Times, May 18, 2007, at A8; Tony Paterson, *CIA Torture Victim Committed After Supermarket Arson Attack*, *Indep.*, May 19, 2007.

874. *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."); Craig Whitlock, *Germans Charge 13 CIA Operatives*, *Wash. Post*, Feb. 1, 2007, at A1.

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.⁸⁷⁵

The classified declaration was delivered to the judge by a court security officer, who took responsibility for its storage when the judge was not privately reviewing it.⁸⁷⁶

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.⁸⁷⁷

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."⁸⁷⁸ The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.⁸⁷⁹ 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.⁸⁸⁰ A deputy clerk with a security clearance brought the declaration to Judge King's chambers, where the judge reviewed the declaration in private, and a cleared deputy clerk returned the declaration to the court's Sensitive Compartmented Information Facility (SCIF) when the judge was finished.⁸⁸¹ Judge Duncan reviewed the declaration in her Richmond chambers when she was in town for a previous sitting.⁸⁸²

Two Supreme Court justices reviewed the classified declaration to consider El-Masri's petition for certiorari,⁸⁸³ which the court denied.⁸⁸⁴

875. *El-Masri*, 437 F. Supp. 2d at 537; see E.D. Va. *El-Masri* Docket Sheet, *supra* note 870 (noting a Mar. 23, 2006, notice of in camera submission).

876. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

877. *El-Masri*, 437 F. Supp. 2d at 537.

878. *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

879. Docket Sheet, *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006).

For this report, Tim Reagan interviewed Judge King in the judge's Richmond chambers on March 19, 2008, and interviewed Judge Duncan by telephone on November 8, 2007.

880. Interview with Hon. Robert B. King, March 19, 2008. The drive is approximately 320 miles.

881. *Id.*; see Reagan, *supra* note 162, at 19 (describing SCIFs).

The court created the SCIF for the Zacarias Moussaoui case. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see *supra*, "Twentieth Hijacker."

882. Interview with Hon. Allyson Kay Duncan, Nov. 8, 2007.

883. Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

884. *El-Masri v. United States*, ___ U.S. ___, 128 S. Ct. 373, 2007 WL 1646914 (U.S. 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.

Hamas Funding

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.⁸⁸⁵ 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.⁸⁸⁶

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 1970.⁸⁸⁷ He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip check-

885. *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. Holy Land Found.*, 511 F.3d 707, 713 (7th Cir. 2007); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 894 (N.D. Ill. 2004) (related civil action); Second Superseding Indictment, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004); see Eric Lichtblau, *U.S. Indicts 3 on Charges of Helping Militant Group*, N.Y. Times, Aug. 21, 2004, at A6; Todd Lighty & Laurie Cohen, *Hamas Probe Nearly Fell Apart*, Chi. Trib., Aug. 22, 2004, Metro, at 1; Matt O'Connor & Laurie Cohen, *U.S. Says Bridgeview Man, 2 Others Financed, Recruited for Terror Group*, Chi. Trib., Aug. 21, 2004, News, at 1.

Hamas, a word that means "zeal" in Arabic, is an acronym for "Harakat al-Muqawama al-Islamiyya," which means "The Islamic Resistance Movement." *Boim*, 511 F.3d at 712; see William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Tom Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1. Hamas was founded in 1987 and designated a terrorist organization in 1995. *Boim*, 511 F.3d at 711–12.

886. Docket Sheet, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter N.D. Ill. *Abu Marzook* Docket Sheet]; see Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, Chi. Trib., Nov. 4, 2003, Metro, at 1; *Palestinian Activist Faces New Charge*, Chi. Trib., June 26, 2004, at 16 [hereinafter *New Charge*].

The indictment against Salah, Ashqar, and Marzook was filed as the second superseding indictment in the preexisting case against Ashqar.

Tim Reagan interviewed Judge St. Eve for this report in the judge's chambers on July 2, 2007.

887. *Boim*, 511 F.3d at 712; see Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, Chi. Trib., June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 885; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, N.Y. Times, Oct. 20, 2006, at A16.

point and charged with providing aid to Hamas.⁸⁸⁸ Police found \$97,400 in his Jerusalem YMCA hotel room.⁸⁸⁹ 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.⁸⁹⁰ He was released in November 1997.⁸⁹¹

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."⁸⁹² On June 9, 1998, the government filed a \$1.4 million civil forfeiture action against Salah and the Quranic Literacy Institute, for whom Salah volunteered, alleging that they laundered money for Hamas.⁸⁹³

888. *Boim*, 511 F.3d at 712; *Marzook*, 435 F. Supp. 2d at 712, 716; *Abu Marzook*, 412 F. Supp. 2d at 916; *Boim*, 340 F. Supp. 2d at 917; *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 793-94 (N.D. Ill. 1999); see Drew Bailey, *Family Fears for Israeli-Held Chicagoan*, Chi. Trib., Jan. 29, 1993, Chicagoland, at 4; David Jackson, Laurie Cohen & Robert Manor, *Money Trail Leads to Saudi, U.S. Says*, Chi. Trib., Oct. 28, 2001, News, at 1; Libby Sander, *2 Men Cleared of Charges of Aiding Hamas Violence*, N.Y. Times, Feb. 2, 2007, at A16 [hereinafter *2 Men Cleared*]; Sander, *supra* note 887.

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.").

889. *In re Ford Van*, 50 F. Supp. 2d at 794; see Jackson *et al.*, *supra* note 888 (reporting \$96,400 found); Sander, *2 Men Cleared*, *supra* note 888 (reporting \$97,000 found); Sander, *supra* note 887 (same).

890. *Boim*, 511 F.3d at 712; *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 888; Sander, *supra* note 887.

891. *Boim*, 511 F.3d at 712; *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, Salah now drives dialysis patients to and from treatment. See Jackson *et al.*, *supra* note 888; Sander, *supra* note 887. 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 887; Lighty & Cohen, *supra* note 885. 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 885.

892. *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; Gaines & Martin, *supra* note 885; Matt O'Connor, *FBI Seizes \$1 Million Linked to Terrorism*, Chi. Trib., June 10, 1998, News, at 1.

893. Docket Sheet, *United States v. One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998) (noting that the next status hearing is scheduled for Apr. 10, 2008); see Cohen, *et al.*, *supra* note 892; Gaines & Martin, *supra* note 885; Jackson *et al.*, *supra* note 888; Lighty & Cohen, *supra* note 885.

The Quranic Literacy Institute's stated purpose was to translate Islamic texts. *Boim*, 511 F.3d at 714; *In re Ford Van*, 50 F. Supp. 2d at 794; see Andrew Martin, *Religious Group Denies Terrorist Link*, Chi. Trib., Oct. 20, 1998, Metro Chicago, at 4.

Parents of David Boim, a 17-year-old boy killed in a 1996 terrorist attack in Israel, filed a federal civil action in Chicago on May 12, 2000, against the Quranic Literacy Institute, Salah, and other defendants, alleging that the defendants provided financial support to Hamas, whom the parents alleged killed their son.⁸⁹⁴ The parents attached to their complaint the government's forfeiture action against Salah and the institute.⁸⁹⁵

The district court granted the plaintiffs summary judgment on liability against some of the defendants, including Salah.⁸⁹⁶ The jury returned a verdict of \$52 million in favor of the plaintiffs,⁸⁹⁷ which the court statutorily trebled to \$156 million.⁸⁹⁸ With one judge dissenting, the court of appeals remanded for a more careful determination of whether the defendants' actions were causes in fact of Boim's murder.⁸⁹⁹ A petition for rehearing en banc is pending.⁹⁰⁰

The U.S. District Court for the Northern District of Illinois assigned the forfeiture action to Judge Wayne R. Andersen. Docket Sheet, *supra*; see Matt O'Connor, *Bridgeview Family Challenges Seizure*, Chi. Trib., June 16, 1998, Metro Chicago, at 3.

894. Compl., Boim v. Quranic Literacy Inst., No. 1:00-cv-2905 (N.D. Ill. May 12, 2000) [hereinafter *Boim* Complaint]; see *Boim*, 511 F.3d at 709–14; Boim v. Quranic Literacy Inst., 349 F. Supp. 2d 1097 (N.D. Ill. 2004) (resolving motions in limine); *Boim*, 340 F. Supp. 2d 885 (resolving motions for summary judgment); Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying motions to dismiss), *aff'd*, 291 F.3d 1000 (7th Cir. 2002) (resolving Boim v. Quranic Literacy Inst., Nos. 01-1969 & 01-1970 (2d Cir. Apr. 19, 2001)); see also Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, Chi. Trib., May 15, 2000, Metro Chicago, at 1.

The parties consented to the jurisdiction of Magistrate Judge Arlander Keys to try the case. *Boim*, 511 F.3d at 716; *Boim*, 340 F. Supp. 2d at 890–91; Docket Sheet, *Boim*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000).

895. Compl., United States v. One 1997 E35 Ford Van, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998), attached as Ex. A, *Boim* Compl., *supra* note 894.

896. *Boim*, 511 F.3d at 716–17; *Boim*, 340 F. Supp. 2d 885; see Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, Chi. Trib., Nov. 11, 2004, Metro Chicago, at 1.

897. *Boim*, 511 F.3d at 710, 720; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004).

898. *Boim*, 511 F.3d at 710, 720; Am. J., *Boim*, No. 1:00-cv-2905 (N.D. Ill. Feb. 25, 2005); see 18 U.S.C. § 2333(a); see also Matt O'Connor, *\$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

899. *Boim*, 511 F.3d 707 (resolving Boim v. American Muslim Soc'y, No. 05-1822 (7th Cir. Mar. 28, 2005); Boim v. Quranic Literacy Inst., No. 05-1821 (7th Cir. Mar. 28, 2005); Boim v. Salah, No. 05-1816 (7th Cir. Mar. 28, 2005); Boim v. Holy Land Found., No. 05-1815 (7th Cir. Mar. 28, 2005)); see *\$156 Million Award Thrown Out*, N.Y. Times, Dec. 29, 2007, at A13; Darryl Fears, *Ruling Against Muslim Group Overturned*, Wash. Post, Dec. 29, 2007, at A2; Maurice Possley, *Terror Suit Award Tossed Out*, Chi. Trib., Dec. 29, 2007, News, at 1.

900. Docket Sheet, Boim v. American Muslim Soc'y, No. 05-1822 (7th Cir. Mar. 28, 2005) (noting petition filed Feb. 8, 2008); Docket Sheet, Boim v. Quranic Literacy Inst., No. 05-1821 (7th Cir. Mar. 28, 2005) (same); Docket Sheet, Boim v. Salah, No. 05-1816 (7th Cir. Mar. 28, 2005) (same); Docket Sheet, Boim v. Holy Land Found., No. 05-1815 (7th Cir. Mar. 28, 2005) (same).

Abdelhaleem Ashqar

On February 23, 1998, Ashqar was jailed in Manhattan for refusing to testify before a grand jury investigating Hamas funding.⁹⁰¹ Although offered immunity, Ashqar refused to cooperate and was jailed for civil contempt.⁹⁰² Ashqar protested his jailing with a hunger strike.⁹⁰³ 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.⁹⁰⁴ He was released after six months in prison on a finding that continued confinement would not induce testimony.⁹⁰⁵

On June 25, 2003, Ashqar refused to testify before a Chicago grand jury investigating American links to Middle East terrorism, and he was jailed for civil contempt on September 5.⁹⁰⁶ Ashqar again protested his imprisonment for contempt with a hunger strike.⁹⁰⁷ After the court of appeals affirmed the holding of civil attempt against Ashqar,⁹⁰⁸ the government indicted him for criminal contempt.⁹⁰⁹ The U.S. District Court for the Northern District of Illinois assigned the prosecution of Ashqar for criminal contempt to Judge Amy St. Eve,⁹¹⁰ who released Ashqar to home detention in Virginia on bail after two months of confinement.⁹¹¹ On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.⁹¹² Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.⁹¹³

901. *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 888; Sander, *supra* note 887. He came to the United States on an academic fellowship. See Sander, *supra* note 887.

902. *In re Grand Jury Subpoena*, 150 F.3d at 171; see Weiser, *supra* note 901.

903. *In re Grand Jury Subpoena*, 150 F.3d at 171; see Weiser, *supra* note 901.

904. *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.

905. *In re Grand Jury Proceedings*, 347 F.3d 197, 200 (7th Cir. 2003); see *Court Upholds Jailing of Activist*, Chi. Trib., Oct. 5, 2003, Metro, at 3 [hereinafter *Jailing*] (reporting that Ashqar lost about 50 pounds in prison).

906. *In re Grand Jury Proceedings*, 347 F.3d at 201; see Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); see also *Jailing*, *supra* note 905.

907. See *Jailing*, *supra* note 905; Franklin & Cohen, *supra* note 901.

908. *In re Grand Jury Proceedings*, 347 F.3d 197; see *Jailing*, *supra* note 905.

909. Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); see Franklin & Cohen, *supra* note 901.

910. Docket Sheet, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); see Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

911. See O'Connor, *supra* note 886.

912. Superseding Indictment, *Ashqar*, No. 1:03-cr-978 (N.D. Ill. June 24, 2004); see *New Charge*, *supra* note 886.

913. 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.

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.⁹¹⁴

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.⁹¹⁵ During his trip he was expelled from Jordan at the United States' urging after setting up a Hamas support office in Amman.⁹¹⁶ Five days after his detention, Israel decided to seek his extradition.⁹¹⁷ On May 7, 1996, the district court in Manhattan approved extradition.⁹¹⁸

While his appeal was pending, Abu Marzook decided to stop challenging his extradition, which meant he would have to be extradited or freed within 60 days.⁹¹⁹ A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.⁹²⁰ Fearing retaliatory terrorist attacks in Is-

914. *Boim v. Holy Land Found.*, 511 F.3d 707, 718 n.6; *In re Extradition of Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996); *Marzook v. Christopher*, No. 1:96-cv-4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996); see Stephen Franklin, *Terror Bombs Rip Hopes in Mideast*, Chi. Trib., July 31, 1997, News, at 1 (identifying Marzook as Hamas's former political leader); Youssef M. Ibrahim, *Hamas Political Chief Says Group Can't Curb Terrorists*, N.Y. Times, Mar. 9, 1996, at 5 ("in his first interview since his detention, Mr. Abu Marzook, 45, a businessman, said he was the head of the political bureau of Hamas"); see also Jason Trahan, *Agent: Charity Was Part of Plot*, Dallas Morning News, Aug. 8, 2007, at 1B (reporting that Abu Marzook is "currently Hamas' No. 2 political leader").

915. *In re Marzook*, 924 F. Supp. at 574; *Marzook*, 1996 WL 583378, at *1; see 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.

916. See Greenhouse, *supra* note 915; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 915.

917. See Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

918. *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.

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).

919. See Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

920. See Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

rael, Prime Minister Benjamin Netanyahu told the United States on April 2, 1997, that Israel no longer wanted Abu Marzook extradited to Israel.⁹²¹ Abu Marzook remained detained pending immigration exclusion proceedings, and one month later, Jordan announced that it would accept Abu Marzook back.⁹²² Abu Marzook was deported to Jordan on May 5.⁹²³

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.⁹²⁴ Jordan deported him in 1999.⁹²⁵ Abu Marzook was reported to be in Syria in 2001.⁹²⁶ On December 19, 2002, the fugitive Abu Marzook was indicted in the Northern District of Texas for conspiracy to fund terrorism.⁹²⁷ He published an op-ed in the *Washington Post* on January 31, 2006,⁹²⁸ and an op-ed in the *Los Angeles Times* on July 10, 2007.⁹²⁹

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.⁹³⁰ 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.⁹³¹

921. See Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

922. 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 915; 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.

923. See MacFarquhar, *supra* note 915.

924. 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.

925. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006–07 (N.D. Ill. 2001).

926. William Glaberson, *Defending Muslims in Court and Drawing Death Threats As Well As a High Profile*, N.Y. Times, Sept. 28, 2001, at B8; see *Hamas Official Denies Accusations*, N.Y. Times, Aug. 22, 2004, at 110 (reporting Abu Marzook to be in Syria in 2004); Scott Wilson, *Hamas to Choose Top Gaza Figure as Prime Minister*, Wash. Post, Feb. 17, 2006, at A14 (identifying Abu Marzook as speaking from Syria in 2006).

927. *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying co-defendants' post-trial motions for acquittal); Docket Sheet, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002); see 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.

928. Mousa Abu Marzook, Op-Ed, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections, and identifying Abu Marzook as "the deputy political bureau chief of the Islamic Resistance Movement (Hamas)").

929. Mousa Abu Marzook, Op-Ed, *Hamas' Stand*, L.A. Times, July 10, 2007 (concerning the release of a BBC journalist, identifying Abu Marzook as "the deputy of the political bureau of Hamas").

930. See Lichtblau, *supra* note 885; Lighty & Cohen, *supra* note 885; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 885.

931. See O'Connor, *supra* note 930.

Salah's prosecution was based, in part, on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.⁹³² But Salah argued that the confession was obtained by more than 50 days of torture by the Israeli secret police.⁹³³ Salah also argued that his financial activity was humanitarian, intended to aid the Palestinian people and not to support terrorism.⁹³⁴ Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.⁹³⁵

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 1993.⁹³⁶ 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.⁹³⁷

The trial began on October 12, 2006.⁹³⁸ The jury began to deliberate on January 11, 2007,⁹³⁹ and on February 1, the jury acquitted Salah and Ashqar of aiding terrorists.⁹⁴⁰ The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.⁹⁴¹ Judge St. Eve sentenced Salah to one year and nine months in prison,⁹⁴² and she sentenced Ashqar to eleven years and five months.⁹⁴³ Ashqar's appeal is pending.⁹⁴⁴

932. *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 888; Sander, *supra* note 887.

933. See Sander, *2 Men Cleared*, *supra* note 888; Sander, *supra* note 887.

934. See Eggen, *supra* note 901; Jackson *et al.*, *supra* note 888; Sander, *2 Men Cleared*, *supra* note 888; Sander, *supra* note 887.

935. *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.

936. *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 888.

937. *Marzook*, 435 F. Supp. 2d at 788–94.

938. Minute Entry, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006).

939. Minute Entry, *id.* (Jan. 11, 2007); see Jury Instructions, *id.* (Jan. 12, 2007); see also Azam Ahmed, *Deliberations Begin in Hamas Case*, Chi. Trib., Jan. 12, 2007, Metro, at 8.

940. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007); *Boim v. Holy Land Found.*, 511 F.3d 707, 713; see Rudolph Bush & Jeff Coen, *Two Found Not Guilty of Supporting Hamas*, Chi. Trib., Feb. 2, 2007, News, at 1; Eggen, *supra* note 901; Sander, *2 Men Cleared*, *supra* note 888.

941. *Boim*, 511 F.3d at 713; see Bush & Coen, *supra* note 940; Eggen, *supra* note 901; Sander, *2 Men Cleared*, *supra* note 888.

Salah's conviction for obstruction of justice was for false answers to interrogatories in the Boims' civil case against him. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 25, 2007); see Bush & Coen, *supra* note 940; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

942. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2007); *Boim*, 511 F.3d at 713; see Michael Higgins, *21-Month Sentence for Salah*, Chi. Trib., July 12, 2007, Metro, at 1; Sander, *American Gets Prison*, *supra* note 941.

943. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007); see *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

Challenge: Foreign Government Evidence

Salah sought to discover Israeli police documents to support his claim that his Israeli confession was obtained by torture and coercion.⁹⁴⁵ Judge St. Eve suggested that he follow rogatory-letter procedures, but Salah ultimately relied on testimony from Israeli police officers.⁹⁴⁶

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).⁹⁴⁷ It was unprecedented for such officers to provide testimony outside of Israel.⁹⁴⁸

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.⁹⁴⁹ The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.⁹⁵⁰ All other persons in court during the testimony had security clearances.⁹⁵¹

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.⁹⁵² The agents and their Israeli attorneys were identified in court documents by code names.⁹⁵³ But Judge St. Eve denied a request that they testify in "light disguise," because Salah had already seen them,

944. Docket Sheet, *United States v. Ashqar*, No. 07-3879 (7th Cir. Nov. 30, 2007) (noting that the appellant's brief is due on Apr. 25, 2008).

945. Salah's Disc. Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005); see Michael Higgins, *supra*, note 932.

946. Interview with Hon. Amy St. Eve, July 2, 2007; see 28 U.S.C. § 1781; Fed. R. Civ. P. 28(b).

947. *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.

948. *Abu Marzook*, 412 F. Supp. 2d at 918 ("Israel has never before permitted ISA agents to give live testimony in the United States."); Gov't's Time Extension Mot. at 2, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004) ("The appearance of the ISA operational personnel as witnesses in a proceeding outside the State of Israel is unprecedented."); see Michael Higgins, *supra* note 947 (quoting the government's brief).

949. *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.

950. *Abu Marzook*, 412 F. Supp. 2d at 917; see Minute Entry at 4, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 29, 2006) [hereinafter Aug. 29, 2006, *Abu Marzook* Minute Entry] ("[T]hese ISA agents and their families face a serious, legitimate risk of grave danger if they are publicly identified. . . . Terrorist organizations have targeted ISA agents.").

951. *Abu Marzook*, 412 F. Supp. 2d at 919.

952. *Id.* at 928; see Higgins, *supra* note 949.

953. See Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

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.⁹⁵⁴

The hearing was open for the testimony of other witnesses, including Israeli police officers.⁹⁵⁵

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.⁹⁵⁶ Again Judge St. Eve permitted the witnesses to use private entrances.⁹⁵⁷ She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.⁹⁵⁸ 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.⁹⁵⁹ But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.⁹⁶⁰ Judge St. Eve decided that the rest of the trial would be public.⁹⁶¹

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.⁹⁶² 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.⁹⁶³

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)⁹⁶⁴ to a substantial amount of classified evidence.⁹⁶⁵ Classified documents were stored in a safe in Judge St. Eve's chambers, to which only

954. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

955. *Id.* at 928; see Higgins, *supra* note 949.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 886.

956. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, 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 901.

957. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, at 6.

958. *Id.* at 4; see Bush, *Conspiring with Israel*, *supra* note 956.

959. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, at 5–6; see Bush, *Conspiring with Israel*, *supra* note 956.

960. Interview with Hon. Amy St. Eve, July 2, 2007.

961. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, at 5; see Bush, *Conspiring with Israel*, *supra* note 956.

962. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, at 4–5; see Bush, *Conspiring with Israel*, *supra* note 956; Bush, *Torture Denied*, *supra* note 956.

963. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 950, at 5–6.

964. 18 U.S.C. app. 3; see Reagan, *supra* note 162.

965. Interview with Hon. Amy St. Eve, July 2, 2007.

the judge and a cleared court reporter had the combination.⁹⁶⁶ For hearings concerning classified documents, the court reporter used a laptop provided by the government, which was also stored in the safe.⁹⁶⁷

Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances.⁹⁶⁸ The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law clerk assistance.⁹⁶⁹

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.⁹⁷⁰

Marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.⁹⁷¹

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.⁹⁷²

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.⁹⁷³ For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.⁹⁷⁴ Judge St. Eve approved these evidence substitutions.⁹⁷⁵ 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.⁹⁷⁶ As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.⁹⁷⁷

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:

966. *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);

967. Interview with Hon. Amy St. Eve, July 2, 2007.

968. *Id.*

969. *Id.*

970. *Id.*

971. *Id.*

972. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); *see Higgins, supra* note 949.

973. *United States v. Salah*, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

974. *Id.* at 917.

975. *Id.* at 925.

976. *Id.* at 919–24.

977. *Id.* at 925.

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.⁹⁷⁸

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.⁹⁷⁹ To support its motion, the government presented a classified affidavit from the FBI's Assistant Director for Counterintelligence, which was stored in Judge St. Eve's safe.⁹⁸⁰

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession⁹⁸¹ occupies 70 pages of the *Federal Supplement*.⁹⁸² Nineteen portions of the opinion are redacted.⁹⁸³ The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.⁹⁸⁴

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.⁹⁸⁵ Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.⁹⁸⁶ 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.⁹⁸⁷

978. *Id.* at 924.

979. *See* Higgins, *supra* note 949.

980. Interview with Hon. Amy St. Eve, July 2, 2007; *see* Higgins, *supra* note 949.

981. Opinion, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 8, 2006).

982. *United States v. Marzook*, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

983. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51, 758, 767.

984. Interview with Hon. Amy St. Eve, July 2, 2007.

985. Gov't's Anon. Jury Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006); *see* Jeff Coen, *Anonymous Jury Urged in Hamas Funds Case*, Chi. Trib., June 28, 2006, Metro, at 4.

986. Ashqar's Resp. Gov't's Anon. Jury Mot., *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006); Salah's Resp. Gov't's Anon. Jury Mot., *id.* (July 18, 2006); *see* Jeff Coen, *Hamas-Case Motion Challenged*, Chi. Trib., June 29, 2006, Metro, at 3.

987. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006); Interview with Hon. Amy St. Eve, July 2, 2007; *see* Rudolph Bush, *Hamas-Case Jury To Be Named*, Chi. Trib., Aug. 10, 2006, Metro, at 3.

Giving State Secrets to Lobbyists

United States v. Franklin
(*T.S. Ellis III, E.D. Va.*)

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).⁹⁸⁸ On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.⁹⁸⁹

It was reported that for more than two years the FBI had been investigating not the analyst but two men who worked at AIPAC.⁹⁹⁰ 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.⁹⁹¹ On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,⁹⁹² and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.⁹⁹³

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.⁹⁹⁴ It was reported that Franklin was seen joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.⁹⁹⁵ An investigation of Franklin revealed that he had given classified information to Rosen and Weissman and he had improperly stored clas-

988. *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).

989. 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).

990. David Johnston & Eric Schmitt, *F.B.I. Is Said to Brief Pentagon Bosses on Spy Case*, N.Y. Times, Aug. 31, 2004, at A14; 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.

991. *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.

992. 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).

993. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 991.

994. See David Johnston & Eric Schmitt, *Pentagon Analyst Was Cooperating When Israel Spy Case Became Public*, N.Y. Times, Aug. 30, 2004, at A12.

995. 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.

sified information in his West Virginia home.⁹⁹⁶ His security clearance was suspended in June 2004.⁹⁹⁷ In July, Franklin cooperated in a recorded sting meeting with Weissman in which Franklin gave the lobbyist classified information.⁹⁹⁸ Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.⁹⁹⁹

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.¹⁰⁰⁰ The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.¹⁰⁰¹ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.¹⁰⁰² 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.¹⁰⁰³ On January 20, 2006, Judge Ellis provisionally sentenced Franklin to 12 years and seven months in prison, leaving room for an adjustment after the completion of Franklin's assistance in a trial against Rosen and Weissman.¹⁰⁰⁴

AIPAC fired Rosen and Weissman on March 21, 2005.¹⁰⁰⁵ The August 4 superseding indictment added Rosen and Weissman as defendants.¹⁰⁰⁶ The indict-

996. 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).

997. See Markon, *Defense Analyst Charged*, *supra* note 996.

998. *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”).

999. *Rosen*, 445 F. Supp. 2d at 609–10; see Markon, *supra* note 998.

1000. Docket Sheet, *United States v. Franklin*, No. 1:05-cr-225 (E.D. Va. May 26, 2005); see David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. Times, May 5, 2005, at A1.

1001. Docket Sheet, *supra* note 1000.

1002. *Id.*

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

1003. *Rosen*, 445 F. Supp. 2d at 608 n.3; Docket Sheet, *supra* note 1000; 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.

1004. Docket Sheet, *supra* note 1000; see David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

1005. *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.

ment 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.¹⁰⁰⁷ 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.¹⁰⁰⁸

According to the indictment, Rosen met Franklin in 2002.¹⁰⁰⁹ Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."¹⁰¹⁰ Rosen allegedly passed information about the document to foreign officials, journalists, and a think-tank fellow.¹⁰¹¹ Weissman allegedly participated in several of these conversations.¹⁰¹²

Rosen and Weissman's trial was originally scheduled to begin in April 2006,¹⁰¹³ but it has been postponed several times as the court deals with constitutional issues and the handling of classified information.¹⁰¹⁴ Judge Ellis ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.¹⁰¹⁵ Trial is set for April 29, 2008.¹⁰¹⁶

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.

1006. Docket Sheet, *supra* note 1000; see David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

1007. *Rosen*, 445 F. Supp. 2d at 608.

1008. *Rosen*, 445 F. Supp. 2d at 608–09; see David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. Times, Aug. 18, 2005 (identifying USGO-2).

1009. *Id.* at 609.

1010. *Id.*

1011. *Id.*

1012. *Id.*

1013. See Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

1014. See Jerry Markon, *Judge Rejects Dismissal of Pro-Israel Lobbyists Case*, Wash. Post, Aug. 11, 2006, at A5; Richard B. Schmitt, *Lobbyists' Lawyers Say Rice Leaked Information*, L.A. Times, Apr. 22, 2006, at 24 [hereinafter *Rice Leaked*] (reporting that the trial was postponed from May 23, 2006, to Aug. 7, 2006); Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case*, L.A. Times, Aug. 11, 2006, at 13 [hereinafter *Lobbyists to Stand Trial*] (reporting that the trial was postponed indefinitely from Aug. 7, 2006).

1015. See Markon, *supra* note 1014; Schmitt, *Lobbyists to Stand Trial*, *supra* note 1014.

1016. Docket Sheet, *supra* note 1000.

Challenge: Classified Evidence

A large amount of classified evidence is at issue in this case. Judge Ellis's career law clerk has a top-secret security clearance, and she can help the judge deal with issues concerning classified information.¹⁰¹⁷ Judge Ellis's temporary law clerk, however, is a Canadian citizen, and so he is not eligible for a security clearance.¹⁰¹⁸

Defense attorneys and witnesses with appropriate security clearances were able to review classified evidence in the court's Sensitive Compartmented Information Facility (SCIF).¹⁰¹⁹ Witnesses were required to visit the SCIF after hours.¹⁰²⁰

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the "silent witness rule."¹⁰²¹ The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public.¹⁰²² It is a partial closing of the trial.¹⁰²³ 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."¹⁰²⁴

The silent witness rule would be appropriate

only when the government established (i) an overriding reason for closing the trial, (ii) that the closure is no broader than necessary to protect that interest, (iii) that no reasonable alternatives exist to closure, and (iv) that the use of the [silent witness rule] provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence, presented without the use of codes.¹⁰²⁵

Challenge: Subpoenaing a Cabinet Officer

The defendants requested that subpoenas be issued to 20 current and former high-ranking government officials, including Secretary of State Condoleezza Rice, because of her former position as National Security Advisor, and convicted former Defense Department employee Franklin.¹⁰²⁶ The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the others would be at best cumulative.¹⁰²⁷ Judge Ellis sustained the government's objection as to five witnesses, but overruled its objection as to Secretary Rice; current National Security Advisor Stephen Hadley, who was her deputy; Paul Wolfowitz and Richard Armitage, each formerly Deputy Secretary of State; and seven others.¹⁰²⁸

1017. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

1018. *Id.*

1019. Docket Sheet, *supra* note 1000; *see* Reagan, *supra* note 162, at 19 (describing SCIFs).

1020. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

1021. *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007).

1022. *Id.* at 793–94.

1023. *Id.* at 794.

1024. *Id.* at 793–94.

1025. *Id.* at 799.

1026. *United States v. Rosen*, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007).

1027. *Id.* at 807 & n.8, 810.

1028. *Id.* at 814–15; *see* Philip Shenon, *Defense May Seek U.S. Testimony in Secrets Case*, N.Y. Times, Nov. 3, 2007, at A14.

[N]othing in the Sixth Amendment right to compulsory process requires, nor should it require, an accused to refrain from calling government officials as witnesses until he has exhausted possible non-governmental witnesses to prove a fact. Inconvenience to public officials in the performance of their official duties is not a basis for infringing a defendant's Sixth Amendment compulsory process rights. And this point is particularly clear where, as here, the forecasted testimony would likely be more credible and probative were it to come from a government official, as compared to an AIPAC employee.¹⁰²⁹

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.¹⁰³⁰

Because so many issues in this case concern classified information, Judge Ellis filed separate orders under seal stating (1) how the silent witness rule would be applied¹⁰³¹ and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.¹⁰³²

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.¹⁰³³ But the court held several closed hearings, each of which required a secured court reporter.¹⁰³⁴

1029. *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).

1030. *See* Jerry Markon, *Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

1031. *Rosen*, 520 F. Supp. 2d at 789, 802.

1032. *Rosen*, 520 F. Supp. 2d at 814; Docket Sheet, *supra* note 1000.

1033. *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.

1034. Docket Sheet, *supra* note 1000 (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; and Jan. 10 and 29 and Feb. 7 and 8, 2008).

Lodi Terrorists

United States v. Hayat

(*Garland E. Burrell, Jr., E.D. Cal.*)

On June 5, 2005, the government arrested Hamid Hayat and his father, Umer, of Lodi, California, an agricultural town 40 miles south of Sacramento.¹⁰³⁵ Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.¹⁰³⁶

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.¹⁰³⁷ A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.¹⁰³⁸ He is reported to have encouraged support of terrorism as part of his undercover work.¹⁰³⁹ The government is reported to have paid him approximately \$225,000.¹⁰⁴⁰

1035. 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.

1036. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *Enemy Within*]; Krikorian & Tempest, *supra* note 1035; Murphy & Johnston, *supra* note 1035; Rone Tempest, Greg Krikorian & Lee Romney, *Ties to Terror Camps Probed*, L.A. Times, June 9, 2005, at 1.

The younger Hayat's maternal grandfather was Pakistan's minister of religious affairs in the late 1980s. Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

1037. 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.

1038. See Bailey, *supra* note 1037; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 1037 ("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 1037.

1039. *E.g.*, Redacted Gov't's Mot. for Protective Order at 4, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. dated Jan. 26, 2006, filed Feb. 1, 2006) ("in a second conversation, the CW [cooperating witness, namely Khan] congratulated Hamid on what is believed to be Hamid's acceptance into a training camp."); see Bailey, *Mixed Picture*, *supra* note 1038 ("But in tape-recorded telephone conversations, Naseem Khan, a paid government informant, accused Hayat of being 'a loafer' after his arrival in Pakistan during the summer of 2003. Khan pressed him to 'be a man' and fulfill his vow to attend a terrorist training camp."); *Enemy Within*, *supra* note 1036 ("Narra-

The Hayats went to Pakistan in April 2003.¹⁰⁴¹ Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.¹⁰⁴² 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.¹⁰⁴³ Four days after Hamid's return to California, federal agents interviewed him again.¹⁰⁴⁴ They also interviewed his father.¹⁰⁴⁵ Both denied the son's involvement with terrorists.¹⁰⁴⁶ After failing a polygraph examination, however, Hamid confessed to attending an al-Qaeda training camp in Pakistan for six months in 2003 and 2004.¹⁰⁴⁷ The father

tor: 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 1037 ("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.").

1040. 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 1037 (more than \$200,000); Bailey, *Mixed Picture*, *supra* note 1038 (about \$250,000); Enemy Within, *supra* note 1036 (hundreds of thousands of dollars); Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. Times, Apr. 27, 2007, at A1 (about \$225,000); Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. Times, Sept. 11, 2007 (more than \$200,000); Rone Tempest, *Al Qaeda in Lodi "Unlikely,"* L.A. Times, Mar. 30, 2006, at 9 (nearly \$230,000 in salary and expenses); Tempest, *FBI Informer*, *supra* note 1037 (nearly \$250,000 "for his efforts in Lodi alone"); Tempest, *Terrorist Training*, *supra* note 1038 (more than \$200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 1037 (about \$3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 1038 (\$250,000); Tempest, *Onetime Clerk*, *supra* note 1037 (more than \$200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 1037 (nearly \$230,000).

1041. Gov't's Trial Mem. at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); Second Superseding Indictment at 2, *id.* (Jan. 26, 2006); First Superseding Indictment at 3, *id.* (Sept. 22, 2005); *see* Enemy Within, *supra* note 1036; Krikorian & Tempest, *supra* note 1035; Tempest, *FBI Informer*, *supra* note 1037.

1042. Gov't's Trial Mem., *supra* note 1041, at 3-4; *see* Archibold, *Diverging Views*, *supra* note 1040; Krikorian & Tempest, *supra* note 1035; Murphy & Johnston, *supra* note 1035.

1043. Gov't's Trial Mem., *supra* note 1041, at 4; Second Superseding Indictment, *supra* note 1041, at 3; First Superseding Indictment, *supra* note 1041, at 3; *see* Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

1044. Gov't's Trial Mem., *supra* note 1041, at 4, 7; *see* Enemy Within, *supra* note 1036; Krikorian & Tempest, *supra* note 1035.

1045. Gov't's Trial Mem., *supra* note 1041, at 5, 9; *see* Enemy Within, *supra* note 1036; Krikorian & Tempest, *supra* note 1035.

1046. Gov't's Trial Mem., *supra* note 1041, at 4-5, 8-9; *see* Krikorian & Tempest, *supra* note 1035.

1047. Gov't's Trial Mem, *supra* note 1041, at 8; *see* Krikorian & Tempest, *supra* note 1035; Tempest, *supra* note 1043; Tempest *et al.*, *supra* note 1036.

The court did not permit a retired FBI agent to offer his expert opinion that the interrogation of the younger Hayat was so leading, and the defendant so suggestible, as to seriously call into question the reliability of the confession, because such testimony would have been cumulative of the cross-examination of the interrogation agents. Order at 41-55, *United States v. Hayat*, No. 2:05-

and son were indicted on June 16, 2005, for making false statements to federal officials.¹⁰⁴⁸ 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.¹⁰⁴⁹ The government added an additional false statement charge against each defendant on January 26, 2006.¹⁰⁵⁰ The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.¹⁰⁵¹

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.¹⁰⁵² Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.¹⁰⁵³ They agreed to return to Pakistan to avoid terrorism-related charges.¹⁰⁵⁴

The two Hayats were tried together, but before separate juries.¹⁰⁵⁵ The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.¹⁰⁵⁶

cr-240 (E.D. Cal. May 17, 2007), available at 2007 WL 1454280 [hereinafter Order Den. New Trial]; see Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times, May 28, 2006, West Mag. at 16; Archibold, *Diverging Views*, *supra* note 1040; Enemy Within, *supra* note 1036.

1048. Indictment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005); see Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. Times, June 17, 2005, at 1; Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, *supra* note 1043; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

1049. First Superseding Indictment, *supra* note 1041; see Tempest, *supra* note 1043; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

1050. Second Superseding Indictment, *supra* note 1041.

1051. Docket Sheet, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005); see Tempest & Krikorian, *supra* note 1048.

Tim Reagan interviewed Judge Burrell for this report in the judge's chambers on February 13, 2007.

1052. See Tempest *et al.*, *supra* note 1036.

1053. See Murphy & Johnston, *supra* note 1035; Tempest, *supra* note 1043; Tempest *et al.*, *supra* note 1036.

1054. See Archibold, *Diverging Views*, *supra* note 1040 (reporting a voluntary return to Pakistan to avoid deportation); Enemy Within, *supra* note 1036 (reporting that the government did not have enough evidence to charge the imams with anything related to terrorism); Maria L. La Ganga & Rone Tempest, *2 Lodi Men To Be Deported*, L.A. Times, July 16, 2005, at 3 (reporting Khan and Adil's agreement to be deported); Lee Romney & Ann M. Simmons, *Pakistani Cleric Agrees to Leave U.S.*, L.A. Times, Aug. 16, 2005, at 1 (reporting Ahmed's agreement to be deported); Tempest, *Terrorist Training*, *supra* note 1038 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, *supra* note 1049 (reporting that Khan was deported in Aug. 2005).

1055. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 19, 2006) (ordering the empanelment of dual juries); see Rone Tempest, *Jury in Lodi Case Asks to See Video*, L.A. Times, Apr. 14, 2006, at 3.

1056. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006) (finding Hamid Hayat guilty); Docket Sheet, *supra* note 1051 (noting the granting of a mistrial as to Umer Hayat because the jury was not able to reach a verdict); see Order Den. New Trial, *supra* note 1047, at 1; see also

The son moved for a new trial, arguing, among other things, that one juror observed the foreperson gesture, before the end of the trial, that the defendant should be hanged.¹⁰⁵⁷ After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.¹⁰⁵⁸ A new trial was denied.¹⁰⁵⁹ The son was sentenced on September 10, 2007, to 24 years in prison.¹⁰⁶⁰ His appeal is pending.¹⁰⁶¹

The government initially decided to retry the father,¹⁰⁶² but decided to drop the charges in exchange for his pleading guilty to a false customs declaration related to his taking too much money to his family on the 2003 trip to Pakistan.¹⁰⁶³ 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.¹⁰⁶⁴

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.¹⁰⁶⁵ Meanwhile, two family members—both U.S. citizens—who were trying to return to Lodi from Pakistan discovered that they were on the no-fly list, and initially they were not permitted to return without submitting to interrogation

Archibold & Kearns, *supra* note 1035; Enemy Within, *supra* note 1036; Walsh, *supra* note 1037 (“The jury split 7-5 for conviction on one count and 6-6 on a second count . . .”); Tempest, *supra* note 1043 (“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.”).

1057. Order Den. New Trial, *supra* note 1047, at 6, 8–13; see Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

1058. Order Den. New Trial, *supra* note 1047, 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.

1059. Order Den. New Trial, *supra* note 1047; see Bulwa, *supra* note 1058.

1060. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007); see Marshall, *supra* note 1040.

1061. Docket Sheet, *United States v. Hayat*, No. 07-10457 (9th Cir. Sept. 21, 2007) (noting that the appellant’s brief is due May 12, 2008).

1062. 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.

1063. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006); Information, *id.* (May 31, 2006); see Enemy Within, *supra* note 1036; Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 1037.

1064. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006); see Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 1037.

1065. Enemy Within, *supra* note 1036; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 1037.

first.¹⁰⁶⁶ They declined to be interrogated¹⁰⁶⁷ and were permitted to return home five months later after intervention of counsel.¹⁰⁶⁸

Challenge: Classified Evidence

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)¹⁰⁶⁹ may apply to this case.¹⁰⁷⁰ 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.¹⁰⁷¹

Six times the government noticed submission of material to the court *ex parte*, *in camera*, and under seal,¹⁰⁷² and twice the government noticed a hearing *ex parte*, *in camera*, and under seal.¹⁰⁷³

1066. 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*.

1067. See Archibold, *supra* note 1066; Bulwa, *supra* note 1066.

1068. 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.

1069. 18 U.S.C. app. 3; see Reagan, *supra* note 162.

1070. CIPA Notice, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. June 27, 2005).

1071. CIPA Mot. at 3, *id.* (July 6, 2005).

1072. Six times the government noticed the submission of *ex parte*, *in camera*, under seal material:

1. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Oct. 6, 2005); see Redacted Gov't's In Camera, Ex Parte, Under Seal CIPA Mem., *id.* (Dec. 16, 2005) (specifying a hearing date of Oct. 7, 2005).
2. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Nov. 18, 2005).
3. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Dec. 9, 2005); see Redacted Gov't's CIPA Mot., *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of Dec. 9, 2005).
4. Notice of Ex Parte, In Camera, Under Seal CIPA Filings, *id.* (Jan. 28, 2006); see Redacted Gov't's CIPA Mot., *id.* (dated Jan. 26, 2006, filed Feb. 2, 2006) (specifying a hearing date of Jan. 27, 2005); Redacted Gov't's CIPA Mot., *id.* (dated Jan. 27, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005); Redacted Gov't's CIPA

When a trial date was set, the government announced that some evidence against the defendants was obtained using methods so secret that they could not be disclosed to anyone without a security clearance.¹⁰⁷⁴ 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.¹⁰⁷⁵

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.¹⁰⁷⁶ The court security officer could not identify a local attorney with a security clearance, but was able to identify two in the Northern District of

Mot., *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005).

5. Notice of Ex Parte, In Camera Classified Filing, *id.* (Apr. 3, 2006); *see* Redacted Gov't's CIPA Mot., *id.* (Apr. 4, 2006) (specifying a hearing date of Apr. 4, 2006); Redacted Order, *id.* (Apr. 3, 2006).

6. Notice of Ex Parte, In Camera, Under Seal CIPA Filing, *id.* (Dec. 13, 2006); *see* Order, *id.* (Dec. 21, 2006) (granting in camera ex parte motion for a protective order).

1073. Twice the government noticed an ex parte, in camera, under seal hearing:

1. Notice of Ex Parte, In Camera, Under Seal CIPA Hr'g, *id.* (Dec. 5, 2005) (specifying a hearing date of Dec. 9, 2005); *see* Redacted Gov't's CIPA Mot., *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of Dec. 9, 2005).

2. Notice of Ex Parte, In Camera, Under Seal CIPA Hr'g, *id.* (Dec. 9, 2005) (specifying a hearing date of Dec. 16, 2005); *see* Redacted Gov't's In Camera, Ex Parte, Under Seal CIPA Mem., *id.* (Dec. 16, 2005) (specifying a hearing date of Dec. 16, 2005).

There may have been a third sealed hearing. *See* Redacted Gov't's CIPA Mot., *id.* (dated Jan. 6, 2005 [sic], filed Jan. 6, 2006) (specifying a hearing date of Jan. 6, 2005 [sic]).

1074. *See Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of Feb. 14, 2006); *see also* Order at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 10, 2006) (announcing a trial date of Feb. 14, 2006, and discussing a government motion that defense counsel obtain a security clearance).

The evidence apparently resulted in four exhibits—satellite images in the vicinity of Balakot, Pakistan—that the parties ultimately stipulated were admissible. Ex. 4 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 3 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 2 Stipulated Order, *id.* (Feb. 3, 2006); Ex. 1 Stipulated Order, *id.* (Feb. 3, 2006).

1075. Defs.' Joint CIPA Resp. at 2–3, *id.* (Jan. 16, 2006).

1076. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

California who were cleared.¹⁰⁷⁷ Ultimately, Judge Burrell decided that cleared counsel for the defendants was not necessary.¹⁰⁷⁸

Within a few weeks, the parties and their attorneys agreed to a stipulated protective order stating that the case might require in camera proceedings concerning classified information, which would be held ex parte because defense counsel did not have security clearances and they did not want to delay the trial to obtain them.¹⁰⁷⁹ Judge Burrell's court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.¹⁰⁸⁰

Hamid Hayat's motion for a new trial¹⁰⁸¹ 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.¹⁰⁸² Judge Burrell filed his ruling on this argument under seal.¹⁰⁸³

1077. *Id.*

1078. *Id.*

1079. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006).

1080. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1081. Def.'s Mem. in Supp. of Mot. for a New Trial, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006).

1082. Sealing Order, *id.* (Feb. 5, 2007); Def.'s Sealing Req., *id.* (Oct. 27, 2006); *see also* Order, *id.* (Mar. 21, 2007) (granting the plaintiff's motion to file an argument III reply under seal); Order, *id.* (Feb. 5, 2007) (granting the government's motion to file a response to argument III under seal).

1083. Order Den. New Trial, *supra* note 1047, at 35; Docket Sheet, *supra* note 1051 (noting that "counsel for the parties are authorized to obtain from the clerk's office a copy of the sealed order").

Warrantless Wiretaps

*Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and related actions (Vaughn R. Walker, N.D. Cal.) and Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.);*¹⁰⁸⁴ *ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.);*¹⁰⁸⁵ *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.¹⁰⁸⁶ On

1084. An interlocutory appeal was heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown.

1085. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

1086. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1. "After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted." *Id.*

The President acknowledged the existence of the program the following day:

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.

President's Radio Address, Dec. 17, 2005, text available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>; see *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (it is undisputed that "the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties"). For a discussion of the *New York Times'* and the government's disclosures, see *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1192–94, 1198–200 (9th Cir. 2007); *ACLU*, 493 F.3d at 648 & n.1; *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218, 1221–22 (D. Or. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986–87 (N.D. Cal. 2006).

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).

May 11, 2006, *USA Today* reported that “[t]he National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by AT&T, Verizon and BellSouth, people with direct knowledge of the arrangement told *USA Today*.”¹⁰⁸⁷ 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.¹⁰⁸⁸ Dozens of lawsuits followed these revelations.¹⁰⁸⁹ 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.¹⁰⁹⁰

In the summer of 2007, FBI agents executed a classified search warrant in a raid of a former Justice Department lawyer as part of an investigation into who leaked to the news media information about the warrantless wiretaps. See Michael Isikoff, *Looking for a Leaker*, Newsweek, Aug. 13, 2007, at 8.

1087. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, *USA Today*, May 11, 2006, at 1A. BellSouth and Verizon have denied participation in this program, but MCI, which Verizon recently acquired, may have participated. See Susan Page, *Lawmakers: NSA Database Incomplete*, *USA Today*, June 30, 2006, at 2A; see also *Al-Haramain Islamic Found.*, 507 F.3d at 1193 n.1; *Hepting*, 439 F. Supp. 2d at 988–89.

1088. Cauley, *supra* note 1087; see *Hepting*, 439 F. Supp. 2d at 988; see also Scott Shane & David Johnston, *Mining of Data Prompted Fight over U.S. Spying*, N.Y. Times, July 29, 2007, at A1 (reporting that the government has acknowledged warrantless wiretaps but has not acknowledged data mining in calling records, although the latter has been widely reported).

1089. See Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, S.J. Mercury News, Aug. 11, 2006, at A12; Jason McLure, *DOJ Losing Ground in Wiretap Fight*, Legal Times, Sept. 4, 2006, at 1.

1090. Conditional Transfer Order 6, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007) (transferring one action against a telephone company), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Apr. 17, 2007); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Feb. 15, 2007) (transferring actions by the federal government against states), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006) (transferring three actions against the government and one action against telephone companies), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 5, *In re NSA*, No. 1791 (J.P.M.L. issued Nov. 3, 2006, final Nov. 21, 2006) (transferring one action against a telephone company), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Nov. 27, 2006); Conditional Transfer Order 2, *In re NSA*, No. 1791 (J.P.M.L. issued Sept. 11, 2006, final Sept. 27, 2006) (transferring one action against a telephone company), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 4, 2006); Conditional Transfer Order 1, *In re NSA*, No. 1791 (J.P.M.L. issued Aug. 31, 2006, final Sept. 18, 2006) (transferring one action against the government and 15 actions against telephone companies), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Sept. 25, 2006); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial Aug. 9, 2006, transfer order transferring 17 actions against telephone companies, one transfer of which later was vacated because the case already was dismissed); see Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 31, 2006) (consolidating for pretrial purposes all cases already before Judge Walker); Docket Sheet, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006); see also Carey, *supra* note 1089; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. Chron., Aug. 11, 2006, at B1; McLure, *supra* note 1089.

Tim Reagan interviewed Judge Walker for this report in the judge's chambers on February 15, 2007.

The government has argued that these cases must be dismissed because they cannot be litigated without revealing state secrets.¹⁰⁹¹ This argument has been successful with respect to alleged transfers of communication records by the telephone companies to the government,¹⁰⁹² but less successful with respect to the warrantless monitoring of the contents of communications, because the government acknowledged that it did that.¹⁰⁹³

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).¹⁰⁹⁴ She issued a perma-

1091. *Al-Haramain Islamic Found.*, 507 F.3d at 1193; *ACLU*, 493 F.3d at 650 & nn.2–3; Mem. Mot. to Dismiss or for Summ. J., *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 20, 2007); Military & State Secrets Privilege P. & A., *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006); Military & State Secrets Privilege P. & A., *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. June 21, 2006); Defs.’ Mot. to Dismiss or for Summ. J., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Defs.’ Mot. to Dismiss or for Summ. J., *Center for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Mot. to Dismiss or for Summ. J., *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); *see also* U.S. Statement of Interest, *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex., July 17, 2006) (announcing intent to seek dismissal on state-secrets grounds).

1092. *ACLU v. NSA*, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing data-mining claims); *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing complaint with leave to amend); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995–98 (N.D. Cal. 2006) (provisionally denying discovery on transfers of communication records); *see ACLU*, 493 F.3d at 650 n.2 (“The alleged data mining, which has not been publicly acknowledged, might fall within [the state-secrets rule of non-justiciability].”); *id.* at 719 (Gilman, J., 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 1089; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6.

1093. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1197–201; *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1220–24 (D. Or. 2006); *ACLU*, 438 F. Supp. 2d at 759, 764–66; *Hepting*, 439 F. Supp. 2d at 980, 991–94; Egelko, *supra* note 1090; 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 1089; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9.

The New York University School of Law’s Center on Law and Security has described two types of “electronic surveillance,” which is a more formal term for wiretaps, and which implicitly acknowledges that not all electronic communications pass through wires: “We define ‘trawling surveillance’ as NSA interception of entire streams of communications, which are then subjected to computer analysis for particular names, internet addresses, and trigger words. ‘Targeted surveillance’ refers to intercepts focused on one person or phone number.” 1 *For the Record* 7 (Jan. 2007), available at http://www.lawandsecurity.org/publications/ForTheRecord/NSA_jan_07.pdf.

1094. *ACLU v. NSA*, 438 F. Supp. 2d 754, 775–76, 778–80, 782 (E.D. Mich. 2006); *ACLU*, 493 F.3d at 650; *see* Eggen & Linzer, *supra* note 1092; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcheson & Margaret Talev, *Wiretap Program Is Ruled Illegal*, S.J. Mercury News, Aug. 18, 2006, at A1; Adam Liptak & Eric Lichtblau, *U.S.*

ment injunction against the program,¹⁰⁹⁵ but a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed and ordered the challenge to the program dismissed.¹⁰⁹⁶ Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,¹⁰⁹⁷ but Judge Ronald Lee Gilman would have affirmed the injunction.¹⁰⁹⁸ The Supreme Court denied certiorari.¹⁰⁹⁹

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveiled, but the U.S. Court of Appeals for the Ninth Circuit held that the proffered evidence was too secret to afford them standing.¹¹⁰⁰

The government announced in January 2007 that it abandoned the warrantless feature of the surveillance program and began receiving warrants for the taps from the Foreign Intelligence Surveillance Court (FISC).¹¹⁰¹ In August, Congress

Judge Finds Wiretap Actions Violate the Law, N.Y. Times, Aug. 18, 2006, at A1; McLure, *supra* note 1089; Romero & Temple-Raston, *supra* note 212, at 149, 195.

Tim Reagan interviewed Judge Taylor for this report in the judge's chambers on December 7, 2006.

1095. *ACLU*, 438 F. Supp. 2d at 782; J. and Permanent Inj. Order, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006).

1096. *ACLU*, 493 F.3d at 648, 687–88 (resolving *ACLU v. NSA*, Nos. 06-2095 & 06-2140 (6th Cir. Aug. 17, 2006)); *see ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (staying injunction pending appeal); Dismissal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Nov. 28, 2007); *see also* Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, Wash. Post, July 7, 2007, at A1; Adam Liptak, *Panel Dismissed Suit Challenging Secret Wiretaps*, N.Y. Times, July 7, 2007, at A1; Charlie Savage, *Court Gives Bush Win on Surveillance*, Boston Globe, July 7, 2007, at 1A.

1097. *ACLU*, 493 F.3d at 653 (“the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA”); *id.* at 692 (Gibbons, J., concurring in the judgment) (“Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.”).

1098. *Id.* at 693, 720 (Gilman, J., 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.

1099. *ACLU v. NSA*, ___ U.S. ___, 128 S. Ct. 1334 (2008); Docket Sheet, *ACLU v. NSA*, No. 07-468 (U.S. Oct. 9, 2007) (noting denial of the petition on Feb. 19, 2008, after consideration at conferences on Jan. 18 and Feb. 15, 2008); *see* Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

1100. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95, 1205(9th Cir. 2007) (pp.14959, 14961–62, 14969–73 of filed op.); *see* Lichtblau, *supra* note 1093.

1101. *Al-Haramain Islamic Found.*, 507 F.3d at 1194; *ACLU*, 493 F.3d at 651 n.4; Notice of Att’y Gen.’s Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 17, 2007); *see* Dan Eggen, *Court Will Oversee Wiretap Program*, Wash. Post, Jan. 18, 2007, at A1 (reporting “a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people”); Frontline: Spying on the Home Front (PBS television broadcast May 15, 2007) [hereinafter Home Front]; Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. Times, Jan. 18, 2007, at A1; Adam Liptak, *Secrecy at Issue in Suits Opposing Domestic Spying*, N.Y. Times, Jan. 26, 2007, at

passed and the President signed temporary revisions to FISA that permit warrantless surveillance of communications reasonably believed to be international.¹¹⁰² But the temporary revisions lapsed in February 2008, because the two houses of Congress did not agree on whether an extension of the revisions should include retroactive immunity for telephone companies' assistance with warrantless surveillance.¹¹⁰³

Five 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.

Suits Against the Government

The American Civil Liberties Union (ACLU), other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's pro-

A1; Romero & Temple-Raston, *supra* note 212, at 195. *But see* Walter Pincus, *Intelligence Chief Decries Constraints*, Wash. Post, May 2, 2007, at A7 (reporting congressional testimony from the new director of national intelligence that the FISA court's January 2007 orders have prevented agencies from collecting intelligence that they should be collecting); James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007, at A16 (reporting congressional testimony from the new director of national intelligence that the President retained authority under Article II of the Constitution to resume warrantless wiretaps).

According to the government, on January 10, 2007, the FISA court issued classified negotiated orders, and the government decided that it no longer had to conduct its surveillance without warrants. Ex. 2, Notice of Filing, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 22, 2007) (also stating that "the number, nature, and contents of the specific orders described herein are highly classified"); *see also* NSA Dir. Decl., *ACLU*, Nos. 06-2095 & 06-2140 (6th Cir. Jan. 25, 2007) ("The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court."), also filed as Ex. 1, Notice of Filing, *supra*. But it was reported that another judge on the FISA court subsequently nullified some or all of the enabling orders. Charlie Savage, *Bush Urges Congress to Pass Wiretap Bill*, Boston Globe, Aug. 3, 2007, at 2A.

1102. Protect America Act of 2007, S. 1927, 110th Cong. (passed Aug. 3, 2007), attached as Ex. A, Notice of Statutory Amendment, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 8, 2007) (noting that the six-month revisions were signed into law on Aug. 5, 2007); 153 Cong. Rec. H9952-66 (Aug. 4, 2007); *id.* S10856-72 (Aug. 3, 2007); *see* James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. Times, Aug. 6, 2007, at A1; Charlie Savage, *New Law Expands Power to Wiretap*, Boston Globe, Aug. 6, 2007, at 1A; *see also* Dan Eggen, *Surveillance Law Extended for 15 Days*, Wash. Post, Feb. 1, 2008, at A5 (reporting that the expiration of the temporary revisions was extended until Feb. 16, 2008).

It was reported that passage of the revisions was motivated in part by an FISC ruling early in 2007 that warrants would be required to completely monitor international communications that are routed through equipment in the United States. Carol D. Leonnig & Ellen Nakashima, *Ruling Limited Spying Efforts*, Wash. Post, Aug. 3, 2007, at A1; Greg Miller, *New Limits Put on Overseas Surveillance*, L.A. Times, Aug. 2, 2007, at 16; Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure*, Wash. Post, Aug. 5, 2007, at A1; Savage, *supra*.

1103. *See* Carl Hulse, *House Leaves Surveillance Law to Expire*, N.Y. Times, Feb. 15, 2008, at A17; Jonathan Weisman & Dan Eggen, *Surveillance Law Set to Expire Today*, Wash. Post, Feb. 16, 2008, at A2.

gram of warrantless wiretaps on January 17, 2006, in federal court in Detroit.¹¹⁰⁴ The court assigned the case to Judge Taylor,¹¹⁰⁵ who enjoined the program on August 17.¹¹⁰⁶ The government immediately appealed,¹¹⁰⁷ and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication records claims.¹¹⁰⁸ On July 6, 2007, the court of appeals vacated the injunction and ordered the case dismissed,¹¹⁰⁹ with one judge dissenting.¹¹¹⁰

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.¹¹¹¹ Judge Lynch heard arguments on the plaintiffs' motion for partial summary judgment¹¹¹² and the government's motion for dismissal on state-secrets grounds¹¹¹³ on September 5,¹¹¹⁴ but did not rule before the case was transferred to Judge Walker.¹¹¹⁵

1104. *ACLU*, 493 F.3d at 648–50; Compl., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); see David Ashenfelter & Niraj Wari, *Suits Filed to Stop Spying*, Det. Free Press, Jan. 18, 2006; Eric Lichtblau, *Two Groups Planning to Sue over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14; Romero & Temple-Raston, *supra* note 212, at 71–72.

1105. 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 1104.

1106. *ACLU*, 493 F.3d at 650; *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006); J. and Permanent Inj. Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); see Eggen & Linzer, *supra* note 1092; Gibson, *supra* note 1094; Hutcheson & Talev, *supra* note 1094; Liptak & Lichtblau, *supra* note 1094; McLure, *supra* note 1089; Romero & Temple-Raston, *supra* note 212, at 149. The court of appeals stayed the injunction pending appeal. *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006); see *Court Allows Warrantless Wiretapping During Appeal*, Wash. Post, Oct. 5, 2006, at A18; *U.S. Eavesdropping Is Allowed to Continue During Appeal*, N.Y. Times, Oct. 5, 2006, at A23.

1107. Docket Sheet, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006); Defs.' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); see Gibson, *supra* note 1094; Hutcheson & Talev, *supra* note 1094; Liptak & Lichtblau, *supra* note 1094.

1108. *ACLU*, 493 F.3d at 648, 650; Docket Sheet, *ACLU v. NSA*, No. 06-2140 (6th Cir. Aug. 30, 2006); Pls.' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006).

In the appeal, eleven amicus curiae briefs were filed. Docket Sheets, *ACLU*, Nos. 06-2095 & 06-2140 (6th Cir. Aug. 17 & 30, 2006) [hereinafter 6th Cir. *ACLU* Docket Sheets].

1109. *ACLU*, 493 F.3d at 648, 687–88; see Goldstein, *supra* note 1096; Liptak, *supra* note 1096; Savage, *supra* note 1096.

1110. *ACLU*, 493 F.3d at 693–720 (Gilman, J., dissenting).

1111. Compl., Center for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *id.*; see Ashenfelter & Wari, *supra* note 1104; Lichtblau, *supra* note 1104.

Tim Reagan interviewed Judge Lynch for this report by e-mail on May 16, 2007.

1112. Pls.' Partial Summ. J. Mem., *Center for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

1113. Military & State Secrets Privilege P. & A., *id.* (May 27, 2006).

1114. Tr., *id.* (Sept. 5, 2006) [hereinafter *Center for Constitutional Rights* Sept. 5, 2006, Tr.]; Order, *id.* (Aug. 8, 2006); see Adam Liptak, *Judge Hears Arguments on Federal Spying Program*, N.Y. Times, Sept. 6, 2006, at A14.

1115. Interview with Hon. Gerard E. Lynch, May 16, 2007.

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.¹¹¹⁶

The Al-Haramain Islamic Foundation—a charity the government accused of aiding terrorists—and its attorneys filed a federal suit in Portland, Oregon, on February 28, 2006, claiming not that the plaintiffs’ communications *might* be tapped, but that their communications actually were tapped, according to inadvertently disclosed top-secret evidence.¹¹¹⁷ The secret evidence was improperly included in materials submitted to the plaintiffs’ attorneys in an action to freeze their assets because of their alleged support of terrorism.¹¹¹⁸ The U.S. District

1116. Mem. of Law of Certain Members of Congress, *Center for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. May 31, 2006); Mem. of Law of Certain Members of Congress, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 10, 2006).

1117. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95 (9th Cir. 2007); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Compl., *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) (describing the document as “United States Treasury Office of Foreign Assets Control logs of . . . conversations”); see *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (“In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted.”); see also Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, *The Oregonian*, Apr. 15, 2006, at B1 [hereinafter *U.S. Attacks Lawsuit*]; see Lichtblau, *supra* note 1093; Liptak, *supra* note 1093; Liptak, *supra* note 1096; McLure, *supra* note 1089; Justin Scheck, *NSA’s Wiretaps Face Scrutiny in S.F. Courtroom*, *S.F. Recorder*, Apr. 10, 2006, at 1; 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.” Pls.’ Reply to Defs.’ Resp. to Objection to Filing Material Ex Parte and In Camera at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 22, 2006) (italics omitted). The document apparently contains a log of clandestinely monitored telephone calls between the charity’s director in Saudi Arabia and its lawyers in Washington, D.C. Compl. at 3–4, *id.* (Feb. 28, 2006); see Ashbel S. Green, *Lawsuits Challenge Feds’ Stance on Secrets*, *The Oregonian*, June 7, 2006, at A1 [hereinafter *Feds’ Stance*]; 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”).

1118. *Al-Haramain Islamic Found.*, 507 F.3d at 1193–95; *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218–19; Defs.’ Resp. to the Oregonian’s Mot. to Intervene and to Unseal Records at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006); Acting Office of Foreign Assets Control Dir. Decl., Attach. A, *id.*; see Lichtblau, *supra* note 1093; Liptak, *supra* note 1093; Liptak, *supra* note 1096; MacLean, *supra* note 1117 (“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 1117 (“The most important piece of evidence in the Portland suit is a secret document accidentally disclosed by the FBI in 2004 through discovery in another lawsuit. It’s currently being held in a secure location in Seattle, despite efforts by the federal government to take it back.”).

The Saudi Arabian government announced in 2004 that it would shut down the charity, see Douglas Jehl, *Saudis Are Shutting Down a Charity Tied to Terrorists*, *N.Y. Times*, June 3, 2004, at A12, and the United States government dismissed the case against the charity, see Joseph B.

Court for the District of Oregon assigned the case against the government to Judge Garr M. King,¹¹¹⁹ who denied a motion by the government to dismiss the case on state-secrets grounds and certified an immediate appeal.¹¹²⁰ The U.S. Court of Appeals for the Ninth Circuit affirmed in an opinion authored by Circuit Judge M. Margaret McKeown and joined by Judges Harry Pregerson and Michael Daly Hawkins, but the court ruled that the plaintiffs could not rely on the secret evidence.¹¹²¹

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.¹¹²² The state-secrets privilege does apply, however, to the evidence that the charity and its attorneys proffered to establish standing.¹¹²³ The court remanded the case for a determination of whether FISA affords the plaintiffs a statutory mechanism for challenging the legality of the alleged surveillance that preempts the privilege.¹¹²⁴ Judge Walker, to whom the case has been transferred, will hear the matter on April 23, 2008.¹¹²⁵

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn¹¹²⁶ and Atlanta.¹¹²⁷ The government moved on July 18, 2006, to dis-

Frazier, *Gonzales Against Releasing Evidence: Case Involved Islamic Charity*, Seattle Times, Mar. 31, 2006, at B2.

1119. Docket Sheet, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter D. Or. *Al-Haramain Islamic Found.* Docket Sheet]; see Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Cases*, The Oregonian, Apr. 25, 2006, at A1.

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on February 14, 2007.

1120. *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 1093. The court of appeals agreed to hear the appeal. Order, *Al-Haramain Islamic Found. v. Bush*, No. 06-80134 (9th Cir. Dec. 21, 2006) (granting permission to appeal); see Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Dec. 22, 2006) [hereinafter 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet].

Proceedings in the district court, which were transferred to the Northern District of California, were stayed pending the interlocutory appeal. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1120 (noting a stay order on Apr. 4, 2007).

1121. *Al-Haramain Islamic Found.*, 507 F.3d 1190; see *id.* at 1193 (describing the privilege as “an evidentiary privilege that protects national security and military information in appropriate circumstances”); see Lichtblau, *supra* note 1093.

1122. *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 1093.

1123. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; see Lichtblau, *supra* note 1093.

1124. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; see Lichtblau, *supra* note 1093.

1125. Minute Entry, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Feb. 7, 2008).

1126. Compl., *Shubert v. Bush*, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006).

1127. Compl., *Guzzi v. Bush*, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006).

miss the Atlanta case for lack of standing,¹¹²⁸ and the government moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.¹¹²⁹

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.¹¹³⁰

Suits Against Telephone Companies

At least 45 suits were filed against telephone companies for their assistance with the warrantless wiretaps. Five were voluntarily dismissed, one was a pro se prisoner suit dismissed by the court, and one was dismissed on state-secrets grounds with leave to amend the complaint. The latter case and 38 other active cases were consolidated in the Northern District of California before Judge Walker. One of these consolidated cases subsequently was voluntarily dismissed.¹¹³¹

One suit filed against a telephone company predated the May 2006 *USA Today* article.¹¹³² 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.¹¹³³ To support their case, the plaintiffs filed under seal

1128. Defs.' Mot. to Dismiss, *id.* (July 18, 2006).

1129. Defs.' Mot. to Dismiss or for Summ. J., *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. May 25, 2007).

1130. Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 2, *supra* note 1090; Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, Center for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) (action transferred from the Southern District of New York); Docket Sheet, Shubert v. Bush, No. 3:07-cv-693 (N.D. Cal. Feb. 2, 2007) (action transferred from the Eastern District of New York); Docket Sheet, *Al-Haramain Islamic Found.*, 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).

1131. Dismissal Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 22, 2007) (dismissing *Electron Tubes Inc. v. Verizon Commc'ns*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), transferred as *Electron Tubes Inc. v. Verizon Commc'ns*, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006)).

1132. *See* Cauley, *supra* note 1087.

1133. Docket Sheet, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006) [hereinafter N.D. Cal. *Hepting* Docket Sheet]; *see* Am. Compl., *id.* (Feb. 22, 2006); *see also* Home Front, *supra* note 1101; John Markoff, *AT&T Is Accused in Eavesdropping*, N.Y. Times, Feb. 1, 2006, at A20; Scott Shane, *Attention in N.S.A. Debate Turns to Telecom Industry*, N.Y. Times, Feb. 11, 2006, at A11.

The lead plaintiff was motivated to sue by the experiences of his father, whose international correspondence was monitored for years because of correspondence with communist China arising from his picking up a shortwave Chinese broadcast at age 13. *Key Figure in Wiretapping Suit Goes Public*, Morning Edition (NPR radio broadcast Mar. 6, 2008).

evidence provided by a former AT&T employee.¹¹³⁴ The court assigned the case to Judge Walker.¹¹³⁵

On May 30, another class action against AT&T was filed in federal court in San Francisco,¹¹³⁶ and the court assigned this case to Judge Walker as related to the first case against AT&T.¹¹³⁷ AT&T moved for dismissal for lack of standing.¹¹³⁸

On June 5 and June 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.¹¹³⁹

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.”¹¹⁴⁰ 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.¹¹⁴¹ This case was randomly assigned to Judge Walker,¹¹⁴² who reassigned it to himself as related to the first case against AT&T.¹¹⁴³

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.¹¹⁴⁴ The case was assigned to Judge Walker as related to the removed case against AT&T.¹¹⁴⁵

1134. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); see McLure, *supra* note 1089; Scheck, *supra* note 1117.

Judge Walker denied motions by news media to unseal the declarations, Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 20, 2007), but they and portions of their exhibits were later unsealed by stipulation, Order, *id.* (Oct. 1, 2007); Stipulation, *id.* (Sept. 25, 2007).

1135. N.D. Cal. *Hepting* Docket Sheet, *supra* note 1133; see Scheck, *supra* note 1117.

1136. Compl., *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

1137. Related Case Order, *id.* (June 21, 2006).

1138. Defs.’ Mot. & Supporting Mem., *id.* (Aug. 9, 2006).

1139. Notice of Removal, *Campbell v. AT&T Commc’ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006) [hereinafter *Campbell* Notice of Removal]; Docket Sheet, *Riordan v. Verizon Commc’ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006).

1140. Compl. at 1, *Campbell v. AT&T Commc’ns of Cal.*, No. 06-452626 (Cal. Sup. Ct. S.F. May 26, 2006), attached as Ex. A to *Campbell* Notice of Removal, *supra* note 1139.

1141. *Campbell* Notice of Removal, *supra* note 1139.

1142. Docket Sheet, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); see Administrative Mot. at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

1143. Related Case Order, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 20, 2006).

1144. See Administrative Mot at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

1145. Related Case Order, *id.* (July 5, 2006).

The government moved to intervene as a defendant in these cases in order to defeat motions to remand,¹¹⁴⁶ and Judge Walker denied the remand motions.¹¹⁴⁷

On July 7, 2006, yet another class action was filed in San Francisco federal court—this one against MCI.¹¹⁴⁸ Judge Walker took assignment of this case as related to the first case filed against AT&T.¹¹⁴⁹

In the first San Francisco case against AT&T, the court denied the government's motion to dismiss on state-secrets grounds.¹¹⁵⁰ The court certified an appeal of its order,¹¹⁵¹ and the court of appeals granted petitions for interlocutory appeal by both the government and AT&T.¹¹⁵² The appeal was heard on August 15, 2007, in San Francisco,¹¹⁵³ but the court withdrew submission on March 14, 2008, at a time of uncertainty whether Congress would grant immunity to telephone companies for their assistance with warrantless surveillance.¹¹⁵⁴

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in other districts. The JPML transferred those cases not voluntarily dismissed to Judge Walker.¹¹⁵⁵ Judge Walker has issued an order to show cause why his denial of the

1146. U.S. Mot. to Intervene, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. Aug. 4, 2006); U.S. Mot. to Intervene, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. Aug. 4, 2006).

1147. *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).

1148. Class Action Compl., *Spielfogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006).

1149. Related Case Order, *id.* (July 17, 2006).

1150. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); see Markoff, *supra* note 1093; McLure, *supra* note 1089; Mohammed, *supra* note 1093.

1151. *Hepting*, 439 F. Supp. 2d at 1011; see McLure, *supra* note 1089.

1152. Order, *United States v. AT&T Corp.*, Nos. 06-80109 & 06-80110 (9th Cir. Nov. 7, 2006), attached, e.g., as Attach. B to Joint Case Management Statement, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Nov. 7, 2006); see Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir. Nov. 8, 2006) (appeal by the government); Docket Sheet, *Hepting v. AT&T Corp.*, No. 06-17132 (9th Cir. Nov. 8, 2006) (appeal by AT&T).

The appeals were consolidated. Docket Sheets, *Hepting*, Nos. 06-17132 & 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 9th Cir. *Hepting* Docket Sheets]. Twelve amicus curiae briefs were filed. Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006).

1153. 9th Cir. *Hepting* Docket Sheets, *supra* note 1152; 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*, Wah. Post, Aug. 16, 2007, at A4.

1154. Order, *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir. Mar. 14, 2008); Order, *Hepting v. AT&T Corp.*, No. 06-17132 (9th Cir. Mar. 14, 2008); see Eric Lichtblau, *House Votes to Reject Immunity for Phone Companies Involved in Wiretaps*, N.Y. Times, Mar. 15, 2008, at A13.

1155. *Supra* note 1090; see Carey, *supra* note 1089; Egelko, *supra* note 1090.

Among the cases filed in the Northern District of California, only the first action against AT&T was part of the multidistrict consolidation order. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006). But the others have also been consolidated before Judge Walker. Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 31, 2006); see also Aug. 14, 2006, docket sheet notations in Docket Sheet, *Spielfogel-Landis*, No. 3:06-cv-4221 (N.D. Cal. July 7,

states-secret privilege in the first San Francisco action against AT&T should not apply also to the other cases.¹¹⁵⁶

A Chicago attorney filed a class action against telephone companies on May 15, 2006.¹¹⁵⁷ The Northern District of Illinois assigned the case to Judge Matthew F. Kennelly.¹¹⁵⁸ 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.¹¹⁵⁹ Judge Kennelly took assignment of this case as related to the first case.¹¹⁶⁰ Judge Kennelly dismissed the second case on state-secrets grounds, but granted the plaintiffs leave to amend,¹¹⁶¹ which they did.¹¹⁶² A third class action against AT&T in Chicago federal court was filed on May 24¹¹⁶³ and assigned to Judge Kennelly as related to the first two.¹¹⁶⁴ All of these cases are now before Judge Walker.¹¹⁶⁵

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).

1156. Civil Minute Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 21, 2006); *see also* Civil Minute Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 9, 2007) (noting a Feb. 9, 2007, hearing on the order to show cause).

1157. Compl., *Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006) (class action on behalf of the attorney and others against AT&T); *see also* Am. Compl., *id.* (May 22, 2006) (adding other telephone companies and the government as defendants); Second Am. Compl., *Joll v. AT&T Corp.*, *id.* (July 7, 2006) (removing the attorney as a plaintiff, which caused the case name to change, and removing the government as a defendant).

1158. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this report in the judge's chambers on May 24, 2007.

1159. Compl., *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006); *see also* Am. Compl., *id.* (June 5, 2006).

1160. Executive Comm. Order, *id.* (June 2, 2006).

1161. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 1092; McLure, *supra* note 1089; Robinson, *supra* note 1092.

Judge Kennelly, however, denied AT&T's motion to dismiss on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903-04, 920.

1162. Second Am. Class Action Compl., *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006).

1163. Compl., *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006).

1164. Executive Comm. Order, *id.* (June 12, 2006).

1165. The first two cases were part of the original multidistrict consolidation. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, *Joll v. AT&T Corp.*, No. 3:06-cv-5485 (N.D. Cal. Sept. 7, 2006); Docket Sheet, *Terkel v. AT&T Corp.*, No. 3:06-cv-5340 (N.D. Cal. Aug. 30, 2006).

The third case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, *Waxman v. AT&T Corp.*, No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

Also transferred to Judge Walker were 31 cases¹¹⁶⁶ originally filed in the following districts:

- the Eastern District of California (one case);¹¹⁶⁷
- the Southern District of California (one case);¹¹⁶⁸
- the Southern District of Florida (two cases);¹¹⁶⁹
- the Northern District of Georgia (one case);¹¹⁷⁰
- the District of Hawaii (one case);¹¹⁷¹
- the Southern District of Indiana (two cases);¹¹⁷²
- the Western District of Kentucky (one case);¹¹⁷³

1166. In addition to the cases listed here, Verizon stated that it intended to remove one case filed against it in Nebraska's state court. Def.'s Administrative Mot., *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. Aug. 14, 2006) (expressing an intention to remove *Davis v. AT&T*, No. 1063569 (Neb. Dis. Ct. Douglas County)).

1167. Notice of Removal, *Conner v. AT&T*, No. 1:06-cv-632 (E.D. Cal. May 23, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, *Conner v. AT&T*, No. 3:06-cv-5576 (N.D. Cal. Sept. 12, 2006).

1168. Compl., *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, *Souder v. AT&T Corp.*, No. 3:06-cv-5067 (N.D. Cal. Aug. 22, 2006).

1169. Two cases were transferred from the Southern District of Florida:

1. Compl., *Fortnash v. AT&T Corp.*, No. 0:06-cv-60828 (S.D. Fla. June 12, 2006); see John Holland, *Hollywood Conservative Files Suit over NSA Wiretaps*, S. Fla. Sun-Sentinel, June 28, 2006, at 1B. This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; see Docket Sheet, *Fortnash v. AT&T Corp.*, No. 3:06-cv-6385 (N.D. Cal. Oct. 12, 2006).
2. Notice of Removal, *Jacobs v. AT&T Corp.*, No. 0:07-cv-60365 (S.D. Fla. Mar. 14, 2007). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 6, *supra* note 1090; see Docket Sheet, *Jacobs v. AT&T Corp.*, No. 3:07-cv-2538 (N.D. Cal. May 14, 2007).

1170. Compl., *Lebow v. BellSouth Corp.*, No. 1:06-cv-1289 (N.D. Ga. May 25, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; see Docket Sheet, *Lebow v. BellSouth Corp.*, No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007).

1171. Class Action Compl., *Crockett v. Verizon Wireless LLC*, No. 1:06-cv-345 (D. Haw. June 26, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; see Docket Sheet, *Crockett v. Verizon Wireless LLC*, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006).

1172. Two cases were transferred from the Southern District of Indiana:

1. Compl., *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-847 (S.D. Ind. May 25, 2006).
2. Notice of Removal, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-932 (S.D. Ind. June 14, 2006).

These cases were transferred to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; 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).

1173. Compl., *Suchanek v. Sprint Nextel Corp.*, No. 1:06-cv-71 (W.D. Ky. May 18, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation.

- the Eastern District of Louisiana (two cases);¹¹⁷⁴
- the District of Maryland (one case);¹¹⁷⁵
- the Western District of Michigan (one case);¹¹⁷⁶
- the District of Minnesota (one case);¹¹⁷⁷
- the Eastern District of Missouri (one case);¹¹⁷⁸
- the District of Montana (two cases);¹¹⁷⁹
- the District of New Jersey (one case);¹¹⁸⁰
- the Eastern District of New York (one case);¹¹⁸¹

Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, Suchanek v. Sprint Nextel Corp., No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006).

1174. Two cases were transferred from the Eastern District of Louisiana:

1. Compl., Herron v. Verizon Global Networks, Inc., No. 2:06-cv-2491 (E.D. La. May 12, 2006). This case was part of the original multidistrict consolidation. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, Herron v. Verizon Global Networks, Inc., No. 3:06-cv-5343 (N.D. Cal. Aug. 30, 2006).
2. Compl., Hardy v. AT&T Corp., No. 2:06-cv-2853 (E.D. La. May 30, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, Hardy v. AT&T Corp., No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006).

1175. Notice of Removal, Bready v. Verizon Md. Inc., No. 1:06-cv-2185 (D. Md. Aug. 23, 2006); *see* Pls.' Mot. for Remand, *id.* (Sept. 6, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Order, *id.* (Oct. 4, 2006) (administratively closing the action while the case is pending in the transferee court); Conditional Transfer Order 2, *supra* note 1090; *see* Docket Sheet, Bready v. Verizon Md. Inc., No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006).

1176. Am. Compl., Dubois v. AT&T Corp., No. 5:06-cv-85 (W.D. Mich. June 12, 2006); Compl., *id.* (May 30, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, Dubois v. AT&T Corp., No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006).

1177. Notice of Removal, Roche v. AT&T Corp., No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 5, *supra* note 1090; *see* Docket Sheet, Roche v. AT&T Corp., No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007).

1178. Notice of Removal, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 4:06-cv-1113 (E.D. Mo. July 20, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Transfer Order, *In re* NSA, No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re* NSA, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 1, *supra* note 1090 (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).

1179. Two cases were transferred from the District of Montana:

1. Compl., Fuller v. Verizon Commc'ns, Inc., No. 9:06-cv-77 (D. Mont. May 12, 2006).
2. Compl., Dolberg v. AT&T Corp., No. 9:06-cv-78 (D. Mont. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re* NSA, 444 F. Supp. 2d 1332; *see* Docket Sheet, Dolberg v. AT&T Corp., No. 3:06-cv-5269 (N.D. Cal. Aug. 28, 2006); Docket Sheet, Fuller v. Verizon Commc'ns, Inc., No. 3:06-cv-5267 (N.D. Cal. Aug. 28, 2006).

1180. Am. Notice of Removal, Chulsky v. Cellco P'ship, No. 2:06-cv-2530 (D.N.J. June 16, 2006); Notice of Removal, *id.* (June 6, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, Chulsky v. Cellco P'ship, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006).

- the Southern District of New York (four cases);¹¹⁸²
- the District of Oregon (one case);¹¹⁸³
- the Eastern District of Pennsylvania (one case);¹¹⁸⁴
- the District of Rhode Island (three cases);¹¹⁸⁵
- the Southern District of Texas (one case);¹¹⁸⁶
- the Western District of Texas (one case);¹¹⁸⁷ and

1181. Compl., Marck v. Verizon Commc'ns, Inc., No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Marck v. Verizon Commc'ns, Inc., No. 3:06-cv-5063 (N.D. Cal. Aug. 22, 2006).

1182. Four cases were transferred from the Southern District of New York:

1. Am. Compl., Mayer v. Verizon Commc'ns Inc., No. 1:06-cv-3650 (S.D.N.Y. June 23, 2006); Compl., *id.* (May 12, 2006).
2. Compl., Electron Tubes Inc. v. Verizon Commc'ns, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006).
3. Compl., Basinski v. Verizon Commc'ns Inc., No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006).
4. Compl., Payne v. Verizon Commc'ns, Inc., No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006).

The first case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Mayer v. Verizon Commc'ns, Inc., No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007). The other three cases were transferred to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; see Docket Sheet, Payne v. Verizon Commc'ns, Inc., No. 3:06-cv-6435 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Basinski v. Verizon Commc'ns Inc., No. 3:06-cv-6434 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Electron Tubes Inc. v. Verizon Commc'ns, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006).

One of these actions subsequently was dismissed. Notice of Voluntary Dismissal, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Feb. 16, 2007) (dismissing *Electron Tubes Inc.*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), transferred as *Electron Tubes Inc.*, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006)).

1183. Am. Compl., Hines v. Verizon Northwest, Inc., No. 3:06-cv-694 (D. Or. June 2, 2006); Compl., *id.* (May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Hines v. Verizon Northwest, Inc., No. 3:06-cv-5341 (N.D. Cal. Aug. 30, 2006).

1184. Compl., Solomon v. Verizon Commc'ns, Inc., No. 2:06-cv-2193 (E.D. Pa. May 24, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; see Docket Sheet, Solomon v. Verizon Commc'ns, Inc., No. 3:06-cv-6388 (N.D. Cal. Oct. 12, 2006).

1185. Three cases were transferred from the District of Rhode Island:

1. Compl., Bissitt v. Verizon Commc'ns, Inc., No. 1:06-cv-220 (D.R.I. May 15, 2006).
2. Compl., Mahoney v. AT&T Commc'ns, Inc., No. 1:06-cv-223 (D.R.I. May 15, 2006).
3. Compl., Mahoney v. Verizon Commc'ns, Inc., No. 1:06-cv-224 (D.R.I. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Bissitt v. Verizon Commc'ns, Inc., No. 3:06-cv-5066 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-220); Docket Sheet, Mahoney v. AT&T Commc'ns, Inc., No. 3:06-cv-5065 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-223); Docket Sheet, Mahoney v. Verizon Commc'ns, Inc., No. 3:06-cv-5064 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-224).

1186. Am. Compl., Trevino v. AT&T Corp., No. 2:06-cv-209 (S.D. Tex. May 19, 2006); Compl., *id.* (May 17, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Trevino v. AT&T Corp., No. 3:06-cv-5268 (N.D. Cal. Aug. 28, 2006).

- the Western District of Washington (one case).¹¹⁸⁸

One of these actions subsequently was dismissed voluntarily.¹¹⁸⁹

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.¹¹⁹⁰

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.¹¹⁹¹ Plaintiffs voluntarily dismissed actions filed in the District of the District of Columbia (three cases),¹¹⁹² the Eastern District of Missouri (one case),¹¹⁹³ and the Middle District of Tennessee.¹¹⁹⁴

1187. Third Am. Compl., *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex. Aug. 14, 2006); Second Am. Compl., *id.* (June 12, 2006); First Am. Compl., *id.* (June 5, 2006); Compl., *id.* (May 18, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, *Harrington v. AT&T, Inc.*, No. 3:06-cv-5452 (N.D. Cal. Sept. 6, 2006).

1188. Compl., *Derosier v. Cingular Wireless LLC*, No. 2:06-cv-917 (W.D. Wash. June 28, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 1090; *see* Docket Sheet, *Derosier v. Cingular Wireless LLC*, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006).

1189. Voluntary Dismissal Order, *Electron Tubes Inc. v. Verizon Comm'ns*, No. 3:06-cv-6433 (N.D. Cal. Feb. 22, 2007).

1190. Plaintiffs filed consolidated master complaints against

1. defendants affiliated with Cingular, Master Consolidated Cingular Compl., *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 16, 2007);
2. defendants affiliated with Comcast, Master Comcast Consolidated Compl., *Id.* (Jan. 16, 2007);
3. defendants affiliated with Sprint, Master Consolidated Spring Compl., *Id.* (Jan. 16, 2007);
4. defendants affiliated with Verizon, Master Consolidated Verizon Compl., *Id.* (Jan. 16, 2007); and
5. defendants affiliated with BellSouth, Master Consolidated BellSouth Compl., *Id.* (Jan. 16, 2007).

1191. Mem. Op., *Tyler v. AT&T*, No. 8:06-cv-523 (D. Neb. Aug. 30, 2006) (finding that the complaint stated no facts and claimed no relief), *sum. aff'd*, Judgment, *Tyler v. AT&T*, No. 06-4174 (8th Cir. Feb. 28, 2007); *see* Am. Compl., *Tyler*, No. 8:06-cv-523 (D. Neb. Aug. 4, 2006); Notice of Removal, *id.* (July 31, 2006).

Upon learning of the dismissal, the JPML vacated its conditional transfer order. Order Vacating Conditional Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. Sept. 7, 2006), filed in *Tyler*, No. 8:06-cv-523 (D. Neb. Sept. 11, 2006).

1192. Notice of Voluntary Dismissal, *Phillips v. BellSouth Corp.*, No. 1:06-cv-918 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Ludman v. AT&T Inc.*, No. 1:06-cv-917 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Driscoll v. Verizon Commc'ns, Inc.*, No. 1:06-cv-916 (D.D.C. May 25, 2006); *see* Compl., *Phillips*, No. 1:06-cv-918 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Ludman*, No. 1:06-cv-917 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, *Driscoll*, No. 1:06-cv-916 (D.D.C. May 25, 2006).

These cases were included in Verizon's original multidistrict consolidation motion. Verizon Transfer Mem. at 4-7, *In re NSA*, No. 1791 (J.P.M.L. May 24, 2006), filed, *e.g.*, in *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 15, 2006).

1193. Notice of Dismissal, *Mink v. AT&T Corp.*, No. 4:06-cv-831 (E.D. Mo. June 22, 2006); Docket Sheet, *id.* (May 26, 2006) (noting July 5, 2006, dismissal); *see* Am. Notice of Removal, *id.*

Suits by the Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.¹¹⁹⁵ The government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,¹¹⁹⁶ Missouri,¹¹⁹⁷ Maine,¹¹⁹⁸ Connecticut,¹¹⁹⁹ and Vermont.¹²⁰⁰ Also filed in Missouri, and transferred to Judge Walker, is an action by the state against the telephone companies.¹²⁰¹

Judge John A. Woodcock, Jr., of the District of Maine, granted the government a preliminary injunction against the state of Maine's investigation.¹²⁰²

(June 12, 2006); Notice of Removal, *id.* (May 26, 2006). The plaintiff refiled in state court, the action was removed again, it was conditionally transferred as part of the multidistrict consolidation, and the plaintiff challenged the transfer. *See supra* note 1178.

1194. Order, *Potter v. BellSouth Corp.*, No. 3:06-cv-469 (M.D. Tenn. July 17, 2006); Notice of Dismissal, *id.* (July 13, 2006); *see* Compl., *id.* (May 15, 2006). This case is listed in the multidistrict consolidation order, *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006), but the transfer was vacated because the case was dismissed before transfer. Order Vacating Transfer, *In re NSA*, No. 1791 (J.P.M.L. Aug. 17, 2006), filed in *Potter*, No. 3:06-cv-469 (M.D. Tenn. Aug. 21, 2006).

1195. Order at 1, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. July 24, 2007) (denying summary judgment in state cases), available at 2007 WL 2127345 [hereinafter State Cases Summ. J. Denial Order]; *see* Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, Portland Press Herald, Aug. 22, 2006, at A1 (reporting that Maine is the third state sued, following suits against Missouri and New Jersey); Judy Harrison, *Wiretaps Lawsuit Moved to California*, Bangor Daily News, Feb. 17, 2007, at 1 (reporting similar suits filed in Maine, Missouri, New Jersey, Connecticut, and Vermont).

1196. Compl., *United States v. Farber*, No. 3:06-cv-2683 (D.N.J. June 14, 2006); *see id.* at 2 ("Compliance with the subpoenas issued by those officers would first place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security."); *see also* Rick Hepp, *ACLU Petitions for Probe of Phone-Record Access*, Newark Star-Ledger, June 16, 2006, at 43.

The name for the New Jersey case changed twice, because New Jersey's attorney general resigned, was initially replaced by an acting attorney general, and then was replaced by a permanent attorney general. Order Amending Caption, *United States v. Rabner*, No. 3:06-cv-2683 (D.N.J. Oct. 17, 2006) (substituting the new attorney general Stuart Rabner as the lead defendant); Letter, *United States v. Milgram*, No. 3:06-cv-2683 (D.N.J. Oct. 12, 2006) (identifying Anne Milgram as the acting attorney general); *see* Richard G. Jones, *In New Jersey, New Nominee to Top Law Job*, N.Y. Times, Aug. 25, 2006, at A20 (reporting on Governor Corzine's nomination of Stuart J. Rabner to replace Farber); Laura Mansnerus & David W. Chen, *New Jersey Attorney General Quits After Investigation Finds Ethics Breach*, N.Y. Times, Aug. 16, 2006, at A18.

1197. Compl., *United States v. Gaw*, No. 4:06-cv-1132 (E.D. Mo. July 25, 2006); *see* Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006.

1198. *United States v. Adams*, 473 F. Supp. 2d 108, 112 (D. Me. 2007); Compl., *United States v. Adams*, No. 1:06-cv-97 (D. Me. Aug. 21, 2006); *see* Aull, *supra* note 1195; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

1199. Compl., *United States v. Palermino*, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006).

1200. Compl., *United States v. Volz*, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006).

1201. Notice of Removal, *Gaw v. AT&T Commc'ns of the Southwest Inc.*, No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006); *see* State Cases Summ. J. Denial Order, *supra* note 1195, at 3.

1202. *Adams*, 473 F. Supp. 2d 108.

The JPML consolidated all of these actions before Judge Walker,¹²⁰³ who denied the government's motions for summary judgment on supremacy and foreign affairs grounds.¹²⁰⁴ 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."¹²⁰⁵ Judge Walker decided to await further guidance from the court of appeals in the pending appeals before deciding the matter more precisely.¹²⁰⁶

Suits to Discover Secret Documents

On the day the *New York Times* first reported on the warrantless wiretap program, the Electronic Privacy Information Center submitted requests under the Freedom of Information Act to four government agencies to obtain documents concerning the program.¹²⁰⁷ The ACLU and the National Security Archive Fund, Inc., submitted similar requests four days later.¹²⁰⁸ Disappointed by what was produced, the organizations sought relief in the U.S. District Court for the District of Columbia, which assigned the cases to Judge Henry H. Kennedy, Jr.¹²⁰⁹ Judge Ken-

1203. Transfer Order, *In re* NSA Records Litig., No. 1791 (J.P.M.L. issued Feb. 15, 2007), filed in *In re* NSA Telecomm. Records Litig., No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007); see State Cases Summ. J. Denial Order, *supra* note 1195, at 2; Docket Sheet, *United States v. Volz*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007) (action transferred from D. Vt.); Docket Sheet, *United States v. Palermino*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007) (action transferred from D. Conn.); Docket Sheet, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007) (action transferred from D.N.J.); Docket Sheet, *United States v. Adams*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007) (action transferred from D. Me.); Docket Sheet, *United States v. Gaw*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007) (action transferred from E.D. Mo.); Docket Sheet, *Clayton v. AT&T Commc'ns of the Southwest Inc.*, No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007) (action transferred from W.D. Mo.); see also Harrison, *supra* note 1195.

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).

1204. State Cases Summ. J. Denial Order, *supra* note 1195, at 15–34.

1205. *Id.* at 35.

1206. *Id.*

1207. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 62–63 (D.D.C. 2007); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 33–34 (D.D.C. 2006); Compl. at 3, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006) [hereinafter *Elec. Privacy Info Ctr. Compl.*].

1208. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 63; Compl. at 6, *ACLU v. Dep't of Justice*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006) [hereinafter *D.D.C. ACLU Compl.*]; see Romero & Temple-Raston, *supra* note 212, at 71.

1209. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; *D.D.C. ACLU Compl.*, *supra* note 1208; Docket Sheet, *ACLU*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006); *Elec. Privacy Info Ctr. Compl.*, *supra* note 1207; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006); see Dan Eggen, *A Judge Finds Administration's Secrecy "Baffling,"* Wash. Post, Sept. 7, 2007, at A19.

nedly has ruled that some of the withheld documents have been properly withheld and some need further justification to withhold.¹²¹⁰

The Electronic Frontier Foundation, who filed the first action against telephone companies, sued the Justice Department under FOIA for release of the secret FISC orders that the government claimed obviated the need for surveillance without warrants.¹²¹¹ The U.S. District Court for the District of Columbia assigned the case to Judge Thomas F. Hogan,¹²¹² who on August 14, 2007, granted the government's motion for summary judgment, finding that the orders meet FOIA's national defense, statutory, and law enforcement exemptions.¹²¹³

On August 9, 2007, the ACLU filed a motion directly with the FISC that its orders on warrantless wiretapping be made public.¹²¹⁴ On August 16, the court's Presiding Judge Colleen Kollar-Kotelly issued an order that the government respond to the motion.¹²¹⁵ Judge John D. Bates issued a public opinion on December 11 denying the motion.¹²¹⁶ 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.¹²¹⁷ Judge Bates rejected the ACLU's sugges-

1210. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56 (D.D.C. 2007).

1211. *Compl., Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

1212. Docket Sheet, *id.*

1213. Mem. Op. at 14–18, *id.* (Aug. 14, 2007) [hereinafter D.D.C. *Elec. Frontier Found. Summ. J. Op.*]; see Mem. Op., *id.* (Jan. 29, 2008) (denying motion for reconsideration based on new revelations in the press).

[FOIA] does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

....

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

....

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . .

5 U.S.C. § 552(b).

1214. *In re Mot. for Release of Ct. Rs.*, 526 F. Supp. 2d 484, 485 (F.I.S.C. 2007); see Dan Eggen, *Secret Court Asks for White House View on Inquiry*, Wash. Post, Aug. 18, 2007, at A3; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. Times, Aug. 18, 2007, at A10.

1215. Scheduling Order, *In re Motion for Release of Court Records*, No. Misc. 07-01 (F.I.S.C. Aug. 16, 2007); see Eggen, *supra* note 1214; Lichtblau, *supra* note 1214.

1216. *In re Ct. Rs.*, 526 F. Supp. 2d 484; see James Risen, *Surveillance Court Declines to Release Secret Opinions*, N.Y. Times, Dec. 12, 2007, at A27; Elizabeth Williamson, *Secret U.S. Intelligence Court Intends to Keep Wiretap Rulings Under Wraps*, Wash. Post, Dec. 12, 2007, at A27.

1217. *In re Ct. Rs.*, 526 F. Supp. 2d 484, 488; see Williamson, *supra* note 1216.

tion 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.¹²¹⁸

Challenge: Classified Evidence

The Portland case against the government concerns an evidentiary document so secret that it can be seen only by judges and has to be stored in a Sensitive Compartmented Information Facility (SCIF).¹²¹⁹ Government attorneys will not even disclose whether they are cleared to see it.

Judge King, District of Oregon

The plaintiffs attempted to file under seal a classified document inadvertently disclosed to them in an asset-freezing proceeding.¹²²⁰ They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."¹²²¹ More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.¹²²² A government security officer reviewed the document in chambers and determined that it contained information at the highest level of classification and, therefore, needed to be housed in a SCIF.¹²²³

1218. *In re Ct. Rs.*, 526 F. Supp. 2d 484, 496.

1219. *See* Reagan, *supra* note 162, at 19 (describing SCIFs).

1220. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Mem. in Supp. to File Material Under Seal and Req. for In Camera Inspection, *Al-Haramain Islamic Found. v. Bush*, 3:06-cv-274 (D. Or. Feb. 28, 2006); *see* Green, *supra* note 1119; Green, *U.S. Attacks Lawsuit*, *supra* note 1117; Liptak, *supra* note 1096.

1221. Mem. in Supp. to File Material Under Seal and Req. for In Camera Inspection, *supra* note 1220; Interview with Hon. Garr M. King, Feb. 14, 2007.

1222. Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Tr., *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21, 2006) [hereinafter *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr.], also filed as Attach. C, Defs.' Resp. to Oregonian's Mot. to Unseal Records, *id.* (Apr. 14, 2006); *see also* Liptak, *supra* note 1093; Liptak, *supra* note 1096.

1223. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1222; Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Gov't Lodging Reply at 4, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006); *see also* Liptak, *supra* note 1096.

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.¹²²⁴ Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.¹²²⁵ The government said that creating a SCIF for the court would be infeasible because of the time and expense required.¹²²⁶ So it was agreed that the document would be sent to the Western District of Washington's U.S. Attorney's SCIF in Seattle.¹²²⁷

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.¹²²⁸ 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.¹²²⁹

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.¹²³⁰ 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."¹²³¹ 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.¹²³² 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.¹²³³ 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.¹²³⁴ 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.¹²³⁵

1224. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1222; Interview with Hon. Garr M. King, Feb. 14, 2007.

1225. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1222; Interview with Hon. Garr M. King, Feb. 14, 2007; *see* Tim Fought, *Mystery Document Headed to Seattle*, *Seattle Times*, Mar. 24, 2006, at B5.

1226. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1222.

1227. *Id.*; *see* Fought, *supra* note 1225.

1228. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Hon. Garr M. King, Feb. 14, 2007.

1229. Tr. at 32–33, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006) [hereinafter *Al-Haramain Islamic Found.* Apr. 25, 2006, Tr.], also filed as Attach. 1, Gov't Lodging Reply, *supra* note 1223; *see* Liptak, *supra* note 1096.

1230. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1229 (granting the government's motion); Defs.' Mot. to Prevent Pls.' Access to Sealed Classified Doc., *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006).

1231. Pls.' Resp. to Defs.' Mot. to Deny Access to Sealed Doc. at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006).

1232. Interview with Hon. Garr M. King, Feb. 14, 2007.

1233. *Id.*

1234. *Id.*

1235. *Id.*

The government has said that it may be necessary to purge the plaintiffs' attorneys' computers of data associated with their declaration of what they remember about the classified document.¹²³⁶

Although he saw the classified evidentiary document,¹²³⁷ Judge King was careful not to rely on its contents in his ruling against dismissal.¹²³⁸ Judge King granted the government's motion to deny the plaintiffs access to it, but he said that the plaintiffs may file in camera affidavits "attesting to the contents of the document from their memories," and that the government should consider providing the plaintiffs with access to a redacted version of the document under a protective order.¹²³⁹

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.¹²⁴⁰ The government said that the identities of persons with clearance to see such documents was a state secret.¹²⁴¹ On one occasion, the judge asked a government attorney before him if he had such clearance.¹²⁴² The attorney responded that he did not think he was permitted to answer that question.¹²⁴³ 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.¹²⁴⁴

Court of Appeals for the Ninth Circuit

Members of the appellate panel also reviewed the classified document in camera, pursuant to procedures established by court security officers.¹²⁴⁵

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 sur-

1236. *Id.*; see Liptak, *supra* note 1096.

1237. *Al-Haramain Islamic Found.* Mar. 21, 2006, Tr., *supra* note 1222; see Green, *Feds' Stance*, *supra* note 1117.

1238. *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").

1239. *Id.* at 1229; see Liptak, *supra* note 1093; Liptak, *supra* note 1096; MacLean, *supra* note 1117.

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 1096. In addition, it appears that a reporter for *The Washington Post* has reviewed the document. *Id.*; MacLean, *supra* note 1117.

1240. Interview with Hon. Garr M. King, Feb. 14, 2007.

1241. *Id.*; see Liptak, *supra* note 1096.

1242. Interview with Hon. Garr M. King, Feb. 14, 2007.

1243. *Id.*

1244. *Id.*

1245. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007).

veiled Al-Haramain. We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be—and has been—provided for us to make a meaningful examination. The process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.¹²⁴⁶

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.¹²⁴⁷

Challenge: Classified Arguments

The government regards the classified arguments in these cases as so secret that it will not permit even attorneys or law clerks with security clearances to see them.¹²⁴⁸ It has been reported that President Bush personally decides who is cleared to see documents related to the surveillance programs at issue in this litigation.¹²⁴⁹

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.¹²⁵⁰ In response, the government lodged a classified declaration for *ex parte in camera* review.¹²⁵¹ The

1246. *Id.* at 1203.

1247. *Id.* at 1204.

1248. *See* Liptak, *supra* note 1096.

In addition to submitting classified arguments in the cases described here, the government offered to submit classified arguments to support its motion to enjoin Maine's investigation of Verizon's assistance in government surveillance if the court would not grant its motion on the basis of unclassified arguments. TRO Mem. at 13 n.3, *United States v. Adams*, No. 1:06-cv-97 (D. Me. Feb. 6, 2007). But because the court did grant the government's motion on the basis of unclassified arguments, the government did not present classified arguments. *See United States v. Adams*, 473 F. Supp. 2d 108 (D. Me. 2007).

1249. *See* Lichtblau, *supra* note 857.

1250. *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 1119 (noting the filing of the motion on Mar. 17, 2006); *see* Green, *U.S. Attacks Lawsuit*, *supra* note 1117.

1251. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1119 (noting the filing of a lodging notice on Apr. 14, 2006); *see* Green, *U.S. Attacks Lawsuit*, *supra* note 1117.

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

government subsequently lodged a second classified declaration for ex parte in camera review “for reasons that must be explained in the superseding classified declaration.”¹²⁵² Judge King stated at a telephonic hearing, “I believe the Court should avoid, if possible, receiving secret declarations from one side and basing decisions on facts or arguments not disclosed to the other side. Now, I hasten to say that I understand that in issues involving national security that may be necessary.”¹²⁵³ Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian’s motion,¹²⁵⁴ which Judge King denied.¹²⁵⁵

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.¹²⁵⁶ 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.¹²⁵⁷ Ultimately he decided to review the classified materials¹²⁵⁸ and permit the case to proceed.¹²⁵⁹

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.¹²⁶⁰ 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.¹²⁶¹ 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.¹²⁶²

Judge King observed that it is difficult to handle a case if there is material the law clerk cannot see.¹²⁶³ He has to be careful what he tells her, and she cannot help him with the material she cannot see.¹²⁶⁴ The judge’s law clerks were going

the Court’s review of Defendants’ classified declaration is appropriate in these circumstances.” Gov’t Lodging Reply, *supra* note 1223, at 3.

1252. Gov’t Lodging Reply, *supra* note 1223, at 2 n.1; *see* Notice of Lodging of Superseding Material, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. May 12, 2006).

1253. *Al-Haramain Islamic Found.* Apr. 25, 2006, Tr., *supra* note 1229.

1254. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

1255. *Id.* at 1218, 1232–33.

1256. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. July 25, 2006) (noticing the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006) (noticing the lodging of (1) a classified brief, (2) a classified declaration by the director of national intelligence, (3) a classified declaration by the director of the NSA, and (4) a classified opposition to the plaintiffs’ pending motion to compel discovery).

1257. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1119.

1258. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1119.

1259. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 1093.

1260. Interview with Hon. Garr M. King, Feb. 14, 2007.

1261. *Id.*

1262. *Id.*; Letter from Carr Sahler, law clerk to Hon. Garr M. King, Apr. 23, 2007.

1263. Interview with Hon. Garr M. King, Feb. 14, 2007.

1264. *Id.*

to seek security clearances for this case, but they stopped looking into it when the case was transferred to Judge Walker.¹²⁶⁵

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.¹²⁶⁶ 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.¹²⁶⁷ 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."¹²⁶⁸ Judge Taylor elected to wait until after the hearing to review the classified documents,¹²⁶⁹ but she considered them in issuing the injunction.¹²⁷⁰

Judge Taylor reviewed classified documents three times.¹²⁷¹ 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.¹²⁷² The security officer told Judge Taylor that she could take notes, but the security officer would have to take them back with her.¹²⁷³ So the judge decided not to take notes.¹²⁷⁴

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

1265. *Id.*

1266. E.D. Mich. *ACLU* Docket Sheet, *supra* note 1105; *see* Pls.' Partial Summ. J. Mot., *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006); *see also* David Ashenfelter, *Battle over Wiretaps to Begin Today*, Det. Free Press, June 12, 2006; Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, N.Y. Times, June 13, 2006, at A17; Niraj Warikoo, *Wiretap Suit All About Power*, Det. Free Press, June 12, 2006.

1267. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Mot. to Dismiss at 4 n.3, *id.* (May 26, 2006); *see* Liptak, *supra* note 1266; Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, L.A. Times, June 12, 2006, at 5.

Strictly speaking, the defendants' brief supported a separate motion and was not a response to the plaintiffs' motion, but the defendants said, "Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state-secrets privilege—were the appropriate response to Plaintiffs' Motion." Defs.' Mot. for Clarification at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 2, 2006); *see* Ashenfelter, *supra* note 1266.

1268. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006).

1269. Tr., *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 12, 2006); *see* Liptak, *supra* note 1266 (reporting that Judge Taylor did not review the classified documents before the hearing).

1270. *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*").

1271. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006; *see* E.D. Mich. *ACLU* Docket Sheet, *supra* note 1105 (noting the lodging of classified documents on May 26, June 30, and Sept. 1, 2006).

1272. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006.

1273. *Id.*

1274. *Id.*

sealed versions of briefs to protect classified information.”¹²⁷⁵ 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.”¹²⁷⁶

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.¹²⁷⁷ The judges worked out with the parties procedures for the judges’ review of classified information.¹²⁷⁸ 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.¹²⁷⁹ The meeting was transcribed, and the transcript was sealed.¹²⁸⁰ 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.¹²⁸¹ One result of the meeting was the government’s agreement to file a list of classified documents presented to the judges,¹²⁸² a list which the government updated upon each additional lodging.¹²⁸³

Approximately two weeks before oral argument, security officers delivered to the judges’ chambers the government’s unredacted opening and reply briefs.¹²⁸⁴

On January 17, the government announced to Congress and the courts that the President would not reauthorize the warrantless wiretap program at issue in this case, but instead would abide by new secret orders issued by the FISC one week earlier.¹²⁸⁵ Five days before this announcement, and two days after the FISC orders were issued, the government again lodged classified materials for the court’s review.¹²⁸⁶ Security officers brought these materials to the judges at the same time as the briefs.¹²⁸⁷

1275. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting order filed Oct. 11, 2006).

1276. *Id.* (noting the government’s filing of briefs on Oct. 16 and Dec. 5, 2006).

1277. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1278. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting an Oct. 19, 2006, letter from the court to the government concerning the filing of classified information with the court and a Nov. 1, 2006, motion by the government for approval of proposed procedures regarding classified information).

1279. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 1101.

1280. Interview with Hon. Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

1281. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 1101.

1282. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1283. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting the filing of classified-document lists on Jan. 12 and 25, Apr. 9, and June 11, 2007).

1284. 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.

1285. *E.g.*, Notice of Att’y Gen.’s Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 17, 2007); *see* Eggen, *supra* note 1101; Lichtblau & Johnston, *supra* note 1101.

1286. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108; *see* *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

1287. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

The security officer who visited Judge Gilman's chambers presented the judge with the classified materials in the judge's office and waited elsewhere in the building for the judge's call saying he had completed his review.¹²⁸⁸ The officer asked Judge Gilman to close his window blinds and close the door to his office.¹²⁸⁹ 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.¹²⁹⁰ Judge Gilman reviewed the materials privately in his office.¹²⁹¹

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.¹²⁹² Judge Batchelder, who is the only tenant in her small-town building, was not asked to close her blinds.¹²⁹³

No one on the judges' staffs saw the classified materials.¹²⁹⁴ Knowing that they would not be able to keep them, none of the judges took notes.¹²⁹⁵ 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.¹²⁹⁶

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.¹²⁹⁷ The judges reviewed the classified submission in Cincinnati on the day of oral argument.¹²⁹⁸

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,¹²⁹⁹ and within days of these lodgings, court security officers delivered the classified submissions to the judges' chambers.¹³⁰⁰

1288. Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007.

1289. *Id.*

1290. *Id.*

1291. *Id.*

1292. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1293. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007.

1294. *Id.*; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1295. 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.

1296. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1297. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting the filing of a supplemental submission and the lodging of a classified submission on Jan. 25, 2007); *see* Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. Times, Jan. 27, 2007, at 14.

1298. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1299. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting the lodging of classified submissions on Apr. 9 and June 11, 2007).

1300. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007 (noting that technically the judges should not have reviewed this material, because it was outside the record); Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

There were no ex parte communications with government attorneys in this appeal.¹³⁰¹

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.¹³⁰²

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.¹³⁰³

With one exception, this was the first time any of these judges had been called upon to review classified information.¹³⁰⁴ 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.¹³⁰⁵ The secrets in that case were handled by ordinary sealing procedures.¹³⁰⁶

Judge Lynch, Southern District of New York

In the Manhattan case, as in the Detroit case, the government lodged, in a secure Washington, D.C., location for the court's ex parte in camera review, a classified brief and classified declarations supporting a motion to dismiss.¹³⁰⁷ Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,¹³⁰⁸ but Judge Lynch did not review the classified lodgings before the hearing on the motion.¹³⁰⁹ He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information dur-

1301. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1302. *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.”).

1303. 6th Cir. *ACLU* Docket Sheets, *supra* note 1108 (noting denial of the motion on July 6, 2007); *see* Weinstein, *supra* note 1297 (reporting the filing of the motion).

1304. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007. Judge Batchelder has been a circuit judge since 1991 and was a bankruptcy judge 1983–85 and a district judge 1985–91; Judge Gilman has been a circuit judge since 1997; and Judge Gibbons has been a circuit judge since 2002 and was a district judge 1983–2002. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>.

1305. *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.

1306. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

1307. *Military & State Secrets Privilege P. & A. Mem.* at 4 n.3, *Center for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Notice of Lodging, *id.* (May 26, 2006).

1308. Interview with Hon. Gerard E. Lynch, May 16, 2007.

1309. *Center for Constitutional Rights* Sept. 5, 2006, Tr., *supra* note 1114; Interview with Hon. Gerard E. Lynch, May 16, 2007.

ing the hearing.¹³¹⁰ The case was transferred to the Northern District of California as part of multidistrict litigation before Judge Lynch ruled on the motion,¹³¹¹ and he never read the classified lodgings.¹³¹²

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.¹³¹³ In advance of this ruling, a court security officer brought from Washington classified arguments supporting the motion.¹³¹⁴ Judge Kennelly reviewed the documents in private while the security officer waited outside his office.¹³¹⁵ 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.¹³¹⁶ When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.¹³¹⁷

Judge Kennelly's opinion states that he did not rely on classified submissions in reaching this decision.¹³¹⁸ His opinion, however, describes how he reviewed the submissions.

Only one copy of the materials was provided, and following our review, the materials were removed to a secure location outside the Court's control (we reviewed the materials again on later occasions under similar conditions). The court was not permitted to discuss the materials with other members of our staff, and notes that we took were removed and kept in a secure location outside the court's control. We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera, ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The court asked the government to provide further information about certain matters in the classified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.¹³¹⁹

In order to avoid inadvertently disclosing information in the classified documents at the public hearing, Judge Kennelly carefully prepared all of his questions

1310. *Center for Constitutional Rights* Sept. 5, 2006, Tr., *supra* note 1114; Interview with Hon. Gerard E. Lynch, May 16, 2007.

1311. Transfer Order, *In re* NSA Telecomm. Records Litig., No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re* NSA Telecomm. Records Litig., No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Interview with Hon. Gerard E. Lynch, May 16, 2007.

1312. Interview with Hon. Gerard E. Lynch, May 16, 2007.

1313. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 1092; McLure, *supra* note 1089; Robinson, *supra* note 1092.

1314. 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).

1315. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1316. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

1317. *Id.*

1318. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

1319. *Id.* at 902 n.2.

for counsel in advance.¹³²⁰ 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.¹³²¹

The night before the classified proceeding, the judge's chambers were swept for surveillance devices.¹³²² 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.¹³²³ During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.¹³²⁴

Judge Walker, Northern District of California

In the first San Francisco action against AT&T, the government intervened and unsuccessfully argued that the state-secrets privilege required dismissal of the case.¹³²⁵ The government sought to support its argument with classified documents.¹³²⁶ 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.¹³²⁷

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."¹³²⁸

1320. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1321. *Id.*

1322. *Id.*

1323. *Id.*

1324. *Id.*

1325. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); Mot. to Dismiss, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); First U.S. Statement of Interest, *id.* (Apr. 28, 2006); see Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, S.J. Mercury News, May 14, 2006, at A1; John Markoff, *U.S. Steps into Wiretap Suit Against AT&T*, N.Y. Times, Apr. 29, 2006, at A9; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. Times, May 14, 2006, at 4.

1326. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); see *Hepting*, 439 F. Supp. 2d at 979; see also Carey, *supra* note 1325.

1327. Tr., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006), filed in part as attach., Notice of Mot. for Transfer & Coordination, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 31, 2006).

1328. Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 6, 2006), available at 2006 WL 1581965; see *Hepting*, 439 F. Supp. 2d at 980; see also Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. Chron., June 8, 2006, at A4.

Judge Walker reviewed the government's classified briefing in his chambers.¹³²⁹ A security officer brought the documents to his chambers in a sealed pouch.¹³³⁰ Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.¹³³¹ Judge Walker took some notes, which the security officer took back with the classified documents.¹³³²

No one on Judge Walker's staff saw the classified documents.¹³³³ Two of his law clerks have begun the process of obtaining security clearances, but the government has said that even when they are cleared, there will be some information that only Judge Walker will be able to see.¹³³⁴

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.¹³³⁵ In part because of time constraints, instead of bringing classified documents to Judge Walker, a court security officer arranged for an FBI agent to bring Judge Walker to an FBI SCIF in the same building as the courthouse, where Judge Walker received a secure fax containing the classified documents for his review and then shredded the fax.¹³³⁶

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.¹³³⁷ Again a court security officer brought them to his chambers, where Judge Walker reviewed them in private.¹³³⁸

On eight additional occasions, the government lodged classified documents.¹³³⁹

"Article III federal judges . . . , by virtue of their Constitutional office, may receive access to classified information in order to address questions before them." U.S. Resp. to Order to Show Cause, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

1329. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

The government also presented a classified reply brief with classified supporting declarations. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 16, 2006).

1330. 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).

1331. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

1332. *Id.*

1333. *Id.*

1334. *Id.* Judge Walker is his district's chief judge, and he therefore has an administrative law clerk in addition to his regular law clerks. The administrative law clerk and the law clerk assigned to this litigation are seeking security clearances. *Id.*

1335. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; *see* Notice of Lodging, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

1336. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

1337. Notice of Lodging, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 13, 2007); Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1338. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1339. Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Mar. 14, 2008); Notice of Lodging, *id.* (Oct. 25, 2007); Notices of Lodging, *id.* (N.D. Cal. June 8, 2007); Notices of Lodg-

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.¹³⁴⁰

The next lodging supported a scheduling motion.¹³⁴¹ 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.¹³⁴²

The public record does not show the reason for the next lodging, and the plaintiffs objected to the government's lodging classified materials without providing any public information about what they are lodging or why.¹³⁴³ The government responded that "nothing more may be said without compromising the Government's compelling interest in protecting the Nation's security."¹³⁴⁴

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.¹³⁴⁵ 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.¹³⁴⁶ Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.¹³⁴⁷

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn¹³⁴⁸ and Manhattan.¹³⁴⁹ Another lodging was a classified reply brief supporting state-secrets motions to dismiss in several other cases.¹³⁵⁰

ing, *id.* (May 25, 2007); Notices of Lodging, *id.* (Apr. 21, 2007); Notice of Lodging, *id.* (Apr. 9, 2007); Notice of Lodging, *id.* (Mar. 13, 2007); Notice of Lodging, *id.* (Feb. 22, 2007).

1340. Notice of Lodging, *id.* (Feb. 22, 2007).

1341. Notice of Lodging, *id.* (Mar. 13, 2007).

1342. Scheduling Mot., *id.* (Mar. 12, 2007); see Mark Mazzetti, *In Shift, Director for Intelligence in State Dept. Post*, N.Y. Times, Jan. 4, 2007, at A1 (reporting the President's appointment of John D. Negroponte, then Director of National Intelligence, to be Deputy Secretary of State, and reporting J. Michael McConnell, a former Director of the National Security Agency, to be Negroponte's replacement).

1343. Letter, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 13, 2007).

1344. Gov't Resp. to Pls.' Letter, *id.* (Apr. 27, 2007).

1345. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

1346. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 21, 2007) (a separate notice for each document); see Mem. Mot. to Dismiss or for Summ. J., *id.* (Apr. 20, 2007) (unredacted brief and declarations).

1347. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

1348. Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. May 25, 2007); see Mot. to Dismiss or for Summ. J., *id.* (May 25, 2007) (redacted brief and declarations).

1349. Notices of Lodging., *id.* (June 8, 2007); see Supplemental Mot. to Dismiss or for Summ. J., *id.* (May 25, 2007) (redacted brief).

1350. Notice of Lodging, *id.* (Aug. 3, 2007).

The government lodged a classified declaration in opposition to the plaintiffs' motion for an order requiring defendants to preserve evidence.¹³⁵¹ 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.¹³⁵² The classified declaration specified "how potentially discoverable information, if any, is being preserved."¹³⁵³ Determining that the the public briefing showed that the plaintiffs were entitled to a preservation order, Judge Walker issued the order without stating whether or not he reviewed the government's classified brief and declaration.¹³⁵⁴

The most recent lodging was submitted to support 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.¹³⁵⁵

Court of Appeals for the Ninth Circuit

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.¹³⁵⁶

Judge Kennedy, District of the District of Columbia

In the FOIA suits to discover documents establishing and supporting the warrantless wiretap program, the government lodged five classified declarations on Sept. 15, 2006, to support its motion for summary judgment. Judge Kennedy expressed frustration in his published resolution of the motion that he was denied assistance of law clerks to review the declarations:

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.¹³⁵⁷

1351. Notice of Lodging, *id.* (Oct. 25, 2007).

1352. Opposition Br. , *id.* (Oct. 25, 2007).

1353. *Id.* at 2.

1354. Preservation Order, *id.* (Nov. 6, 2007).

1355. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Mar. 14, 2008); Mot. to Dismiss, *id.*

1356. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 1120; 9th Cir. *Hepting* Docket Sheets, *supra* note 1152; *see* Vick, *supra* note 1153.

1357. 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 1209 (quoting text).

To support a second motion for summary judgment, the government lodged classified exhibits on October 19.¹³⁵⁸

Judge Hogan, District of the District of Columbia

In the Electronic Frontier Foundation's unsuccessful FOIA suit to discover the secret FISC orders on which the government said it would rely to obtain warrants for what previously were warrantless wiretaps, the government lodged, on June 25, 2007, for ex parte in camera review, a classified declaration opposing the plaintiff's motion that the court examine the secret orders.¹³⁵⁹ Judge Hogan relied on this declaration both to grant the government summary judgment and to deny the motion to review the FISC orders.¹³⁶⁰

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.¹³⁶¹

To write the classified opinion, Judge Kennelly was required to compose the opinion on a "clean" laptop computer provided by the court security officer.¹³⁶² The computer, and all drafts, were stored in the U.S. Attorney's SCIF in the same building.¹³⁶³ As the judge was preparing the classified opinion, he had additional questions for the government.¹³⁶⁴ It was arranged that he would ask them on a "secured telephone unit" in the U.S. Attorney's SCIF.¹³⁶⁵

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret memorandum.¹³⁶⁶

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

1358. Docket Sheet, *ACLU v. Dep't of Justice*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006); Docket Sheet, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006).

1359. Notice of Lodging, *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. June 25, 2007).

1360. D.D.C. *Elec. Frontier Found. Summ. J. Op.*, *supra* note 1213, at 11, 15, 18.

1361. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

1362. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

1363. *Id.*

1364. *Id.*

1365. *Id.*

1366. Minute Entry, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007).

was brought to the court's attention, two days after the filing, the electronic text file was replaced with an electronic image file.

At a May 17, 2006, hearing in the first case against telephone companies filed in San Francisco, Judge Walker issued the following order:

Plaintiffs are instructed to file by close of business on May 22, 2006, a memorandum that addresses: (1) whether this case can be litigated without deciding the state secrets issue, thereby obviating any need for the court to review the government's classified memorandum and declarations and (2) whether the state secrets privilege is implicated by plaintiffs' FRCP 30(b)(6) deposition request for information whether AT&T received any certification from the government. AT&T and the government may each file reply memoranda on these issues by close of business on May 24, 2006.¹³⁶⁷

As instructed, AT&T filed a reply brief on May 24, 2006.¹³⁶⁸ 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.¹³⁶⁹ Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.¹³⁷⁰ On the day of the CNET report, the court filed a substitute electronic version of the redacted file.¹³⁷¹

CNET's website provides a link to the originally filed Acrobat text file.¹³⁷² 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.¹³⁷³

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."¹³⁷⁴ The judge wrote: "The court contemplates that the individual would be one who had a security

1367. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006).

1368. N.D. Cal. *Hepting* Docket Sheet, *supra* note 1133.

1369. Notice of Manual Filing, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 24, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 1133.

The redacted text appeared in one of AT&T's three arguments—an argument spanning four pages of the 20-page brief: "I.B. The Court Cannot Adjudicate Plaintiffs' Prima Facie Claims Until It Reviews The Classified Submissions." Redacted Reply Mem., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006).

1370. Declan McCullagh, *AT&T Leaks Sensitive Info in NSA Suit*, May 26, 2006, http://news.com.com/AT38T+leaks+sensitive+info+in+NSA+suit/2100-1028_3-6077353.html.

1371. Redacted Reply Mem., *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 1133.

1372. <http://www.politechbot.com/docs/att.not.redacted.brief.052606.pdf>.

1373. Redacted Reply Mem., *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006).

1374. *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).

clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters.”¹³⁷⁵ Judge Walker did not believe that other judges previously used Federal Rule of Evidence 706(a) to appoint an expert of this type.¹³⁷⁶ Judge Walker decided, however, not to appoint such an expert “at this stage.”¹³⁷⁷

1375. *Id.* at 1010–11; *see also id.* at 1011 (noting that the court has a specific candidate in mind). Judge Walker thinks that former CIA Director James Woolsey would be a good candidate, but one of the parties expressed concerns about Mr. Woolsey’s having opined on the secret surveillance program. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

1376. *Hepting*, 439 F. Supp. 2d at 1010.

1377. Civil Minute Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Aug. 8, 2006).

The Federal Judicial Center

Board

The Chief Justice of the United States, *Chair*

Judge Susan H. Black, U.S. Court of Appeals for the Eleventh Circuit

Judge David O. Carter, U.S. District Court for the Central District of California

Magistrate Judge Karen Klein, U.S. District Court for the District of North Dakota

Judge Loretta A. Preska, U.S. District Court for the Southern District of New York

Judge Philip M. Pro, U.S. District Court for the District of Nevada

Judge Stephen Raslavich, U.S. Bankruptcy Court for the Eastern District of Pennsylvania

Judge William B. Traxler, Jr., U.S. Court of Appeals for the Fourth Circuit

James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

Judge Barbara J. Rothstein

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovation & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.