

National Security Case Studies: Special Case-Management Challenges

Seventh Edition

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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. Four defendants were sentenced to prison terms many decades long. In a related prosecution for seditious conspiracy, ten defendants were convicted and sentenced to prison terms ranging from twenty-five years to life.

For these prosecutions, judges had to deal with classified evidence, court security, jury security, pro se defendants, interpreters, and efforts to prevent terrorist communications.

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Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.) 38

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, killing 224 people, including twelve Americans. Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya.

Four defendants were tried in 2001 and sentenced to life in prison. A fifth defendant was sentenced to life for stabbing a prison guard while awaiting trial. Also sentenced to life in prison were a defendant transferred from the terrorism detention center at Guantánamo Bay in 2009; a defendant extradited by the United Kingdom in 2012; and Osama Bin Laden's son-in-law, who was captured in 2013.

Among the judges' special challenges in these prosecutions were accommodating classified evidence, classified arguments, and classified opinions; hostile relations between the defendants and their attorneys; shuttling jurors to and from the courthouse and a secret meeting location; and temporary protection of the identity of a confidential source and witness.

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Millennium Bomber

United States v. Ressam (John C. Coughenour, W.D. Wash.) and United States v. Haouari (John F. Keenan, S.D.N.Y.) 88

Ahmed Ressam was sentenced to thirty-seven years in prison for planning a 2000 bombing. Defendants in other related cases were Abdelghani Meskini and Mokhtar Haouari. Judicial challenges included classified evidence, foreign evidence, court security, jury security, and witness security.

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Chapter 4

Mujahedeen Khalq

United States v. Afshari (Robert M. Takasugi and David O. Carter, C.D. Cal.) 104

Sentencing for solicitation of charitable contributions to a terrorist organization, which occurred a dozen years after indictment, was complicated by a pending government decision to no longer consider the organization a terrorist organization. The sentencing judge and his law clerks were given access to sensitive ongoing diplomatic communications.

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Detroit

United States v. Koubriti (Gerald E. Rosen, E.D. Mich.) 109

The first terrorism trial in the United States after the September 11, 2001, attacks was rife with prosecutorial misconduct. Although prosecu-

tion of the prosecutor was unsuccessful, Judge Gerald E. Rosen had to examine evidence at CIA headquarters and admonish the attorney general for violating the court's gag order.

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INTRODUCTION

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

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

In 2017, a judge presiding over a terrorism prosecution in the District of Colorado¹ said in court that he found an earlier edition of this book useful.

I have given to counsel in this case the citation to case studies at the district court level that are published by the Federal Judicial Center. I don't believe I mentioned this at the time, but I gave it because, with the hundreds of cases decided by the appellate courts, they do not address the practical functional problems of trying a case of this nature. So I look to other judges and how they have done this.²

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

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

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

This publication, the August 28, 2022—seventh and final—edition, supersedes the following:

- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (September 20, 2007)

1. See Chapter 22: Islamic Jihad Union, *infra* page 363.

2. Transcript at 15, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 9, 2017, filed Apr. 21, 2017), D.E. 1375 (remarks by District of Colorado Judge John L. Kane).

National Security Case Studies (7th ed.)

- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (March 26, 2008)
- *National Security Case Studies: Special Case-Management Challenges* (February 22, 2010)
- *National Security Case Studies: Special Case-Management Challenges* (November 14, 2011)
- *National Security Case Studies: Special Case-Management Challenges* (June 25, 2013)
- *National Security Case Studies: Special Case-Management Challenges* (April 24, 2015)

I. TERRORISM PROSECUTIONS

Terrorism prosecutions include prosecutions for acts of terrorism, conspiracy on sometimes thwarted acts of terrorism, and material support. Proscribed material support can include advocacy (“Chapter 22: Islamic Jihad Union”), financial support (“Chapter 13: Ashland and Moscow,” “Chapter 14: Prosecution of a Charity”), or attending terrorism training camps (“Chapter 9: Lackawanna,” “Chapter 16: Lodi”). Some cases include additional charges for false statements.

These prosecutions typically present courts with enhanced security concerns. In addition to physical security concerns about the courthouse, the jury, and sometimes witnesses, there often are information security concerns involving the court’s handling of classified information. Classified information security officers provided by the Justice Department are the experts on how courts keep classified information secure.³

The terrorism prosecutions selected for this collection of case studies range in time from the 1993 bombing of the World Trade Center to two 2018 trials in the District of Colorado.

Prosecutions related to the first World Trade Center bombing (chapter 1) included both prosecutions for the 1993 bombing and for thwarted plots to bomb Manhattan tunnels and landmarks and American airplane flights in Asia.

The original prosecutions for the 1998 bombings of American embassies in Kenya and Tanzania (chapter 2) were interrupted by the stabbing of a detention guard, which resulted in another prosecution. Other defendants were prosecuted from 2009 through 2015.

Handling classified information is perhaps the most unusual case-management challenge for courts presiding over national security cases. Occasionally, judges have immersed themselves in classified information (“Chapter 5: Detroit”). For one case, that did not become necessary until it was time to sentence the defendants (“Chapter 4: Mujahedeen Khalq”). A terrorism prosecution, however, might involve no classified information at all (“Chapter 19: Sears Tower”).

3. Revised Security Procedures Established Pursuant to Pub. L. No. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 2 (2020); *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers*, app. B (Federal Judicial Center, 2d ed. 2013).

Sometimes, to protect national security, a jury is presented with an unclassified substitute for classified information, such as a summary or an admission. An instruction may help the jury understand how and why classified information is avoided in the trial (“Chapter 15: Chicago Fundraising”). Courts might also employ the silent-witness rule, in which a limited amount of classified information is presented to the jury, such as the identity of a person or a country. The classified information is kept from the public, but it must not be kept from the defendant himself (“Chapter 10: A Plot to Kill President Bush”).

Witnesses are sometimes afforded extra protection to conceal their identities from the public (“Chapter 7: American Taliban,” “Chapter 15: Chicago Fundraising”). It is also not uncommon for terrorism prosecutions to require foreign evidence (“Chapter 3: Millennium Bomber,” “Chapter 10: A Plot to Kill President Bush,” “Chapter 13: Ashland and Moscow,” “Chapter 15: Chicago Fundraising”).

As with other types of litigation, terrorism prosecutions sometimes are complex because of intertwined cases (“Chapter 1: First World Trade Center Bombing,” “Chapter 11: Paintball,” “Chapter 13: Ashland and Moscow,” “Chapter 14: Prosecution of a Charity,” “Chapter 17: Toledo,” “Chapter 22: Islamic Jihad Union”). Management of a case’s complexity and high profile could benefit from careful developments of protocol, such as the decorum order developed for a prosecution for conspiracy to attack Fort Dix (chapter 20).

Some terrorism defendants elect to proceed pro se. Perhaps the most famous example is Zacarias Moussaoui (“Chapter 6: Twentieth Hijacker”), whose pro se privilege ultimately was taken away because of his disruptive filing behavior. Pro se defendants in other cases were less disruptive (“Chapter 18: Atlanta,” “Chapter 21: Triangle Takedown”).

The mental health of defendants subject to strict security measures during pretrial detention can be an issue of concern (“Chapter 8: Dirty Bomber,” “Chapter 12: Minneapolis”).

Terrorism prosecutions frequently result in convictions, but sometimes defendants are acquitted. Some acquittals have been followed by deportation (“Chapter 13: Ashland and Moscow,” “Chapter 17: Toledo,” “Chapter 19: Sears Tower”) or a prosecution for something else (“Chapter 11: Paintball”).

Chapter 1

First World Trade Center Bombing

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

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.⁴ Four defendants were sentenced to prison terms many decades long. In a related prosecution for seditious conspiracy, ten defendants were convicted and sentenced to prison terms ranging from twenty-five years to life.

For these prosecutions, judges had to deal with classified evidence, court security, jury security, pro se defendants, interpreters, and efforts to prevent terrorist communications.

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4. 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-Gabrowny*, 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-Gabrowny*, 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.

Challenge: Terrorist Communications 37

The Bombing of the World Trade Center

On April 24, 1992, Ahmad Mohammad Ajaj moved from Houston, Texas, to Pakistan, where he attended a terrorist training camp on the border between Afghanistan and Pakistan called Camp Khaldan.⁵ He learned how to make bombs, and he met Ramzi Ahmed Yousef.⁶ On September 1, 1992, Ajaj and Yousef entered the United States using false identities.⁷ Ajaj's passport was discovered to be a forgery.⁸ 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.⁹ Yousef was stopped for traveling on an Iraqi passport without a visa but released on his own recognizance because the detention center was full.¹⁰

In the United States, Yousef assembled a conspiracy of terrorists.¹¹ With the assistance of Mahmoud Abouhalima, Yousef and Mohammad A. Salameh rented an apartment and a storage unit in Jersey City, New Jersey,

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

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

Yousef was born Abdul Basit Mahmud Abdul Karim. See Peter Lance, *Triple Cross* 101 (2006); Terry McDermott & Josh Meyer, *The Hunt for KSM* 45 (2012); Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* 202 (2006) ("He was not a particularly devout Muslim—he was motivated mainly by his devotion to the Palestinian cause and his hatred of Jews . . .").

7. 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 4; Lance, *supra* note 6, at 102; Mary B.W. Tabor, *Man Held in Bombing but Is Not Charged, Lawyer Says*, N.Y. Times, May 6, 1993, at B3; Wren, *supra* note 4.

8. *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 294; see Blumenthal, *supra* note 4; McDermott & Meyer, *supra* note 6, at 45.

9. *Salameh*, 152 F.3d at 107, 109, 118–20 (noting an October 6, 1992, guilty plea); *Salameh*, 54 F. Supp. 2d at 246, 294; Docket Sheet, *United States v. Ajaj*, No. 1:92-cr-993 (E.D.N.Y. Sept. 14, 1992) (judgment, Jan. 13, 1993, D.E. 17); see Blumenthal, *supra* note 4; Tabor, *supra* note 7.

10. *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 4; Lance, *supra* note 6, at 102; Terry McDermott, *Perfect Soldiers* 131–32 (2005); McDermott & Meyer, *supra* note 6, at 45.

11. *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246; see Lance, *supra* note 6, at 147 (describing Yousef as having "a massive IQ and an ego to match"); McDermott, *supra* note 10, at 132 ("Yousef, as a prospective terrorist, had two great abilities: his technical knowledge of explosives and his charm.").

where they made and stored explosive materials.¹² Nidal Ayyad, a chemical engineer, acquired the explosives.¹³

On February 23, 1993, Salameh rented a Ryder van, which the conspirators loaded with explosive materials.¹⁴ Three days later, Yousef and Eyad Ismoil drove the van to the World Trade Center, where they exploded the bomb by timer at 12:18 p.m.¹⁵

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 U.S. support of Israel.¹⁶ His DNA was found on the New

12. *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 4; 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*].

13. 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 12; Lance, *supra* note 6, at 110; Mitchell, *Engineer Held*, *supra* note 12.

14. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 246–47; *United States v. El-Gabrowny*, 876 F. Supp. 495, 497 (S.D.N.Y. 1994); *United States v. El-Gabrowny*, 825 F. Supp. 38, 40 (S.D.N.Y. 1993); see Blumenthal, *supra* note 4; 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.

15. *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; see Bernstein, *supra* note 12; Blumenthal, *supra* note 4; Lance, *supra* note 6, at 113–14; McDermott & Meyer, *supra* note 6, at 48; Wren, *supra* note 4; see also Benjamin Weiser, *Man Accused of Delivering a Bomb Said He Believed It Was Soap*, N.Y. Times, Oct. 16, 1997, at B3 (reporting testimony that Ismoil thought the van carried soap).

“Originally, the slightly built Palestinian[, Salameh,] was scheduled to be the wheel man for the rented yellow Ryder truck that would deliver the device. But by the fall of 1992 Salameh was involved in no less than three separate traffic accidents. In one, Yousef was injured and hospitalized.” Lance, *supra* note 6, at 111.

16. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; see Bernstein, *supra* note 12; 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 4; Alison Mitchell, *Letter Explained Motive in Bombing, Officials Now Say*, N.Y. Times, Mar. 28, 1993, at 11.

York Times envelope, and a draft of the letter to the Times was found on his computer.¹⁷

Investigators discovered the van's vehicle identification number in the bomb's debris.¹⁸ 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.¹⁹ "Because [Yousef] was the financier and had fled the country, leaving his accomplices on their own, Salameh was broke and desperately needed the cash from the deposit."²⁰

Abdul Rahman Yasin, another conspirator, also fled the country.²¹ Abouhalima fled to Egypt after the explosion, and he was arrested by Egyptian authorities on March 13.²² He was returned to the United States on March 25.²³

It was not until February 7, 1995, that Yousef was captured at the SuCasa Guest House in Islamabad, Pakistan.²⁴ For a \$2 million reward,

17. *Salameh*, 152 F.3d at 129; *Salameh*, 54 F. Supp. 2d at 247; see Blumenthal, *supra* note 4; Mary B.W. Tabor, *Questions Linger in Explosion Case*, N.Y. Times, Sept. 14, 1993, at B1.

18. *Yousef*, 327 F.3d at 79, 135; *El-Gabrowny*, 876 F. Supp. at 497; *El-Gabrowny*, 825 F. Supp. at 40; see Blumenthal, *supra* note 4; Blumenthal, *Insistence on Refund*, *supra* note 14; McDermott, *supra* note 10, at 136; McDermott & Meyer, *supra* note 6, at 52; McFadden, *supra* note 14.

19. 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 12; Blumenthal, *supra* note 4; Blumenthal, *Insistence on Refund*, *supra* note 14; McDermott, *supra* note 10, at 136; McFadden, *supra* note 12; McFadden, *supra* note 14. See generally *Blindspot: The Road to 9/11: The Bomb*, WNYC Radio podcast (episode 3, Sept. 16, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11.

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 rented van for a bombing would let himself be seen repeatedly by witnesses." McFadden, *supra* note 12.

20. McDermott & Meyer, *supra* note 6, at 52 (referring to Yousef as Basit).

21. *Salameh*, 152 F.3d at 108; see Tabor, *supra* note 17 (reporting the government's offering \$2 million rewards each for Yousef and Yasin).

22. *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.

23. See Mitchell, *supra* note 22.

24. *Salameh*, 152 F.3d at 108 n.2, 135; *United States v. Yousef*, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); see David Johnston, *Fugitive in Trade Center Blast Is Caught and Returned to U.S.*, N.Y. Times, Feb. 9, 1995, at 1; Lance, *supra* note 6, at 200–02; McDermott & Meyer, *supra* note 6, at 77–78; James C. McKinley, Jr., *Suspected Bombing Leader Indicted on Broader Charges*, N.Y. Times, Apr. 14, 1995, at 3; Wren, *supra* note 4 ("Until his

and to avoid prison, one of Yousef's recruits turned him in to the FBI.²⁵ Yousef's uncle, Khalid Shaikh Mohammed (KSM), was staying in the same guesthouse and was an on-the-scene witness to news media about the arrest.²⁶ Ismoil was apprehended in Jordan on July 30.²⁷ Yasin, who was questioned but released by the FBI after the bombing, remains a fugitive.²⁸

Ajaj was released from his six-month sentence on March 1, 1993.²⁹ On March 9, he was rearrested on an immigration detainer.³⁰

arrest in Pakistan in 1995, the United States considered him the most wanted fugitive alive . . ."); Wright, *supra* note 6, at 230–33.

In the 1997 television film *Path to Paradise: The Untold Story of the World Trade Center Bombing*, as the character Yousef is being extradited to New York, he says, "Next time, we will bring them both down," referring to the World Trade Center towers (HBO 1997).

25. See Lance, *supra* note 6, at 200; McDermott & Meyer, *supra* note 6, at 75–80.

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

Lance, *supra* note 6, at 200–01.

26. See Lance, *supra* note 6, at 201–02.

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

28. Federal Bureau of Investigation, *Most Wanted Terrorists*, www.fbi.gov/wanted/wanted_terrorists (listing Yasin as one of the FBI's most wanted terrorism suspects); *Salameh*, 152 F.3d at 108 n.2; United States v. Salameh, 54 F. Supp. 2d 236, 254 (S.D.N.Y. 1999); see Alison Mitchell, *U.S. Informer Is New Suspect in Bomb Plot*, N.Y. Times, Aug. 5, 1993, at B1; Sharon Otterman, *Finding Resilience, 25 Years After 1993 World Trade Center Bombing*, N.Y. Times, Feb. 20, 2018, at A17; Robert F. Worth, *Second Attack on Iraq Prison in 48 Hours Wounds 5 Iraqis*, N.Y. Times, Apr. 5, 2005, at A9.

Although a fugitive with a \$25 million reward offered for his capture, Yasin was interviewed by Lesley Stahl for *60 Minutes* in 2002. *60 Minutes: The Man Who Got Away* (CBS television broadcast May 23, 2002), www.cbsnews.com/news/60-minutes-the-man-who-got-away/; Transcript: The Yasin Interview, www.cbsnews.com/news/transcript-the-yasin-interview/ (interview transcript); 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).

29. *Salameh*, 152 F.3d at 108; see Tabor, *supra* note 7.

30. *Id.*

Salameh and Ayyad were indicted in the Southern District of New York on March 17.³¹ The district court assigned the case to Judge Kevin Thomas Duffy.³² On March 31, a superseding indictment added Abouhalima and Yousef as defendants.³³ On the next day, Judge Duffy ordered the parties and their attorneys not to discuss publicly anything related to the case.³⁴ The court of appeals vacated this gag order as overbroad on April 30.³⁵

Bilal Alkaiji turned himself in on March 24,³⁶ and a second superseding indictment added him as a defendant on April 7.³⁷ Because evidence against him was weaker than evidence against the others, his prosecution

31. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 5); see Ralph Blumenthal, *Suspect in Blast Believed to Be in Pakistan*, N.Y. Times, Mar. 18, 1993, at B4; see also Mitchell, *Engineer Held*, *supra* note 12 (reporting on Ayyad's arrest on March 10, 1993).

32. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; see Mary B.W. Tabor, *As Trial Is Set in Explosion, Hunt Widens*, N.Y. Times, Apr. 2, 1993, at B1; Benjamin Weiser, *Judge Reflects on Terrorism Trials and End of a Decades-Long Career*, N.Y. Times, Oct. 11, 2016, at A21 (reporting, "Judge Duffy said he approached [the case] like any other criminal matter").

Judge Duffy retired on September 30, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges; see Weiser, *supra* (reporting also, "For more than a decade, the judge and his family were guarded by federal marshals, who followed them everywhere."). He died on April 1, 2020, of COVID-19. FJC Biographical Directory, *supra*; see Joseph P. Fried, *Kevin Thomas Duffy*, 87, *U.S. Judge Who Presided Over Mob and Terrorism Trials*, N.Y. Times, Apr. 4, 2020, at B12; *Judge Oversaw '90s Terrorism Trials*, Wash. Post, Apr. 5, 2020, at C9 (reporting that Judge Duffy "made relatively quick work of the trial of four men who conspired to bomb the World Trade Center in February 1993").

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

The Southern District of New York's 2006 Milton Pollack Fellow, Philip J. Gross, also prepared a report on challenges to the district's judges in terrorism cases. Philip J. Gross, *Guide to High Security & Terrorism Cases* (2006), www.fjc.gov/content/guide-high-security-and-terrorism-cases-southern-district-new-york.

33. *United States v. Yousef*, 327 F.3d 56, 135 (2d Cir. 2003); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 6); see Ralph Blumenthal, *Missing Suspect Charged in Trade Center Bombing*, N.Y. Times, Apr. 1, 1993, at B3.

34. *United States v. Salameh*, 992 F. 2d 445, 446 (2d Cir. 1993); see Tabor, *supra* note 32.

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

36. See Blumenthal, *supra* note 4; Mitchell, *supra* note 22.

37. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 11).

was severed.³⁸ On May 9, 1994, he pleaded guilty to an immigration violation and agreed to deportation.³⁹ Judge Duffy sentenced him on July 13 to one year and eight months in prison, which was four months more than the time already served.⁴⁰

A third superseding indictment on May 26, 1993, added Ajaj as a defendant.⁴¹ A fourth superseding indictment added the fugitive Yasin as a defendant on August 4.⁴² Salameh, Ayyad, Abouhalima, Ajaj, Yousef, and Yasin were named as defendants in a fifth superseding indictment filed on September 1.⁴³

Jury selection in the trial against Salameh, Ayyad, Abouhalima, and Ajaj began on September 14.⁴⁴ The court issued five thousand extra jury summonses to assemble a jury pool for the case.⁴⁵

Opening arguments began on October 5.⁴⁶ The jury began its deliberations on February 23, 1994, and convicted the defendants on March 4.⁴⁷

38. See Bernstein, *supra* note 12; Mitchell, *supra* note 28; Tabor, *supra* note 17; Mary B.W. Tabor, *Trade Center Defendant Agrees to a Plea Bargain*, N.Y. Times, May 10, 1994, at B3 [hereinafter *Plea Bargain*].

A sixth superseding information against Alkaiasi was filed on May 9, 1994. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 225).

39. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; see Tabor, *Plea Bargain*, *supra* note 38.

40. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; *id.* (judgment, D.E. 325); see Ronald Sullivan, *Bombing Figure Gets 20 Months for an Immigration Violation*, N.Y. Times, July 14, 1994.

Alkaiasi was released from prison on November 7, 1994. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 28065-054).

41. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 28); see Mitchell, *U.S. Widens Charges*, *supra* note 12.

42. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 46); see Mitchell, *supra* note 28.

43. United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 62).

44. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; see Ralph Blumenthal, *Jury Selection Starts in World Trade Center Case*, N.Y. Times, Sept. 15, 1993, at B1; Tabor, *supra* note 17.

Judge Duffy did 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 32, at 23–24.

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

Between conviction and sentencing, the defendants dismissed their attorneys.⁴⁸ Salameh, Abouhalima, and Ajaj sought to hire as sentencing attorneys the law firm representing other defendants in a related trial, which is described below.⁴⁹ Judge Duffy ruled that this would present an unacceptable conflict,⁵⁰ so the four defendants appeared at sentencing pro se.⁵¹

On May 24, 1994, the court sentenced each of the four defendants to 240 years in prison.⁵² Judge Duffy arrived at 240 years by computing the remaining life expectancies of the six killed victims, which summed to 180 years, and adding sixty years, which was the mandatory sentence for two counts of assault on a federal officer.⁵³

On August 4, 1998, the court of appeals affirmed the convictions, but it remanded the case for resentencing, holding that the defendants did not effectively waive their rights to counsel at sentencing.⁵⁴ Judge Duffy resentenced the defendants in October 1999 to prison terms ranging from 108 years and four months to 117 years and one month.⁵⁵ The terms varied according to the defendants' ages, because for some of the counts, Judge

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

47. *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 27; see Bernstein, *supra* note 12; Richard Bernstein, *Jurors Begin Deliberations in Blast Case*, N.Y. Times, Feb. 24, 1994, at B1; Wren, *supra* note 4.

48. *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.

49. *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 Michael B. Mukasey); "Plots to Bomb New York Landmarks," *infra* page 14; see *United States v. Rahman*, 861 F. Supp. 266, 272 (S.D.N.Y. 1994); see also Bernstein, *supra* note 48; Gross, *supra* note 32, at 10.

50. *Salameh*, 856 F. Supp. 781; see Gross, *supra* note 32, 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.

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

52. *Id.* at 108; *Salameh*, 856 F. Supp. at 782; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 311 to 314); see Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. Times, May 25, 1994, at A1; Gross, *supra* note 32, at 10–11; Wren, *supra* note 4.

53. See Bernstein, *supra* note 52; Gross, *supra* note 32, at 11.

54. *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 32, at 11.

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

Duffy used a sentencing method recently approved by the court of appeals of imposing a sentence of one month less than a defendant's life expectancy if the sentencing guidelines suggested a life term, but at the time of the crime the guidelines specified that life terms would be decided by the jury, which had made no such determination in this case.⁵⁶ The new sentences were affirmed by the court of appeals on August 6, 2001.⁵⁷

In 2020 and 2021, Judge Lewis A. Kaplan, to whom the cases had been reassigned following Judge Duffy's retirement, reduced the sentences by thirty years in light of Supreme Court decisions in 2015 and 2019 on crimes of violence.⁵⁸

On September 22, 2011, New York's court of appeals determined that the Port Authority of New York and New Jersey had governmental immunity from civil liability for the bombing.⁵⁹

56. *Id.* (noting sentences of 108 years and four months for Abouhalima, 114 years and ten months for Ajaj, 116 years and eleven months for Salameh, and 117 years and one month for Ayyad); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (D.E. 773 to 776, same); see *United States v. Tocco*, 135 F.3d 116, 131–32 (2d Cir. 1998) (approving a sentencing scheme by Eastern District of New York Judge Jack B. Weinstein).

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

58. Amended Judgment, *United States v. Ayyad*, No. 1:93-cr-180-2 (S.D.N.Y. Aug. 17, 2021), D.E. 1018 (sentencing Ayyad to eighty-seven years and one month); Amended Judgment, *United States v. Salameh*, No. 1:93-cr-180-1 (S.D.N.Y. Apr. 20, 2021), D.E. 1011 (sentencing Salameh to eighty-six years and eleven months); Amended Judgment, *United States v. Abouhalima*, No. 1:93-cr-180-3 (S.D.N.Y. Nov. 5, 2020), D.E. 993 (sentencing Abouhalima to seventy-eight years and four months); Opinion, *United States v. Salameh*, No. 1:93-cr-180 (S.D.N.Y. Jan. 6, 2021), D.E. 1003, 2021 WL 51456; Opinion, *id.* (Aug. 24, 2020), D.E. 979; Opinion, *id.* (June 24, 2020), D.E. 959, 2020 WL 3447953; Opinion, *id.* (June 17, 2020), D.E. 956, 2020 WL 3318031; Opinion, *id.* (Feb. 19, 2020), D.E. 937 [hereinafter *Crime of Violence Vacatur Opinion*], 2020 WL 815464; see BOP Locator, *supra* note 40 (noting release dates of March 8, 2060, for Mahmud Abouhalima, reg. no. 28064-054; May 23, 2067, for Salameh, reg. no. 34338-054; June 22, 2067, for Ayyad, reg. no. 16917-050; and June 17, 2091, for Ajaj, reg. no. 40637-053); see also *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019) (holding unconstitutionally vague a sentencing enhancement for using a firearm while committing a crime of violence); *Johnson v. United States*, 576 U.S. 591 (2015) (holding a sentencing enhancement for firearm possession by someone with three or more violent felony convictions to be unconstitutionally vague).

An amended judgment creates an opportunity for a habeas corpus petition not regarded as successive with respect to any petition filed before the amended judgment. Order, *Salameh v. United States*, No. 22-6218 (2d Cir. June 13, 2022), D.A. 11.

59. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 957 N.E.2d 733 (2011); see *id.* at 446, 957 N.E.2d at 744 ("We . . . hold that the Port Authority acted within its gov-

Because of prison transfers, Ajaj has litigated conditions of his confinement in various jurisdictions. In 2019, District of Colorado Judge Brooke Jackson enjoined the Federal Bureau of Prisons from denying Ajaj a certified halal diet absent a compelling government interest.⁶⁰ In 2022, the court of appeals revived other claims regarding group prayer.⁶¹ Earlier, District of Colorado Judge Raymond P. Moore administratively closed a conditions-of-confinement suit on January 26, 2021, because Ajaj developed COVID-19 (coronavirus disease 2019, a global pandemic disease caused by the severe acute respiratory syndrome coronavirus 2, SARS-CoV-2), and prosecution of the case became untenable.⁶²

Having survived motions to dismiss them, other suits by Ajaj remain pending in the Southern District of Illinois⁶³ and the Southern District of Indiana.⁶⁴

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.⁶⁵ On March 4, 1993, federal agents searched

ernmental capacity because its security operations at the WTC constituted police protection.”); *see also* Benjamin Weiser, *Port Authority Not Liable in '93 Bombing, Court Says*, N.Y. Times, Sept. 23, 2011, at A25.

60. Amended Final Judgment, *Ajaj v. Fed. Bureau of Prisons*, No. 1:15-cv-992 (D. Colo. Apr. 15, 2019), D.E. 331; *Ajaj v. Fed. Bureau of Prisons*, 25 F.4th 805, 809 (10th Cir. 2022).

61. *Ajaj*, 25 F.4th 805 (reversing a holding of mootness and recognizing that the Religious Freedom Restoration Act authorizes suits for money damages).

62. Order, *Ajaj v. United States*, No. 1:15-cv-2849 (D. Colo. Jan. 26, 2021), D.E. 231; *see* Report and Recommendation, *id.* (Dec. 14, 2020), D.E. 224; *see also* Opinion, *id.* (Sept. 28, 2020), D.E. 196 (permitting some claims to go forward in a case filed on December 31, 2015); Supplemental Complaint, *id.* (Oct. 21, 2019, filed Feb. 10, 2019), D.E. 168; Second Amended Complaint, *id.* (Aug. 4, 2017), D.E. 82.

63. Opinion, *Ajaj v. United States*, No. 3:14-cv-1245 (S.D. Ill. Mar. 12, 2021), D.E. 271 (allowing a religious exercise claim to go forward in a case filed on November 3, 2014); Opinion, *id.* (Dec. 11, 2019), D.E. 255 (allowing a claim for cruel and unusual punishment to go forward); Fourth Amended Complaint, *id.* (Apr. 16, 2019), D.E. 221.

64. Opinion, *Ajaj v. Kruger*, No. 2:20-cv-244 (S.D. Ind. Sept. 21, 2021), D.E. 59, 2021 WL 4287497 (allowing claims for failure to provide halal meals to go forward); Complaint, *id.* (May 8, 2020), D.E. 1.

65. *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 4.

It was reported that Salameh failed four attempts to get a New Jersey driver's license using his own address. Blumenthal, *supra* note 4.

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.⁶⁶ Agents found el-Gabrowny near his home, and he was belligerent when frisked.⁶⁷ He was discovered to have fraudulent Nicaraguan passports for Nosair and Nosair's family.⁶⁸

El-Gabrowny was indicted for assault in the Southern District of New York on March 17.⁶⁹

The court assigned the case to Judge Michael B. Mukasey,⁷⁰ who tried to conduct the case as much like other criminal trials as possible.⁷¹

Nosair was in prison on a sentence of seven and one-third to twenty-two years for a state conviction on assault and weapons charges stemming from the killing of a "militant Zionist" and former member of the Israeli parliament, Rabbi Meir Kahane, at a November 5, 1990, speech that Ka-

66. *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.

67. *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 14; Alison Mitchell, *Suspect in Bombing Is Linked to Sect with a Violent Voice*, N.Y. Times, Mar. 5, 1993, at A1.

68. *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 4; McFadden, *supra* note 12.

69. *El-Gabrowny*, 35 F.3d at 64; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; *El-Gabrowny*, 825 F. Supp. at 39; Docket Sheet, *United States v. Abdel Rahman*, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Abdel Rahman* Docket Sheet] (D.E. 3; also noting the filing of a superseding indictment against El-Gabrowny on May 19, 1993, D.E. 9); see Blumenthal, *supra* note 31.

70. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; Michael B. Mukasey, *Eleventh Annual Barbara K. Olson Memorial Lecture*, Engage, Mar. 2012, at 132, 134.

Judge Mukasey retired from the bench in 2006 and returned to the practice of law until President George W. Bush named him as his third attorney general. FJC Biographical Directory, *supra* note 32; see Michael Abramowitz & Dan Eggen, *Ex-Judge Is Said to Be Pick at Justice*, Wash. Post, Sept. 17, 2007, at A1; Dan Eggen, *Senate Confirms Mukasey by 53–40*, N.Y. Times, Nov. 9, 2007, at A1; Joseph Goldstein, *As Judge Leaves for Law Firm, His Legacy Is Remembered*, N.Y. Sun, July 26, 2006, at 1; Carl Hulse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. Times, Nov. 9, 2007, at A1; Sheryl Gay Stolberg & Philip Shenon, *Bush to Appoint Ex-Judge as Head of Justice Dept.*, N.Y. Times, Sept. 17, 2007, at A1.

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

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

hane made in New York City.⁷² There was evidence that projectiles found in the room where Kahane and others were shot came from Nosair's gun, but Nosair was acquitted of the murder.⁷³

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.⁷⁴ Salem met el-Gabrowny at the trial of el-Gabrowny's cousin Nosair.⁷⁵

72. *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 4; Lance, *supra* note 6, at 62–64, 81–83; McFadden, *supra* note 12; John T. McQuiston, *Kahane Is Killed After Giving Talk in New York Hotel*, N.Y. Times, Nov. 6, 1990, at A1; Mitchell, *supra* note 67; Ronald Sullivan, *Judge Gives Maximum Term in Kahane Case*, N.Y. Times, Jan. 30, 1992, at A1. See generally *Blindspot: The Road to 9/11: The Bullet*, WNYC Radio podcast (episode 1, Sept. 9, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11 (reporting on Nosair's murder of Kahane, including an interview with Nosair's son); Zak Ebrahim & Jeff Giles, *The Terrorist's Son* 47–48 (2014) (providing a description of the trial by the defendant's son).

73. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; see Blumenthal, *supra* note 4; 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 12; McFadden, *supra* note 14; Mitchell, *supra* note 67; Selwyn Raab, *Jury Acquits Defendant in Kahane Trial*, N.Y. Times, Dec. 22, 1991, at 136; Tabor, *supra* note 17.

"My father was the first known Islamic jihadist to take a life on American soil. He worked with the support of a terror cell overseas that would ultimately call itself Al-Qaeda." Ebrahim & Giles *supra* note 72, at 12 (reflections by Nosair's son). "If my father's plan to kill Kahane had gone off without a hitch, I'd apparently have grown up in Central America with a Spanish name." *Id.* at 41 (reflecting on the discovery of fraudulent Nicaraguan passports in Uncle Ibrahim's apartment).

At the scene, Nosair shot and was shot by Carlos Acosta, a postal police officer. *Rahman*, 189 F.3d at 105; see Lance, *supra* note 6, at 57, 81–83. Although Nosair was convicted of assault with a deadly weapon on Acosta, Nosair sued Acosta and the postal service for his own injury. *Nosair v. Acosta*, No. 1:92-cv-8274, 1993 WL 336996 (S.D.N.Y. Sept. 1, 1993). His suit was dismissed as precluded by his conviction, *id.*, and his appeal was dismissed as frivolous, Docket Sheet, *Nosair v. Acosta*, No. 93-2661 (2d Cir. Oct. 7, 1993).

74. *Rahman*, 189 F.3d at 104, 106; see Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. Times, Jan. 31, 1995, at 1 (reporting that Salem was paid more than \$1 million by the United States government for his assistance); Lance, *supra* note 6, at 209 (reporting that Salem was "going to get \$1.5 million and a new life in the Witness Protection Program"); Alison Mitchell, *Bomb Informer Active in 1991, Authorities Say*, N.Y. Times, July 15, 1993, at A1 [hereinafter *Bomb Informer*]; Alison Mitchell, *Egyptian Was Informer, Officials Say*, N.Y. Times, June 26, 1993, at 123 [hereinafter *Egyptian Informer*]; Alison Mitchell, *Official Recalls Delay in Using Informer*, N.Y. Times, July 16, 1993, at B2 (reporting that Salem had entered the federal witness protection program); Mitchell, *supra* note 67 (describing Abdel Rahman as "blind, with one eye without a pu-

Abdel Rahman was tried but acquitted in Egypt as an accomplice in the October 6, 1981, murder of President Anwar el-Sadat.⁷⁶ He illegally entered the United States in 1990 and faced a deportation order at the time of the World Trade Center bombing.⁷⁷ His followers plotted to assassinate Egypt's president, Hosni Mubarak, during a March 1993 visit to the United Nations in New York City.⁷⁸ Siddig Ibrahim Siddig Ali obtained Mubarak's itinerary from a source in the Sudanese government.⁷⁹ But the plot was foiled when a confidant of Abdel Rahman's, Abdo Mohammed Hag-

pil, the other an empty socket"); *see also* Lance, *supra* note 6, at 8 ("Blinded shortly after birth, Omar Abdel Rahman had memorized the Koran by the age of eleven."); Mary B.W. Tabor, *Informer's Ex-Wife Said He Warned of Terrorism*, N.Y. Times, Sept. 28, 1993, at B2 (reporting that Salem "said that the day after the explosion [he] was upset and told [his ex-wife] the bombing could have been averted if the F.B.I. had heeded his warnings"). *See generally* *Blindspot: The Road to 9/11: The Mole*, WNYC Radio podcast (episode 2, Sept. 9, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11; *id.* *Blindspot: The Double Life* (bonus episode, Sept. 25, 2020).

Salem authored two memoirs: *Undercover* (2014) and *On the Run* (2018).

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

76. *See* William E. Farrell, 5 in *Sadat Trial Sentenced to Die*, N.Y. Times, Mar. 7, 1982, at 11; William E. Farrell, *Egypt Reports Plot to Kill Aides at Sadat's Funeral*, N.Y. Times, Oct. 31, 1981, at 13; McFadden, *supra* note 12; McFadden, *supra* note 14; Mitchell, *supra* note 67; Tabor, *supra* note 17; *see also* The 9/11 Commission Report 56 (2004) (Abdel Rahman's "preaching had inspired the assassination of Sadat"); Ali H. Soufan, *The Black Banners* 47 (2011) ("he was acquitted but expelled from Egypt"), *reprinted as* *The Black Banners* (Declassified) (2020) (restoring redactions).

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

77. *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 14; Mitchell, *supra* note 67; *see also* Soufan, *supra* note 76, at 47 ("The visa was given to him in Sudan by a CIA official.").

According to the 9/11 Commission, "[a]fter 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).

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

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

gag, informed the Egyptian government of the assassination plan, and Mubarak's New York trip was canceled.⁸⁰

Siddig Ali and Clement Rodney Hampton-El led paramilitary training on weekends between October 1992 and February 1993.⁸¹ Participants included Amir and Fadil Abdelgani and Tarig Elhassan, as well as the Egyptian informant Haggag.⁸² The training was for jihad, perhaps in Bosnia.⁸³ 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.⁸⁴

In May 1993, the informant Salem persuaded Siddig Ali to establish a bomb-making safehouse where the FBI had installed surveillance equipment.⁸⁵

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.⁸⁶

On June 13, 1993, Fares Khallafalla and the informant Salem purchased timers for bombs.⁸⁷ On June 19 and 21, Amir Abdelgani, Victor Alvarez, and Salem unsuccessfully tried to steal cars to use as both bomb-delivery and getaway vehicles.⁸⁸ 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.⁸⁹

80. *Id.*

81. *Id.* at 107.

82. *Id.*

83. *Id.*

84. *Id.* at 105; see Lance, *supra* note 6, at 47–49, 74.

85. *Rahman*, 189 F.3d at 109; see Lance, *supra* note 6, at 118; Mitchell, *Egyptian Informer*, *supra* note 74. See generally *Blindspot: The Road to 9/11: The Sheikh*, WNYC Radio podcast (episode 4, Sept. 23, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11.

“Salem was a difficult informant who had a strained relationship with the government, even secretly taping his conversations with the FBI and insinuating that the Bureau failed to stop the World Trade Center bombing after he provided information on the bomb plot.” Wadie E. Said, *Crimes of Terror* 34 (2015).

86. *Rahman*, 189 F.3d at 108–09; see Ralph Blumenthal, *U.S. Says Bomb-Plot Suspects Talked of Blowing Up Manhattan Jewelry District*, N.Y. Times, June 30, 1993, at B3; Lance, *supra* note 6, at 118; Robert D. McFadden, *8 Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. Times, June 25, 1993, at A1.

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

88. *Id.*; see McFadden, *supra* note 86.

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

A couple of hours after midnight on June 24, the FBI raided the safe-house and arrested Siddig Ali, the Abdelganis, Elhassan, and Alvarez while they were mixing explosive chemicals.⁹⁰ Hampton-El, Saleh, and Khal-lafalla were arrested at their homes in Flatbush, Yonkers, and Jersey City, respectively.⁹¹

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.⁹² But after his van evaded federal agents following him on June 30, the government decided to arrest him on an immigration detainer.⁹³ A negotiated surrender was agreed on for July 3.⁹⁴

On July 14, the indictment against el-Gabrownny was expanded to include bomb conspiracy charges and additional defendants Siddig Ali, Hampton-El, Amir and Fadel Abdelgani, Elhassan, Khallafalla, Alvarez, Saleh, and two others: Earl Gant and a defendant identified only as “Wahid.”⁹⁵ Nosair, Abdel Rahman, Haggag, and Mohammed Abouhalima, the brother of World Trade Center bomber Mahmoud Abouhalima, were added as defendants by superseding indictment on August 25.⁹⁶

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, 1994.⁹⁷ He was sentenced on July 20, 1994, to time served, with three years of supervised release.⁹⁸

90. *Id.* at 111; see McFadden, *supra* note 86.

91. *Rahman*, 189 F.3d at 111; see McFadden, *supra* note 86.

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

93. *See id.*

94. *See id.*

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

95. *United States v. Rahman*, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (D.E. 19); see Ralph Blumenthal, *Court Says Tapes in Bomb Plot Fail to Support Some Charges*, N.Y. Times, July 8, 1993, at B3 (reporting that Wahid was still missing); Mitchell, *Bomb Informer*, *supra* note 74.

96. *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (D.E. 47); 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.

97. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *see id.* (information, D.E. 221); *see also* Ralph Blumenthal, *Defendant in a Bombing Plot Released on Bail*, N.Y.

“Wahid” turned out to be Matarawy Mohammed Said Saleh, who was arrested on July 22, 1993, and who is not related to codefendant Mohammed Saleh.⁹⁹ Because prosecutors determined that Wahid joined the conspiracy only hours before the government began arresting codefendants, he pleaded guilty and was sentenced on December 19, 1995, to time served, with three years of supervised release.¹⁰⁰ Later, the Egyptian was deported.¹⁰¹

Haggag agreed to testify for the government; terrorism charges against him were dropped, and he pleaded guilty to an unrelated insurance fraud scheme in which he tried to collect on a fire that he set in a cafe that he co-owned.¹⁰²

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.¹⁰³

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.

98. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *id.* (judgment, D.E. 290); 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); see also BOP Locator, *supra* note 40 (noting release from prison on October 18, 1993, reg. no. 47042-066).

99. 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.

100. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *id.* (judgment, D.E. 492); see Fried, *supra* note 99.

101. See *Al-Qaida Suspect Had Nuclear Access in N.J.*, Press of Atlantic City, Mar. 13, 2010, at A1; see also BOP Locator, *supra* note 40 (noting release from prison on November 19, 1996, reg. no. 10135-039).

102. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (sentencing, Feb. 5, 1996; judgment, D.E. 521); see Joseph P. Fried, *In Plea Deal, Jerseyman to Testify in Terror Trial*, N.Y. Times, May 2, 1995, at 5.

103. *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-Gabrowni*, 844 F. Supp. 955, 957 (S.D.N.Y. 1994); see Tabor, *supra* note 96.

Judge Mukasey denied Nosair’s motion to dismiss some counts against him as double jeopardy because of a 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

Famed defender of the unpopular William M. Kunstler and his partner, Ronald L. Kuby, represented el-Gabrowny.¹⁰⁴ When the indictment was superseded to include Siddig Ali and others as defendants, Kunstler and Kuby appeared for both el-Gabrowny and Siddig Ali.¹⁰⁵ Judge Mukasey sought to ensure that conflict-of-interest waivers by the defendants were knowing.¹⁰⁶

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

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

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.

104. *United States v. Rahman*, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see David Margolick, *Still Radical After All These Years*, N.Y. Times, July 6, 1993, at B1; Albert Ruben, *The People’s Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantánamo* 91 (2011).

Kunstler cofounded the Center for Constitutional Rights, which, beginning in 2002, coordinated representation of Guantánamo Bay habeas petitioners. See Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 25 (2008); see also Chapter 28: Guantánamo Bay, *infra* page 434.

105. *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see Ruben, *supra* note 104, at 91 (“The case . . . became for Kunstler an opportunity, having nothing in the least to do with the guilt or innocence of the accused, but of challenging the government.”).

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

...
... [B]oth defendants said they had understood the explanations of possible conflicts, and both expressed the desire to be represented by the Kunstler firm.¹⁰⁷

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.¹⁰⁸

Warren and Kunstler represented Nosair at his state murder trial,¹⁰⁹ 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.¹¹⁰

Judge Mukasey denied Nosair's application to name Warren as his appointed attorney in this federal trial as an exception to regular CJA procedures.¹¹¹ Judge Mukasey assigned Nosair a CJA panel attorney.¹¹²

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.¹¹³ The

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

108. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69.

109. See Lance, *supra* note 6, at 62–65, 81; Selwyn Raab, *Jury Selection Seen as Crucial to Verdict*, N.Y. Times, Dec. 23, 1991, at B8; Ruben, *supra* note 104, at 90.

110. *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (complaint, Mar. 5, 1993, D.E. 1; indictment, Mar. 17, 1993, D.E. 3).

111. *United States v. Abdel Rahman*, No. 1:93-cr-181, 1993 WL 340992 (S.D.N.Y. Sept. 3, 1993); see Gross, *supra* note 32, at 8.

In denying Nosair's request for reconsideration, Judge Mukasey also denied an application by Lynne Stewart to represent Mohammed Abouhalima. *United States v. Abdel Rahman*, No. 1:93-cr-181, 1993 WL 410449 (S.D.N.Y. Oct 13, 1993); see Gross, *supra* note 32, at 8.

112. *Rahman*, 861 F. Supp. at 270; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (D.E. 102).

113. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; *United States v. Abdel 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 32, at 7–10 (describing as a "celebrity lawyer" issue the attorneys' wanting to represent not only lesser known defendants but also the most high-profile defendant).

government moved to disqualify the Kunstler firm from representing more than one defendant.¹¹⁴ On November 9, 1993, Judge Mukasey ruled that the firm could either represent el-Gabrowny and Siddig Ali, as they had, or Abdel Rahman, but not all three.¹¹⁵ Abdel Rahman opted to represent himself, and the court appointed a panel attorney to assist him.¹¹⁶ By the time the trial commenced, he was represented by Lynne Stewart,¹¹⁷ who had represented Ajaj at Ajaj's arraignment in the bombing case.¹¹⁸

On February 8, 1994, Mohammed Abouhalima was released in a sealed proceeding.¹¹⁹ But he was indicted on September 18, 1996, for aiding his brother's escape.¹²⁰ He was convicted on May 28, 1997, and sentenced on November 24, 1998, to eight years in prison.¹²¹

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.¹²² The substitute counsel asked to be relieved as Siddig Ali's attorney, because his knowledge of Siddig Ali's proffers to the gov-

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

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

116. *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.

117. *See* Bernstein, *supra* note 74.

Stewart died on March 7, 2017. *See* Joseph P. Fried, *Lynne Stewart Dies at 77*, N.Y. Times, Mar. 8, 2017, at B16; Larry Neumeister, *Lawyer Jailed for Aiding "Blind Sheikh,"* Wash. Post, Mar. 9, 2017, at B5.

118. *See* Tabor, *supra* note 7.

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

120. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (D.E. 816); *see* Joseph P. Fried, *U.S. Says Man Helped Brother Flee in Trade Center Bombing*, N.Y. Times, Sept. 19, 1996, at 8.

121. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *id.* (judgment, D.E. 867); *see Two Are Sentenced in Trade Center Bombing*, N.Y. Times, Nov. 25, 1998. The court of appeals affirmed the conviction. *United States v. Abouhalima*, No. 98-1677, 1999 WL 1295846 (2d Cir. Dec. 23, 1999).

Mohammed Abouhalima was released from prison on August 25, 2005. BOP Locator, *supra* note 40 (reg. no. 28173-054).

122. *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.

ernment would constrain what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.¹²³ The government objected.¹²⁴ Judge Mukasey ruled that Kunstler and Kuby could no longer represent Siddig Ali.¹²⁵ Judge Mukasey also ruled that the Kunstler firm's prior representations of Siddig Ali and Nosair had now created conflicts of interest with its representation of el-Gabrownny so serious as to disqualify the firm from representing el-Gabrownny as well.¹²⁶ Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.¹²⁷

Voir dire began on January 9, 1995.¹²⁸ To facilitate jury selection, Judge Mukasey used a jury questionnaire, which he had seldom done before, and he found it very helpful.¹²⁹ Judge Mukasey used an anonymous jury and conducted postquestionnaire voir dire in a conference room with the press represented by two reporters—one from print and one from electronic media.¹³⁰

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

124. *Id.* at 267–68.

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

126. *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.

127. See Joseph P. Fried, *Sheik Called an Architect of Terrorism*, N.Y. Times, Sept. 6, 1995, at 3; Ruben, *supra* note 104, at 11, 98; David Stout, *William Kunstler, 76, Dies*, N.Y. Times, Sept. 5, 1995, at 6 (reporting that Kunstler died of a heart attack).

128. *United States v. Abouhalima*, 961 F. Supp. 78, 80 (S.D.N.Y. 1997); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see Richard Bernstein, *Trial for 12 Opens in Plot for Bombing New York Buildings*, N.Y. Times, Jan. 10, 1995, at 1.

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

129. Michael B. Mukasey, *United States v. Abdel Rahman: Jury Questionnaire* (Jan. 9, 1995), www.fjc.gov/sites/default/files/2015/TRNYS018.pdf; 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 32, at 22–23.

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

Opening statements commenced on January 30.¹³¹ 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.¹³² 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.¹³³ As was his usual practice, Judge Mukasey permitted jurors to take notes.¹³⁴

On February 6, Siddig Ali pleaded guilty, agreed to be a witness for the government, and asked God to forgive him for his acts, which he admitted were wrong.¹³⁵ He was sentenced to eleven years in prison on October 15, 1999, on a finding that he provided the government with extensive assistance in the case.¹³⁶

Judge Mukasey conducted the nine-month trial four days per week.¹³⁷ A brief experience with five days per week fatigued all participants without moving things along noticeably faster.¹³⁸ Both Arabic and Spanish interpreters were required.¹³⁹

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

131. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see Bernstein, *supra* note 74.

132. Michael B. Mukasey, United States v. Abdel Rahman: Preliminary Charge (Feb. 1, 1995), www.fjc.gov/sites/default/files/2012/TRNYS019.pdf; Interview with Michael B. Mukasey, June 25, 2007.

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

134. *Id.*

135. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see Richard Bernstein, *Bomb Plot Defendant Shifts Plea to Guilty and Implicates Others*, N.Y. Times, Feb. 7, 1995, at 1.

136. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *id.* (judgment, D.E. 880); see Benjamin Weiser, *Remorseful Terror Conspirator Gets an 11-Year Sentence*, N.Y. Times, Oct. 16, 1999, at B6.

In about 2017, the informant Salem spotted, but did not speak with, Siddig Ali in the Atlanta airport. See *Blindspot: The Double Life*, *supra* note 74 (interview with Salem).

137. 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”).

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

139. *Id.*

by a bomb.¹⁴⁰ Judge Mukasey permitted the jurors to consult news of the event, but admonished them not to let it influence them in the trial.¹⁴¹

On October 1, 1995, the jury convicted el-Gabrowny, Hampton-El, both Abdelganis, Elhassan, Khallafalla, Alvarez, Saleh, Nosair, and Abdel Rahman of seditious conspiracy and other charges, including a guilty verdict for Nosair in Rabbi Kahane's murder.¹⁴² On January 17, 1996, Judge Mukasey sentenced Nosair and Abdel Rahman to life in prison and sentenced the other eight defendants as follows: el-Gabrowny to fifty-seven years; Hampton-El, Elhassan, Alvarez, and Saleh to thirty-five years; Amir Abdelgani and Khallafalla to thirty years; and Fadil Abdelgani to twenty-five years.¹⁴³

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a reconsideration of el-Gabrowny's sentence.¹⁴⁴ On remand, Judge Mukasey sentenced el-Gabrowny to thirty-three years in prison,¹⁴⁵ and the court of appeals affirmed the new sentence.¹⁴⁶

Habeas petitions by Nosair,¹⁴⁷ Hampton-El,¹⁴⁸ and Saleh¹⁴⁹ were unsuccessful. Nosair, el-Gabrowny, and Saleh were unsuccessful in a challenge

140. 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.

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

142. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; *id.* (judgments, D.E. 510, 512, 514 to 522); 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), www.fjc.gov/sites/default/files/2012/TRNYS020.pdf.

143. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69; see Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. Times, Jan. 18, 1996, at 1; Wren, *supra* note 4.

144. *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.

145. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 69 (May 23, 2000, D.E. 888).

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

147. *Nosair v. United States*, 839 F. Supp. 2d 646 (S.D.N.Y. 2012); *Nosair v. Wiley*, 308 F. App'x 285 (10th Cir. 2009); see Order, *Nosair v. United States*, No. 16-2203 (2d Cir. Jan. 13, 2021), D.E. 72 (denying permission to file a successive habeas corpus petition); see also Benjamin Weiser, *Man Convicted in Terrorism Conspiracy Is Denied New Trial*, N.Y. Times, Jan. 14, 2012, at A18.

of their transfer to the Bureau of Prison's most secure facility, the Administrative Maximum Prison in Florence, Colorado, because, as the U.S. Court of Appeals for the Tenth Circuit affirmed, there is no liberty interest in such a transfer requiring due process.¹⁵⁰

Judge Mukasey retired from the bench and returned to practice in 2006.¹⁵¹ The court reassigned Saleh's case to Judge William H. Pauley III in 2008, Alvarez's case to Judge Lorna G. Schofield in 2016, Siddig Ali's case to Judge Loretta A. Preska in 2016, Khallafalla's case to Judge Analisa Torres in 2018, and the other defendants' cases to Judge P. Kevin Castel in 2019.¹⁵²

Alvarez was committed in 2001, over his objection, to psychiatric hospitalization until no longer in need of care or until the expiration of his sentence.¹⁵³ In light of recent Supreme Court holdings on sentence enhancements for crimes of violence, the court of appeals granted Alvarez permission to seek habeas corpus relief in 2019.¹⁵⁴ Judge Schofield reduced

148. Opinion, Hampton-El v. Walton, No. 3:14-cv-311 (S.D. Ill. Apr. 4, 2014), D.E. 3, 2014 WL 1345363.

149. Opinion, No. 20-2254 (2d Cir. May 27, 2022), D.E. 112, 2022 WL 1701515, *affg* Opinion, United States v. Saleh No. 1:93-cr-181-8 (S.D.N.Y. Jan. 15, 2021), D.E. 1195, 2021 WL 149082 (denying a motion to reopen the criminal case), *appeal dismissed*, No. 21-341 (2d Cir. Aug. 2, 2021), D.E. 35 (dismissing the appeal because it lacks an arguable basis either in law or in fact), *and affg* Opinion, Saleh, No. 1:93-cr-181-8 (S.D.N.Y. July 8, 2020), D.E. 1168, 2020 WL 3839626 (denying compassionate release in light of the COVID-19 pandemic); Order, Saleh v. United States, No. 19-3223 (2d Cir. Feb. 10, 2021), D.E. 49 (denying permission to file a successive habeas corpus petition); Opinion, Saleh v. United States, No. 1:01-cv-169 (S.D.N.Y. July 31, 2014), D.E. 21, 2014 WL 3855022, *certificate of appealability denied*, Order, No. 14-2942 (2d Cir. Dec. 3, 2014), D.E. 23.

150. Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012).

151. FJC Biographical Directory, *supra* note 32.

152. S.D.N.Y. Abdel Rahman Docket Sheet, *supra* note 69 (D.E. 995, 1057, 1101, 1138).

Judge Pauley died on July 6, 2021. FJC Biographical Directory, *supra* note 32; see Sam Roberts, *William H. Pauley III*, 68, *Judge Who Oversaw Trump Hush Money Case*, N.Y. Times, July 18, 2021, at 24.

153. Order, United States v. Alvarez, No. 6:01-cv-3136 (W.D. Mo. June 26, 2001), D.E. 16, *approving* Report and Recommendation, *id.* (May 23, 2001), D.E. 9, *and summarily aff'd*, Judgment, No. 01-3165 (8th Cir. Nov. 30, 2001); see also Docket Sheet, United States v. Alvarez, No. 6:07-cv-3244 (W.D. Mo. Aug. 1, 2007) (similar later case mostly sealed).

154. Order, Alvarez v. United States, No. 16-1878 (2d Cir. Dec. 4, 2019), D.E. 48; see United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019); Johnson v. United States, 576 U.S. 591 (2015).

his sentence by five years on March 3, 2020.¹⁵⁵ He was released on July 30 subject to mental health evaluation and treatment.¹⁵⁶

At the completion of el-Gabrownny's prison sentence on May 12, 2021, he was in a coma, so Judge Castel appointed counsel to represent el-Gabrownny for next steps.¹⁵⁷ A 2017 Freedom of Information Act case by el-Gabrownny for information about the World Trade Center bombing's investigation and prosecutions resulted in some relief.¹⁵⁸

Fadil Abdelgani was released from prison in 2015; Elhassan was released in 2017; Amir Abdelgania and Khallafalla were released in 2019.¹⁵⁹ Hampton-El died in prison in 2014,¹⁶⁰ and Abdel Rahman did so in 2017.¹⁶¹ Nosair and Saleh remain in prison.¹⁶²

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.¹⁶³ There, he launched a conspiracy to bomb U.S. airliners serving routes in southeast

155. Order, *United States v. Alvarez*, No. 1:93-cr-181-9 (S.D.N.Y. Mar. 3, 2020), D.E. 1157; Amended Judgment, *id.* (Mar. 3, 2020), D.E. 1158.

156. Order, *id.* (July 30, 2020), D.E. 1186; BOP Locator, *supra* note 40 (reg. no. 34848-054).

157. Order, *United States v. Elgabrownny*, No. 1:93-cr-181-1 (S.D.N.Y. May 14, 2021), D.E. 1200; *see* Ben Feuerherd, "Freed" Terrorist in Coma, N.Y. Post, May 15, 2021, Metro+Sports Extra, at 12; *see also* BOP Locator, *supra* note 40 (reg. no. 28054-054).

158. Docket Sheet, *Elgabrownny v. CIA*, No. 1:17-cv-66 (D.D.C. Jan. 11, 2017); *Elgabrownny v. CIA*, ___ F. Supp. 3d ___, 2020 WL 1451580 (D.D.C. 2020) (opinion filed at D.D.C. No. 1:17-cv-66, D.E. 82) (providing some relief to defendants); Opinion, *Elgabrownny*, No. 1:17-cv-66 (D.D.C. Mar. 31, 2019), D.E. 58, 2019 WL 1440345 (requiring additional disclosures).

159. BOP Locator, *supra* note 40 (noting releases from prison on April 3, 2015, for Fadil Abdelgani, reg. no. 34849-054; September 26, 2017, for Elhassan, reg. no. 34852-054; and July 19, 2019, for Amir Abdelgani, reg. no. 34850-054, and Khallafalla, reg. no. 34856-054).

160. *Id.* (noting death on June 20, 2014, at an age of seventy-six, reg. no. 34854-054).

161. *Id.* (noting death on February 18, 2017, at an age of seventy-eight, reg. no. 34892-054); *see* Julia Preston, *Omar Abdel Rahman, Blind Cleric Who Plotted Terrorist Attacks, Dies at 78*, N.Y. Times, Feb. 19, 2017, at 22; Matt Schudel, "Blind Sheikh" Behind Terrorist Plots Against U.S., Wash. Post, Feb. 19, 2017, at C7.

162. BOP Locator, *supra* note 40 (noting Nosair's life sentence, reg. no. 35074-054, and a release date of September 3, 2023, for Saleh, reg. no. 34853-054).

163. *United States v. Yousef*, 327 F.3d 56, 79–80 (2d Cir. 2003). *See generally* *Blindspot: The Road to 9/11: The Idea*, WNYC Radio podcast (episode 5, Sept. 30, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11.

Asia.¹⁶⁴ To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.¹⁶⁵ Also in December, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.¹⁶⁶ 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.¹⁶⁷

Yousef and his high school friend, Abdul Hakim Murad, were burning off excess chemicals in their Manila apartment on January 6, 1995, and they accidentally started a fire that resulted in a visit from Philippine police officers and discovery of the plot to bomb planes.¹⁶⁸

164. The 9/11 Commission Report 147 (2004) (noting that the plan became known as the “Bojinka” plot); *Yousef*, 327 F.3d at 79–80; see Lance, *supra* note 6, at 150–56; *id.* at 181 (“They planned to execute the Bojinka plot right after assassinating the Holy Father, during the week of January 12.”); Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror* 24 (2007) (reporting that the plan was to use liquid explosives that would pass through airport metal detectors); see also McDermott & Meyer, *supra* note 6, at 66 (noting that *bojinka* is Serbo-Croatian for big noise).

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

McDermott, *supra* note 10, at 148.

165. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; see Lance, *supra* note 6, at 152 (describing the injuries as minor); McDermott, *supra* note 10, at 147; McDermott & Meyer, *supra* note 6, at 67; Wren, *supra* note 4.

166. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; *United States v. Yousef*, 927 F. Supp. 673, 675 (S.D.N.Y. 1996); see Lance, *supra* note 6, at 152–54; McDermott, *supra* note 10, at 148–49; McDermott & Meyer, *supra* note 6, at 67; McKinley, *supra* note 24; Wren, *supra* note 4.

167. *Yousef*, 327 F.3d at 79, 81; *Yousef*, 927 F. Supp. at 675; see Lance, *supra* note 6, at 154–55; McDermott, *supra* note 10, at 148–49; McDermott & Meyer, *supra* note 6, at 67 (“the pilots heroically managed to land [the plane] with a gaping hole in its fuselage”); McKinley, *supra* note 24; Wren, *supra* note 4; Wright, *supra* note 6, at 267.

168. *Yousef*, 327 F.3d at 79, 81; see Lance, *supra* note 6, at 178–80; McDermott & Meyer, *supra* note 6, at 68 (describing Yousef as ever careless); McKinley, *supra* note 24; 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 164, at 24; Wren, *supra* note 4; see also McDermott, *supra* note 10, at 146, 152–54 (reporting that the apartment was selected because it was on the route of a planned papal procession).

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.¹⁶⁹ 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.¹⁷⁰

Philippine authorities arrested Shah on January 11, but he escaped.¹⁷¹ He was recaptured by Malaysian authorities in December and flown to New York on December 12.¹⁷²

Yousef fled the Philippines,¹⁷³ but he was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.¹⁷⁴ He was transported to the Southern District of New York on February 8.¹⁷⁵ En route, he confessed to an intention to topple one of the World Trade Center towers into the other.¹⁷⁶

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.¹⁷⁷ Yousef asked to ad-

169. *Yousef*, 327 F.3d at 79, 81; *United States v. Yousef*, 925 F. Supp. 1069 (S.D.N.Y. 1996); see McKinley, *supra* note 24.

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

171. *Id.* at 79, 82; see Lance, *supra* note 6, at 227; James C. McKinley, Jr., *F.B.I. Arrests Man in Far East, Charged in Plot to Bomb Planes*, N.Y. Times, Dec. 13, 1995, at 5.

172. *Yousef*, 327 F.3d at 79, 82; see Lance, *supra* note 6, at 227; McKinley, *supra* note 171.

173. See Wright, *supra* note 6, at 267 (“leaving behind his computer with . . . plans encrypted on the hard drive”).

174. 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 24; McDermott, *supra* note 10, at 153–54; McKinley, *supra* note 24; Temple-Raston, *supra* note 164, at 24; Wren, *supra* note 4.

175. *Yousef*, 327 F.3d at 82; *Yousef*, 925 F. Supp. at 1065; see S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27 (noting Yousef’s not-guilty plea on February 9, 1995); see also Johnston, *supra* note 24; Wren, *supra* note 4.

176. See McDermott & Meyer, *supra* note 6, at 78–79; Benjamin Weiser, *Suspect’s Confession Cited as Bombing Trial Opens*, N.Y. Times, Aug. 6, 1997, at B6; Wright, *supra* note 6, at 202; see also Ebrahim & Giles *supra* note 72, at 13.

177. *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 27 (also noting the filing on April 13, 1995, of an eighth superseding indictment against Yousef, Yasin, and Murad, D.E. 356; the filing on June 14, 1995, of a ninth superseding indictment against Yousef, Yasin, and Murad, D.E. 366; the filing on September 11, 1995, of a tenth superseding indictment against Yousef, Yasin, Murad, and Ismoil, D.E. 391; the filing on December 13, 1995, of eleventh superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah, D.E. 402; and the filing on February 21, 1996, of twelfth superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah, D.E. 412); see *Judge Dismisses 75 on Bomb Jury Panel*, N.Y. Times, May 14, 1996, at 2 [hereinafter *Judge Dismisses 75*]; Lance,

dress 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.¹⁷⁸ Yousef and Judge Duffy agreed that he would do this.¹⁷⁹ All three defendants were convicted on September 5, the fourth day of deliberation.¹⁸⁰

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.¹⁸¹ This time, Yousef let a lawyer represent him.¹⁸² Both defendants were convicted on November 12.¹⁸³

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.¹⁸⁴ At

supra note 6, at 227; McDermott & Meyer, *supra* note 6, at 108–10 (reporting that Yousef's trial for the airplane plot occurred before his trial for the World Trade Center bombing so that a delay in the airplane trial would not make it more difficult to get testimony from witnesses in the Philippines).

178. See Gross, *supra* note 32, at 5; Christopher S. Wren, *Plot of Terror in the Skies Is Outlined by a Prosecutor*, N.Y. Times, May 30, 1996, at 3.

179. See Gross, *supra* note 32, 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 4; Christopher S. Wren, *With Judge's Gentle Help, Terror Suspect Starts Case*, N.Y. Times, Aug. 22, 1996, at 1.

180. *Yousef*, 327 F.3d at 85; see Wren, *supra* note 4.

181. *Yousef*, 327 F.3d at 77–78, 80; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; see *Jury Selection Begins in Trade Center Trial*, N.Y. Times, July 16, 1997, at B2.

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

183. *Yousef*, 327 F.3d at 80, 137; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; see Benjamin Weiser, “*Mastermind*” and Driver Found Guilty in 1993 Plot to Blow Up Trade Center, N.Y. Times, Nov. 13, 1997, at A1.

184. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; *id.* (judgment, D.E. 655); see Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. Times, Jan. 9, 1998, at A1 [hereinafter *Mastermind*]; Weiser, *supra* note 32 (reporting that Judge Duffy cited the Quran during sentencing); see also BOP Locator, *supra* note 40 (noting a life sentence, reg. no. 03911-000).

In 2005, the court of appeals denied Yousef's appeal of the district court's decision not to appoint habeas corpus counsel under the CJA. *United States v. Yousef*, 395 F.3d 76 (2d Cir. 2005). Five years later, Judge Duffy appointed counsel to challenge Yousef's conditions of confinement, Order, *United States v. Yousef*, No. 1:93-cr-180-4 (S.D.N.Y. Apr. 8, 2010, filed Apr. 9, 2010), D.E. 827, and transferred the matter to the District of Colorado, Opinion, *id.* (July 22, 2011, filed July 28, 2011), D.E. 842, 2011 WL 3422834. On May 13, 2014, Judge Richard P. Matsch “conclude[d] that Yousef has not shown that his conditions of confinement are so atypical and impose such a hardship as to infringe upon the limited liberty left to him under his sentences.” Opinion at 11, *Yousef v. United States*,

his sentencing, Yousef proclaimed, “I am a terrorist and I am proud of it.”¹⁸⁵ Judge Duffy sentenced Ismoil on April 3, 1998, to 240 years in prison; and the judge sentenced Murad on May 15, 1998, to life plus sixty years.¹⁸⁶ The court of appeals affirmed the convictions and sentences on April 4, 2003.¹⁸⁷ Ismoil’s sentence was reduced by thirty years in 2020 in light of Supreme Court decisions in 2015 and 2019 on crimes of violence.¹⁸⁸

Judge Duffy sentenced Shah to thirty years in prison on October 8, 2004.¹⁸⁹ Following his conviction, Shah provided the government with some cooperation.¹⁹⁰ He was released on September 3, 2021.¹⁹¹

No. 1:12-cv-2585 (D. Colo. May 13, 2014), D.E. 83, 2014 WL 1908711. Judge Matsch observed, however, that Bureau of Prisons procedures for imposing special administrative measures (SAMs) are “offensive to traditional values of fairness and transparency but this Court may neither address nor remedy [that] here.” *Id.* at 12. An appeal was dismissed voluntarily. Order, *Yousef v. United States*, No. 14-1255 (10th Cir. May 1, 2015).

Judge Matsch died on May 26, 2019. FJC Biographical Directory, *supra* note 32.

185. See *Lance*, *supra* note 6, at 284; McDermott & Meyer, *supra* note 6, at 113; Weiser, *Mastermind*, *supra* note 184.

186. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; *id.* (judgments, D.E. 666, 669); see *Pilot Is Given Life Term for Bombing Plot*, N.Y. Times, May 16, 1998, at B5; Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. Times, Apr. 5, 1998, at B2; see also BOP Locator, *supra* note 40 (noting Murad’s life sentence, reg. no. 37437-054).

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

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

Judge Winter died on December 8, 2020. FJC Biographical Directory, *supra* note 32.

188. Amended Judgment, *United States v. Ismoil*, No. 1:93-cr-180-9 (S.D.N.Y. Mar. 4, 2020), D.E. 944; *Crime of Violence Vacatur Opinion*, *supra* note 58; see BOP Locator, *supra* note 40 (noting a release date of August 6, 2174, reg. no. 37802-054); see also *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019); *Johnson v. United States*, 576 U.S. 591 (2015).

189. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 27; *id.* (judgment, D.E. 816).

190. See David Johnston & Benjamin Weiser, *Officials Follow Money to Link Suspect to Attack*, N.Y. Times, June 6, 2002, at 28.

On June 30, 2020, Judge Kaplan denied Shah’s motion for compassionate release because of a claimed increased risk of COVID-19 infection arising from obesity, sleep apnea, high cholesterol, and asthma, finding the risk factors speculative, mild, or unproven, and finding a strong need for Shah to complete the remaining fourteen months of his

2001 Destruction of the World Trade Center

On June 5, 2008, during the presidency of George W. Bush, five men were arraigned in military tribunals at Guantánamo Bay for the attacks of September 11, 2001: KSM, Mustafa Ahmed al-Hawsawi, Ramzi Bin al-Shibh, Walid Bin Attash, and Ali Abdul Aziz Ali.¹⁹² Eric H. Holder, President Obama's attorney general, announced on November 13, 2009, that the men would be tried in the Southern District of New York instead.¹⁹³ Their sealed December 14 indictment was added to the indictment for the 1993 World Trade Center bombing.¹⁹⁴ Magistrate Judge James C. Francis IV granted the government's request to both seal the indictment and keep it off the case's docket.¹⁹⁵ According to the government,

knowledge of the specific date the Superseding Indictment was returned may lead the defendants to coordinate with each other in ways that undermine both their security and the security of others. In addition, notice that new charges have been filed against the defendants may lead them to destroy evidence they now possess.¹⁹⁶

sentence. Opinion, *United States v. Shah*, No. 1:93-cr-180-10 (S.D.N.Y. June 30, 2020), D.E. 961, 2020 WL 3578103.

191. Locator, *supra* note 40 (reg. no. 42799-054).

192. See William Glaberson, *Arraigned, 9/11 Defendants Talk of Martyrdom*, N.Y. Times, June 6, 2008, at A1; Josh White, *9/11 Architect Tells Court He Hopes for Martyrdom*, Wash. Post, June 6, 2008, at A1.

193. See Peter Finn & Carrie Johnson, *Alleged Sept. 11 Planner Will Be Tried in New York*, Wash. Post, Nov. 14, 2009, at A1; Karen J. Greenberg, *Rogue Justice* 195 (2016); Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. Times, Nov. 14, 2009, at A1.

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

The unsealing of an indictment against KSM was earlier announced at the 1998 sentencing of his nephew Yousef. See Lance, *supra* note 6, at 283–85; McDermott & Meyer, *supra* note 6, at 136; Weiser, *Mastermind*, *supra* note 184. A sealed indictment against KSM was returned in January 1996. See McDermott, *supra* note 10, at 165. See generally *Blindspot: The Road to 9/11: The Ghost*, WNYC Radio podcast (episode 8, Oct. 21, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11.

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

Judge Francis retired on October 27, 2017. Judicial Milestones, www.uscourts.gov/judicial-milestones/james-c-francis-iv; see John Riley, *Michael Cohen's Lawyers, Prosecutors Suggest Potential Special Masters*, Newsday, Apr. 19, 2018, at 5.

196. Affirmation at 2, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011), D.E. 833.

The defense appropriation act for 2011, however, forbade the use of defense funds to transfer KSM or any other Guantánamo Bay detainee for prosecution in a civilian court,¹⁹⁷ so the government obtained a dismissal of the superseding indictment in favor of renewed military tribunal prosecutions.¹⁹⁸ Pretrial proceedings continue at Guantánamo Bay.¹⁹⁹

Challenge: Interpreters

These prosecutions required both Arabic and Spanish interpreters.²⁰⁰

Challenge: Court Security

Security was tight in these trials. One downside of tight security in a criminal prosecution is that it suggests to the jury that the defendants are dangerous. In the trial for conspiracy to bomb airplanes, Judge Duffy had to dismiss the first seventy-five prospective jurors because they indicated that they would be influenced by heavy court security.²⁰¹

Challenge: Pro Se Defendants

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

After their convictions, Salameh, Ayyad, Mahmoud Abouhalima, and Ajaj dismissed their attorneys, and they appeared pro se for sentencing.²⁰²

197. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011); see Peter Finn & Anne E. Kornblut, *President Decries Rules on Detainees*, Wash. Post, Jan. 8, 2011, at A2; Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. Times, Jan. 8, 2011, at A11; see also Charlie Savage, *Power Wars* 157–60 (2015) (reporting that the scuttling of civilian trials proved “to be a repeat of Obama’s tactical mistake, back in January, of announcing that he was closing the Guantánamo prison but not immediately moving all the detainees out of it, creating time for political winds to shift”).

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

199. Office of Military Commission Cases, www.mc.mil/CASES.aspx; see Carol Rosenberg, *In Reversal, Judge Proceeds with Sole 9/11 Trial for Group*, Miami Herald, Aug. 14, 2014, at 3A.

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

201. See *Judge Dismisses 75*, *supra* note 177.

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

In response to Judge Mukasey's determination that Kunstler's law firm could represent either el-Gabrownny and Siddig Ali or Abdel Rahman, but not all three, Abdel Rahman elected to represent himself for a time.²⁰³

Abdel Rahman had been successful defending himself pro se in Egypt on conspiracy charges in connection with the 1981 assassination of Egyptian President Anwar Sadat and thus thought he could duplicate those results; Abdel Rahman also wanted to use the trial as a platform from which to convey his views. Ultimately, Abdel Rahman's close circle of people around him convinced him that he would have little chance of prevailing if he continued through trial pro se and convinced him to accept counsel.²⁰⁴

At Yousef's first trial, for the plot to bomb airplanes, he appeared pro se so that he could address the jury during opening arguments.²⁰⁵ He was convicted, and he opted for counsel representation at his second trial, for participation in the first bombing of the World Trade Center.²⁰⁶

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors' protection.²⁰⁷

This process becomes necessary in high profile cases to protect the security of jurors. The confidential information in that case, mercifully, is something that even the court, and in a sense, the judge, is unaware of.

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

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

204. Gross, *supra* note 32, at 4 (reporting on an interview with Judge Mukasey, footnote omitted).

205. *See id.* at 5.

206. *See Suspect to Use Lawyer, supra* note 182.

207. Michael B. Mukasey, United States v. Abdel Rahman: Preliminary Voir Dire (Jan. 9, 1995) [hereinafter Mukasey Preliminary Voir Dire], www.fjc.gov/sites/default/files/2012/TRNYS017.pdf; *Behind Closed Doors: Secret Justice in America*, 9 J. L. & Pol'y 1, 10 (2000) [hereinafter *Behind Closed Doors*] (remarks by Judge Mukasey); *see* Bernstein, *supra* note 12; Blumenthal, *supra* note 44; Gross, *supra* note 32, at 21 ("In every major terrorism trial that has taken place in the Southern District [of New York], an anonymous jury has been used due to the heightened risk of harm to potential jurors because of the nature of the crime at issue."); McDermott & Meyer, *supra* note 6, at 110; Tabor, *supra* note 45; Wren, *supra* note 4 ("After the [first Yousef] trial ended, the jurors were whisked away in three vans before reporters could approach them.").

The clerk knows the names of the jurors; the judge and the parties do not. The court tries at all costs to keep that information secret.²⁰⁸

To protect the jurors' safety and anonymity, they did not report directly to the courthouse but to secret locations from which deputy marshals transported them to court.²⁰⁹

In Judge Mukasey's case, "the identities of at least two of the jurors became known to some reporters after the case was over. As a result, those reporters camped outside the jurors' doors to discuss the jury's deliberations."²¹⁰ When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.²¹¹

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.²¹² 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.²¹³

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.²¹⁴

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).²¹⁵ Judge Mukasey kept the exhibits in a safe while he considered whether they had to be produced.²¹⁶ He ruled which exhibit had to be disclosed to the defendants, ordered that it not be disclosed to

208. *Behind Closed Doors*, *supra* note 207, at 10 (remarks by Judge Mukasey).

209. Mukasey Preliminary Voir Dire, *supra* note 207; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Judge Kevin Thomas Duffy, July 23, 2007.

210. *Behind Closed Doors*, *supra* note 207, at 10 (remarks by Judge Mukasey).

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

212. Interview with Meghan Silhan, law clerk to Judge Kevin Thomas Duffy, July 23, 2007; see Bernstein, *supra* note 12; Tabor, *supra* note 45.

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

214. Mukasey Preliminary Voir Dire, *supra* note 207; see Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

215. *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 32, at 37; see also 18 U.S.C. app. 3 (2020) (text of CIPA); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

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

anyone else by the defendants, and ordered that all of the exhibits be kept under seal with the classified information security officer.²¹⁷

Challenge: Terrorist Communications

According to the *New York Times*,

After news reports in 2006 that three men imprisoned in the 1993 World Trade Center bombing had sent letters to a Spanish terrorist cell, the Bureau of Prisons created two special wards, called Communication Management Units, or C.M.U.'s. The units, which opened at federal prisons in Terre Haute, Ind., in 2006 and Marion, Ill, in 2008, have set off litigation and controversy, chiefly because critics say they impose especially restrictive rules on Muslim inmates, who are in the majority.²¹⁸

217. *Rahman*, 870 F. Supp. 47; see Gross, *supra* note 32, at 37 (reporting that only one of the six documents had to be disclosed); Liptak, *supra* note 137 (“Judge Mukasey was concerned throughout about balancing the defendants’ rights against national security. He ordered an array of potential evidence to be disclosed to the defense, for instance, but drew the line at information he said would needlessly compromise intelligence operations.”); see also Reagan, *supra* note 215, at 21–22 (providing information about classified information security officers).

218. Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1; see *Royer v. Fed. Bureau of Prisons*, 808 F. Supp. 2d 274 (D.D.C. 2011); *Aref v. Holder*, 774 F. Supp. 2d 147 (D.D.C. 2011). See generally Said, *supra* note 85, at 141.

Chapter 2

Kenya and Tanzania

*United States v. El-Hage (Leonard B. Sand, Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)*²¹⁹

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, killing 224 people, including twelve Americans.²²⁰ Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya.²²¹

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

For this case study, on November 4, 2009, Tim Reagan interviewed Judge Newman in his Hartford chambers and Judge Cabranes and his law clerk Matt McKenzie in the judge's New Haven chambers. Judge Feinberg died on July 31, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges; see William Yardley, *Wilfred Feinberg, 94, U.S. Appellate Judge in New York*, N.Y. Times, Aug. 8, 2014, at A16.

220. The 9/11 Commission Report 70 (2004); *United States v. Ghailani*, 733 F.3d 29, 36–38 (2d Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 104 (2d Cir. 2008); *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *United States v. Ghailani*, 751 F. Supp. 2d 515, 521 (S.D.N.Y. 2010); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001); *United States v. 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 Call Terror Suspect Apolitical*, N.Y. Times, Sept. 20, 1998, at 126; James C. McKinley, Jr., *Bombs Rip Apart 2 U.S. Embassies in Africa*, N.Y. Times, Aug. 8, 1998, at A1; see also Russ Feingold, *While America Sleeps* 11–12, 104 (2012) (reporting that “Al Qaeda . . . apparently narrowly missed a third one in Uganda on the same day”); Terry McDermott, *Perfect Soldiers* 63 (2005) (“That most of the dead were African Muslims seemed not to matter to true believers.”); Ali H. Soufan, *The Black Banners* 14 (2011) (reporting that the bombings occurred two months after an ABC interview with Osama Bin Laden in which Bin Laden threatened, “We anticipate a black future for America. Instead of remaining United States, it shall end up separated states and shall have to carry the bodies of its sons back to America.”), *reprinted as* *The Black Banners* (Declassified) (2020) (restoring redactions). See generally Steve Coll, *Ghost Wars* 403–07 (2004); Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* 225–26 (2006).

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

Soufan, *supra*, at 78; see Wright, *supra*, at 307.

Four defendants were tried in 2001 and sentenced to life in prison. A fifth defendant was sentenced to life for stabbing a prison guard while awaiting trial. Also sentenced to life in prison were a defendant transferred from the terrorism detention center at Guantánamo Bay in 2009; a defendant extradited by the United Kingdom in 2012; and Osama Bin Laden's son-in-law, who was captured in 2013.

Among the judges' special challenges in these prosecutions were accommodating classified evidence, classified arguments, and classified opinions; hostile relations between the defendants and their attorneys; shuttling jurors to and from the courthouse and a secret meeting location; and temporary protection of the identity of a confidential source and witness.

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

221. See Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6; Soufan, *supra* note 220, at 80.

"Hundreds more would have been killed and hurt but for the extraordinary luck of there having been a filled water truck parked at just that moment in front of the Dar es Salaam embassy." McDermott, *supra* note 220, at 177.

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Nairobi

Pakistani authorities arrested Mohammed Saddiq Odeh on the day of the bombings for traveling with a fraudulent passport,²²² and he quickly became a suspect in the Nairobi bombing.²²³ Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12 as another suspect in the bombing.²²⁴ Al-'Owhali admitted driving the bomb to the embassy in Kenya.²²⁵ Later that month, the suspects were moved to New York,²²⁶ and

222. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 185 (2d Cir. 2008); *Terrorist Bombings*, 552 F.3d at 104; *United States v. Bin Laden*, 132 F. Supp. 2d 198 (S.D.N.Y. 2001); see Raymond Bonner, *Pakistan Arrests Two New Suspects in Embassy Blasts*, N.Y. Times, Aug. 19, 1998, at A1; Bonner, *supra* note 221; Soufan, *supra* note 220, at 88 ("Pakistani authorities had noticed that the picture on his passport was fraudulent").

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

224. *Terrorist Bombings*, 552 F.3d at 181; *Terrorist Bombings*, 552 F.3d at 105; *United States v. Bin Laden*, 132 F. Supp. 2d 168, 173–74 (S.D.N.Y. 2001); see David Johnston, *Blast Suspect Held in U.S. and Is Said to Admit Role*, N.Y. Times, Aug. 28, 1998, at A1; Soufan, *supra* note 220, at 85–87, 92.

225. See Johnston, *supra* note 224; see also *Terrorist Bombings*, 552 F.3d at 182 (noting that al-'Owhali's cooperation was contingent on his being tried in the United States, which he regarded as his enemy, instead of in Kenya, which he did not). See generally Wright, *supra* note 220, at 306–16.

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.

they were indicted on October 7.²²⁷ The United States decided to seek the death penalty against al-'Owhali but not Odeh.²²⁸

The government identified Haroun Fazil as another suspect in the Nairobi bombing.²²⁹ He was believed to have driven a pickup truck leading the vehicle carrying the bomb to the embassy.²³⁰ The government offered a multimillion-dollar reward for information leading to his arrest.²³¹ Indicted as Fazul Abdullah Mohammed,²³² he came to be regarded as the bombings' mastermind, and he was killed in a firefight in 2011 when he mistakenly came upon a security checkpoint in Mogadishu, Somalia, and tried to

226. *Terrorist Bombings*, 552 F.3d at 105; *Bin Laden*, 132 F. Supp. 2d at 205; *Bin Laden*, 132 F. Supp. 2d at 178; see Dan Barry, *With Suspect in Town, Giuliani Steps Up Security*, N.Y. Times, Aug. 28, 1998, at A6; David Johnston, *Charges Against 2d Suspect Detail Trial of Terrorists*, N.Y. Times, Aug. 29, 1998, at A4; Soufan, *supra* note 220, at 90, 94.

227. 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] (noting a first superseding indictment filed on October 7, 1998, D.E. 11, and first court appearances on October 8, 1998); *Terrorist Bombings*, 552 F.3d at 102; *United States v. Bin Laden*, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); see *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see also H.L. Pohlman, *Terrorism and the Constitution* 38–39 (2008) (discussing types of extraterritorial jurisdiction over crimes committed abroad).

228. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (death penalty notice, June 27, 2000, D.E. 227); *Terrorist Bombings*, 552 F.3d at 105, 109; *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001); *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.

229. See Benjamin Weiser, *2 New Suspects Linked by U.S. to Terror Case*, N.Y. Times, Sept. 18, 1998, at A1 [hereinafter *2 New Suspects*]; Benjamin Weiser, *A Bin Laden Agent Left Angry Record of Gripes and Fears*, N.Y. Times, Dec. 2, 1998, at A1 [hereinafter *Angry Record*]. See generally Chris Heffelfinger, *Radical Islam in America* 58–60 (2011) (providing additional information about Fazil, identifying him as Abdullah Muhammad Fazul Husseine Mullah Ati, alias Harun Fazul).

230. See Weiser, *2 New Suspects*, *supra* note 229; Weiser, *Angry Record*, *supra* note 229.

231. See Weiser, *2 New Suspects*, *supra* note 229; Weiser, *Angry Record*, *supra* note 229; 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*].

232. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (second superseding indictment, Nov. 4, 1998, D.E. 13).

flee.²³³ In 2009, Saleh Ali Saleh Nabhan, who was also believed to be responsible for the 2002 bombing of an Israeli hotel on the Kenyan coast, was killed in Somalia in a helicopter raid on Al-Shabab.²³⁴

On September 16, 1998, Wadih el-Hage, a naturalized U.S. citizen and resident of Arlington, Texas, who once shared a house with Fazil in Nairobi and who once was Osama Bin Laden's personal secretary, was arrested immediately after testifying before a grand jury.²³⁵ 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.²³⁶ On October 7, charges against him were broadened to include conspiracy to kill American citizens.²³⁷

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

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

235. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 104 (2d Cir. 2008); *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Lyman, *supra* note 220; Weiser, *2 New Suspects*, *supra* note 229; see also The 9/11 Commission Report 56 (2004) ("Hage was a U.S. citizen who had worked with Bin Laden in Afghanistan in the 1980s, and in 1992 he went to Sudan to become one of al Qaeda's major financial operatives."); Heffelfinger, *supra* note 229, at 60 ("Born into a Catholic family in Lebanon in 1960, Wadih converted to Islam as a teenager while living in Kuwait where his father worked for an oil company, and was largely shunned by his family thereafter.").

236. *El-Hage*, 213 F.3d at 77; *Bin Laden*, 91 F. Supp. 2d at 605–07 (noting that el-Hage appeared before the grand jury on September 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (criminal complaint, Sept. 17, 1998, D.E. 1); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 12 (2008) [hereinafter *Trying Cases*] (remarks by Judge Leonard B. Sand); see Lyman, *supra* note 220; Weiser, *2 New Suspects*, *supra* note 229.

The court 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).

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

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.²³⁸

On October 24, 2000, el-Hage tried to plead guilty, but the court did not accept his plea, because Judge Sand determined that el-Hage was pleading guilty to avoid the strip searches required every time he came to court rather than because he believed he was guilty.²³⁹

Dar es Salaam

On September 21, 1998, the government of Tanzania charged Mustafa Mahmoud Said Ahmed and Rashid Saleh Hemed with the bombing of the American embassy in Dar es Salaam.²⁴⁰ Tanzania dropped charges against Ahmed in March 2000.²⁴¹ After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.²⁴²

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.²⁴³ His attorney admitted at

238. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *United States v. Salim*, 549 F.3d 67, 70 (2d Cir. 2008); see Benjamin Weiser, *U.S. May Ask Death Penalty in Embassy Bombings*, N.Y. Times, Oct. 9, 1998, at A10.

Tim Reagan interviewed Judge Sand for this case study in his chambers on June 25, 2007. Judge Sand died on December 3, 2016. FJC Biographical Directory, *supra* note 219; see Joseph P. Fried, *Leonard B. Sand, Judge Who Oversaw Yonkers Segregation Case, Is Dead* at 88, N.Y. Times, Dec. 6, 2016, at B8.

The case originally was assigned to Judge John E. Sprizzo, S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227, 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*]. Judge Sprizzo died on December 16, 2008. FJC Biographical Directory, *supra* note 219.

239. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Benjamin Weiser, *Judge Rejects Guilty Plea in Bomb Plot*, N.Y. Times, Oct. 25, 2000, at B1.

240. See Bonner, *supra* note 221; 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).

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

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

243. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *United States v. Bin Laden*, 91 F. Supp. 2d 600, 604 n.3 (S.D.N.Y. 2000); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1242–43 (D. Colo. 2014); see Benjamin Weiser, *Man Charged in Bombing of U.S. Embassy in Africa*, N.Y. Times, Oct. 9, 1999, at A4.

trial that K.K. Mohamed helped assemble the bomb.²⁴⁴ The United States decided to seek the death penalty against him.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷

A Larger Plot

Osama Bin Laden was included in a November 4, 1998, superseding indictment,²⁴⁸ but he remained a fugitive until his killing by U.S. forces in 2011.²⁴⁹

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.*

244. See Hirsch, *supra* note 220, at 69, 81 (reporting also that Mohamed was known as "K.K."); Benjamin Weiser, *Suspect Admits Helping Make Embassy Bomb*, N.Y. Times, Feb. 6, 2001, at A1 (reporting that Mohamed's attorney made the concession during opening arguments); see also *Bin Laden*, 156 F. Supp. 2d at 362–63 ("During interrogation by American officials on October 5 and 6, 1999, Khalfan Mohamed admitted to playing a role in the August 7, 1998, bombing of the American Embassy in Dar es Salaam.").

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

245. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (death penalty notice, June 27, 2000, D.E. 230); *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001); *United States v. Bin Laden*, 126 F. Supp. 2d 256 (S.D.N.Y. 2000) (denying a claim that the death penalty certification was race-based); see Weiser, *Faking Illness*, *supra* note 228; Weiser, *2d Death Penalty*, *supra* note 228.

246. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; see Hirsch, *supra* note 220, 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").

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

248. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (second superseding indictment, Nov. 4, 1998, D.E. 13); The 9/11 Commission Report 128 (2004); see Soufan, *supra* note 220, at 72; Benjamin Weiser, *Saudi Is Indicted in Bomb Attacks on U.S. Embassies*, N.Y. Times, Nov. 5, 1998, at A1.

Bin Laden was indicted two months before the embassy bombings, on June 10, 1998, for a 1993 killing of eighteen American soldiers in Mogadishu, Somalia. Docket Sheet, *United States v. Bin Laden*, No. 1:98-cr-539 (S.D.N.Y. June 10, 1998); The 9/11 Commission Report 110 (2004); see Soufan, *supra* note 220, at 72; Benjamin Weiser, *Prosecutors Are Expected to Seek Dismissal of All Charges*, N.Y. Times, May 4, 2011, at A11.

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, 1998.²⁵⁰ German authorities handed him over to the U.S. government on December 20 on condition that he not face the death penalty.²⁵¹ He first appeared before the district court on December 21.²⁵² The government charged him with four broad conspiracy counts.²⁵³

Khalid al-Fawwaz, reportedly a close friend of Osama Bin Laden's who ran Al-Qaeda's media operations, was arrested by British authorities in September 1998.²⁵⁴ In June 1999, the U.S. government indicted him for having a hand in the 1998 bombings.²⁵⁵ At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdel Bary on July 11, 1999.²⁵⁶ Britain's House of Lords ruled on De-

249. Nolle Prosequi, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. June 17, 2011), D.E. 1103 (voluntarily dismissing indictments against Bin Laden); see Peter Baker & Helene Cooper, *Bin Laden Killed by U.S. Forces in Pakistan, Obama Says, Declaring Justice Has Been Done*, N.Y. Times, May 2, 2011, at A1; Dana Priest & William M. Arkin, *Top Secret America* 256–61 (2011); Nicholas Schmidle, *Getting Bin Laden*, New Yorker, Aug. 8, 2011, at 34; Soufan, *supra* note 220, at 532–36; Benjamin Weiser, *Federal Court Drops Charges Against Bin Laden*, N.Y. Times, June 18, 2011, at A9; Scott Wilson & Craig Whitlock, *U.S. Forces Kill Osama Bin Laden*, Wash. Post, May 2, 2011, at A1.

250. *United States v. Bin Laden*, 160 F. Supp. 2d 670, 674 (S.D.N.Y. 2001); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (Salim complaint, Sept. 14, 1998, D.E. 1; Salim arrest warrant, Sept. 14, 1998, D.E. 2); 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.

251. *Bin Laden*, 156 F. Supp. 2d at 370; see Weiser, *Held Without Bail*, *supra* note 250.

252. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *Bin Laden*, 92 F. Supp. 2d at 231.

253. See Weiser, *Held Without Bail*, *supra* note 250; Weiser, *Nuclear Material*, *supra* note 250 (reporting the unsealing of charges on September 25, 1998).

254. *United States v. Al Fawwaz*, 116 F. Supp. 3d 194, 197 (S.D.N.Y. 2015); 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 229; Weiser, *Deliver Aide*, *supra* note 238; Craig Whitlock, *Extradition of Terror Suspects Founders*, Wash. Post, Dec. 21, 2008, at A1.

255. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (sixth superseding indictment, June 16, 1999, D.E. 73); *Al Fawwaz*, 116 F. Supp. 3d at 202–03; see Jacobs, *supra* note 254.

256. See David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6; Whitlock, *supra* note 254; see also Soufan, *supra* note

cember 17, 2001, that these three suspects could be extradited to the United States.²⁵⁷ Eidarus died of leukemia on July 16, 2008, while under house arrest in London.²⁵⁸ On April 10, 2012, the European Court of Human Rights approved the extradition of al-Fawwaz and Abdel Bary.²⁵⁹ The men were flown to New York on October 5.²⁶⁰

Ali A. Mohamed—a former sergeant in the U.S. Army who previously was a major in Egypt’s army and then a CIA asset—was secretly charged with Al-Qaeda conspiracies in September 1998.²⁶¹ 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 27.²⁶² On Octo-

220, at 98 (“Although we had urged the British to arrest Fawwaz, Abdel Bary, and Eidarus in 1996, they had refused.”); *United States v. Bary*, 978 F. Supp. 2d 356, 360–62 (S.D.N.Y. 2013) (describing a previous period of arrest from September 23 to 27, 1998).

257. See Warren Hoge, *Court Approves Extraditions in Bombings of U.S. Embassies*, N.Y. Times, Dec. 18, 2001; Whitlock, *supra* note 254.

258. Nolle Prosequi, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Dec. 3, 2008), D.E. 730; see Whitlock, *supra* note 254.

259. Judgment, *Ahmad v. United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (Eur. Ct. H.R. Apr. 10, 2012), hudoc.echr.coe.int/eng#{"fulltext":["24027/07"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-110267"]} (also approving extraditions of Mustafa Kamal Mustafa, Seyla Talha Ahsan, and Babar Ahmad; review by Grand Chamber denied on September 24, 2012); *Al Fawwaz*, 116 F. Supp. 3d at 201–02; see Notice, *El Hage*, No. 1:98-cr-1023 (Sept. 25, 2012), D.E. 1114; see also John F. Burns & Alan Cowell, *European Court Says Britain Can Send Terror Suspects to U.S.*, N.Y. Times, Apr. 11, 2012, at A4.

260. See *Al Fawwaz*, 116 F. Supp. 3d at 197, 202 (noting that al-Fawwaz was presented to the court on October 6, 2012); Transcript at 14, *El Hage*, No. 1:98-cr-1023 (Oct. 9, 2012, filed Nov. 14, 2012), D.E. 1130 (provisionally setting trial for October 7, 2013); see also James Ball, *Five Al-Qaeda Suspects Reach U.S.*, Wash. Post, Oct. 7, 2012, at A3; Sarah Lyall & Alan Cowell, *British Judges Approve Extradition of Muslim Cleric to U.S. on Terrorism Charges*, N.Y. Times, Oct. 6, 2012, at A6; Larry Neumeister & John Christoffersen, *Five Terror Suspects Appear in U.S. Courts*, Miami Herald, Oct. 7, 2012, at 3A.

261. See Peter Lance, Triple Cross 10–17, 33–45, 318 (2006); Soufan, *supra* note 220, at 94; Benjamin Weiser, *U.S. Ex-Sergeant Linked to Bin Laden Conspiracy*, N.Y. Times, Oct. 30, 1998, at A1; see also The 9/11 Commission Report 68 (2004) (describing Ali Mohamed as “a former Egyptian army officer who had moved to the United States in the mid-1980s, enlisted in the U.S. Army, and became an instructor at Fort Bragg”); Lance, *supra*, at 301 (reporting that “to shield itself from the embarrassment of arresting an al Qaeda spy who had been one of their own informants, he was charged on a ‘John Doe’ warrant”); Benjamin Weiser & James Risen, *A Soldier’s Shadowy Trail in U.S. and in the Mideast*, N.Y. Times, Dec. 1, 1998, at A1 (reporting that Mohamed applied to be a CIA agent in 1984).

262. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (fifth superseding indictment, May 19, 1999, D.E. 55); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 231 (S.D.N.Y.

ber 20, 2000, he agreed to plead guilty.²⁶³ He was moved to a secret location, and he was never sentenced.²⁶⁴

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.²⁶⁵ He was held in secret for more than four months before charges against him were made public.²⁶⁶ In early 2003, he pleaded guilty²⁶⁷ and was sentenced to ten years and one month in prison.²⁶⁸ He was released on August 21, 2009.²⁶⁹

Stabbing a Prison Guard

On November 1, 2000, Salim stabbed a prison guard with a sharpened comb when the guard escorted Salim back to retrieve some documents from a cell shared with K.K. Mohamed.²⁷⁰

2000); see Lance, *supra* note 261, at 320–22; Benjamin Weiser, *Indicted Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. Times, June 5, 1999, at A3 (reporting that Mohamed was also known as Abu Omar); Weiser, *U.S. Charges Ex-Soldier*, *supra* note 231.

263. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (D.E. 274); see Lance, *supra* note 261, at 3–7, 358–60; Benjamin Weiser, *Bin Laden Linked to Embassy Blast by an Ex-Soldier*, N.Y. Times, Oct. 21, 2000, at A1.

Mohamed was not called as a witness at the trial of the other defendants. See Lance, *supra* note 261, at 6, 364; Benjamin Weiser, *Lawyers Seeking to Expose Plea Deal in Bombings Case*, N.Y. Times, May 6, 2001, at 151.

264. See Lance, *supra* note 261, at 7, 23–24, 361–62 (reporting also his receiving occasional visits from his American wife); Soufan, *supra* note 220, at 94.

265. 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*].

266. See S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (tenth superseding indictment, Mar. 12, 2001, D.E. 550); see also Weiser, *Qaeda Member*, *supra* note 265; Weiser, *Held Secretly*, *supra* note 265.

267. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (noting a guilty plea on January 31, 2003); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 138 (2d Cir. 2008) (noting al-Nalfi's conviction in February 2003); see Weiser, *Qaeda Member*, *supra* note 265.

268. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (Feb. 21, 2003, D.E. 681); see Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of ten years).

269. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 45047-054).

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

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

Well, Officer Louis Pepe didn't follow that protocol and took the handcuffs off Salim while he was still in the cell. Salim had taken a plastic comb and honed it into a knife and stabbed the corrections officer and inflicted a permanent brain injury to him.²⁷¹

Because Salim's attorneys were both witnesses to the stabbing and potential targets, the court discontinued their representation of Salim and severed his prosecution from the other defendants' trial, which was scheduled to begin only two months later.²⁷² Both Salim and K.K. Mohamed were transferred to other jails,²⁷³ but only Salim was charged with the stabbing.²⁷⁴ The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.²⁷⁵

jamin Weiser, *Quandary in Terror Case*, N.Y. Times, Nov. 12, 2000, at 139 [hereinafter *Quandary*].

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

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

271. *Trying Cases*, *supra* note 236, at 13–14 (remarks by Judge Sand).

272. *Bin Laden*, 160 F. Supp. 2d at 673; *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); see Hirsch, *supra* note 220, at 213; Weiser, *Quandary*, *supra* note 270.

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

274. *Bin Laden*, 160 F. Supp. 2d at 673; see Weiser, *Escape Plan*, *supra* note 270.

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

Salim pleaded guilty on April 3, 2002, to attempted murder.²⁷⁶ Judge Batts sentenced him to thirty-two years in prison,²⁷⁷ but the court of appeals concluded that a terrorism enhancement did not require transnational conduct,²⁷⁸ so Judge Batts resentenced Salim to life.²⁷⁹ The court of appeals affirmed the life sentence in 2012.²⁸⁰ In light of his life sentence for the stabbing, the government dropped Salim's prosecution for the bombing in 2019.²⁸¹

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.²⁸² With the help of a jury question-

argued that he participated in the stabbing. See Weiser, *Doctor Details Injuries*, *supra* note 270.

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

Judge Batts died on February 3, 2020. FJC Biographical Directory, *supra* note 219; see Katharine Q. Seelye and Benjamin Weiser, *Deborah A. Batts, the First Openly Gay Federal Judge, Is Dead at 72*, N.Y. Times, Feb 7, 2020, at A26.

276. S.D.N.Y. *Salim* Docket Sheet, *supra* note 275; *Salim*, 549 F.3d at 70; United States v. Salim, 287 F. Supp. 2d 250, 259 (S.D.N.Y. 2003); see Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

277. S.D.N.Y. *Salim* Docket Sheet, *supra* note 275 (noting judgment, including a \$4,722,820 restitution order, D.E. 90); *Salim*, 549 F.3d at 70; see *Salim*, 287 F. Supp. 2d 250 (finding facts for the sentence calculation); see also Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004, at B3 (reporting that Judge Batts had to eject the victim from the court for disruptive behavior).

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

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

280. United States v. Salim, 690 F.3d 115 (2d Cir. 2012), *cert. denied*, 568 U.S. 1115 (2013); see Opinion, *Salim v. United States*, No. 1:14-cv-212 (S.D.N.Y. Aug. 27, 2015), D.E. 135, 2015 WL 10792047 (denying ineffectiveness-of-counsel habeas corpus relief).

281. Nolle Prosequi, United States v. Salim, No. 1:98-cr-1023-12 (S.D.N.Y. May 8, 2019), D.E. 2114; see Transcript at 6–7, *id.* (Nov. 21, 2016, filed Dec. 7, 2018), D.E. 2087; see also Opinion, *id.* (May 12, 2020), D.E. 2134, 2020 WL 2420517 (denying Salim's objection to a nolle prosequi without his consent, because the nolle prosequi occurred before trial).

282. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 102, 106 (2d Cir. 2008); United States v. Bin Laden, 156 F. Supp. 2d 359, 363 (S.D.N.Y. 2001); United States v. Bin Laden, 132 F. Supp. 2d 168,

naire, Judge Sand screened a jury pool of 1,302 people.²⁸³ Opening arguments began a month later, on February 5.²⁸⁴

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.²⁸⁵ The pins helped the deputy marshals identify victims for appropriate seating, but Judge Sand ordered that the pins not be worn after defense counsel argued that they would improperly influence the jurors.²⁸⁶

Closing arguments began on May 1,²⁸⁷ and the jury began its deliberations on May 10.²⁸⁸ All four defendants were convicted of all charges on May 29.²⁸⁹

Judge Sand granted al-'Owhali and K.K. Mohamed separate death-penalty hearings.²⁹⁰ First came al-'Owhali's hearing—the first death-

172 (S.D.N.Y. 2001); *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); 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”).

283. Leonard B. Sand, United States v. El Hage: Jury Questionnaire (Jan. 3, 2001), www.fjc.gov/sites/default/files/2014/TRNYS025.pdf; *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); Interview with Judge 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 Judge Leonard B. Sand, June 25, 2007.

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

285. See Hirsch, *supra* note 220, at 72.

286. See *id.* at 72–73.

287. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Benjamin Weiser, *Conspiracy by Bin Laden Is Described*, N.Y. Times, May 2, 2001, at B1.

288. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see *Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; see also Hirsch, *supra* note 220, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

289. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *Terrorist Bombings*, 552 F.3d at 101–02, 107; United States v. Bin Laden, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); United States v. Bin Laden, 160 F. Supp. 2d 670, 673 n.5 (S.D.N.Y. 2001); *Bin Laden*, 156 F. Supp. 2d at 363; Mohammed v. Holder, 47 F. Supp. 3d 1236, 1243 (D. Colo. 2014); *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); see Hirsch, *supra* note 220, at 179–80; Weiser, *4 Guilty*, *supra* note 228 (reporting also that none of the defendants testified).

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

penalty hearing in the Southern District of New York since the 1950s—and the jury began to deliberate on his sentence on June 5, 2001.²⁹¹ On June 12, the jury announced that it was deadlocked, which meant that al-‘Owhali would be imprisoned for life without the possibility of release.²⁹²

290. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); see Benjamin Weiser, *McVeigh Execution Casts Shadow on Embassy Terror Trial*, N.Y. Times, Apr. 24, 2001, at B2 (reporting on Judge Sand’s April 23, 2001, ruling).

291. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Hirsch, *supra* note 220, at 186; Benjamin Weiser, *Jury Weighs Death Penalty for Bomber*, N.Y. Times, June 6, 2001, at B4.

The last execution in New York was the 1954 execution of Gerhard Puff, who was executed a year after Julius and Ethel Rosenberg. See Benjamin Weiser, *Reno Allows First U.S. Death Penalty Trial in Manhattan in Decades*, N.Y. Times, Nov. 20, 1997, at B1 [hereinafter *Reno Allows*]. Attorney General Janet Reno authorized capital prosecutions of John Cuff, Deric Frank, and Clarence Heatley in 1997, but they pleaded guilty and avoided capital sentencing trials. See *25-Year Sentence for Ex-Girlfriend’s Death*, N.Y. Times, Jan. 30, 2000, at 133; Benjamin Weiser, *Former Officer Gets a Life Term for 10 Murders in a Drug Gang*, N.Y. Times, Mar. 23, 1999, at B1; Benjamin Weiser, *Gang Leader, in Plea Deal, Admits to Role in 13 Killings*, N.Y. Times, Feb. 6, 1999, at B2; Weiser, *Reno Allows*, *supra*; Benjamin Weiser, *Reno Authorizes a Second Death Penalty Case for Prosecutors in Manhattan*, N.Y. Times, Nov. 21, 1997, at B4. The first federal defendant sentenced to death in New York since Puff was Ronell Wilson, whom a jury voted to execute on January 30, 2007, in the Eastern District of New York. Judgment, *United States v. Wilson*, No. 1:04-cr-1016 (E.D.N.Y. Mar. 29, 2007), D.E. 407; see Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. Times, Jan. 31, 2007, at A1. The court of appeals, however, vacated the sentence on June 30, 2010. *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010); see Manny Fernandez & A.G. Sulzberger, *U.S. Court Strikes Down Death Penalty for Officers’ Killer*, N.Y. Times, July 1, 2010, at A20. A second jury voted on July 24, 2013, to execute Wilson. Special Verdict Form, *Wilson*, No. 1:04-cr-1016 (E.D.N.Y. July 24, 2013), D.E. 1437; *United States v. Wilson*, 967 F. Supp. 2d 673, 677 (E.D.N.Y. 2013); see Mosi Secret, *Killer of Two Undercover Detectives Is Sent Back to Death Row*, N.Y. Times, July 25, 2013, at A19. The court of appeals remanded the case for reconsideration of Wilson’s intellectual ability in light of the Supreme Court’s May 27, 2014, holding in *Hall v. Florida* that IQ may not be used in a bright-line test, Order, *United States v. Wilson*, No. 13-3566 (2d Cir. June 25, 2014), D.E. 43; see *Hall v. Florida*, 572 U.S. 701 (2014), and District Judge Nicholas G. Garaufis determined on March 15, 2016, that Wilson was ineligible to receive the death sentence because he “demonstrated significant deficits in adaptive functioning.” *United States v. Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016), *appeal withdrawn*, Order, No. 16-890 (2d Cir. June 28, 2017); see Alan Feuer, *Judge Says Killer of Two Detectives Is Ineligible for Capital Punishment*, N.Y. Times, Mar. 16, 2016, at A19.

292. *Terrorist Bombings*, 552 F.3d at 101, 107; *Bin Laden*, 156 F. Supp. 2d at 361 n.2; see Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. Times, June 13, 2001, at A1 (reporting that ten jurors concluded that execution would make the defendant a mar-

The jury began to deliberate on K.K. Mohamed's sentence on July 5²⁹³ and announced a deadlock on July 10.²⁹⁴

On October 18, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.²⁹⁵ Because of the intervening and nearby attacks on September 11, court security on the day of sentencing was substantially enhanced.²⁹⁶

The defendants, including Salim, in time were sent to serve their sentences at the Administrative Maximum Facility—or supermax—in Florence, Colorado, but Odeh is now in another prison.²⁹⁷

New Trial Denied

On January 23, 2002, Judge Kevin Thomas Duffy took over for Judge Sand in the criminal proceedings for the embassy bombings.²⁹⁸ That same

tyr and that five jurors decided that life in prison would be the greater punishment); Hirsch, *supra* note 220, at 201–03 (same, reporting also that before announcing their verdict, the jurors requested a copy of the oath they had taken).

It was reported that the vote was nine to three in favor of execution. Benjamin Weiser, *4 Are Sentenced to Life in Prison in 1998 U.S. Embassy Bombings*, N.Y. Times, Oct. 19, 2001, at A1 [hereinafter *4 Are Sentenced*]; Weiser, *Jury Torn*, *supra* note 289.

293. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Benjamin Weiser, *Terror Jury Deliberates*, N.Y. Times, July 6, 2001, at B5.

294. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *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).

295. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *Terrorist Bombings*, 552 F.3d at 102, 102; *United States v. Bin Laden*, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1243 (D. Colo. 2014); see Soufan, *supra* note 220, at 94; Weiser, *4 Are Sentenced*, *supra* note 292.

296. See Hirsch, *supra* note 220, at 244; Weiser, *4 Are Sentenced*, *supra* note 292 (“The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.”).

297. BOP Locator, *supra* note 269 (al-‘Owhali reg. no. 42371-054; Odeh reg. no. 42375-054; el-Hage reg. no. 42393-054; Salim reg. no. 42426-054; Mohamed reg. no. 44623-054); see Benjamin Weiser, *Prison Switch for Terrorists in Bombings*, N.Y. Times, Dec. 25, 2001, at B6.

298. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 165 (2d Cir. 2008); *Terrorist Bombings*, 552 F.3d at 101 n.2, 141 n.41; *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); see *Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 220, at 258.

Judge Duffy retired on September 30, 2016. FJC Biographical Directory, *supra* note 219; see Benjamin Weiser, *Judge Reflects on Terrorism Trials and End of a Decades-Long Career*, N.Y. Times, Oct. 11, 2016, at A21. He died on April 1, 2020, of COVID-19. See

month, prosecutors learned that the U.S. Marshals Service had many hours of videotaped interviews with the government's first witness, an informant named Jamal Ahmed al-Fadl, that should have been turned over to el-Hage's attorneys for preparation of cross-examination.²⁹⁹ In response to el-Hage's motion for a new trial, Judge Duffy wrote, "Through a mixture of inaction, incompetence and stonewalling to cover up their mistakes, the United States Marshals Service and the Department of Justice's Office of Enforcement Operations have seriously jeopardized the convictions of Al-Qaeda terrorist Wadih El-Hage."³⁰⁰

Al-Fadl was in the Witness Security Program, living in a secret location.³⁰¹ Prosecutors had arranged for a videoconference connection to al-Fadl, and the Marshals Service had recorded videoconferences with al-Fadl without the prosecutors' knowledge.³⁰² Prosecutors received copies of the videotapes from the Marshals Service and provided defense counsel with transcripts, redacting "various portions to protect the identities of certain individuals and to protect operation information that they believed was not subject to discovery."³⁰³ On October 24, 2003, el-Hage moved for a new trial.³⁰⁴

Judge Duffy concluded that "although this material would have fueled a significant attack on al-Fadl's credibility, it would not have directly contradicted the government's case, and appears to fall within the general rule that undisclosed impeachment material generally does not warrant a new trial."³⁰⁵ The court of appeals agreed.³⁰⁶

Joseph P. Fried, *Kevin Thomas Duffy, 87, U.S. Judge Who Presided Over Mob and Terrorism Trials*, N.Y. Times, Apr. 4, 2020, at B12; *Judge Oversaw '90s Terrorism Trials*, Wash. Post, Apr. 5, 2020, at C9.

299. *Terrorist Bombings*, 552 F.3d at 140–43; *Bin Laden*, 397 F. Supp. 2d at 474–81, 518; *Trying Cases*, *supra* note 236, at 12 (remarks by Judge Sand); see Benjamin Weiser, *U.S. Videos of Qaeda Informer Offer Glimpse Into a Secret Life*, N.Y. Times, May 1, 2004, at A1 [hereinafter *Qaeda Informer*].

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

301. *Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 474; see Weiser, *Qaeda Informer*, *supra* note 299. See generally Wright, *supra* note 220, at 5–6, 187, 217, 223–25, 275–77 (reporting, among other things, "When bin Laden refused to give him a raise, the Sudanese secretary reached into the till. . . . In return for nearly \$1 million, he became a government witness. While in protective custody, he won the New Jersey Lottery.").

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

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

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

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

All four defendants appealed their convictions,³⁰⁷ but K.K. Mohamed withdrew his appeal.³⁰⁸

After the trial, the *New York Times* published an article based on interviews with nine of the twelve jurors.³⁰⁹ 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.³¹⁰ Judge Duffy determined that the article neither entitled el-Hage to a new trial nor to an evidentiary hearing.³¹¹

On November 24, 2008, the court of appeals affirmed the convictions of Odeh, al-'Owhali, and el-Hage.³¹² Only el-Hage appealed his life sentence, and the court of appeals remanded his case for resentencing in light of the Supreme Court's 2005 decision in *United States v. Booker* that sen-

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

307. Docket Sheet, *United States v. Mohamed*, No. 01-1571 (2d Cir. Nov. 1, 2001) [hereinafter 2d Cir. *Mohamed* Docket Sheet]; Docket Sheet, *United States v. Odeh*, No. 01-1553 (2d Cir. Oct. 24, 2001); Docket Sheet, *United States v. El Hage*, No. 01-1550 (2d Cir. Oct. 25, 2001); Docket Sheet, *United States v. Al-'Owhali*, No. 01-1535 (2d Cir. Oct. 19, 2001) [hereinafter 2d Cir. *Al-'Owhali* Docket Sheet] (lead case); see Weiser, *Jury Torn*, *supra* note 289.

308. *Terrorist Bombings*, 552 F.3d at 101 n.1; 2d Cir. *Mohamed* Docket Sheet, *supra* note 307 (noting a January 21, 2004, order that the appeal was withdrawn with prejudice); see Benjamin Weiser, *3 Seek Retrial in Bombing of Embassies*, N.Y. Times, Jan. 23, 2004, at B4.

309. Weiser, *Jury Torn*, *supra* note 289 (reporting that one juror could not be found and two jurors declined interviews).

310. *Id.*; see *United States v. Bin Laden*, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); see also Weiser, *supra* note 308; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1.

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

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

Al-'Owhali obtained a remand to the district court for proceedings on the effect of new evidence on the validity of his confession. 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 307 (noting a remand on April 30, 2009). On February 16, 2010, Judge Duffy denied al-'Owhali relief. Opinion, *United States v. Al-'Owhali*, No. 1:98-cr-1023-4 (S.D.N.Y. Feb. 16, 2010), D.E. 883, *aff'd*, *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 407 F. App'x 548 (2d Cir. 2011).

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

tencing guidelines are advisory rather than mandatory.³¹³ Judge Lewis A. Kaplan, to whom the case had been reassigned in 2009, resentenced el-Hage on April 23, 2013, to life in prison.³¹⁴ On January 21, 2015, the court of appeals affirmed the resentencing.³¹⁵

Judge Kaplan appointed counsel on July 20, 2016, to represent el-Hage in a habeas petition arguing ineffective assistance of counsel for discouraging el-Hage from testifying.³¹⁶ Judge Kaplan denied relief on April 30, 2019, without a hearing: “The Court finds that there is a reasonable likelihood that defendant’s testimony would have damaged his defense—and does not find a corresponding likelihood that the testimony would have benefitted him.”³¹⁷

A Guantánamo Bay Defendant

Among the twenty-five indicted defendants, many of whom remained fugitives, was Ahmed Khalfan Ghailani.³¹⁸ He was captured in a shootout raid on his home in Pakistan in the summer of 2004 and held in secret CIA prisons until September 2006, when he was transferred to Guantánamo Bay.³¹⁹ Ghailani’s alleged role was to obtain explosives and transport them

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

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

Tim Reagan interviewed Judge Kaplan for this case study in his chambers on November 5, 2009.

315. *United States v. El-Hage*, 589 F. App’x 29 (2d Cir.), *cert. denied*, 576 U.S. 1018 (2015).

316. Opinion, *El Hage*, No. 1:98-cr-1023-1 (S.D.N.Y. July 20, 2016), D.E. 2023, 2016 WL 9308319; Order, *id.* (July 20, 2016), D.E. 2024.

317. Opinion at 8, *id.* (Apr. 30, 2019), D.E. 2111, 2019 WL 1915594.

318. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (third superseding indictment, Dec. 16, 1998, D.E. 31); *United States v. Ghailani*, 733 F.3d 29, 38 (2d Cir. 2013); *Terrorist Bombings*, 552 F.3d at 101 n.1; *United States v. Ghailani*, 751 F. Supp. 2d 515, 518 (S.D.N.Y. 2010); see William Glaberson, *Guantánamo Detainee, Indicted in ’98, Now Faces War Crimes Charges*, N.Y. Times, Apr. 1, 2008, at A14. See generally Karen J. Greenberg, *Rogue Justice* 189–204 (2016).

319. *Ghailani*, 733 F.3d at 38; *Ghailani*, 751 F. Supp. 2d at 518, 523–24; *United States v. Ghailani*, 751 F. Supp. 2d 508, 509–10 (S.D.N.Y. 2010); *United States v. Ghailani*, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); *United States v. Ghailani*, 686 F. Supp. 2d 279, 283–84 (S.D.N.Y. 2009); see Jess Bravin, *The Terror Courts* 363 (2013); Glaberson, *supra* note 318; Benjamin Weiser, *Conspirator’s Path from Poverty as a Boy in Zanzibar to Bin Lad-*

to Dar es Salaam.³²⁰ He grew up in Zanzibar, and after the embassy bombings he reportedly became a cook for Osama Bin Laden.³²¹

The U.S. government announced on March 31, 2008, that it would try Ghailani by military commission,³²² but the following year the government decided to try him in the Southern District of New York instead.³²³ On June 15, 2009, the case was transferred to Judge Kaplan,³²⁴ who determined that the interval between Ghailani's indictment and his presentation to the court for prosecution did not violate a Sixth Amendment right to a speedy trial.³²⁵ Although the time since his transfer from CIA to military custody implicated his speedy trial right,³²⁶ he was not substantially prejudiced by the delay.³²⁷ The court of appeals agreed.³²⁸

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

en's Side, N.Y. Times, Jan. 24, 2011, at A19; Josh White & Joby Warrick, *Detainee Is Charged with Capital Murder in Embassy Bombing*, Wash. Post, Apr. 1, 2008, at A2.

320. *United States v. Ghailani*, 743 F. Supp. 2d 261, 265 (S.D.N.Y. 2010); *United States v. Ghailani*, 743 F. Supp. 2d 242, 247 (S.D.N.Y. 2010). See generally Wadie E. Said, *Crimes of Terror* 112–15 (2015).

321. See Weiser, *supra* note 319.

322. *Ghailani*, 733 F.3d at 40; *Ghailani*, 751 F. Supp. 2d at 525; see Glaberson, *supra* note 318; White & Warrick, *supra* note 319.

323. *Ghailani*, 733 F.3d at 40; *Ghailani*, 751 F. Supp. 2d at 518, 526; *Ghailani*, 751 F. Supp. 2d at 503; *Ghailani*, 686 F. Supp. 2d at 284; see Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, Wash. Post, June 10, 2009, at A1; William Glaberson, *Detainee to Be Transferred to U.S. for Trial*, N.Y. Times, May 22, 2009, at A16; Carol Rosenberg, *First Guantánamo Detainee Moved to U.S., Pleads Not Guilty*, Miami Herald, June 10, 2009, at 3A; Benjamin Weiser, *A Row Over Who Will Represent Guantánamo Detainee*, N.Y. Times, June 2, 2009, at A17; Benjamin Weiser, *In U.S. Court, Guantánamo Detainee Pleads Not Guilty to Embassy Bombing Charges*, N.Y. Times, June 10, 2009, at A24.

324. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227.

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

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

327. *Id.* at 520, 531–34.

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

custody; if Ghailani's allegation were true then "the proper remedy is money damages or criminal prosecution of the offending officers."³²⁹

Jury selection began on September 22.³³⁰ Judge Kaplan used a jury questionnaire,³³¹ but he did not want the questionnaire to deprive the court of the benefits of oral voir dire:

While the Court recognizes that eliciting pedigree information about prospective jurors by written questionnaire would be more efficient [than] doing so by oral *voir dire*, there is much to be said also for doing it orally. Affording an opportunity for prospective jurors to speak orally in the presence of the parties about familiar matters such as their backgrounds, education, employment and families may help make them sufficiently comfortable to be more responsive with respect to more sensitive matters. In any case, it gives the parties more of an impression of the individuals than would questionnaire answers alone.³³²

Voir dire began on September 29.³³³ Judge Kaplan appointed counsel to represent one of the jurors, whose employer apparently illegally refused to excuse the juror's absence from work.³³⁴

The trial began on October 12.³³⁵ Judge Kaplan reserved some seats in the courtroom for the news media.³³⁶ On November 17, the jury found Ghailani guilty on one count of conspiracy to destroy buildings but not guilty of the remaining 281 counts, including separate counts of murder

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

330. See Lewis A. Kaplan, *United States v. Ghailani: Preliminary Remarks to Venire* (Sept. 23, 2010) [hereinafter *Ghailani Preliminary Remarks*], www.fjc.gov/sites/default/files/2014/TRNYS030.pdf (derived from the morning session of the second day of potential jurors reporting for service).

331. Lewis A. Kaplan, *United States v. Ghailani: Jury Questionnaire* (Sept. 22, 2010), www.fjc.gov/sites/default/files/2014/TRNYS031.pdf; *Ghailani Preliminary Remarks*, *supra* note 330; see *United States v. Ghailani*, 743 F. Supp. 2d 242, 247 n.1 (S.D.N.Y. 2010); see also Benjamin Weiser & Colin Moynihan, *Glimpse at Jurors in Ex-Detainee's Trial*, N.Y. Times, Oct. 14, 2010, at A33 ("The 11-page questionnaire, filled out by more than 1,000 potential jurors, included more than 30 questions.").

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

333. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227.

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

335. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *United States v. Ghailani*, 733 F.3d 29, 40 (2d Cir. 2013); see Benjamin Weiser, *Trial of Man Held at Guantánamo Opens, but Guantánamo Isn't Mentioned*, N.Y. Times, Oct. 13, 2010, at A19.

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

for each of the persons killed at the two embassies.³³⁷ Judge Kaplan sentenced Ghailani to life in prison.³³⁸ On October 24, 2013, the court of appeals affirmed the sentence.³³⁹

A Challenge to Prison Security Measures

On December 17, 2007, K.K. Mohamed submitted a pro se complaint to the U.S. District Court for the District of Colorado alleging improper conditions of confinement.³⁴⁰ Magistrate Judge Boyd N. Boland reviewed the complaint and, on December 27, ordered it filed.³⁴¹ On September 29, 2011, District Judge Marcia S. Krieger dismissed most claims, but she ruled that the complaint as amended alleged a potentially valid violation of the First Amendment.³⁴²

337. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *Ghailani*, 733 F.3d at 40–41; see Peter Finn, *Terror Detainee Largely Acquitted*, Wash. Post, Nov. 18, 2010, at A1; Carol Rosenberg, *Guantánamo Detainee’s Verdict a Test for War Court vs. Civilian Trial*, Miami Herald, Nov. 18, 2010, at 1A; Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. Times, Nov. 18, 2010, at A1.

“There were strong indications that what really happened with the Ghailani verdict was a compromise made with a holdout on the jury in order to avoid a mistrial: eleven jurors persuaded the twelfth to convict on one count in exchange for their agreement to acquit him on the rest.” Charlie Savage, *Power Wars* 326 (2015).

338. Judgment, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Jan. 25, 2011), D.E. 1090; *Ghailani*, 733 F.3d at 36–37, 41; see BOP Locator, *supra* note 269 (reg. no. 02476-748); see also Peter Finn, *Embassy Bomber Receives Life Sentence*, Wash. Post, Jan. 26, 2011, at A2; Greenberg, *supra* note 318, at 202; Benjamin Weiser, *Life Sentence Without Parole for Former Detainee*, N.Y. Times, Jan. 26, 2011, at A18.

339. *Ghailani*, 733 F.3d at 54–56, *cert. denied*, 572 U.S. 1010 (2014); see Weiser, *supra* note 328.

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

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

Judge Boland retired on February 8, 2015. Judicial Milestones, www.uscourts.gov/judicial-milestones/boyd-n-boland.

342. Opinion at 15–22, 32, *Mohammed v. Holder*, No. 1:07-cv-2697 (D. Colo. Sept. 29, 2011), D.E. 234 [hereinafter *Mohammed* Opinion], 2011 WL 4501959; see Schwartz & Weiser, *supra* note 340.

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

At issue were special administrative measures (SAMs), which are restrictions on a prisoner's communications and contacts with others at the direction of a law-enforcement or intelligence agency to prevent violence.³⁴³

Judge Krieger agreed to appoint pro bono counsel if a willing attorney could be found.³⁴⁴ According to Mohamed, an attorney attempted to send him mail in October 2011, but the mail did not reach Mohamed because of security measures.³⁴⁵ In time, an attorney agreed to represent Mohamed, and the court initially set a discovery deadline of January 11, 2013.³⁴⁶ A protective order forbade the attorney from using any discovery for any purpose other than litigating Mohamed's case.³⁴⁷ Judge Krieger presided over a bench trial from May 5 to 12, 2014.³⁴⁸ Mohamed appeared by video conference from the prison courtroom.³⁴⁹

On June 17, Judge Krieger found some of the SAMs imposed against Mohamed to be "arbitrary and capricious and unsupported by substantial evidence in the record": (1) a prohibition on oral contact with a brother while permitting such contact with Mohamed's mother and sisters; (2) a prohibition on written contact with specific persons who are not immediate family members; and (3) refusal to deliver outgoing mail to Mohamed's attorney, which Mohamed requested because of a belief that the

343. *Mohammed*, 47 F. Supp. 3d at 1239–44; see 28 C.F.R. § 501.3 (2021).

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

344. *Mohammed* Opinion, *supra* note 342, at 32.

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

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

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

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

On February 1, 2014, the pro bono attorney filed a motion for relief from the government's allegedly "making the litigation and trial as difficult and costly as possible for the Plaintiff and his *pro bono* counsel." Sanctions Motion, *id.* (Feb. 1, 2014), D.E. 343. The government opposed the motion as procedurally defective. Government Motion to Strike Sanctions Motion, *supra*.

349. Transcripts, *Mohammed*, No. 1:07-cv-2697 (D. Colo. May 5 through 8 and 12, 2014, filed Nov. 9, 2014), D.E. 411 to 415; see *Mohammed* Final Pretrial Conference Transcript, *supra* note 348, at 30–32 (notifying Mohamed's attorney that Judge Krieger would be willing to entertain a motion for in-person appearance, but noting that she would be disinclined to grant such a motion).

prison was not delivering his outgoing mail to the postal service.³⁵⁰ Judge Krieger remanded the matter to the FBI for further consideration and resolution during Mohamed's SAMs review cycle.³⁵¹ Judge Krieger denied a discovery motion filed during the following SAMs review cycle, opining that a challenge to SAMs decisions subsequent to her 2014 remand would require the filing of a new case.³⁵²

Osama Bin Laden's Son-in-Law

An indictment against Sulaiman Abu Ghayth, one of Osama Bin Laden's sons-in-law, was filed in the case against embassy bombers on March 1, 2013, for conspiracy to kill Americans based on the defendant's support of Bin Laden in 2001.³⁵³

In 2002, Abu Ghayth was smuggled from Afghanistan into Iran following the 2001 U.S. invasion of Afghanistan.³⁵⁴ He was kept under house arrest in Iran for eleven years.³⁵⁵ Turkey deported him to Kuwait in February 2013, but U.S. authorities arrested him during a layover in Jordan on February 28, New York time.³⁵⁶

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

351. *Id.* at 1263–65; see Said, *supra* note 320, at 137.

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

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

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

354. See *Abu Ghayth* Indictment, *supra* note 353, at 2; Greg Miller & Julie Tate, *Bin Laden Son-in-Law Pleads Not Guilty to Conspiracy Charge*, Wash. Post, Mar. 9, 2013, at A3.

355. See Affidavit at 1–2, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. July 19, 2013), D.E. 1268 [hereinafter *Abu Ghaith* Affidavit]; see also Mazzetti & Rashbaum, *supra* note 353; Miller & Tate, *supra* note 354; Joby Warrick, *New Tensions Test Fragile Ties Between Iran, Al-Qaeda*, Wash. Post, Mar. 13, 2013, at A1.

356. Transcript at 3, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 8, 2013, filed Mar. 22, 2013), D.E. 1167; see *Abu Ghaith* Affidavit, *supra* note 355, at 2–10; see also Mazzetti & Rashbaum, *supra* note 353 (“Jordan’s spy service, the General Intelligence Directorate, is one of the Central Intelligence Agency’s closest partners in the Middle East.”); Miller & Tate, *supra* note 354; Shane, *supra* note 234; Warrick, *supra* note 355.

Abu Ghayth's trial began on March 3, 2014, with jury selection.³⁵⁷ Judge Kaplan used a jury questionnaire in this case as well.³⁵⁸ On March 8, the *New York Times* reported that one juror, an accountant, was fired when her employer found out the trial for which she was serving.³⁵⁹ It appeared that the employer was trying to shift responsibility for the juror's wages during the trial to unemployment insurance, but the juror was reinstated after intervention by an attorney appointed by Judge Kaplan.³⁶⁰ Judge Kaplan explained in court, "It is a violation of federal law for an employer to discharge, threaten to discharge, intimidate or coerce any permanent employee by reason of jury service in the federal courts."³⁶¹

Abu Ghayth testified in his own defense,³⁶² and he was convicted on March 26, after six hours of jury deliberation over two days, of being Al-Qaeda's spokesperson following September 11, 2001.³⁶³ On September 23, 2014, Judge Kaplan sentenced Abu Ghayth to life in prison.³⁶⁴ The court of appeals affirmed the conviction and the sentence on September 28, 2017.³⁶⁵

357. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; see Benjamin Weiser, *Jury Selection Begins at Trial of Bin Laden's Son-in-Law*, N.Y. Times, Mar. 4, 2014, at A17.

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

359. Benjamin Weiser, *Juror Loses Job for Serving in Terror Trial*, N.Y. Times, Mar. 8, 2014, at A15; see Weiser, *supra* note 358.

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

361. Mar. 10, 2014, *Abu Ghayth* Transcript, *supra* note 360, at 315.

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

363. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; Transcript at 1566, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 26, 2014, filed Apr. 1, 2014), D.E. 1593 [hereinafter Mar. 26, 2014, *Abu Ghayth* Transcript]; see Tom Hays & Larry Neumeister, *Bin Laden's In-Law Found Guilty for Role in Terror Propaganda*, Miami Herald, Mar. 27, 2014, at 1A; Charles Levinson & Christopher M. Matthews, *Bin Laden Son-in-Law Found Guilty*, Wall St. J., Mar. 27, 2014, at A3; Benjamin Weiser, *Jurors Convict Bin Laden Aide in Terror Case*, N.Y. Times, Mar. 27, 2014, at A1.

364. Judgment, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Sept. 23, 2014), D.E. 1726; Transcript, *id.* (Sept. 23, 2014, filed Oct. 7, 2014), D.E. 1747 (noting no applications for departure from sentencing guideline calculations in the presentence report); see BOP Locator, *supra* note 269 (reg. no. 91969-054); see also Benjamin Weiser, *Bin Laden Advis-*

A Defendant Captured in Tripoli Died Before Trial

The ninth superseding indictment filed on December 20, 2000, included as the twenty-first defendant Abu Anas al-Liby.³⁶⁶ He was captured in Tripoli on October 5, 2013,³⁶⁷ and transferred to a navy ship for questioning.³⁶⁸ He arrived in the Southern District of New York several days later³⁶⁹ and announced in court a preference for his birth name, Nazih Abdel-Hamaed al-Raghie.³⁷⁰

The trial of al-Fawwaz, who had been extradited with Abdel Bary by the United Kingdom in 2012, and al-Liby was scheduled to begin in January 2015.³⁷¹ Judge Kaplan scripted preliminary remarks for prospective jurors and a jury questionnaire.³⁷² On January 2, however, al-Liby died.³⁷³

er Warns of Dire Consequences as He Gets Life Sentence, N.Y. Times, Sept. 24, 2014, at A25.

365. United States v. Abu Ghayth, 709 F. App'x 719 (2d Cir. 2017), *cert. denied*, 584 U.S. ___, 138 S. Ct. 1450 (2018).

366. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (D.E. 380).

367. United States v. Al-Liby, 23 F. Supp. 3d 194, 196 (S.D.N.Y. 2014) (denying a motion to dismiss the indictment for wrongful capture); United States v. Al Fawwaz, 116 F. Supp. 3d 194, 198, 204 (S.D.N.Y. 2015); *see* Julian E. Barnes & Devlin Barrett, *U.S. Raids in Africa Show Unilateral Strategy*, Wall St. J., Oct. 7, 2013, at A8; David D. Kirkpatrick, Nicholas Kulish & Eric Schmitt, *U.S. Commando Raids Hit Terror Targets in 2 Nations*, N.Y. Times, Oct. 6, 2013, at A1; Ernesto Londoño & Scott Wilson, *Twin Raids in Africa Target Terror Leaders*, Wash. Post, Oct. 6, 2013, at A1; *see also* Video Shows U.S. Abduction of Accused Al-Qaeda Terrorist on Trial for Embassy Bombings, Wash. Post, www.washingtonpost.com/world/national-security/video-shows-us-abduction-of-accused-al-qaeda-terrorist-on-trial-for-embassy-bombings/2014/02/10/7f84927a-8f6b-11e3-b46a-5a3d0d2130da_story.html (video of capture); Adam Goldman, *Video Shows U.S. Abduction of Alleged Al-Qaeda Terrorist in Libya Last Year*, Wash. Post, Feb. 11, 2014, at A4.

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

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

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

371. *Al Fawwaz*, 116 F. Supp. 3d at 198, 204–05; Order, *Al-Liby*, No. 1:98-cr-1023-21 (S.D.N.Y. Oct. 22, 2014), D.E. 1766.

372. Order, *Al-Liby*, No. 1:98-cr-1023-21 (S.D.N.Y. Sept. 30, 2014), D.E. 1738.

373. Nolle Prosequi, *id.* (Apr. 9, 2015), D.E. 1977; Letter, *id.* (Jan. 3, 2015), D.E. 1821; *Al Fawwaz*, 116 F. Supp. 3d at 198, 204–05; *see* Transcript at 3, *Al-Liby*, No. 1:98-cr-1023-21 (S.D.N.Y. Jan. 6, 2015, filed Feb. 5, 2015), D.E. 1896 (remarks by al-Liby's attorney: "I

Extradited Defendants

Judge Kaplan denied al-Fawwaz's motion to be tried separately from Abdel Bary,³⁷⁴ but on September 19, 2014, Abdel Bary offered a plea of guilty to a superseding information.³⁷⁵ Judge Kaplan sentenced Abdel Bary to twenty-five years in prison on February 6, 2015.³⁷⁶

Voir dire in al-Fawwaz's trial began on January 20.³⁷⁷ Trial commenced on January 22,³⁷⁸ and the jury convicted him on February 26.³⁷⁹

On May 15, Judge Kaplan sentenced al-Fawwaz to life in prison,³⁸⁰ a sentence that the court of appeals affirmed on June 2, 2017.³⁸¹

just want to say for the record, my paralegal also, we were there actually until the end until my client had coded, and it was a very, very difficult thing to witness . . ."); *see also* Adam Goldman, *Al-Qaeda Suspect Dies Before Trial*, Wash. Post, Jan. 3, 2015, at A3; Benjamin Weiser & Michael S. Schmidt, *Qaeda Suspect Facing Trial in New York Over Africa Embassy Bombings Dies*, N.Y. Times, Jan. 4, 2015, at 9.

374. Opinion, *United States v. Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. June 20, 2013), D.E. 1243, 2013 WL 3111043; *see United States v. Bary*, 978 F. Supp. 2d 356, 359 (S.D.N.Y. 2013) (denying motions to dismiss the indictment); *see also Al Fawwaz*, 116 F. Supp. 3d at 204.

375. Plea Transcript, *United States v. Abdel Bary*, No 1:98-cv-1023-17 (S.D.N.Y. Sept. 19, 2014, filed Oct. 7, 2014), D.E. 1745; Superseding Information, *id.* (Sept. 19, 2014), D.E. 1719; *see Guilty Plea in '98 Embassy Bombings*, Bos. Globe, Sept. 20, 2014, at A2; Benjamin Weiser, *Judge Questions Plea Deal with Man Tied to Lethal Qaeda Bombings*, N.Y. Times, Sept. 20, 2014, at A17.

376. Judgment, *Abdel Bary*, No 1:98-cv-1023-17 (S.D.N.Y. Feb. 12, 2015), D.E. 1912; Transcript, *id.* (Feb. 6, 2015), filed Mar. 17, 2015), D.E. 1933; *see United States v. Bary*, 57 F. Supp. 3d 300 (S.D.N.Y. 2014) (accepting the plea).

377. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *see Al Fawwaz*, 116 F. Supp. 3d 194 (denying al-Fawwaz's motion to delay the trial again).

378. Transcript, *Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Jan. 22, 2015, filed Mar. 18, 2015), D.E. 1935 [hereinafter Jan. 22, 2015, *Al-Fawwaz* Transcript]; *see Benjamin Weiser, Third Trial in 1998 U.S. Embassy Bombings in Africa Begins*, N.Y. Times, Jan. 23, 2015, at A22.

379. Transcript, *Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Jan. 26, 2015, filed Mar. 18, 2015), D.E. 1975; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227; *see Nicole Hong, Witnesses in Terror Trial Had a Guide*, Wall St. J., Feb. 28, 2015, at A3; Jennifer Peltz, *Man Convicted for Role in 1998 Embassy Bombings*, Miami Herald, Feb. 27, 2015, at 3A; Benjamin Weiser, "Bin Laden's Man in London" Is Convicted of Conspiracy, N.Y. Times, Feb. 27, 2015, at A23.

380. Judgment, *Al-Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. May 19, 2015), D.E. 1989; Transcript, *id.* (May 15, 2014, filed May 27, 2015), D.E. 1994; *see Tom Hays & Larry Neumeister, A Top Bin Laden Aide Gets Life Prison Term*, Bos. Globe, May 16, 2015, at A5; James McKinley, Jr., *Bin Laden Aide Sentenced in '98 Attacks*, N.Y. Times, May 16, 2015, at A16.

On October 7, 2020, three weeks before Abdel Bary's scheduled release for deportation, Judge Kaplan granted him compassionate release because of his health risk factors during the global COVID-19 infectious pandemic.³⁸² Abdel Bary was deported to asylum in the United Kingdom, protecting him from harm in Egypt.³⁸³

The Concurrent Sentence Doctrine

The Second Circuit's court of appeals decided in 2022 not to consider whether al-'Owhali's sentence should be adjusted as a result of Supreme Court decisions in 2015 through 2019 holding some crime-of-violence proscriptions unconstitutionally vague.³⁸⁴ "We hold that a court may exercise its discretion under the concurrent sentence doctrine to decline to review the merits of a claim on collateral review when the challenged conviction's sentence runs consecutively to one or more unchallenged life sentences."³⁸⁵

381. *United States v. Al-Fawwaz*, 691 F. App'x 676 (2d Cir. 2017); *see* BOP Locator, *supra* note 269 (reg. no. 67497-054).

382. Opinion, *United States v. Abdel Bary*, No. 1:98-cv-1023-17 (S.D.N.Y. Oct. 7, 2020), D.E. 2158, 2020 WL 5946985 (noting the risk factors of asthma, obesity, and being sixty years of age, and concluding that "the government's interest in keeping him incarcerated for a few more days by resisting this motion is very small"); *see* BOP Locator, *supra* note 269 (noting release from prison on October 9, 2020, reg. no. 67496-054); *see also* Benjamin Weiser, *As Al Qeda Terrorist Leaves Prison, Victims' Families Relive the Pain*, N.Y. Times, Nov. 28, 2020, at A21.

383. *See* Charles Hymas & Robert Mendick, *Asylum Deal Returns Bin Laden Aide to UK*, Daily Telegraph, Oct. 21, 2020, at 1 (reporting also that Abdel Bary was extradited to the United States "only after the UK agreed to take him back as a successful asylum seeker").

384. *Al-'Owhali v. United States*, ___ F.4th ___, 2022 WL 2057539 (2d Cir. 2022) (opinion filed at 2d Cir. No. 20-3174, D.E. 102), *aff'g* Opinion, *United States v. Al-'Owhali*, No. 1:98-cv-1023-4 (S.D.N.Y. July 20, 2020, filed July 21, 2020), D.E. 2150; *see, e.g., United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019) (holding unconstitutionally vague a sentencing enhancement for using a firearm while committing a crime of violence); *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018) (invalidating a deportation statute that defined "aggravated felony" with reference to "a crime of violence"); *Johnson v. United States*, 576 U.S. 591 (2015) (holding a sentencing enhancement for firearm possession by someone with three or more violent felony convictions to be unconstitutionally vague).

385. *Al-'Owhali*, ___ F.4th at ___, 2022 WL 2057539 (p.3 of opinion filed at 2d Cir. No. 20-3174, D.E. 102).

Civil Actions

The Supreme Court decided unanimously on February 24, 2020, that persons injured by the 1998 attacks in Nairobi and Dar es Salam were statutorily entitled to a discretionary award of punitive damages against Sudan, leaving for another day the question of whether a retroactive statute authorizing punitive damages against a foreign sovereign is constitutional.³⁸⁶

The Supreme Court case arose from seven actions in the district court for the District of Columbia against Sudan and Iran.³⁸⁷ In the suits against Sudan, the court of appeals, affirming the district court, ruled that “the plaintiffs have offered sufficient admissible evidence that establishes that Sudan’s material support of al Qaeda proximately caused the 1998 embassy bombings.”³⁸⁸

The litigation included a question certified to the District of Columbia’s court of appeals by the Court of Appeals for the District of Columbia Circuit: does an action for intentional infliction of emotional distress resulting from an act of terrorism require presence at the terrorist act?³⁸⁹ The local court of appeals ruled that it did not.³⁹⁰

In three other cases, the U.S. Court of Appeals for the District of Columbia Circuit reversed, on May 10, 2019, dismissal of claims against Iran as untimely, holding that the district court could not raise sua sponte a timeliness defense on behalf of Iran, which did not appear in the case.³⁹¹

386. *Opati v. Republic of Sudan*, 590 U.S. ___, 140 S. Ct. 1601 (2020); see Jess Bravin, *Terror Victims Can Sue for Punitive Damages*, Wall St. J., May 19, 2020, at A4; Adam Liptak, *Sudan Must Pay Billions for Role in Terrorism*, *Top Court Rules*, N.Y. Times, May 19, 2020, at A19.

387. Docket Sheet, *Opati v. Republic of Sudan*, No. 1:12-cv-1224 (D.D.C. July 24, 2012,); Docket Sheet, *Khaliq v. Republic of Sudan*, No. 1:10-cv-356 (D.D.C. Mar. 23, 2010); Docket Sheet, *Onsongo v. Republic of Sudan*, No. 1:08-cv-1380 (D.D.C. Aug. 7, 2008); Docket Sheet, *Mwila v. Islamic Republic of Iran*, No. 1:08-cv-1377 (D.D.C. Aug. 7, 2008); Docket Sheet, *Amduso v. Republic of Sudan*, No. 1:08-cv-1361 (D.D.C. Aug. 5, 2008); Docket Sheet, *Wamai v. Republic of Sudan*, No. 1:08-cv-1349 (D.D.C. Aug. 5, 2008); Docket Sheet, *Owens v. Republic of the Sudan*, No. 1:01-cv-2244 (D.D.C. Oct. 26, 2001).

388. *Owens v. Republic of Sudan*, 864 F.3d 751, 799 (D.C. Cir. 2017); see *Opati v. Republic of Sudan*, 60 F. Supp. 3d 68 (D.D.C. 2014).

389. *Owens*, 864 F.3d at 812.

390. *Republic of Sudan v. Owens*, 194 A.3d 38 (D.C. 2018); see *Owens v. Republic of Sudan*, 924 F.3d 1256 (D.C. Cir. 2019) (endorsing the local court’s answer to the certified question).

391. *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095 (D.C. Cir. 2019); see Docket Sheet, *Chogo v. Republic of the Sudan*, No. 1:15-cv-951 (D.D.C. June 19, 2015); Docket

Judge John D. Bates granted default judgment against Iran in the cases, plus a fourth case, in 2020.³⁹²

The court of appeals, on July 27, 2018, affirmed Judge Bates's 2017 dismissal of a 2015 suit against a French bank doing business with Sudan on a finding that actions by the bank did not cause the bombings.³⁹³ Two additional cases filed by two individual plaintiffs in 2019 against Iran for the Nairobi bombing are pending.³⁹⁴ In 2021, Judge Bates referred efforts to satisfy the judgments to Judge James E. Boasberg, who was presiding over litigation arising from the 1984 kidnapping and mistreatment of a CNN journalist in Beirut.³⁹⁵

At the end of 2020, the United States struck a deal with Sudan to remove Sudan from a list of states sponsoring terrorism, Sudan agreeing to pay several hundred million dollars to embassy bombing victims.³⁹⁶

Sheet, *Kinyua v. Republic of the Sudan*, No. 1:14-2118 (D.D.C. Dec. 15, 2014); Docket Sheet, *Sheikh v. Republic of the Sudan*, No. 1:14-cv-2090 (D.D.C. Dec. 11, 2014).

392. *Sheikh v. Republic of the Sudan*, 485 F. Supp. 3d 255 (D.D.C. 2020) (awarding approximately \$567 million in compensatory and punitive damages in three cases); *Kinyua v. Republic of the Sudan*, 466 F. Supp. 3d 1 (D.D.C. 2020) (awarding \$10.25 million in one case); *see also* Docket Sheet, *Lonnquist v. Islamic Republic of Iran*, No. 1:17-cv-1630 (D.D.C. Aug. 15, 2017).

393. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266 (D.C. Cir. 2018), *aff'd* 235 F. Supp. 3d 85 (D.D.C. 2017); *see* Docket Sheet, *Owens v. BNP Paribas S.A.*, No. 1:15-cv-1945 (D.D.C. Nov. 3, 2015).

394. Docket Sheet, *Katana v. Islamic Republic of Iran*, No. 1:19-cv-2068 (D.D.C. July 11, 2019); Docket Sheet, *Ratemo v. Islamic Republic of Iran*, No. 1:19-cv-2067 (D.D.C. July 11, 2019).

395. Opinion, *Owens v. Republic of the Sudan*, No. 1:01-cv-2244 (D.D.C. Jan. 14, 2021), D.E. 495, 2021 WL 131446; *see* *Levin v. Islamic Republic of Iran*, 523 F. Supp. 3d 14 (D.D.C. 2021) (quashing attempted writs of attachment), *rev'd*, ___ F.4th ___, 2022 WL 3364493 (D.C. Cir. 2022) (opinion filed at D.C. Cir. No. 21-7036) (holding that funds blocked in transit were not necessarily not blocked assets of a terrorist party); Docket Sheet, *Khaliq v. Wells Fargo Bank, N.A.*, No. 1:21-cv-128 (D.D.C. Jan. 15, 2021); Docket Sheet, *Mwila v. Wells Fargo Bank, N.A.*, No. 1:21-cv-127 (D.D.C. Jan. 15, 2021); Docket Sheet, *Owens v. Wells Fargo Bank, N.A.*, No. 1:21-cv-126 (D.D.C. Jan. 15, 2021); Docket Sheet, *Levin v. Islamic Republic of Iran*, No. 1:05-cv-2494 (D.D.C. Dec. 30, 2005).

396. *See* Lara Jakes, *Terror Victims from '98 to Get Compensation in Sudan Deal*, N.Y. Times, Dec. 22, 2020, at A13.

"Sudan entered into a private settlement agreement with Plaintiffs on July 31, 2020, and then executed a bilateral claims-settlement agreement with the U.S. on October 30, 2020." Order, *Mwila v. Islamic Republic of Iran*, No. 1:08-cv-1377 (D.D.C. Aug. 5, 2021), D.E. 174.

Challenge: Attorney–Client Contacts

In detention, the original defendants were cut off from virtually all communications.³⁹⁷ 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.³⁹⁸ 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.³⁹⁹

Attorney–client communications were also impaired by the fact that defense counsel could not discuss classified evidence with their clients (because the defendants did not have security clearances).⁴⁰⁰ The court of appeals affirmed Judge Sand’s ruling that failure to share classified information with the defendants, as opposed to their cleared counsel, did not violate the Constitution.⁴⁰¹

Relations between defendants and assigned counsel are often difficult; they were particularly so in this case: “Lawyers don’t often represent somebody who hates them, who, all things being considered, would just as

397. *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*].

398. See Weiser, *Suspects Isolated*, *supra* note 397; Weiser, *Judge to Hear Complaints*, *supra* note 397; Weiser, *Rules Violate Rights*, *supra* note 397.

399. *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.

400. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 116–23 (2d Cir. 2008); *United States v. Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001); Leonard B. Sand, *United States v. El Hage: Protective Order* ¶ 15 (July 29, 1999) [hereinafter *First El Hage Protective Order*], www.fjc.gov/sites/default/files/2014/TRNYS024.pdf; see Philip J. Gross, *Guide to High Security & Terrorism Cases* 12 (2006), www.fjc.gov/content/guide-high-security-and-terrorism-cases-southern-district-new-york (Southern District of New York report on challenges to the district’s judges in terrorism cases).

401. *Terrorist Bombings*, 552 F.3d at 115–30, 156; *Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393; see Weiser, *supra* note 312.

soon kill them. How you maintain an attorney–client relationship under those circumstances is very difficult.”⁴⁰²

Although circumstances suggested that Salim meant to do his attorneys harm, Ghailani’s confidence in his military commission attorneys was so great that he asked Judge Kaplan to order the secretary of defense to continue their representation of him in New York.⁴⁰³ Although the secretary was not a party to the case, Judge Kaplan agreed to consider the motion.⁴⁰⁴ Judge Kaplan ruled that although an indigent defendant has a constitutional right to effective assistance of counsel, the indigent defendant does not have a constitutional right to select counsel.⁴⁰⁵

Ghailani’s dissatisfaction with one of his appointed New York attorneys resulted in the court’s dismissing the attorney from the case.⁴⁰⁶

Upon his indictment, the court assigned the federal defender to represent Abu Ghayth, but Abu Ghayth retained, with funds provided by his brother in Kuwait, a lawyer who himself was under federal indictment in the Northern District of New York for tax improprieties.⁴⁰⁷ After a colloquy ensuring that Abu Ghayth knowingly accepted the risks of having an attorney who might seek favor for himself with the prosecution, Judge Kaplan approved the substitution.⁴⁰⁸ Judge Kaplan conducted additional conflict waiver colloquies after the attorney was indicted in the Southern

402. *Trying Cases*, *supra* note 236, at 13 (remarks by Judge Sand).

403. Motion, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 7, 2009), D.E. 791.

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

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

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

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

The attorney also represented Mousa Abu Marzook. See Weiser, *supra* note 354; see also Chapter 14: Prosecution of a Charity, *infra* page 252; Chapter 15: Chicago Fundraising, *infra* page 267.

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

District as well.⁴⁰⁹ Three weeks after Abu Ghayth's conviction, the attorney agreed to plead guilty in the Northern District to impeding the IRS, and to a December 18, 2013, indictment in the Southern District for failure to file tax returns.⁴¹⁰ On November 21, 2014, the attorney was sentenced to one year and six months in prison.⁴¹¹

Judge Kaplan conducted conflict waiver colloquies with al-Liby upon learning that al-Liby's defense was funded by the Libyan government, which had been reported to be cooperative in al-Liby's capture.⁴¹²

In 2014, K.K. Mohamed's pro bono attorney in the action challenging prison conditions represented to the court, in a motion to appear at pretrial proceedings by telephone, that since his representation of Mohamed he was selected for extraordinary screening at airports, often resulting in travel delays.⁴¹³ Judge Krieger granted the motion.⁴¹⁴ In the interim, the attorney appeared in person in Denver.⁴¹⁵

At the final pretrial conference, Mohamed informed Judge Krieger that he wanted to fire his attorney.⁴¹⁶ Judge Krieger told Mohamed that he

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

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

411. Judgment, *Cohen*, No. 5:12-cr-316 (N.D.N.Y. Nov. 25, 2014), D.E. 96; Transcript, *id.* (Nov. 21, 2014, filed Dec. 9, 2014), D.E. 98; see Docket Sheet, *Cohen*, No. 1:13-cr-979 (S.D.N.Y. Dec. 18, 2013) (noting transfer to the Northern District for sentencing); BOP Locator, *supra* note 269 (noting release from prison on April 22, 2016, reg. no. 19846-052); see also Colin Moynihan, *Lawyer Who Represented Bin Laden Kin Is Sentenced in Tax Case*, N.Y. Times, Nov. 23, 2014, at 33.

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

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

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

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

415. *Mohammed* Final Pretrial Conference Transcript, *supra* note 348.

416. *Id.* at 7.

would be represented by his attorney at the proceeding and Mohamed could file a motion after the proceeding.⁴¹⁷ If Mohamed proceeded without his attorney, he would still have to abide by the time schedule set that day.⁴¹⁸ To allow Mohamed and his attorney to confer privately, Judge Krieger recessed the proceeding and closed the courtroom.⁴¹⁹ Mohamed was represented by his attorney at trial.⁴²⁰

Challenge: Interpreters

For the trial before Judge Sand, both Arabic and Kiswahili interpreters were required.⁴²¹

Challenge: Mental Health During Detention

After several months of restrictive confinement, el-Hage angrily criticized Judge Sand during a hearing for not reading a letter el-Hage had prepared that proclaimed his innocence and contended that the United States could have prevented the embassy bombings.⁴²² Deputy marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge toward the judge.⁴²³ Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.⁴²⁴ The government agreed to give el-Hage a cellmate, but the court ruled that his conditions of confinement were largely proper, and el-Hage complained that the cellmate made his cell too crowded.⁴²⁵

417. *Id.* at 7–8.

418. *Id.*; Interview with Judge Marcia S. Krieger, Aug. 25, 2014.

419. *Mohammed* Final Pretrial Conference Transcript, *supra* note 348, at 6–7; Interview with Judge Marcia S. Krieger, Aug. 25, 2014.

420. D. Colo. *Mohammed* Trial Minutes, *supra* note 414.

421. Interview with Judge Leonard B. Sand, June 25, 2007.

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

423. *Terrorist Bombings*, 552 F.3d at 149–50; *Trying Cases*, *supra* note 236, at 13 (remarks by Judge Sand); see Weiser, *Suspect Avows Innocence*, *supra* note 422; Weiser, *Suspect Charges*, *supra* note 422.

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

425. 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 424.

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage's possessions and privileges.⁴²⁶ According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.⁴²⁷ However, two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness.⁴²⁸ Judge Sand decided that the expert opinions were well founded and that el-Hage was competent to stand trial.⁴²⁹

During Ghailani's pretrial phase, he unsuccessfully moved for prescriptions on the strip and visual body-cavity searches performed every time he left the detention center for a court appearance.⁴³⁰ Judge Kaplan found that such searches applied without exception to all inmates at the Metropolitan Correctional Center in Manhattan.⁴³¹ Ghailani claimed that he could tolerate these invasions of his dignity until the ninth occasion of the search in which he was required to not only display his bare buttocks but "open himself to allow a visual rectal cavity inspection."⁴³² Between the time of search to which he objected and the time of Judge Kaplan's ruling, Ghailani agreed to come to court to attend a proceeding only once.⁴³³ A psychologist testified that the stress of the searches was exacerbated by posttraumatic stress disorder resulting from enhanced interrogation techniques during his CIA custody, the details of which were classified.⁴³⁴

Judge Kaplan ruled that the government had made a credible showing that there were no ready alternatives to the search that would provide the same level of security.⁴³⁵ If stress of the searches triggered a response that made him unable to assist in his defense, then his prosecution would be suspended until he recovered.⁴³⁶

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

427. See *id.*

428. See Weiser, *Faking Illness*, *supra* note 228.

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

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

431. *Id.* at 510.

432. *Id.* at 510–11.

433. *Id.* at 511.

434. *Id.* & n.11; see Greenberg, *supra* note 318, at 195 (reporting also, "After this hearing, however, Ghailani changed his mind and decided to attend the courtroom session [because] he realized for the first time that his defense team was genuinely fighting for him.").

435. *Ghailani*, 751 F. Supp. 2d at 514.

436. *Id.* at 514–15.

A week later, by letter apparently prepared by his attorney, Ghailani waived the right to attend a pretrial conference held that day.⁴³⁷ A week after that, Judge Kaplan issued an order finding that Ghailani never suffered from posttraumatic stress disorder and his refusal to attend proceedings was motivated in part by an effort to frustrate the prosecution.⁴³⁸ Ghailani was back in court on the eve of trial for a three-day hearing on his successful motion to suppress a key witness,⁴³⁹ and he was in court for his trial.⁴⁴⁰

Challenge: Jury Security

Judge Sand decided to close jury selection and to use an anonymous jury, but not to sequester the jury.⁴⁴¹

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.⁴⁴²

For the trial against Ghailani, Judge Kaplan granted the government's motion for an anonymous jury.⁴⁴³ Deputy marshals shuttled the jurors to and from the courthouse and provided them with breakfast, lunch, and

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

438. Order, *id.* (July 1, 2010), D.E. 971.

439. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227.

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

441. See Feuer, *supra* note 283; Gross, *supra* note 400, at 21–22; Weiser, *supra* note 282; Weiser, *Jury Torn*, *supra* note 289; 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").

442. Weiser, *Jury Torn*, *supra* note 289.

443. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. June 16, 2010), D.E. 961; see *Ghailani* Preliminary Remarks, *supra* note 330, at 2; see also Weiser & Moynihan, *supra* note 331 ("the defense lawyers, prosecutors and even the judge have not been told their names"); Greenberg, *supra* note 318, at 190.

refreshments.⁴⁴⁴ Judge Kaplan also used anonymous juries for the trials of Abu Ghayth⁴⁴⁵ and al-Fawwaz.⁴⁴⁶

In al-Fawwaz's trial, a juror who lived forty-five miles or so north of the courthouse called in one day to say that weather prevented her from getting to court.⁴⁴⁷ The jury was anonymous, and the member of the court staff who had contact information for the juror also did not come in.⁴⁴⁸ The government was amenable to the seating of an alternate juror, but the defense wanted to retain the juror, who "was very open about her Palestinian roots."⁴⁴⁹ Judge Kaplan agreed to ask security staff to bring the juror to court, and proceedings began with a full jury at 1:30 p.m.⁴⁵⁰

Challenge: Court Security

In the first trial, persons entering the courtroom had to pass through a metal detector and sign a log book stating their reasons for attending the trial.⁴⁵¹

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

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

444. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 27, 2010), D.E. 1029; *Ghailani* Preliminary Remarks, *supra* note 330, at 2; *see* Greenberg, *supra* note 318, at 198.

445. Mar. 26, 2014, *Abu Ghayth* Transcript, *supra* note 363, at 1567–68; Dec. 23, 2013, *Abu Ghayth* Transcript, *supra* note 409, at 8; *see* Larry Neumeister, *Bin Laden's Son-in-Law Faces Judge*, *Bos. Globe*, Mar. 4, 2014, at A10; Weiser, *supra* note 358.

446. *United States v. Al Fawwaz*, 57 F. Supp. 3d 307 (S.D.N.Y. 2014); Jan. 22, 2015, *Al-Fawwaz* Transcript, *supra* note 378, at 11–12; *see* Order, *United States v. Al Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Dec. 10, 2014), D.E. 1796 (ordering the marshal to provide the anonymous jurors with transportation to and from the courthouse); *see also* Tom Hays, *Bombings Defendant Was Top Aide to Bin Laden, US Prosecutor Says*, *Bos. Globe*, Jan. 23, 2015, at A8.

447. Transcript at 689, 691, *Al Fawwaz*, No. 1:98-cr-1023-15 (S.D.N.Y. Feb. 2, 2015, filed Mar. 18, 2015), D.E. 1947.

448. *Id.* at 690.

449. *Id.* at 689, 692–93.

450. *Id.* at 691–93, 695.

451. *See* Hirsch, *supra* note 220, at 71.

apparent to us?” And so we were discussing the sending of a paraphrase—not the exact language, but the substance.

While this discussion is going on, El-Hage, seated between two marshals in the jury box, jumps out of the jury box and races toward the bench. Now, I don’t know why he was racing to the bench. I have a suspicion that he was not coming to shake my hand and thank me for the careful attention I was giving to his case. The courtroom was scattered with security officers. You know, you sort of look around and you see them, and they sometimes don’t look so alert to you. Instantly, there was a security officer standing in front of me, shielding me with his body, which I appreciated. There had been a sketch artist who was just in the line of fire between El-Hage and myself. She immediately threw her easel over and ducked. Of course, one of the security officers tackled El-Hage just as he was coming up to the bench.⁴⁵²

Because of el-Hage’s actions, the defendants were shackled to the floor under the table.⁴⁵³ To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out.⁴⁵⁴ And, for this trial, there was no “all rise” when the judge entered.⁴⁵⁵ Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.⁴⁵⁶

Over the course of [Ghailani’s] trial, routine measures like metal detectors and a cell phone ban were augmented with other prohibitions. Water bottles, for example, and eventually *The New York Times* and other newspapers became forbidden items, the former because they might contain explosives, the latter because they might contain explosive headlines about the case that could be glimpsed by jurors, who were not supposed to know that Ghailani had been tortured or held at Guantanamo, or that he had worked as Bin Laden’s cook and bodyguard.⁴⁵⁷

452. *Trying Cases*, *supra* note 236, at 13 (remarks by Judge Sand).

453. *Id.* at 14; Interview with Judge Leonard B. Sand, June 25, 2007; *see* Gross, *supra* note 400, at 15 & n.54; Hirsch, *supra* note 220, at 78.

454. *Trying Cases*, *supra* note 236, at 14 (remarks by Judge Sand); Interview with Judge Leonard B. Sand, June 25, 2007; *see* Hirsch, *supra* note 220, at 78.

455. *United States v. Bin Laden*, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); *Trying Cases*, *supra* note 236, at 14 (remarks by Judge Sand); *see* Hirsch, *supra* note 220, at 78.

456. Interview with Judge Leonard B. Sand, June 25, 2007.

457. Greenberg, *supra* note 318, at 198–99.

Challenge: Witness Security

The informant al-Fadl was formerly Osama Bin Laden's payroll manager, whom the government had identified prior to his testimony, even to defense counsel, only as CS-1, or "confidential source one."⁴⁵⁸ He had been under U.S. protection in an undisclosed location since 1998 after pleading guilty to a conspiracy charge in a sealed proceeding in the Southern District of New York.⁴⁵⁹ In 1996, al-Fadl presented himself at the American embassy in Eritrea as an asset in the fight against Al-Qaeda after he was caught embezzling nearly \$110,000 from Bin Laden's organization.⁴⁶⁰

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.⁴⁶¹ Judge Sand forbade courtroom artists from sketching al-Fadl's face.⁴⁶²

Judge Kaplan also forbade courtroom artists from sketching a witness's face.⁴⁶³ Ghailani moved to suppress evidence from a witness whom Tanzanian authorities arrested in 2006, the FBI questioned, and who was released after the witness agreed to testify against Ghailani.⁴⁶⁴ Ghailani ar-

458. See Hirsch, *supra* note 220, at 103; Benjamin Weiser, *Ex-Aide to Bin Laden Describes Terror Campaign Aimed at U.S.*, N.Y. Times, Feb. 7, 2001, at A1 [hereinafter *Ex-Aide*]; Benjamin Weiser, *Secret Witness Set to Testify in Terror Trial*, N.Y. Times, Feb. 5, 2001, at B1; Weiser, *Qaeda Informer*, *supra* note 299.

Al-Fadl was related by marriage to al-Nalfi. See Weiser, *Qaeda Member*, *supra* note 265; Weiser, *Held Secretly*, *supra* note 265; Weiser, *Qaeda Informer*, *supra* note 299.

459. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 142 (2d Cir. 2008); *United States v. Bin Laden*, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); see Docket Sheet, *United States v. Al-Fadl*, No. 1:97-cr-673 (S.D.N.Y. July 10, 1997) (unsealed Apr. 2, 2001); see also Weiser, *Ex-Aide*, *supra* note 458; Weiser, *Qaeda Informer*, *supra* note 299.

460. The 9/11 Commission Report 109 (2004); *Bin Laden*, 397 F. Supp. 2d at 474; see Mark Bowden, *The Finish* 90 (2012); Bravin, *supra* note 319, at 202 (describing al-Fadl as "an al Qaeda turncoat who had become the US government's star informer"); Lance, *supra* note 261, at 260–65 (describing al-Fadl as a Zelig of terror and reporting that the embezzlement resulted in part from jealousy over el-Hage's higher compensation from Al-Qaeda); Soufan, *supra* note 220, at 66–69, 71; Weiser, *Qaeda Informer*, *supra* note 299. See generally *Blindspot: The Road to 9/11: The Falcon Hunt*, WNYC Radio podcast (episode 7, Oct. 14, 2020), www.npr.org/podcasts/908344999/blindspot-the-road-to-9-11.

461. See Hirsch, *supra* note 220, at 109.

462. See *id.*

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

464. *United States v. Ghailani*, 743 F. Supp. 2d 242, 247–48, 259–60 (S.D.N.Y. 2010); see Benjamin Weiser, *Dispute Over Witness in Embassy Bombing Case*, N.Y. Times, Sept.

gued that finding the witness resulted from coercion during extremely harsh interrogation while Ghailani was in the CIA's Rendition, Detention, and Interrogation Program.⁴⁶⁵ Judge Kaplan ordered an evidentiary hearing on the matter,⁴⁶⁶ at which the witness testified.⁴⁶⁷ The witness's identity was initially redacted from Judge Kaplan's opinion ordering the hearing,⁴⁶⁸ but his identity was revealed at the hearing⁴⁶⁹ and the opinion was reposted three weeks later without the witness's name redacted.⁴⁷⁰ Judge Kaplan suppressed the witness,⁴⁷¹ and the government elected not to delay the trial by appealing the suppression order.⁴⁷²

For the prosecution of Abu Ghayth, Judge Kaplan denied a government request to let a witness testify under a pseudonym.⁴⁷³

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client's religious beliefs.⁴⁷⁴ As Judge Sand reported,

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

3, 2010, at A16 ("brief references in declassified papers say he is a Tanzanian named Hussein who sold Mr. Ghailani hundreds of pounds of TNT that was later used to blow up the United States Embassy in Tanzania").

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

466. *Id.* at 261; see Weiser, *supra* note 464.

467. *United States v. Ghailani*, 743 F. Supp. 2d 261, 274 (S.D.N.Y. 2010); see Weiser, *supra* note 463.

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

469. See Weiser, *supra* note 463.

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

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

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

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

474. Interview with Judge Leonard B. Sand, June 25, 2007.

“How can I be represented by a lawyer who mocks my religion?” I granted the application.⁴⁷⁵

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.⁴⁷⁶

Challenge: Classified Evidence

The handling of classified evidence in criminal trials is governed by the Classified Information Procedures Act (CIPA).⁴⁷⁷

In order to have access to classified evidence, defense counsel had to obtain security clearances.⁴⁷⁸ Protective orders specified defense attorneys’ responsibilities for protecting government secrets.⁴⁷⁹

Initially, the attorneys in the original trial objected to their adversaries’ invading their privacy with background checks, but the government assured the attorneys and the court that background information would not be shared with prosecutors in the case.⁴⁸⁰ The court of appeals affirmed a district court ruling that a security clearance requirement did not violate the defendants’ Sixth Amendment right to counsel.⁴⁸¹

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

475. *Trying Cases*, *supra* note 236, at 13 (remarks by Judge Sand).

476. *See Hirsch*, *supra* note 220, at 78.

477. 18 U.S.C. app. 3 (2020); *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

478. First *El Hage* Protective Order, *supra* note 400, ¶ 5; Interview with Judge Lewis Kaplan, Nov. 5, 2009; *see* Gross, *supra* note 400, at 13; Benjamin Weiser, *Bomb Suspects’ Lawyers to Need Security Checks*, N.Y. Times, July 1, 1999, at B5.

479. Abu Ghayth Protective Order, *United States v. El-Hage*, No. 1:98-cr-1023 (S.D.N.Y. Apr. 11, 2013), D.E. 1184; Al-Fawwaz and Abdel Bary Protective Order, *id.* (Jan. 11, 2013), D.E. 1137; Ghailani Classified Protective Order, *id.* (July 21, 2009), D.E. 765; Ghailani Unclassified Protective Order, *id.* (July 14, 2009), D.E. 763; First *El Hage* Protective Order, *supra* note 400.

480. *See* Weiser, *supra* note 478.

481. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 119–28 (2d Cir. 2008); *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); *see* Gross, *supra* note 400, at 13.

a security clearance.⁴⁸² The defendant agreed to proceed with that risk,⁴⁸³ but on the following day another retained attorney entered an appearance on behalf of Abu Ghayth,⁴⁸⁴ and she was eligible for a clearance.⁴⁸⁵ Abu Ghayth waived conflict arising from the new attorney's having earlier represented Abdel Bary.⁴⁸⁶

Judge Sand resolved issues concerning discovery of classified information by conducting *ex parte* discussions with defense counsel about defense strategy and *ex parte* discussions with prosecutors about potentially relevant classified information.⁴⁸⁷ Sometimes Judge Sand was able to mediate a substitution for classified information:

The District Court held five *in camera* CIPA hearings in February 2001. Portions of the February 6, 2001 hearing were conducted *ex parte*; the others were attended by counsel for both sides. El-Hage's defense attorneys, in the presence of the government, described in detail the classified material that they anticipated disclosing. The District Court then excused El-Hage's counsel in order to inquire into the government's reasons for refusing to declassify these items. After the government completed its presentation and was excused, the District Court recalled El-Hage's attorneys, inquiring, in the absence of government counsel, into the use that El-Hage's counsel planned to make of the classified information at issue. Having established that El-Hage's attorneys wished to use the classified material for cross-examination of a government witness, the District Court suggested that the parties could work together to produce a paraphrased version of the relevant portions. The District Court then recalled the government in order to discuss the merits of this proposal with counsel on both sides.⁴⁸⁸

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

After giving El-Hage's counsel the opportunity to set forth their theory on the relevance of this information, the District Court explained that—

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

483. *Id.* at 7–10, 17.

484. Appearance, *id.* (May 22, 2013), D.E. 1224.

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

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

487. Interview with Judge Leonard B. Sand, June 25, 2007.

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

based upon its review of an *ex parte* submission made by the government—it could represent with confidence that the classified information did not have the significance claimed by counsel.⁴⁸⁹

Judge Sand held—and the court of appeals agreed—that the Fourth Amendment’s warrant requirement does not apply to extraterritorial searches by the U.S. government, but the Fourth Amendment’s reasonableness requirement does apply to extraterritorial searches of U.S. citizens.⁴⁹⁰ In 1996 and 1997, as part of an investigation of Al-Qaeda, telephone lines used by el-Hage in Kenya were bugged, and his Nairobi home was searched.⁴⁹¹ To resolve el-Hage’s suppression motion, Judge Sand determined the reasonableness of the searches by *ex parte* examination of classified evidence instead of hearing evidence in an adversary proceeding.⁴⁹² The court of appeals determined that Judge Sand’s method was appropriate.⁴⁹³

Judge Kaplan reviewed classified information on Ghailani to determine what had to be produced in discovery to cleared defense counsel.⁴⁹⁴ Defense counsel challenged the adequacy of a chart summarizing the nature of 897 classified “CIA reports that the government claims are not themselves discoverable but that contain statements made by the defendant in response to custodial interrogation.”⁴⁹⁵ After reviewing 895 of the documents, Judge Kaplan determined that cleared defense counsel were entitled to an augmented chart “indicating, whenever the underlying documents so indicate, the duration of the interview in which a statement was made and whether that interview took place in the defendant’s cell or

489. *Id.* at 119.

490. *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 157, 159, 161–64, 167–72, 176–77 (2d Cir. 2008); *United States v. Bin Laden*, 264 F. Supp. 2d 264, 270–77 (S.D.N.Y. 2000); see Orin Kerr, *The Fourth Amendment and the Global Internet*, 67 Stanford L. Rev. 285, 299–300 (2015); Weiser, *supra* note 312.

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

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

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

493. *Terrorist Bombings*, 552 F.3d at 159, 167, 177.

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

495. *Id.* at 1.

elsewhere.”⁴⁹⁶ Judge Kaplan determined that the defense was entitled to additional information about two of the documents—“a summary of each statement referencing the Embassy Bombings sufficient to indicate the substance of the statement, the time when it was made, and to whom”—and Judge Kaplan reserved judgment on two documents that the government had not yet shown him.⁴⁹⁷

In al-Liby’s case as well, Judge Kaplan reviewed classified evidence to determine what had to be disclosed to cleared defense counsel.⁴⁹⁸ Both al-Liby’s attorneys⁴⁹⁹ and al-Fawwaz’s attorneys⁵⁰⁰ filed notices in August 2014 that they intended to use classified evidence at the trial. Pursuant to CIPA, Judge Kaplan held an in camera hearing on the matter.⁵⁰¹

Judge Sand’s and Judge Kaplan’s law clerks had security clearances.⁵⁰² It was Circuit Judge José A. Cabranes’s practice to ask his law clerks to seek security clearances,⁵⁰³ but Circuit Judge Jon O. Newman had never had a cleared clerk, unless the clerk came with a security clearance as a result of previous employment.⁵⁰⁴ It is especially difficult for appellate judges to wait until they have a relevant case to ask their clerks to seek security clearances, because appellate judges are typically assigned to cases only a few weeks before oral argument.⁵⁰⁵

In K.K. Mohamed’s challenge to prison conditions, some discovery withheld as subject to the state-secrets privilege was presented to Judge Krieger for her ex parte, in camera examination.⁵⁰⁶ A career law clerk for Judge Krieger received a security clearance to assist her in the review of

496. *Id.* at 2.

497. *Id.*

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

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

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

501. Order, *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 22, 2014), D.E. 1767; *see* 18 U.S.C. app. 3 § 6 (2020).

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

503. Interview with Judge José A. Cabranes, Nov. 4, 2009.

504. Interview with Judge Jon O. Newman, Nov. 4, 2009.

505. Interview with 2d Cir. Clerk’s Office Staff, Nov. 6, 2009.

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

classified materials.⁵⁰⁷ Some of the material submitted to Judge Krieger was redacted.⁵⁰⁸

The government argued that Judge Krieger could disregard classified evidence, unless she was inclined to rule against the government, in which case she should consider it.⁵⁰⁹ “The Court expressed some doubt about the proposition that ‘you get a second bite at the apple,’ but invited defense counsel to address the issue more fully in closing arguments.”⁵¹⁰ Judge Krieger concluded that classified information did not alter her judgment in favor of the prisoner.⁵¹¹

Challenge: Classified Arguments

By the time of Ghailani’s prosecution, electronic filing had become widespread in federal courts. Judge Kaplan issued a two-page order explaining how filings containing classified information would be electronically docketed: an unredacted copy of the filing would be filed with the classified information security officer and only a caption page would be filed electronically until a redacted copy could be filed electronically after a security review.⁵¹²

In K.K. Mohamed’s action challenging prison conditions, Mohamed’s attorney sought access to national security information justifying special administrative measures.⁵¹³ The government filed a classified ex parte declaration in opposition to the motion.⁵¹⁴

Challenge: Classified Orders and Opinions

A discovery order by Judge Kaplan early in the Ghailani prosecution contained details about two classified documents, about which Judge Kaplan

507. Interview with Judge Marcia S. Krieger, Aug. 25, 2014.

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

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

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

510. *Id.*

511. *Id.* at 1254–55, 1259, 1263.

512. Order, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 27, 2009), D.E. 806; *see Reagan, supra* note 477, at 21–22 (providing information about classified information security officers).

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

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

determined cleared counsel were entitled to more information.⁵¹⁵ The order was filed with the classified information security officer on November 24, 2009.⁵¹⁶ The security officer arranged for redaction by intelligence agencies: two bulleted paragraphs were redacted from the order, and then the redacted order was filed publicly on December 7.⁵¹⁷

A second discovery order was filed with the classified information security officer on December 8, and a redacted version was filed publicly on February 4, 2010.⁵¹⁸ Judge Kaplan's opinion denying relief from strip and visual body-cavity searches was filed with the classified information security officer on June 14, determined to contain no classified information, and then filed publicly three days later.⁵¹⁹

On July 12, Judge Kaplan filed with the classified information security officer an opinion rejecting Ghailani's speedy-trial motion, and the opinion was publicly filed the next day with three slight redactions.⁵²⁰ Also on July 12, Judge Kaplan filed with the security officer a classified supplement to his opinion discussing Ghailani's treatment while in CIA custody; the supplement was filed on the next day.⁵²¹

On August 17, Judge Kaplan ordered an evidentiary hearing on whether testimony from a government witness should be suppressed because the government learned of the witness through extraordinary interrogation methods.⁵²² Judge Kaplan's memorandum opinion ordering the hearing was filed with the classified information security officer on August 18; on September 1, a heavily redacted version of the opinion was filed publicly.⁵²³ Redactions included the name of the witness and appeared to include details of Ghailani's capture, detention, and interrogation.⁵²⁴ The witness's

515. *Ghailani* Discovery Order, *supra* note 494.

516. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Dec. 7, 2009), D.E. 843.

517. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Jan. 7, 2010.

518. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Feb. 4, 2010), D.E. 878.

519. Order, *id.* (June 17, 2010), D.E. 962; *United States v. Ghailani*, 751 F. Supp. 2d 508 (S.D.N.Y. 2010).

520. Opinion, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010, filed July 13, 2010), D.E. 976; *see United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

521. Opinion, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010, filed July 13, 2010), D.E. 978 (redacted); Order, *id.* (July 15, 2010), D.E. 980.

522. *United States v. Ghailani*, 743 F. Supp. 2d 242, 261 (S.D.N.Y. 2010); *see Weiser*, *supra* note 464.

523. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 1, 2010), D.E. 1000.

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

identity was revealed at the hearing on the admissibility of his testimony, and a substitute redacted opinion not redacting his name was filed three weeks after the hearing.⁵²⁵

On October 6, Judge Kaplan agreed to suppress the witness.⁵²⁶ A redacted opinion on the matter was filed publicly approximately one week later.⁵²⁷

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided that testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of al-'Owhali's trial.⁵²⁸ It was reported, "The lawyers . . . said they want[ed] to question Dr. Albright about 'her knowledge of the number of Iraqi children dying as a direct consequence of the United States enforcement of United Nations sanctions following the gulf war.'"⁵²⁹ Judge Sand agreed to sign the subpoena,⁵³⁰ but on the government's motion he quashed it.⁵³¹ As a substitute for the secretary's live testimony, al-'Owhali presented at trial a *60 Minutes* interview with Albright.⁵³² Al-'Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.⁵³³

Challenge: Interviewing Detainees

On March 18, 2014, while the trial was underway, Judge Kaplan denied Abu Ghayth's request to call Guantánamo detainee Khalid Shaikh Mo-

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

526. *Ghailani*, 743 F. Supp. 2d 261; see Greenberg, *supra* note 318, at 196–98.

527. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 14, 2010), D.E. 1040; see Benjamin Weiser, *Judge Says Witness Barred from Ex-Detainee's Trial Had Lied*, N.Y. Times, Oct. 15, 2010, at A21.

528. See Hirsch, *supra* note 220, 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*].

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

530. See *Subpoena for Albright*, *supra* note 528.

531. See Weiser, *supra* note 529.

532. See Hirsch, *supra* note 220, at 196.

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

hammered (KSM) as a witness.⁵³⁴ The government permitted Abu Ghayth's attorney to submit written questions to KSM, who was a defendant in military commission proceedings for the September 11, 2001, attack.⁵³⁵ The questions could not address certain issues, such as conditions of KSM's detention, and they were reviewed by government personnel walled off from the prosecution; KSM's answers were to be subjected to a classification review.⁵³⁶ The government, however, refused a request by KSM's military commission attorney that KSM's responses be reviewed by persons walled off from KSM's prosecution.⁵³⁷ Judge Kaplan scolded Abu Ghayth's attorney for not bringing the impasse to the court's attention promptly for possible remedy.⁵³⁸

That impasse apparently resolved, KSM's fourteen-page response was submitted for review three days after Abu Ghayth's trial began⁵³⁹ and presented to the court ten days after that.⁵⁴⁰

Judge Kaplan explained his reasons for denying KSM's testimony four weeks after the trial.⁵⁴¹ He denied the request to call KSM as a witness because "Abu Ghayth had failed to show that the proposed testimony would

534. *United States v. Abu Ghayth*, 17 F. Supp. 3d 289 (S.D.N.Y. 2014); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (D.E. 1556, 1557); see Charles Levinson, *Judge Blocks Testimony by Alleged 9/11 Planner*, Wall St. J., Mar. 19, 2014, at A8; Benjamin Weiser, *Judge Bars 9/11 Architect's Testimony at the Trial of Bin Laden's Son-in-Law*, N.Y. Times, Mar. 19, 2014, at A19.

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

536. Feb. 19, 2014, *Abu Ghayth* Order, *supra* note 535; see Benjamin Weiser, *Suspect Facing Terror Trial Gets Access to 9/11 Detainee*, N.Y. Times, Feb. 20, 2014, at A1 (also reporting that the questions were transmitted to Guantánamo Bay on February 18, 2014).

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

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

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

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

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

be material, admissible, noncumulative, and competent.”⁵⁴² KSM’s narrative “ignored almost all of the questions that asked specifically about Abu Ghayth, Abu Ghayth’s associates, and Abu Ghayth’s role in making videos and with al Qaeda’s media center.”⁵⁴³ In addition, the request was untimely.⁵⁴⁴ “Abu Ghayth did not seek any assistance from the Court in securing access to [KSM] until February 2014”⁵⁴⁵

For the prosecutions of al-Fawwaz, Abdel Bary, and Abu Ghayth, Judge Kaplan prepared for the discovery and use at trial of classified evidence and evidence derived from classified information by having transcribed ex parte proceedings with the government and optional ex parte proceedings with defense counsel to learn the bases of both sides’ cases and how trial presentations would relate to classified information.⁵⁴⁶

Challenge: Foreign Evidence

On August 19, 2013, Judge Kaplan granted al-Fawwaz’s motion for letters rogatory to the courts of the United Kingdom for exculpatory evidence from MI5.⁵⁴⁷ In 2014, the parties stipulated to an order permitting the government to depose foreign witnesses in the prosecutions of al-Fawwaz, Abdel Bary, and al-Liby.⁵⁴⁸ Judge Kaplan agreed to issue letters rogatory⁵⁴⁹ for two MI5 agents whom the defense had been unable to locate or con-

542. *Id.* at 300.

543. *Id.* at 297.

544. *Id.* at 303–04.

545. *Id.* at 294.

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

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

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

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

tact⁵⁵⁰ and for two other witnesses likely to yield material evidence but unwilling to travel to the United States.⁵⁵¹ Later, Judge Kaplan granted permission for the deposition of another witness in London.⁵⁵² For that witness, it turned out that proceeding without United Kingdom court assistance—made possible by the witness’s consent to the deposition—allowed video recording of the deposition.⁵⁵³

The United Kingdom responded that some of the MI5 information was “sensitive material” and would be provided pursuant to the “US Classified Information Procedure.”⁵⁵⁴ One unwilling witness was seriously ill, and the other would be compelled to provide evidence.⁵⁵⁵

After meeting in New York with prosecutors and cleared defense counsel, the United Kingdom decided to refuse the request for MI5 evidence on national security grounds.⁵⁵⁶

On January 15, 2014, in the case against Abu Ghayth, Judge Kaplan granted the government’s motion for closed-circuit trial testimony from a cooperating witness convicted in the United Kingdom of complicity in the plot for Richard Reid to detonate a shoe bomb on a transatlantic flight in 2001.⁵⁵⁷ Examining attorneys for both sides were in the United Kingdom, including Abu Ghayth’s lead counsel; the video feed showed the faces of the witness and the defendant.⁵⁵⁸

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

551. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 227 (Apr. 30, 2014); *see also* Order, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Apr. 15, 2014, filed Dec. 8, 2014), D.E. 1793 (granting in part an additional request for letters rogatory to the United Kingdom; limiting the grant to evidence of uncontested materiality and denying the request as to matters that Judge Kaplan determined to be a fishing expedition).

552. Opinion, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 4, 2014), D.E. 1706.

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

554. United Kingdom Response, *id.* (Aug. 14, 2014, filed Sept. 2, 2014), D.E. 1704.

555. *Id.* (including a doctor’s report that the ill witness would be troubled by recalling events of 1998, a time when her husband was terminally ill).

556. United Kingdom Letter, *id.* (Sept. 29, 2014, filed Sept. 29, 2014), D.E. 1731; *see* United Kingdom Letter, *id.* (Oct. 6, 2014, filed Oct. 9, 2014), D.E. 1753 (providing additional explanations for the refusal in response to an inquiry from Judge Kaplan); *see also* United States v. Al Fawwaz, 116 F. Supp. 3d 194, 198 (S.D.N.Y. 2015).

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

558. Transcript at 493–686, *id.* (Mar. 11, 2014, filed Apr. 1, 2014), D.E. 1577; Mar. 10, 2014, *Abu Ghayth* Transcript, *supra* note 360, at 416–86; Approved Procedures, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Feb. 19, 2014), D.E. 1494; *see* Benjamin Weiser, *At*

A similar procedure was used for a government witness in London in al-Fawwaz's trial.⁵⁵⁹

Judge Kaplan also granted Abu Ghayth permission to take deposition testimony from Salim Hamdan, a former detainee at Guantánamo Bay released to Yemen who was known as Osama Bin Laden's former driver.⁵⁶⁰

Trial of Bin Laden Relative, Witness Describes Meeting 9/11 Mastermind, N.Y. Times, Mar. 12, 2014, at A23.

559. Transcript, United States v. Al-Fawwaz, No. 1:98-cr-1023-15 (S.D.N.Y. Feb. 9, 2015, filed Mar. 18, 2015), D.E. 1959.

560. Jan. 15, 2014, S.D.N.Y. *Abu Ghayth* Opinion, *supra* note 557, at 7–10; *see* Jan. 7, 2014, *Abu Ghayth* Transcript, *supra* note 409, at 8–35; *see also* Chapter 28: Guantánamo Bay, *infra* page 434.

Chapter 3

Millennium Bomber

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

Ahmed Ressam was sentenced to thirty-seven years in prison for planning a 2000 bombing. Defendants in other related cases were Abdelghani Meskini and Mokhtar Haouari. Judicial challenges included classified evidence, foreign evidence, court security, jury security, and witness security.

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Apprehension

On December 14, 1999, Ressam was detained by customs officials suspicious of his nervousness as he tried to enter the United States by ferry from Canada into Washington with over one hundred pounds of explosives in his car.⁵⁶¹

561. *United States v. Ressam*, 679 F.3d 1069, 1073 (9th Cir. 2012); *United States v. Ressam*, 474 F.3d 597, 600 (9th Cir. 2007); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 673 (S.D.N.Y. 2006); The 9/11 Commission Report 82 (2004); see Complaint, *United States v. Ressam*, No. 2:99-mj-547 (W.D. Wash. Dec. 17, 1999), D.E. 1 [hereinafter *Ressam Complaint*]; Paula Bock, *An Otherwise Ordinary Day in Quiet Port Angeles, Local Folks Tackle a Terrorist—And Nothing Has Been*

Ressam was born in Algeria in 1967, and in February 1994 he moved to Canada, where he unsuccessfully applied for political asylum.⁵⁶² In Canada, he lived on welfare and petty theft.⁵⁶³ In 1998 and 1999, he attended terrorist training camps in Afghanistan.⁵⁶⁴

Traveling under the name Benni Noris with fraudulent documentation, Ressam rented a car in Vancouver and drove it onto a ferry from Victoria to Port Angeles, Washington.⁵⁶⁵ Ressam's car was the last off the ferry.⁵⁶⁶ Noting that Ressam's hands were shaking and, despite the cold weather, he was sweating, the customs inspector asked him to step out of the car, and Ressam initially refused.⁵⁶⁷ Then he got out of the car and, as

Quite the Same Since, Seattle Times, Nov. 25, 2001, at 16; *Frontline: Trail of a Terrorist* (PBS television broadcast Oct. 25, 2001) [hereinafter *Trail of a Terrorist*], www.pbs.org/wgbh/pages/frontline/shows/trail/etc/script.html (transcript); Susan Gilmore & Mike Carter, *Man Stopped at Border with Suspected Bomb Materials*, Seattle Times, Dec. 16, 1999, at A1; Josh Meyer, *Border Arrest Stirs Fear of Terrorist Cells in U.S.*, L.A. Times, Mar. 11, 2001, at 1; Steve Miletich, Susan Gilmore, Mike Carter, Joshua Robin, Ian Ith & Anne Koch, *FBI Probes Possible Terrorist Plot Here*, Seattle Times, Dec. 17, 1999, at A1; Scott Sunde & Elaine Porterfield, *Wider Bomb Plot Possible*, Seattle Post-Intelligencer, Dec. 18, 1999, at A1; Sam Howe Verhovek & Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, N.Y. Times, Dec. 18, 1999, at A1; Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* 336–37 (2006).

562. *Ressam*, 679 F.3d at 1072; *Ressam*, 474 F.3d at 599; see *Ressam Complaint*, *supra* note 561; Bock, *supra* note 561; William Booth, *Focus Is Narrow as Ressam Trial Begins*, Wash. Post, Mar. 14, 2001, at A8; John F. Burns, *Arrest at U.S. Border Reverberates in France*, N.Y. Times, Dec. 22, 1999, at A1; Maggie Farley, *Canada's Lapses Kept Algerian Suspect Free*, L.A. Times, Dec. 23, 1999, at 1; *Trail of a Terrorist*, *supra* note 561; Meyer, *supra* note 561; Steven Pearlstein, *Canadians Examine Lapses in Security*, Wash. Post, Dec. 22, 1999, at A8; Ali H. Soufan, *The Black Banners* 141 (2011) ("A wily Algerian, he falsely claimed political asylum in Canada in 1994, using a fake passport and a story about persecution."), *reprinted as* *The Black Banners* (Declassified) (2020) (restoring redactions).

563. See *Trail of a Terrorist*, *supra* note 561; Soufan, *supra* note 562, at 141–42; Wright, *supra* note 561, at 337.

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

565. *Ressam*, 679 F.3d at 1073; *Ressam*, 474 F.3d at 599–600; *Ressam*, 221 F. Supp. 2d at 1254; see *Ressam Complaint*, *supra* note 561; Bock, *supra* note 561; *Trail of a Terrorist*, *supra* note 561; Soufan, *supra* note 562, at 142; Sunde & Porterfield, *supra* note 561; Verhovek & Weiner, *supra* note 561.

566. See *Ressam*, 474 F.3d at 600; *Ressam Complaint*, *supra* note 561; Bock, *supra* note 561; *Trail of a Terrorist*, *supra* note 561; Meyer, *supra* note 561; Soufan, *supra* note 562, at 142 ("Apparently he thought that the last car off would receive less attention."); Sunde & Porterfield, *supra* note 561.

567. See *Ressam Complaint*, *supra* note 561; Gilmore & Carter, *supra* note 561; Meyer, *supra* note 561; Sunde & Porterfield, *supra* note 561; Verhovek & Weiner, *supra* note 561.

agents began searching the trunk, he fled.⁵⁶⁸ He was caught a few blocks away.⁵⁶⁹

It was later determined that Ressam's sweating may have been caused by malaria, which he did not know at the time that he had.⁵⁷⁰

A search of the car showed that its spare tire had been replaced by ten garbage bags containing 118 pounds of urea and fourteen pounds of aluminum sulfate, two olive jars packed in sawdust containing a honey-like explosive, pill bottles containing other explosives, nine-volt batteries, and four circuit boards connected to Casio watches.⁵⁷¹

According to the *Seattle Times*,

A Tylenol bottle contained a powerful military-grade explosive, cyclotrimethylene-trinitramine, or RDX. Another small bottle held hexamethylenetriperoxodiamin, or HMTD, an unstable explosive so dangerous it's not manufactured commercially. Two tall olive jars were filled with 50 ounces of ethylene glycol dinitrate, or EGDN, a chemical cousin to nitroglycerin. Used in dynamite, EGDN is sensitive to shock, heat and friction. Screwing the jar lids could have been enough to set it off.⁵⁷²

Also in the car were maps of Washington, Oregon, and California.⁵⁷³ Further investigation led to suspicion that he was an agent of Osama Bin Laden.⁵⁷⁴

568. *Ressam*, 679 F.3d at 1073; *Haouari v. United States*, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); see *Ressam Complaint*, *supra* note 561; Bock, *supra* note 561; Gilmore & Carter, *supra* note 561; *Trail of a Terrorist*, *supra* note 561; Meyer, *supra* note 561; Sunde & Porterfield, *supra* note 561; Verhovek & Weiner, *supra* note 561; Wright, *supra* note 561, at 337.

569. *Ressam*, 679 F.3d at 1073; see *Ressam Complaint*, *supra* note 561; Gilmore & Carter, *supra* note 561; Meyer, *supra* note 561; Miletich et al., *supra* note 561; Verhovek & Weiner, *supra* note 561; Wright, *supra* note 561, at 337.

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

571. *Ressam*, 679 F.3d at 1073 n.2; *Ressam*, 474 F.3d at 600; *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see *Ressam Complaint*, *supra* note 561; John J. Goldman, *Algerian Admits Bomb Plot, Pledges Cooperation*, *L.A. Times*, Mar. 9, 2001, at 12; John Kifner & William K. Rashbaum, *Brooklyn Man Is Charged with Aiding in Bomb Plot*, *N.Y. Times*, Dec. 31, 1999, at A1; Steve Miletich, Mike Carter, James V. Grimaldi & Anne Koch, *Terrorist Link Explored*, *Seattle Times*, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 561; Verhovek & Weiner, *supra* note 561.

572. Bock, *supra* note 561.

573. See Meyer, *supra* note 561; Miletich et al., *supra* note 561; Sunde & Porterfield, *supra* note 561; Verhovek & Weiner, *supra* note 561.

Ressam was indicted on December 22, 1999, in the Western District of Washington for false statements and improper transportation of explosives.⁵⁷⁵ The court assigned the case to Judge John C. Coughenour.⁵⁷⁶

Abdelmajid Dahoumane

Ressam shared a motel room with another man for three weeks just before the ferry trip.⁵⁷⁷ Canadian authorities determined that the other man was Abdelmajid Dahoumane.⁵⁷⁸ On January 20, 2000, Ressam's indictment was superseded to add a terrorism charge and to add Dahoumane as a defendant.⁵⁷⁹ On April 6, the U.S. embassy in Montreal offered a reward of \$5 million for information leading to Dahoumane's arrest and conviction.⁵⁸⁰

574. See Michael Janofsky, *Terrorism Trial May Keep to Narrower Focus*, N.Y. Times, Mar. 14, 2001, at A12; Meyer, *supra* note 561; Steven Mufson, *Arrest Stirs Terrorism Concerns*, Wash. Post, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 561.

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

576. Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 23, 1999), D.E. 11 ("For reasons of security, the Honorable John C. Coughenour, Chief Judge for the Western District of Washington, directs the above-captioned case be filed in Seattle and assigned to the undersigned."); see Porterfield, *supra* note 575.

Tim Reagan interviewed Judge Coughenour for this case study in his chambers on October 3, 2008.

577. See *Trail of a Terrorist*, *supra* note 561; Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. Times, Dec. 19, 1999, at 142.

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

579. Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Jan. 20, 2000), D.E. 20; see Mike Carter, *Algerian Bomb-Plot Web Grows with New Charges*, Seattle Times, Jan. 21, 2000, at A1; Elaine Porterfield, *Indictment Details Bomb Conspiracy*, Seattle Post-Intelligencer, Jan. 21, 2000, at A1; David A. Vise & Dan Eggen, *Bomb Plot Suspect Sought by United States, Canada Is Detained in Algeria*, Wash. Post, Dec. 8, 2000, at A44; see also Second Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Feb. 14, 2001), D.E. 178; Sam Skolnik, *Terrorism Charge Expanded in Bomb-Smuggling Case*, Seattle Post-Intelligencer, Feb. 15, 2001, at B3 (reporting on the second superseding indictment).

580. See Meyer, *supra* note 561 (reporting that this was the same bounty offered for Osama Bin Laden); Steve Miletich & Mike Carter, *Prints Found on Bomb Parts*, Seattle Times, Apr. 12, 2000, at B1; *Reward Offered on Suspected Terrorist*, L.A. Times, Apr. 7,

Dahoumane was arrested in Algeria late in 2000.⁵⁸¹ On April 1, 2001, the Algerian government announced that it would try Dahoumane there.⁵⁸² Dahoumane pleaded guilty in Algeria.⁵⁸³

Los Angeles

Investigation showed that Ressam had a reservation for one night's stay at a Seattle motel near the Space Needle and a flight to London on the following day.⁵⁸⁴ Seattle canceled its millennium New Year's Eve party scheduled for the base of the Space Needle.⁵⁸⁵ Because of the extensive news coverage in Seattle about "the possibility of a planned bombing of the Space Needle, the signature building of the Seattle skyline," on March 3, 2000, Judge Coughenour granted Ressam's motion to move the trial to Los Angeles.⁵⁸⁶

It was reported that a substantial factor in Judge Coughenour's ruling was the superior security of Los Angeles's newer courthouse compared to Seattle's old courthouse, designed in the 1920s, where judges rode the

2000, at 6; Sam Skolnik, *U.S. Puts \$5 Million Bounty for Algerian*, Seattle Post-Intelligencer, Apr. 7, 2000, at A1; Vise & Eggen, *supra* note 579.

581. See Lorraine Adams, *The Other Man*, Wash. Post Mag., May 20, 2001, at 10; Judith Miller, *Suspect in New Year's Terror Plot Is Arrested in Algeria*, N.Y. Times, Dec. 7, 2000, at A3; Vise & Eggen, *supra* note 579.

582. See Adams, *supra* note 581; *Algiers to Try Terror Suspect Sought by U.S.*, N.Y. Times, Apr. 2, 2001, at A5.

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

584. See *Ressam Complaint*, *supra* note 561; Miletich et al., *supra* note 571; Verhovek & Weiner, *supra* note 561.

585. See Timothy Egan, *Citing Security, Seattle Cancels a New Year's Eve Party*, N.Y. Times, Dec. 29, 1999, at A16; *Trail of a Terrorist*, *supra* note 561; Steve Miletich, J. Martin McOmber & Anne Koch, *How City Party Was Canceled*, Seattle Times, Dec. 28, 1999, at A1; Kery Murakami, *Seattle Center New Year's Gala Canceled*, Seattle Post-Intelligencer, Dec. 28, 1999, at A1; Jube Shiver, Jr., *Millennium Disconnects*, L.A. Times, Dec. 29, 1999, at 9.

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

586. Order, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 3, 2000), D.E. 56; *United States v. Ressam*, 679 F.3d 1069, 1074 (9th Cir. 2012); *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); see Meyer, *supra* note 561; Steve Miletich, *Ressam Will Get L.A. Trial*, Seattle Times, Mar. 3, 2000, at A1; Kim Murphy, *Trial of Suspected Algerian Terrorist Will Be Shifted from Seattle to L.A.*, L.A. Times, Mar. 4, 2000, at 14; Elaine Porterfield, *Bombing Suspect Will Be Tried in L.A.*, Seattle Post-Intelligencer, Mar. 4, 2000, at A1.

same elevators as defendants, jurors, and witnesses.⁵⁸⁷ In addition, transportation of Ressam between the detention center in Seattle and the courthouse required road closures, but this was not necessary in Los Angeles because of the detention center's proximity to the courthouse.⁵⁸⁸

Royal Canadian Mounted Police

A minor international incident erupted in March 2000 as Ressam's attorneys prepared for trial.⁵⁸⁹ The Western District of Washington's Federal Public Defender's office agreed to accept service on Ressam's behalf of three seizure notices from the Royal Canadian Mounted Police.⁵⁹⁰ Two attorneys and an investigator traveled to Montreal to investigate the seizures, and they obtained from the court there copies of documents in the related files.⁵⁹¹ Apparently, the documents were disclosed to Ressam's attorneys in error, and they were taken back from the attorneys at the airport.⁵⁹² The U.S. government moved for return of all copies of the documents and for an order prohibiting Ressam's attorneys from discussing them with their client.⁵⁹³ Both parties submitted affidavits, and Ressam's attorneys submitted a sealed ex parte affidavit "concerning purpose of review of Montreal court files."⁵⁹⁴

The federal defender pointed out that an order barring discussion with his client would present his attorneys with a conflict of interest potentially requiring withdrawal from the case: either they could serve their client and

587. Mike Carter, *Jury Selection to Begin Today in Ressam Trial*, Seattle Times, Mar. 12, 2001, at B1; Steve Miletich, *Security Cited as Judge Moves Ressam Trial to L.A.*, Seattle Times, Mar. 4, 2000, at A1; Murphy, *supra* note 586; Porterfield, *supra* note 586.

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

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

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

590. See Oliver Affidavit, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000), D.E. 75.

591. See Document Return Motion Response, *id.* (Mar. 23, 2000), D.E. 74; Steve Miletich, *Man in Alleged Bomb Plot to Enter Lesser Plea*, Seattle Times, Mar. 16, 2000, at B2; Sunde, *supra* note 589.

592. See Document Return Motion, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000), D.E. 66; Miletich, *supra* note 589; Sunde, *supra* note 589.

593. Document Return Motion, *supra* note 592; see Miletich, *supra* note 589.

594. Document Return Motion Response, *supra* note 591; Document Return Motion, *supra* note 592.

risk sanctions or they could obey the order and disserve their client.⁵⁹⁵ After a hearing, Judge Coughenour ruled that the matter was moot because Ressam's attorneys no longer had copies of the documents.⁵⁹⁶ The judge told the attorneys that they could use the information from the Canadian files, but only as a last resort and without disclosing to Ressam its origin.⁵⁹⁷

Ressam's Trial

A couple of weeks before trial, on February 28, 2001, a 6.8-magnitude earthquake hit the Seattle area,⁵⁹⁸ so a status conference held the next day was held at the SeaTac detention facility where Ressam was housed.⁵⁹⁹

Jury selection began in Los Angeles on March 12, 2001.⁶⁰⁰ After a little more than seven hours of voir dire, a jury was selected from forty-four prospective jurors.⁶⁰¹ Opening arguments and the first witnesses were presented on the next day.⁶⁰²

On the first day of trial, a government witness presented a map seized from Ressam's Montreal apartment with Los Angeles International Airport and two other local airports circled.⁶⁰³ Discovery of this map had been reported by news media nearly two months previously.⁶⁰⁴

On April 6, 2001, the jury convicted Ressam on all counts.⁶⁰⁵ On the same day, he and twenty-three others were sentenced by a French judge,

595. Document Return Motion Response, *supra* note 591; see Mike Carter, *Ressam Lawyers May Use Secret Files*, Seattle Times, Mar. 24, 2000, at B3.

596. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000), D.E. 80; see Carter, *supra* note 595.

597. See Carter, *supra* note 595; Sunde, *supra* note 589.

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

599. Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 1, 2001, filed Mar. 8, 2001), D.E. 208 [hereinafter Mar. 1, 2001, *Ressam* Transcript].

600. Minutes, *id.* (Mar. 12, 2001), D.E. 226; see Carter, *supra* note 587; *Jury Selection Begins in Terrorism Trial*, N.Y. Times, Mar. 13, 2001, at A17.

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

602. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 13, 2001), D.E. 232; see Booth, *supra* note 562; Janofsky, *supra* note 574.

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

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

605. *United States v. Ressam*, 679 F.3d 1069, 1071 & n.1, 1074 (9th Cir. 2012); *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); *Haouari v. United States*, 429 F. Supp.

before whom Ressam was tried in absentia, to five years in prison for conspiracy to support Islamic militants.⁶⁰⁶

Abdelghani Meskini and Mokhtar Haouari

Abdelghani Meskini's Brooklyn telephone number was found when Ressam was arrested.⁶⁰⁷ Meskini, who reportedly lived as a con man and thief, was once an Algerian army officer, and he came to the United States as a stowaway in about 1994.⁶⁰⁸

Apparently Meskini flew to Seattle on December 11, 1999, to meet Ressam.⁶⁰⁹ Because Ressam was a no-show, Meskini flew back to New York on December 16.⁶¹⁰ On the basis of his number's being in Ressam's car, the Foreign Intelligence Surveillance Court authorized surveillance of Meskini's telephone.⁶¹¹ Meskini was arrested early in the morning on December 30 at his home as a suspected accomplice of Ressam.⁶¹²

2d 671, 677 (S.D.N.Y. 2006); Docket Sheet, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); see Adams, *supra* note 581; William Booth, *Algerian Convicted on Terror Charges*, Wash. Post, Apr. 7, 2001, at A1; Mike Carter, *Ressam Guilty on All Counts*, Seattle Times, Apr. 7, 2001, at A1; Thomas J. Lueck, *Algerian Is Found Guilty in Plot to Bomb Sites in the U.S.*, N.Y. Times, Apr. 7, 2001, at A9; Josh Meyer, *Man Convicted of Taking Part in Bomb Plot*, L.A. Times, Apr. 7, 2001, at 1; Sam Skolnik & Scott Sunde, *Ressam Guilty of Terrorism*, Seattle Post-Intelligencer, Apr. 7, 2001, at A1; see also Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Apr. 4, 2001, filed Oct. 11, 2005), D.E. 396 (jury instructions).

606. See Booth, *supra* note 605; Carter, *supra* note 605; Meyer, *supra* note 605; Skolnik & Sunde, *supra* note 605.

607. See Booth, *supra* note 605; Mike Carter, *Feds Link Ressam to Terror Camps*, Seattle Times, Mar. 9, 2001, at A1; *Trail of a Terrorist*, *supra* note 561; Meyer, *supra* note 561; Steve Miletich & Mike Carter, *Ressam Linked to Terrorist Group*, Seattle Times, Dec. 31, 1999, at A1; Benjamin Weiser, *New Trouble for Terrorist Who Helped Prosecutors*, N.Y. Times, July 31, 2010, at A12; Wright, *supra* note 561, at 337.

608. See Weiser, *supra* note 607.

609. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 581; Meyer, *supra* note 561; Miletich & Carter, *supra* note 607; David A. Vise, *Algerian Arrested Dec. 24*, Wash. Post, Jan. 4, 2000, at A2.

610. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 581; Meyer, *supra* note 561; Miletich & Carter, *supra* note 607; Vise, *supra* note 609.

611. See Walter Pincus, *Judge Discusses Details of Work on Secret Court*, Wash. Post, June 26, 2007, at A4; see also Mar. 1, 2001, *Ressam* Transcript, *supra* note 599.

612. *Haouari*, 429 F. Supp. 2d at 677; United States v. *Haouari*, No. 1:00-cr-15, 2000 WL 1593345, at *1 (S.D.N.Y. Oct. 25, 2000); see Adams, *supra* note 581; *Trail of a Terrorist*, *supra* note 561; Kifner & Rashbaum, *supra* note 571; Meyer, *supra* note 561; Miletich & Carter, *supra* note 607; Vise, *supra* note 609.

On January 6, 2000, a sealed indictment was filed in the Southern District of New York against Mokhtar Haouari, a former schoolmate of Meskini's in Algeria.⁶¹³ He was arrested four days later in Montreal; another three days after that, the indictment was superseded to add Meskini as a defendant.⁶¹⁴ The court assigned the case to Judge John F. Keenan.⁶¹⁵

Based in part on surveillance of Meskini's telephone conversations, Haouari was charged with coordinating Ressam's bomb plot.⁶¹⁶ Haouari waived extradition proceedings and agreed to be tried in the United States, where he was arraigned on August 14.⁶¹⁷

On March 7, 2001, Meskini pleaded guilty and agreed to cooperate with the prosecution.⁶¹⁸ As Ressam's sentencing date approached, Meskini agreed to cooperate with the prosecution of Haouari, and Ressam's sentencing was postponed.⁶¹⁹

On January 23, 2004, Meskini was sentenced to six years in prison, with credit for time served.⁶²⁰ Released in 2005, his application for the wit-

613. Docket Sheet, *United States v. Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 10, 2000) [hereinafter *Haouari* Docket Sheet] (D.E. 1); see Adams, *supra* note 581; Craig Pyes, *Canada Adds Details on Algerians' Suspected Bomb Plot*, N.Y. Times, Jan. 21, 2000, at A3.

614. *Haouari* Docket Sheet, *supra* note 613 (D.E. 3); see Adams, *supra* note 581; Benjamin Weiser & Craig Pyes, *U.S., in Pursuit of Bomb Plot, Indicts Man Held in Canada*, N.Y. Times, Jan. 19, 2000, at A1.

615. *Haouari* Docket Sheet, *supra* note 613.

Tim Reagan interviewed Judge Keenan for this case study in his chambers on November 6, 2009.

616. See Meyer, *supra* note 561; Pyes, *supra* note 613.

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

618. *United States v. Ressam*, 679 F.3d 1069, 1074–75 (9th Cir. 2012); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); *United States v. Haouari*, No. 1:00-cr-15, 2001 WL 1154714, at *1 (S.D.N.Y. Sept. 28, 2001); see Adams, *supra* note 581; Carter, *supra* note 607; Dan Eggen, *Algerian Guilty in Plot to Bomb Landmarks in U.S.*, Wash. Post, Mar. 9, 2001, at A3; Alan Feuer, *Man Pleads Guilty to Role in Millennial Terrorism Plot*, N.Y. Times, Mar. 10, 2001, at B2; Goldman, *supra* note 571; Meyer, *supra* note 561; Sam Skolnik, *A Guilty Plea to Aiding Ressam*, Seattle Post-Intelligencer, Mar. 9, 2001, at B1; Weiser, *supra* note 607.

619. See *Trail of a Terrorist*, *supra* note 561; Laura Mansnerus & Judith Miller, *Bomb Plot Insider Details Training*, N.Y. Times, July 4, 2001, at A1; Sam Skolnik & Paul Shukovsky, *Ressam: Seattle No Target*, Seattle Post-Intelligencer, May, 21, 2001, at A1; see also Transcript, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. July 27, 2005, filed Aug. 4, 2005), D.E. 384 [hereinafter July 27, 2005, *Ressam* Transcript] (discussing Ressam's cooperation); Transcript, *id.* (Apr. 27, 2005, filed Sept. 9, 2005), D.E. 394 [hereinafter Apr. 27, 2005, *Ressam* Transcript] (same).

620. *Haouari* Docket Sheet, *supra* note 613 (D.E. 96); see Weiser, *supra* note 607.

ness protection program was rejected.⁶²¹ With the government's approval, he got a job in Atlanta as a building manager for an apartment complex known to be "a hotbed of criminal activity, where narcotics sales and prostitution occurred openly and persistently."⁶²² In October 2010, he was sentenced to two years and seven months for an attempt to acquire an AK-47 assault rifle.⁶²³ He was sentenced in Georgia to another year in January 2018 for possession of another firearm.⁶²⁴ On March 14, 2018, Middle District of Georgia District Judge Clay D. Land denied Meskini's habeas corpus petition seeking relief from immigration detention.⁶²⁵

At Haouari's trial, on July 3, 2001, Ressam testified that he and accomplices had planned to bomb Los Angeles International Airport on New Year's Eve.⁶²⁶ He said that he planned to explode a suitcase filled with fertilizer and nitric acid.⁶²⁷

In order to keep the witness Ressam separate from the defendant Haouari, each was brought to Judge Keenan's courtroom by a different elevator.⁶²⁸ There was one other courtroom on the same floor as Judge Keenan's, and separate prisoner elevators served the two courtrooms.⁶²⁹ Ressam was brought up in the other courtroom's elevator.⁶³⁰

621. See Weiser, *supra* note 607.

622. Opinion at 3, *United States v. Haouari*, No. 1:00-cr-15 (S.D.N.Y. Oct. 27, 2010), D.E. 130, 2010 WL 4345748.

623. *Haouari* Docket Sheet, *supra* note 613; see Benjamin Weiser, "Millennium Plot" Terrorist Reimprisoned in Gun Case, *N.Y. Times*, Oct. 30, 2010, at A16.

624. Judgment, *United States v. Beltran*, No. 1:13-cr-2 (N.D. Ga. Jan. 5, 2018), D.E. 64; see Indictment, *id.* (Jan. 3, 2013), D.E. 1; see also Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting release from prison on January 10, 2018, reg. no. 44712-054).

625. Opinion, *Meskini v. Attorney Gen.*, No. 4:14-cv-42 (M.D. Ga. Mar. 14, 2018), D.E. 151, 2018 WL 1321576.

626. *United States v. Ressam*, 679 F.3d 1069, 1074 (9th Cir. 2012); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see *Trail of a Terrorist*, *supra* note 561; Josh Meyer, *Terrorist Says Plans Didn't End with LAX*, *L.A. Times*, July 4, 2001, at 1; Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target*, *Wash. Post*, July 4, 2001, at A2; see also Mike Carter & Steve Miletich, *Ressam: L.A. Airport Was Target*, *Seattle Times*, May 30, 2001, at A1 (reporting that Ressam had told Haouari's prosecutors that the Los Angeles airport was his target); Josh Meyer, *Millennium Terrorist Now Detailing Plot*, *Sources Say*, *L.A. Times*, May 30, 2001, at 1 (same).

627. See *Trail of a Terrorist*, *supra* note 561; Powell & Haughney, *supra* note 626.

628. Interview with Judge John F. Keenan, Nov. 6, 2009.

629. *Id.*

630. *Id.*

Haouari found Ressam's testimony so upsetting that he repeatedly banged his head against the counsel table.⁶³¹ In time, he knocked himself out.⁶³² Judge Keenan had to excuse the jury and seek medical attention for the defendant.⁶³³

One juror, who worked as a waitress, had to be replaced when at work she recognized a journalist covering the trial and struck up a conversation with him about it.⁶³⁴

On July 13, the jury acquitted Haouari of aiding and abetting what became known as the millennium bombing plot, but convicted him of conspiracy and fraud.⁶³⁵ On January 16, 2002, Judge Keenan sentenced Haouari to twenty-four years in prison.⁶³⁶ A year later, the court of appeals affirmed the conviction and the sentence.⁶³⁷ Haouari was released on July 17, 2020.⁶³⁸

Ressam's Sentencing

On July 27, 2005, at the conclusion of Ressam's cooperation with investigations and prosecutions,⁶³⁹ Judge Coughenour sentenced Ressam to twenty-two years in prison.⁶⁴⁰

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.*

635. *Haouari v. United States*, 510 F.3d 350, 351 (2d Cir. 2007); *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); *United States v. Haouari*, No. 1:00-cr-15, 2001 WL 1154714, at *1 (S.D.N.Y. Sept. 28, 2001); see Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. Times, Jan. 17, 2002, at A26; Christine Haughney, *Third Algerian Convicted in Bombing Plot*, Wash. Post, July 14, 2001, at A22; Laura Mansnerus, *Man Is Guilty in Bomb Plot at Millennium*, N.Y. Times, July 14, 2001, at B1; Josh Meyer, *LAX Bombing Plot Figure Is Convicted*, L.A. Times, July 14, 2001, at 8.

636. *Haouari*, 429 F. Supp. 2d at 673; *United States v. Ressam*, 679 F.3d 1069, 1075 (9th Cir. 2012); see Fritsch, *supra* note 635; John J. Goldman, *Algerian Gets Prison in LAX Bomb Plot*, L.A. Times, Jan. 17, 2002, at 13.

637. *Meskini*, 319 F.3d 88; *Haouari*, 429 F. Supp. 2d at 673; see Benjamin Weiser, *Conviction Upheld in Bomb Plot*, N.Y. Times, Jan. 28, 2003, at B7.

638. BOP Locator, *supra* note 624 (2020, reg. no. 44949-054)

639. Judge Coughenour observed that the gentler approach of Seattle-based investigators was more effective in obtaining Ressam's cooperation than the more aggressive approach of New York-based investigators, who took over during the prosecution of Haouari. Interview with Judge John C. Coughenour, Oct. 3, 2008; see also Mike Carter, *Mystery FBI Agent Revealed*, Seattle Times, Nov. 15, 2012, at A1 ("Special Agent Fred Humphries was outspoken in opposing the FBI's decision at the time to turn Ressam over

A year and a half later, the court of appeals reversed Ressam's conviction on one count, for carrying explosives while committing a felony, reasoning that carrying explosives did not relate to the felony of signing a false name on a customs declaration.⁶⁴¹ The court remanded the case for resentencing.⁶⁴²

On December 7, 2007, the Supreme Court agreed to review the court of appeals' decision.⁶⁴³ On March 25, 2008, Attorney General Michael B. Mukasey, who, as a judge, had presided over the prosecution of blind Sheik Omar Abdel Rahman,⁶⁴⁴ argued the government's case to reinstate the conviction.⁶⁴⁵ The Supreme Court agreed with the argument and reinstated the conviction on May 19.⁶⁴⁶

to agents from New York after the attacks, and warned their tough tactics were undoing the cooperation Humphries had coaxed out of the al-Qaida-trained terrorist.”).

640. *Ressam*, 679 F.3d at 1076–78; *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); July 27, 2005, *Ressam* Transcript, *supra* note 619; see Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, *Seattle Times*, July 28, 2005, at A1; Jonathan Hafetz, *Habeas Corpus After 9/11* 209 (2011); Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced to 22 Years*, *N.Y. Times*, July 28, 2005, at A20; Paul Shukovsky, *22 Years*, *Seattle Post-Intelligencer*, July 28, 2005, at A1; Tomas Alex Tizon & Lynn Marshall, *Would-Be Millennium Bomber Ressam Gets 22-Year Sentence*, *L.A. Times*, July 28, 2005, at 10.

641. *Ressam*, 474 F.3d at 598–604; see *Ressam*, 679 F.3d at 1078; see Hal Bernton & Mike Carter, *Appeals Court Throws Out 1 Ressam Felony Conviction*, *Seattle Times*, Jan. 17, 2007, at B3; Paul Shukovsky, *Court Reverses 1 Count Against Ressam*, *Seattle Post-Intelligencer*, Jan. 17, 2007, at B1; Jennifer Steinhauer, *Appeals Court Vacates Term of Algerian in Bomb Plot*, *N.Y. Times*, Jan. 17, 2007, at A13; Henry Weinstein, *Court Voids Sentence in LAX Plot*, *L.A. Times*, Jan. 17, 2007, at 8.

642. *Ressam*, 474 F.3d at 604; see *Ressam*, 679 F.3d at 1078; see also Shukovsky, *supra* note 641.

Judge Marsha S. Berzon joined Judge Pamela Ann Rymer's opinion for the court, but Judge Arthur L. Alarcón dissented from the reversal of the conviction and determined that Ressam's sentence was too lenient. *Ressam*, 474 F.3d at 604–08 (Judge Alarcón, dissenting). Six judges dissented from the court's denying en banc rehearing. *United States v. Ressam*, 491 F.3d 997 (9th Cir. 2007).

Judge Rymer died on September 21, 2011, and Judge Alarcón died on January 28, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

643. *United States v. Ressam*, 552 U.S. 1074 (2007); See Robert Barnes, *Cases of 2 U.S. Citizens in Iraq to Be Heard*, *Wash. Post*, Dec. 8, 2007, at A2; Linda Greenhouse, *Americans Held in Iraq Draw Justices' Attention*, *N.Y. Times*, Dec. 8, 2007, at A15.

644. See Chapter 1: First World Trade Center Bombing, *supra* page 5.

645. See Carrie Johnson & Robert Barnes, *After a Lifetime in Law, a First Day in Court*, *Wash. Post*, Mar. 26, 2008, at A4; David G. Savage, *Justices Hear Terrorism Cases*,

On December 3, Judge Coughenour resentenced Ressam to twenty-two years in prison.⁶⁴⁷ On February 2, 2010, a three-judge panel of the court of appeals determined that the sentence was too lenient and remanded the case for resentencing by a different judge.⁶⁴⁸ Over the dissent of four judges, on March 12, 2012, an eleven-judge en banc panel agreed that the sentence was unreasonably lenient, but the en banc panel remanded the case to Judge Coughenour for resentencing.⁶⁴⁹ Judge Coughenour resentenced Ressam on October 24 to thirty-seven years.⁶⁵⁰

L.A. Times, Mar. 26, 2008, at 17; Philip Shenon, *Mukasey Goes to Court to Argue a Terrorism Case*, N.Y. Times, Mar. 26, 2008.

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

646. United States v. Ressam, 553 U.S. 272 (2008); see Ressam, 679 F.3d at 1078; see also William Branigin, *High Court Affirms Terrorism Conviction*, Wash. Post, May 20, 2008, at A6; Linda Greenhouse, *Court Upholds Child Pornography Law, Despite Free Speech Concerns*, N.Y. Times, May 20, 2008, at A17; *Justices Rule Against Ressam in Terror Case*, Seattle Post-Intelligencer, May 20, 2008, at B2; David G. Savage, *Full Prison Term Restored for "Millennium Bomber,"* L.A. Times, May 20, 2008, at 11.

647. Amended Judgment, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Dec. 3, 2008), D.E. 424; Ressam, 679 F.3d at 1071, 1078–84; see Mike Carter, *Ressam Recants Everything Said as an Informant*, Seattle Times, Dec. 4, 2008, at A1; Paul Shukovsky, *Ressam Sentence Reinstated*, Seattle Post-Intelligencer, Dec. 4, 2008, at B1.

648. United States v. Ressam, 629 F.3d 793 (9th Cir.) (opinion by Judge Arthur L. Alarcón, joined by Judge Richard R. Clifton; Judge Ferdinand F. Fernandez dissented from both the reversal of the sentence and the reassignment to a different judge), *amending* 593 F.3d 1095 (9th Cir. 2010); Ressam, 679 F.3d at 1085; see Hafetz, *supra* note 640, at 209; John Schwartz, *Appeals Court Throws Out Sentence in Bombing Plot, Calling It Too Light*, N.Y. Times, Feb. 3, 2010, at A15; Jennifer Sullivan, *Court: Ressam Sentence "Failed to Protect Public,"* Seattle Times, Feb. 3, 2010, at A1; Carol J. Williams, *22-Year Term in LAX Bomb Plot Overturned*, L.A. Times, Feb. 3, 2010, at 9.

649. Ressam, 679 F.3d at 1071–72, 1088–97 & n.11; see Ian Lovett, *Appeals Court Overturns Millennium Bomb-Plot Sentence as Too Lenient*, N.Y. Times, Mar. 13, 2012, at A13; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 524–25 (2014); Jennifer Sullivan, *Terrorist Ressam's Sentence Too Short, Appeals Court Says*, Seattle Times, Mar. 13, 2012, at B1; Carol J. Williams, *Sentence Overturned in LAX Plot*, L.A. Times, Mar. 13, 2012.

650. Sentencing Order, Ressam, No. 2:99-cr-666 (W.D. Wash. Oct. 24, 2012), D.E. 458; Transcript, *id.* (Oct. 24, 2012, filed Oct. 30, 2012), D.E. 462; see Mike Carter, *Ressam Gets 37 Years at Resentencing in Millennial Bomb Plot*, Seattle Times, Oct. 25, 2012, at B1; Kirk Johnson, *New Sentence Is Imposed in Bomb Plot from 1999*, N.Y. Times, Oct. 25, 2012, at A18; Kim Murphy, *LAX Bomb Plotter Gets 37 Years*, L.A. Times, Oct. 25, 2012, at 7; BOP Locator, *supra* note 624 (noting a release date of July 1, 2032, reg. no. 29638-086);

Challenge: Classified Evidence

Invoking the Classified Information Procedures Act (CIPA),⁶⁵¹ the government asked Judge Coughenour to review classified documents to determine whether or not they were discoverable.⁶⁵² Judge Coughenour reviewed the documents without the assistance of a law clerk, because there was not enough time to obtain top-secret clearance for a clerk.⁶⁵³ The documents were delivered to the judge by a classified information security officer and reviewed by the judge under the security officer's watch.⁶⁵⁴ They were stored in a safe to which the officer, and not the judge, had access.⁶⁵⁵ Judge Coughenour decided that the documents were not discoverable.⁶⁵⁶

Challenge: Foreign Evidence

The government sought testimony of witnesses in Canada, beyond the court's subpoena power, who were unwilling to travel to the United States to offer testimony.⁶⁵⁷ So, by stipulation of the parties, Judge Coughenour traveled to Canada to preside over video depositions in both Montreal and Vancouver to obtain the testimony.⁶⁵⁸ A Canadian court official attended

see also Mike Carter, *U.S. Won't Appeal Ressam's Sentence*, Seattle Times, Nov. 29, 2012, at B3 (reporting that the government decided not to appeal the sentence).

651. 18 U.S.C. app. 3 (2020) (text of CIPA); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

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

653. Interview with Judge John C. Coughenour, Oct. 3, 2008.

654. *Id.*; see Reagan, *supra* note 651, at 21–22 (providing information about classified information security officers).

655. Interview with Judge John C. Coughenour, Oct. 3, 2008.

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

656. Interview with Judge John C. Coughenour, Oct. 3, 2008.

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

658. See Mar. 1, 2001, *Ressam Transcript*, *supra* note 599; see also Skolnik, *supra* note 657.

to rule on potential issues of Canadian law.⁶⁵⁹ Ressam participated by video conference from his jail cell with the assistance of an Arabic interpreter.⁶⁶⁰

On one occasion, after Judge Coughenour had traveled to Canada for the deposition, a Canadian judge ruled, at a proceeding from which Judge Coughenour was excluded, that the witness did not have to testify.⁶⁶¹

Some of the witnesses subsequently indicated that they might be willing to testify live at Ressam's trial, but the parties agreed that either side could substitute deposition video tapes.⁶⁶²

Challenge: Court Security

At Ressam's first appearance in court in Seattle, on December 17, 1999, "Security was so tight at the courthouse that anyone entering—even employees—had to produce a photo identification. A phalanx of U.S. marshals also blocked the door to [U.S. Magistrate Judge David] Wilson's courtroom and armed officers patrolled the streets as Ressam was brought to the courthouse."⁶⁶³

For Ressam's trial also, security at the Roybal courthouse in Los Angeles was enhanced, including added patrols, bomb-sniffing dogs, and inspections of cars entering the underground garage.⁶⁶⁴

Challenge: Jury Security

Judge Coughenour was not asked to use an anonymous jury; he had never used one.⁶⁶⁵ But jurors did not report directly to the courthouse; instead they met at a secret location from which they were transported to the courthouse by deputy marshals.⁶⁶⁶

659. See Mar. 1, 2001, *Ressam* Transcript, *supra* note 599.

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

661. Apr. 27, 2005, *Ressam* Transcript, *supra* note 619; Interview with Judge John C. Coughenour, Oct. 3, 2008.

662. Interview with Judge John C. Coughenour, Oct. 3, 2008; see Mar. 1, 2001, *Ressam* Transcript, *supra* note 599.

663. Sunde & Porterfield, *supra* note 561.

Judge Wilson retired on February 27, 2000. *Judicial Milestones*, The Third Branch, Apr. 2000, at 8.

664. See Carter, *supra* note 601.

665. Interview with Judge John C. Coughenour, Oct. 3, 2008.

666. *Id.*

Challenge: Witness Security

On March 29, 2001, Meskini testified at Ressam's trial.⁶⁶⁷ He was brought to the courtroom through a side door.⁶⁶⁸

Judge Coughenour overruled the government's attempts to protect the identity of another witness, such as by taking testimony remotely or behind a screen and withholding background information, and the government decided not to use the witness.⁶⁶⁹

667. See Adams, *supra* note 581; Booth, *supra* note 605; Steve Miletich, *Key Witness Testifies Against Ressam*, Seattle Times, Mar. 30, 2001, at B1; Sam Skolnik, *U.S. Puts Reputed Fraud on the Stand*, Seattle Post-Intelligencer, Mar. 30, 2001, at B1.

668. See Miletich, *supra* note 667.

669. Interview with Judge John C. Coughenour, Oct. 3, 2008.

Chapter 4

Mujahedeen Khalq

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

Sentencing for solicitation of charitable contributions to a terrorist organization, which occurred a dozen years after indictment, was complicated by a pending government decision to no longer consider the organization a terrorist organization. The sentencing judge and his law clerks were given access to sensitive ongoing diplomatic communications.

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After a three-year investigation, on three criminal complaints filed in the Central District of California on February 26, 2001, the FBI arrested five Iranians and two Iranian Americans at various Los Angeles locations on February 27.⁶⁷⁰ They were charged with providing material support to Mujahedeen Khalq, also known as MEK, which the State Department classified as a terrorist organization on October 8, 1997.⁶⁷¹ MEK arose in the 1960s and 1970s in opposition to the shah of Iran.⁶⁷² It came to be a regular solicitor of donations at airports, including the Los Angeles International

670. Docket Sheet, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001) [hereinafter *Afshari* Docket Sheet] (D.E. 1); Docket Sheet, *United States v. Rahmani*, No. 2:01-mj-393 (C.D. Cal. Feb. 26, 2001); see Soraya Sarhaddi Nelson, *7 Accused of Raising Funds for Terrorists*, L.A. Times, Mar. 1, 2001, at 3.

671. *United States v. Afshari*, 426 F.3d 1150, 1152–53 (9th Cir. 2005); *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152 (D.C. Cir. 2004) (declining to overturn the redesignation); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) (declining to overturn the redesignation); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (remanding redesignation for a due-process cure); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) (declining to overturn the designation); *United States v. Afshari*, 635 F. Supp. 2d 1110, 1113 (C.D. Cal. 2009); see Nelson, *supra* note 670.

672. *Afshari*, 426 F.3d at 1152; see Nelson, *supra* note 670.

“Depending on whom you ask, the People’s Jihadists [(the Mujahedeen Khalq)] are Iran’s government-in-waiting or a duplicitous terrorist cult that forbids sexual thought.” Patrick Kingsley, *A Peek Inside Iranian Dissidents’ Shadowy Camp in the Balkans*, N.Y. Times, Feb. 16, 2020, at 10.

Airport, ostensibly for charitable purposes.⁶⁷³ The defendants were charged with participating in those solicitation efforts.⁶⁷⁴

U.S. citizens Mohammad Omidvar and Navid Taj, also known as Najaf Eshkoftagi, were granted \$25,000 bail.⁶⁷⁵ Iranian Hossein Afshari's bail was set at \$100,000.⁶⁷⁶ The other Iranians—Roya Rahmani, also known as Tahmineh Tahamtan, the only woman, Hassan Rezaie, Moustafa Ahmady, and Alireza Mohammad Moradi—were denied pretrial release.⁶⁷⁷ The grand jury returned an indictment on March 13.⁶⁷⁸ Two days later, Rahmani's bail was set at \$500,000.⁶⁷⁹ In April, bail was set for Rezaie, Ahmady, and Moradi at \$60,000 each.⁶⁸⁰

On June 21, 2002, Judge Robert M. Takasugi dismissed the indictment.⁶⁸¹ Judge Takasugi determined that the statute authorizing the designation of MEK as a terrorist organization was unconstitutional:

[The statute admits] of no other interpretation but that the organization to be designated is precluded from challenging the facts contained in the administrative record or presenting evidence to rebut the proposition that it is a terrorist organization. Such provisions are unconstitutional as violative of due process and render [the statute] facially invalid.⁶⁸²

The court of appeals reversed the dismissal in a series of opinions from December 2004 through October 2005.⁶⁸³

On June 14, 2005, and November 29, 2007, the government filed superseding indictments, the latter adding Mohammad Bigdeli and Elham Kiamanesh as fugitive defendants.⁶⁸⁴

673. See Nelson, *supra* note 670.

674. *Afshari*, 635 F. Supp. 2d at 1112–13.

675. *Afshari* Docket Sheet, *supra* note 670 (D.E. 31, 60).

676. *Id.* (D.E. 54).

677. *Id.* (D.E. 9, 18, 19, 42, 43, 52, 53).

678. Indictment, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001), D.E. 65.

679. *Afshari* Docket Sheet, *supra* note 670 (D.E. 77).

680. *Id.* (D.E. 132).

681. *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002), *rev'd*, 426 F.3d 1150 (9th Cir. 2005); *United States v. Afshari*, 635 F. Supp. 2d 1110, 1113–14 (C.D. Cal. 2009); see Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22, 2002, at 1.

682. *Rahmani*, 209 F. Supp. 2d at 1058.

683. *Afshari*, 426 F.3d 1150 (on rehearing); *United States v. Afshari*, 412 F.3d 1071 (9th Cir. 2005) (amended opinion); *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004) (opinion withdrawn); *Afshari*, 635 F. Supp. 2d at 1114.

The court transferred the case from Judge Takasugi in Los Angeles to Judge David O. Carter in Santa Ana on February 23, 2009.⁶⁸⁵ Judge Takasugi died on August 4.⁶⁸⁶

On March 10 from 5:00 to 9:00 p.m. and on March 11 from 6:00 p.m. until past midnight, Judge Carter held a status conference with all counsel and defendants in preparation for an April trial.⁶⁸⁷ Among the matters covered were the judge's learning how to pronounce the participants' names, a review of witnesses to be called, and preparation of a jury questionnaire.⁶⁸⁸ On March 17 and 18, Judge Carter heard motions.⁶⁸⁹ On April 9, the government filed a third superseding indictment.⁶⁹⁰

Jury selection began on Friday, April 17.⁶⁹¹ Jury questionnaire review continued on Monday and Tuesday, with jury selection to resume on April 29.⁶⁹² On the morning of April 29, the parties announced that they were close to a settlement of the case.⁶⁹³ By 11:31 a.m., the parties were able to put plea agreements on the record.⁶⁹⁴ As a precaution, Judge Carter kept the jury at the courthouse during the plea colloquies.⁶⁹⁵

684. Second Superseding Indictment, *United States v. Afshari*, No. 2:01-cr-209 (C.D. Cal. Nov. 29, 2007), D.E. 677; First Superseding Indictment, *id.* (June 14, 2005), D.E. 339.

The fugitive defendants were dismissed on June 25, 2013. Order, *id.* (June 25, 2013), D.E. 1370.

685. Notice, *id.* (Feb. 23, 2009), D.E. 916; *Afshari*, 635 F. Supp. 2d at 1114.

For this case study, Tim Reagan interviewed Judge Carter and his law clerks Daniel Galindo and Robert Hodgson at the Santa Ana courthouse on October 16, 2012.

686. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

687. Transcripts, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 10 and 11, 2009, filed Mar. 11 and 13 and May 6, 2009), D.E. 945, 946, 950, 1130.

688. *Id.*

689. Transcripts, *id.* (Mar. 17 and 18, 2009, filed Mar. 18, 19, and 20, July 21, and Sept. 30, 2009), D.E. 962, 963, 966 to 968, 971, 975, 1168, 1169, 1204.

690. Third Superseding Indictment, *id.* (Apr. 9, 2009), D.E. 1034.

691. Minutes, *id.* (Apr. 17, 2009), D.E. 1086; Transcripts, *id.* (Apr. 17, 2009, filed Apr. 20, June 15, and July 8, 2009), D.E. 1082, 1153, 1159.

692. Minutes, *id.* (Apr. 20 and 21, 2009), D.E. 1092, 1093.

693. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009), D.E. 1132 (status conference).

694. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009), D.E. 1134 (change of plea); Minutes, *id.* (Apr. 29, 2009), D.E. 1120 to 1126; see Julie Cart, *7 Admit Raising Funds for Terrorists*, L.A. Times, Apr. 30, 2009, at 5; Kimberly Edds, *7 Plead Guilty to Raising Money for Terrorists*, Orange Cty. Reg., May 1, 2009, at B.

695. Interview with Judge David O. Carter, Oct. 16, 2012.

Judge Carter delayed sentencing because of political efforts to have MEK removed from the list of terrorist organizations.⁶⁹⁶ In September 2012, the secretary of state removed MEK from the terrorist organization list.⁶⁹⁷

On February 19, 2013, Judge Carter sentenced each defendant to three years of supervised release.⁶⁹⁸ On March 18, 2014, Judge Carter allowed the defendants to meet together on March 22 to celebrate the Iranian New Year.⁶⁹⁹ On April 3, 2015, Judge Carter granted six of the seven defendants early release from supervision.⁷⁰⁰

Challenge: Classified Evidence

In preparation for trial, the defendants filed a notice that they might introduce classified evidence,⁷⁰¹ and Judge Carter reviewed classified evidence for discoverability.⁷⁰²

The court's contacts with classified information became much more sensitive when Judge Carter determined that for sentencing purposes he needed to know how likely it was that MEK would be removed from the terrorist list.⁷⁰³ Judge Carter, therefore, determined that he and his law

696. *Id.*; see *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220 (D.C. Cir. 2010) (remanding redesignation for a due-process remedy); see also Dena Bunis, *Iranian Exiles Get Local Support*, Orange Cty. Reg., Sept. 9, 2008, at B. See generally Ali Gharib & Eli Clifton, *Long March of the Yellow Jackets: How a One-Time Terrorist Group Prevailed on Capitol Hill*, *The Intercept*, Feb. 26, 2015, firstlook.org/theintercept/2015/02/26/long-march-yellow/; Wadie E. Said, *Crimes of Terror* 51–57 (2015).

697. See Shashank Bengali, *U.S. to Adjust Terror List*, *L.A. Times*, Sept. 22, 2012, at 3; Scott Shane, *Star Lobbyists Help Iran Group Escape Shadow*, *N.Y. Times*, Sept. 22, 2012, at A1; Joby Warrick, *U.S. to Remove Iranian Exiles from Terrorist List*, *Wash. Post*, Sept. 22, 2012, at A14.

698. Judgments, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Feb. 19, 2013), D.E. 1337, 1339, 1341, 1343, 1345, 1347, 1349; Transcript, *id.* (Feb. 19, 2013, filed Mar. 1, 2017), D.E. 1456 (Rahmani); see Orders and Minutes, *id.* (Apr. 3, 2015), D.E. 1420 to 1431 (terminating supervised release for all but Omidvar); Minutes, *id.* (Dec. 1, 2014), D.E. (release revocation hearing for Omidvar; revocation in abeyance until January 25, 2016).

699. Order, *id.* (Mar. 18, 2014), D.E. 1392.

700. Minutes, *id.* (Apr. 3, 2015), D.E. 1421, 1425, 1428 to 1431; Transcript, *id.* (Apr. 3, 2015, filed Mar. 1, 2017), D.E. 1457; see *id.* at 6–8 (referring to a claim of supervision violation for Omidvar); Minutes, *id.* (Dec. 1, 2014), D.E. 1398 (same).

701. Notice, *id.* (Mar. 20, 2009), D.E. 973.

702. Transcript at 6–9, *id.* (Apr. 14, 2009, filed Apr. 15, 2009), D.E. 1060.

703. Interview with Judge David O. Carter, Oct. 16, 2012.

clerks needed access to very sensitive and timely diplomatic and counter-terrorism records.⁷⁰⁴

Judge Carter's law clerks and a court reporter received security clearances allowing them to view top-secret sensitive compartmented information (SCI).⁷⁰⁵ SCI must be stored in a sensitive compartmented information facility (SCIF).⁷⁰⁶ The Santa Ana courthouse did not have one, but the courthouse in Los Angeles did.⁷⁰⁷ Classified information designated secret and not SCI could be stored in an approved safe in the Santa Ana courthouse.⁷⁰⁸

704. *Id.*

705. *Id.*

706. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

707. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Dec. 19, 2012.

708. *Id.*

Chapter 5

Detroit

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

The first terrorism trial in the United States after the September 11, 2001, attacks was rife with prosecutorial misconduct. Although prosecution of the prosecutor was unsuccessful, Judge Gerald E. Rosen had to examine evidence at CIA headquarters and admonish the attorney general for violating the court's gag order.⁷⁰⁹

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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.⁷¹⁰ Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.⁷¹¹ Agents found fraudulent identifica-

709. Tim Reagan interviewed Judge Rosen for this case study in his chambers on December 7, 2006, and by telephone on January 3 and April 18, 2007. Judge Rosen retired on January 31, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

710. *Koubriti v. Convertino*, 593 F.3d 459, 462 (6th Cir. 2010) (finding prosecutorial immunity in one defendant's civil action); *United States v. Koubriti*, 305 F. Supp. 2d 723, 724–25, 727 (E.D. Mich. 2003) (sanctioning Attorney General John Ashcroft for false and public statements about the case in violation of the court's gag order); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003) (agreeing to partially close the jury voir dire); *United States v. Koubriti*, 199 F. Supp. 2d 656, 658–59 (E.D. Mich. 2002) (denying motions to suppress evidence acquired during the search of the apartment); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001) (denying bond release pending trial); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 21 (2008) [hereinafter *Trying Cases*] (remarks by Judge Rosen); see David Johnston, *3 Held in Detroit After Aircraft Diagrams Are Found*, N.Y. Times, Sept. 20, 2001, at B2; Philip Shenon & Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. Times, Nov. 1, 2001, at A1; Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001, at B1.

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

tion documents in the name of Youssef Hmimssa, a former roommate, who had asked the current residents to hold the documents for him.⁷¹² Koubriti and Hannan admitted that they knew that the documents were fraudulent.⁷¹³ They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.⁷¹⁴ Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.⁷¹⁵ Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.⁷¹⁶ Abdel Ilah Elmardoudi, a suspected ringleader in Chicago, also was indicted on March 27.⁷¹⁷ On August 28, 2002, the government added charges against the defendants for material support of terrorism.⁷¹⁸ The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Rosen.⁷¹⁹

31, 2008) [hereinafter *The Prosecutor*], www.thisamericanlife.org/radio-archives/episode/356/the-prosecutor.

Two days later, al-Marabh was arrested in Burbank, Illinois. See Shenon & Van Natta, *supra* note 710; 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.

712. *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 710; Shenon & Van Natta, *supra* note 710; *The Prosecutor*, *supra* note 711; Van Natta, *supra* note 710.

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

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

715. *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 710; Van Natta, *supra* note 710.

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

717. *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 711; *The Prosecutor*, *supra* note 711.

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.

718. *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.

719. Docket Sheet, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001) [hereinafter E.D. Mich. *Koubriti* Docket Sheet]; Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 Cardozo Pub. L. Pol’y & Ethics J. 101, 102 (2006) (“I presided over

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.⁷²⁰ In September 2005, he was sentenced to six years and six months in prison for document fraud.⁷²¹ He was deported to Morocco in 2007.⁷²²

This case was a high-profile case that received some national press coverage and a lot of local press coverage.⁷²³ The court selected 280 prospective jurors for the case, and Judge Rosen greeted them on March 18, 2003, with a speech disclosing the case on which they might serve and welcoming them to their opportunity to provide civic service.⁷²⁴

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.⁷²⁵ 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.⁷²⁶ Jurors were questioned individually, beginning with those "apparently suitable," in random order, and a jury was selected from the approximately sixty-five to eighty potential jurors in that group.⁷²⁷

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.

720. *Koubriti*, 305 F. Supp. 2d at 734; see *Koubriti v. Convertino*, 593 F.3d 459, 462 n.3 (6th Cir. 2010); *Koubriti*, 199 F. Supp. 2d at 658 n.1.

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

721. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 1, 2005), D.E. 633; see Cecil Angel, *Ex-Terrorism Trial Witness Gets Maximum Sentence*, Detroit Free Press, Sept. 2, 2005, at 6.

Hmimssa was released from prison on May 25, 2007. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 20451-424).

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

723. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

724. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 719 (noting voir dire from March 18 to 26, 2003); Gerald E. Rosen, *United States v. Koubriti: Preliminary Voir Dire* (Mar. 18, 2003), www.fjc.gov/sites/default/files/2014/TRMIE001.pdf (text of speech); Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

725. Gerald E. Rosen, *United States v. Koubriti: Jury Questionnaire* (Mar. 18, 2003), www.fjc.gov/sites/default/files/2014/TRMIE002.pdf; Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

726. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

727. *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.⁷²⁸

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.⁷²⁹ The defendant moved for a mistrial, but the government maintained that the document was not material.⁷³⁰ Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.⁷³¹

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 nonclassified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further, as the Government's filing also makes abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case.⁷³²

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

728. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *United States v. Koubriti*, 305 F. Supp. 2d 723, 736 (E.D. Mich. 2003); see *Koubriti v. Convertino*, 593 F.3d 459, 463 & n.7 (6th Cir. 2010); *United States v. Elmdoudi*, 501 F.3d 935, 938 (8th Cir. 2007); see also Hakim, *supra* note 720; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10; *The Prosecutor*, *supra* note 711.

Ali-Haimoud sued the publisher of *The Terrorist Recognition Handbook* for falsely identifying him, with a photograph, as a known Al-Qaeda member. Notice of Removal, *Ali-Haimoud v. Nance*, No. 2:04-cv-74737 (E.D. Mich. Dec. 3, 2004), D.E. 1. The case was remanded to state court on stipulation that the plaintiff would neither seek nor accept more than \$75,000 in damages. Stipulation, *id.* (Apr. 26, 2005), D.E. 11.

729. *United States v. Koubriti*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004); *United States v. Koubriti*, 297 F. Supp. 2d 955, 958–61 (E.D. Mich. 2004); *Trying Cases*, *supra* note 710, at 22 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463; see also *The Prosecutor*, *supra* note 711.

730. Interviews with Judge Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

731. *Trying Cases*, *supra* note 710, at 23 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463; see also *The Prosecutor*, *supra* note 711.

732. *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.").

avoided any evidence or information which contradicted or undermined that view.”⁷³³

In a criminal trial over which Judge Arthur J. Tarnow presided, the prosecutor and a government witness were acquitted of wrongdoing.⁷³⁴

As a result of the withheld evidence, at the request of both the government and the defense, on September 2, 2004, the court dismissed the terrorism charges against Koubriti and Elmardoudi and ordered a new trial on the fraudulent-document charges against Koubriti, Elmardoudi, and Hannan.⁷³⁵ The government elected not to pursue further the charges tried.⁷³⁶

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.⁷³⁷ Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of

733. *Id.* at 681; see Hakim, *supra* note 719 (quoting text).

734. Jury Verdict, *United States v. Convertino*, No. 2:06-cr-20173 (E.D. Mich. Oct. 31, 2007), D.E. 195; *Koubriti*, 593 F.3d at 464; *Trying Cases*, *supra* note 710, at 23 (remarks by Judge Rosen); see Spencer S. Hsu, *Ex-Prosecutor, Security Officer Cleared in Terrorism Case*, Wash. Post, Nov. 1, 2007, at A3; Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, N.Y. Times, Nov. 1, 2007, at A17; *The Prosecutor*, *supra* note 711.

Tim Reagan interviewed Judge Tarnow for this case study by telephone on October 3, 2012. Judge Tarnow died on January 21, 2022. FJC Biographical Directory, *supra* note 709.

735. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *Koubriti*, 336 F. Supp. 2d at 682; *Trying Cases*, *supra* note 710, at 23 (remarks by Judge Rosen); see *Koubriti*, 593 F.3d at 463–64; *United States v. Elmdoudi*, 501 F.3d 935, 938 & n.4 (8th Cir. 2007); see also Hakim, *supra* note 719; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15; *The Prosecutor*, *supra* note 711.

736. *United States v. Koubriti*, 435 F. Supp. 2d 666, 670 & n.5 (E.D. Mich. 2006); Order to Dismiss Third Superseding Indictment, *United States v. Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Jan. 18, 2005), D.E. 591; see *The Prosecutor*, *supra* note 711.

737. *Koubriti*, 509 F.3d at 748; Fourth Superseding Indictment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Dec. 15, 2004), D.E. 580; see *Koubriti*, 593 F.3d at 464; *Koubriti*, 435 F. Supp. 2d at 668, 670; see also *Terror Case Is Switched to Fraud Charges*, Wash. Post, Dec. 16, 2004, at A10.

When federal agents first searched Koubriti and Hannan’s apartment, they noticed airport-employee badges, which the agents regarded as alarming evidence. *United States v. Koubriti*, 199 F. Supp. 2d 656, 660 (E.D. Mich. 2002); *United States v. Koubriti*, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001); see Johnston, *supra* note 710; *The Prosecutor*, *supra* note 711. 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 710.

time served and deportation to Morocco.⁷³⁸ The court released Koubriti on bond on October 12, 2004.⁷³⁹ Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.⁷⁴⁰ On February 9, 2010, Judge Rosen granted the government's motion to dismiss Koubriti's indictment for successful completion of pretrial diversion.⁷⁴¹

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.⁷⁴² The district court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,⁷⁴³ and the case settled.⁷⁴⁴ Koubriti then sued his prosecutors for malicious prosecution,⁷⁴⁵ but the Sixth Cir-

738. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Mar. 22, 2005), D.E. 612; Plea Agreement, *id.* (Mar. 22, 2005), D.E. 611; *see also Koubriti*, 435 F. Supp. 2d at 668 n.1 (noting Hannan's deportation).

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

740. *Koubriti*, 509 F.3d 746 (holding that a retrial after a mistrial is not double jeopardy), *cert. denied*, 552 U.S. 1328 (2008); *Koubriti*, 435 F. Supp. 2d 666.

741. Order, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Feb. 9, 2010), D.E. 679; *see* David Ashenfelter, *Deal May Lead to Probation for Koubriti*, Detroit Free Press, Apr. 15, 2009, at 4A (reporting on an agreement to save Koubriti from a criminal record and provide him with a path to citizenship); Paul Egan, *Ex-Terror Suspect in Talks to Clear Record*, Detroit News, Apr. 15, 2009, at 4A (same).

742. Complaint, *Koubriti v. Rojo*, No. 2:05-cv-74343 (E.D. Mich. Nov. 14, 2005), D.E. 1.

In their first motion for summary judgment, the defendants noted that "[w]hile incarcerated in the Wayne County Jail Plaintiff was deemed a level 4 security risk by the U.S. Marshals, and as such, was placed in a 'super max' security cell block." Defendants' Summary-Judgment Motion at 1, *id.* (July 25, 2006), D.E. 15.

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

Id. at 2.

743. Opinion, *id.* (July 27, 2007), D.E. 48, 2007 WL 2178331 (granting summary judgment on the exercise claim); Opinion, *id.* (Jan. 3, 2007), D.E. 24, 2007 WL 45923 (granting summary judgment on the pork claim).

744. Stipulated Dismissals, *id.* (Aug. 9 and 24, 2007), D.E. 52, 53.

745. Complaint, *Koubriti v. Convertino*, No. 2:07-cv-13678 (E.D. Mich. Aug. 30, 2007), D.E. 1; Docket Sheet, *id.*; *see* Paul Egan, *Ex-Terror Suspect Sues Convertino*, Detroit News, Aug. 31, 2007, at 5B; *The Prosecutor*, *supra* note 711.

cuit's court of appeals determined that the prosecutors had prosecutorial immunity.⁷⁴⁶ The district court granted summary judgment to an FBI agent defendant, bringing the case to a close.⁷⁴⁷

Elmardoudi was sentenced by the U.S. District Court for the District of Minnesota to four years and three months in prison in a separate prosecution for trafficking in fraudulent telephone calling cards,⁷⁴⁸ and he was sentenced by the U.S. District Court for the Northern District of Iowa to five years in prison for fraudulent use of Social Security numbers.⁷⁴⁹

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."⁷⁵⁰ Jurors did not come directly to the courthouse in the morning.⁷⁵¹ Instead, they assembled at a secret location and were driven to the courthouse in a van.⁷⁵² Someone found out about the secret location and called the jury room with a death threat.⁷⁵³ On the following day, someone called the Detroit News with a death threat concerning the judge.⁷⁵⁴ The marshal changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.⁷⁵⁵

746. *Koubriti v. Convertino*, 593 F.3d 459 (6th Cir.), *cert. denied*, 562 U.S. 829 (2010); see Ben Schmitt & Robin Erb, *Man Can't Sue U.S. Prosecutor in Terror Case*, Detroit Free Press, Feb. 4, 2010, at A8.

747. Order, *Koubriti*, No. 2:07-cv-13678 (E.D. Mich. May 23, 2011), D.E. 69, 2011 WL 1982239; see David Ashenfelter, Mike Brookbank, Tammy Stables Battaglia, Elisha Anderson & Megha Satyanarayana, *Dismissal Ends Terror Trial Lawsuit*, Detroit Free Press, May 24, 2011, at A4.

748. *United States v. Elmardoudi*, 501 F.3d 935, 937, 940 (8th Cir. 2007) (describing the crime as "'shoulder surfing,' that is, surreptitiously memorizing other people's calling card and credit card numbers at the Minneapolis-St. Paul airport and then passing the numbers on to other people who used them to pay for telephone calls."), *cert. denied*, 552 U.S. 1120 (2008); Amended Sentencing Judgment, *United States v. Elmardoudi*, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006), D.E. 40.

749. Judgment, *United States v. Elmardoudi*, No. 1:06-cr-112 (N.D. Iowa Mar. 14, 2008), D.E. 110; Indictment, *id.* (Aug. 16, 2006), D.E. 1; see *Elmardoudi*, 501 F.3d at 937. The court of appeals affirmed denial of a motion to dismiss the indictment. *United States v. Elmardoudi*, 313 F. App'x 923 (8th Cir.), *cert. denied*, 558 U.S. 958 (2009).

750. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

751. *Id.*

752. *Id.*

753. *Trying Cases*, *supra* note 710, at 21 (remarks by Judge Rosen); Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

754. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

755. *Id.* and Jan. 3, 2007.

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.⁷⁵⁶ Jury selection was conducted behind closed doors.⁷⁵⁷ Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.⁷⁵⁸ Judge Rosen noted that it was very important to make sure that the jury clerk knew that the names and addresses of the jurors were confidential.⁷⁵⁹

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued "a public and formal judicial admonishment of the Attorney General."⁷⁶⁰ As Judge Rosen recalled,

the Attorney General of the United States violated a gag order that was stipulated by the parties—indeed, drafted by the government—not once, but twice, which occasioned contempt motions by the defense throughout the trial, which I put off until after the trial. I think I was the first federal judge to be required to issue a public admonishment of the Attorney General of the United States.⁷⁶¹

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.⁷⁶² 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

756. *United States v. Koubriti*, 305 F. Supp. 2d 723, 728 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003); *United States v. Koubriti*, 252 F. Supp. 2d 418 (E.D. Mich. 2002) (denying a motion opposing the empaneling of an anonymous jury); *Trying Cases*, *supra* note 710, at 21 (remarks by Judge Rosen); see David Eggen & Allan Lengel, *In Detroit, First Post-9/11 Terrorism Trial*, Wash. Post, Mar. 19, 2003, at A3; David Runk, *Judge Says Elmardoudi Terror Trial to Proceed*, St. Paul Pioneer Press, Mar. 25, 2003, at B9.

757. *Trying Cases*, *supra* note 710, at 21 (remarks by Judge Rosen); Interview with Judge Gerald E. Rosen, Dec. 7, 2006; see Eggen & Lengel, *supra* note 756.

758. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

759. *Id.*

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

761. *Trying Cases*, *supra* note 710, at 21 (remarks by Judge Rosen).

762. *Koubriti*, 305 F. Supp. 2d at 728–29; see *id.* at 733 ("I didn't initiate the gag order, but I intend to keep it in place until further order of the Court, and I intend to enforce it."); see also *The Prosecutor*, *supra* note 711.

11th attacks.”⁷⁶³ In addition, during the trial, the attorney general commented favorably at a press conference on the credibility of the cooperating codefendant’s testimony.⁷⁶⁴

On the day before the grand jury handed down the second superseding indictment adding terrorism charges for the first time, Fox News announced the forthcoming indictment in detail sufficient to suggest the indictment had been improperly leaked.⁷⁶⁵ On the following day, MSNBC News presented improperly leaked evidence against the defendants.⁷⁶⁶ The attorney general’s responsibility for these leaks remained unclear.⁷⁶⁷

The defendants moved for sanctions against the attorney general on August 28, 2003.⁷⁶⁸ 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.”⁷⁶⁹ In response, the attorney general stated that he regretted making the statements and acknowledged that they were mistakes, but said that the errors were entirely inadvertent.⁷⁷⁰

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.⁷⁷¹ Criminal contempt proceedings against a sitting cabinet officer would require extraordinary procedures and implicate serious constitutional issues.⁷⁷² Because the record did not suggest willful violation of the court’s

763. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; see Shenon & Van Natta, *supra* note 710 (reporting on the attorney general’s news conference); *The Prosecutor*, *supra* note 711.

Two days after the news conference, the Justice Department acknowledged that “it did not know whether three Arab men now in custody in Michigan had advance knowledge of the terror attacks of Sept. 11.” Don Van Natta, Jr., *Justice Dept. Alters Stand on 3 Detained*, N.Y. Times, Nov. 3, 2001, at B5; see *The Prosecutor*, *supra* note 711. More than five years after that, however, government counsel told an appellate panel at oral argument that Elmardoudi was accused of supporting terrorists connected with the September 11, 2001, attacks. *United States v. Elmardoudi*, 504 F.3d 935, 938 n.3 (8th Cir. 2007).

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

765. *Id.* at 731; *Trying Cases*, *supra* note 710, at 22 (remarks by Judge Rosen); see *The Prosecutor*, *supra* note 711 (noting that Judge Rosen learned from the broadcast that he would preside over the case).

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

767. *Id.* at 725 n.1.

768. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 719.

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

770. *Id.* at 737–38; see Schmitt, *supra* note 760.

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

772. *Id.* at 726, 742, 752–57.

order, Judge Rosen decided that confronting these difficulties would not be necessary.⁷⁷³ Because the attorney general did violate the court's order on two occasions, however, Judge Rosen decided to formally admonish him.⁷⁷⁴

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.⁷⁷⁵ Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and use of the CIA's evidence.⁷⁷⁶ Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.⁷⁷⁷

Review of classified evidence in Detroit required the court to (1) establish a sensitive compartmented information facility (SCIF)⁷⁷⁸ and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.⁷⁷⁹

The SCIF was a secure room in which documents were stored in independently locked file drawers.⁷⁸⁰ The room was created by classified information security officers provided by the Justice Department's Litigation Security Group,⁷⁸¹ and then the court programmed the codes for access.⁷⁸²

773. *Id.* at 726, 748–57.

774. *Id.* at 725–26, 757–65; see Schmitt, *supra* note 760; *The Prosecutor*, *supra* note 711.

775. *Trying Cases*, *supra* note 710, at 22 (remarks by Judge Rosen); Interviews with Judge Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

776. Interviews with Judge Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

777. *Trying Cases*, *supra* note 710, at 5–6 (remarks by Professor Daniel J. Capra); Interviews with Judge Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

778. Interview with Judge Gerald E. Rosen, Dec. 7, 2006; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

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

Judge Rosen employed career law clerks, and all of his originally cleared staff remained on staff. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

780. Rosen, *supra* note 719, at 105; Interview with Judge Gerald E. Rosen, Dec. 7, 2006; see also *Trying Cases*, *supra* note 710, at 4–5 (remarks by Professor Capra).

781. See Reagan, *supra* note 778, at 21–22 (providing information about classified information security officers).

782. Interview with Judge Gerald E. Rosen, Dec. 7, 2006.

Only chambers staff with security clearances were permitted to enter this SCIF.⁷⁸³

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

The first thing that the judge should do is to have a conference with the lawyers and attempt to determine whether classified information is going to be a part of the case. That's not as easy as it sounds, because sometimes it is unclear whether classified information will be a part of the case. The government may have classified information, but they may not be certain if they are going to use it. So, at the very least, if it looks remotely as if classified information may be implicated in the case, the court should discuss this with counsel and have a very open discussion.⁷⁸⁴

For the prosecution of the prosecutor and a government witness, Judge Tarnow's law clerk and a court reporter obtained security clearances.⁷⁸⁵ Classified information was stored in a chambers safe, but the classified information was not a significant factor in Judge Tarnow's case.⁷⁸⁶

783. *Id.*

784. *Trying Cases*, *supra* note 710, at 3 (remarks by Professor Capra).

785. Interview with Judge Arthur J. Tarnow, Oct. 3, 2012.

786. *Id.*

Chapter 6

Twentieth Hijacker

United States v. Moussaoui
(*Leonie M. Brinkema, E.D. Va.*)⁷⁸⁷

The terrorism prosecution of Zacarias Moussaoui presented the special challenge combination of extensive classified information and a pro se defendant in a high-profile case.

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

Tim Reagan attended the September 25, 2009, rehearing, interviewed Judge Gregory for this report in the judge's chambers that same day, and interviewed Judge Shedd by telephone on September 3, 2009.

Judge Wilkins retired on October 5, 2008. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges. Judge Williams assumed disability senior status on July 8, 2009, and died on November 2, 2013. *Id.* Judge Shedd retired on May 2, 2022. *Id.*

Background

On September 11, 2001, four hijacked commercial jumbo jets were crashed in New York, Virginia, and Pennsylvania, killing nearly three thousand people, including nineteen suspected hijackers.⁷⁸⁸ 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.⁷⁸⁹ The fourth plane crashed near Shanksville, Pennsylvania, after passengers thwarted the hijackers' plan to strike a strategic target—probably the Capitol.⁷⁹⁰ This plane apparently had only four hijackers aboard.⁷⁹¹ Just a few days later, it was reported that Moussaoui may have been intended to be the twentieth hijacker.⁷⁹²

788. The 9/11 Commission Report 1–14, 311 (2004); *United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010); *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); *United States v. Moussaoui*, 333 F.3d 509, 512 (4th Cir. 2003); see Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon*, Wash. Post, Sept. 12, 2001, at A1; Serge Schmemmann, *U.S. Attacked*, N.Y. Times, Sept. 12, 2001, at A1; see also legacy.com/Sept11/Home.aspx (providing victim profiles). See generally Lawrence Wright, *The Looming Tower* 347–50, 354–56, 381–86, 394–95 (2006) (describing the planning of the attack).

“FBI agents reviewed the list of passengers on the hijacked planes with airline officials to find out if family members had asked about each of them. Of all the passengers, there were only nineteen that no one had inquired about. Those were the hijackers.” Peter Bergen, *United States of Jihad* 34–35 (2016).

789. See Grunwald, *supra* note 788; 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 788.

790. The 9/11 Commission Report 244 (2004); *Moussaoui*, 591 F.3d at 266; see Jess Bravin, *The Terror Courts* 329 (2013); Grunwald, *supra* note 788; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; Terry McDermott, *Perfect Soldiers* 229, 241 (2005); *New Theory*, *supra* note 789; Schmemmann, *supra* note 788; Wright, *supra* note 788, at 406; see also Terry McDermott, *The Mastermind*, New Yorker, Sept. 13, 2010, at 38, 49 (“[Khalid Shaikh Mohammed] allowed Atta to overrule Bin Laden’s choice of the White House as one of the targets—Atta thought it was too difficult—and substituted the Capitol.”); Terry McDermott & Josh Meyer, *The Hunt for KSM* 142 (2012) (reporting same); Ali H. Soufan, *The Black Banners* 282 (2011) (reporting that Osama Bin Laden identified the Capitol as the fourth target), *reprinted as The Black Banners* (Declassified) (2020) (restoring redactions).

791. 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 789; Longman, *supra* note 790; *New Theory*, *supra* note 789.

792. 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–

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.⁷⁹³ Three days earlier, he had begun instruction at the Pan Am International Flight Academy.⁷⁹⁴ It was initially reported that he aroused suspicion when he expressed an interest in steering a jumbo jet but not in taking off or landing.⁷⁹⁵ The *Washington Post* reported in November, however, that the director of the FBI told federal prosecutors at a closed-door meeting that initial reports of Moussaoui's not wanting to learn how to take off or land were inaccurate, and Moussaoui no longer was thought to be intended as the twentieth hijacker; he was thought to have been intended for a later attack.⁷⁹⁶

St. Paul Star Trib., Sept. 20, 2001, at 9A (reporting that the French newsmagazine *L'Express* speculated online on September 19, 2001, that Moussaoui might be the twentieth hijacker).

Khalid Sheikh Mohammed wanted even more men, as many as seven or eight per plane. At least half a dozen men selected for the mission never made it into the United States—several had visas denied, others agreed to participate, then withdrew before ever leaving for the United States. At least one man was turned away by an immigration officer at arrival.

McDermott, *Perfect Soldiers*, *supra* note 790, at 204 (footnotes omitted).

793. The 9/11 Commission Report 247 (2004) (reporting that the planners of the attacks might have canceled them if they had known about Moussaoui's arrest); *Moussaoui*, 591 F.3d at 266; *Moussaoui*, 382 F.3d at 457; *Moussaoui*, 333 F.3d at 512; *United States v. Moussaoui*, 282 F. Supp. 2d 480, 483 (E.D. Va. 2003); *see* Katherine C. Donahue, *Slave of Allah* 3, 15–16 (2007); Johnston & Shenon, *supra* note 789; McDermott, *Perfect Soldiers*, *supra* note 790, at 226; Peterson, *supra* note 792; H.L. Pohlman, *Terrorism and the Constitution* 192 (2008); Soufan, *supra* note 790, at 277.

794. The 9/11 Commission Report 246–47, 273 (2004); *Moussaoui*, 591 F.3d at 266, 274; *see* Johnston & Shenon, *supra* note 791.

One of the three instructors who alerted authorities to suspicion concerning Moussaoui received a \$5 million reward in 2008. *See Reward in Moussaoui Case*, N.Y. Times, Jan. 25, 2008, at A18; *Two Others Seek Reward in Moussaoui Case*, N.Y. Times, Jan. 26, 2008, at A10.

795. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, Wash. Post, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 791; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, Wash. Post, Sept. 22, 2001, at A20.

796. Dan Eggen, *Yemeni Fugitive Linked to Hijackers*, Wash. Post, Nov. 15, 2001, at A20; *see* Bin al-Shibh Deposition Opinion at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 10, 2003), 2003 WL 21263699 (“he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda”); Philip Shenon, *F.B.I. Chief Says Failed Sept. 11 Hijackers May Remain at Large*, N.Y. Times, Nov. 17, 2001, at B5; *see also* McDermott, *Perfect Soldiers*, *supra* note 790, at 204 (reporting that attack planners decided that they would use Moussaoui only as a last resort).

Moussaoui was born on May 30, 1968, in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.⁷⁹⁷ He moved to London in 1990, and then moved back to France in 1997.⁷⁹⁸ By the time he entered the United States on a student visa, French authorities already suspected him of terrorist ties.⁷⁹⁹ In February 2001, he moved to Norman, Oklahoma, for training at the Airman Flight School, where his performance was judged poor.⁸⁰⁰

During this time, he apparently had contact with Ramzi Muhammad Abdullah Bin al-Shibh, a roommate of Mohamed Atta⁸⁰¹ in Hamburg, Germany.⁸⁰² Atta is believed to have been the leader of the September 11

In 2004, the 9/11 Commission reported that 9/11 conspirator “Khallad believes KSM [Khalid Shaikh 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).

797. See Daley, *supra* note 792; Donahue, *supra* note 793, at 42, 104; Schmidt & Romano, *supra* note 795.

798. See Daley, *supra* note 792.

799. See Donahue, *supra* note 793, at 16–17, 116–17; Grimaldi, *supra* note 795 (reporting that French officials warned the FBI of their suspicions at least ten days before the September 11 attacks); Diana Jean Schemo & Robert Pear, *Suspects in Hijackings Exploited Loopholes in Immigration Policy*, N.Y. Times, Sept. 27, 2001, at A1.

In April 1998, Moussaoui was at the same terrorist training camp in Afghanistan as Ahmed Ressam, who was sometimes referred to as the Millennium Bomber. *United States v. Ressam*, 679 F.3d 1069, 1075 (9th Cir. 2012); see Donahue, *supra* note 793, at 121, 165; see also Chapter 3: Millennium Bomber, *supra* page 88 (concerning the prosecution of Ressam).

800. The 9/11 Commission Report 224–25 (2004) (reporting that Mohamed Atta, the hijacking pilot of American Airlines flight 11, visited the flight school several months earlier); *United States v. Moussaoui*, 591 F.3d 263, 274 (4th Cir. 2010); see Daley, *supra* note 792; Donahue, *supra* note 793, at 13–15, 125; Timothy Dwyer & Jerry Markon, *Flight Instructor Recalls Unease with Moussaoui*, Wash. Post, Mar. 10, 2006, at A2; Johnston & Shenon, *supra* note 791; Schmidt & Romano, *supra* note 795; Soufan, *supra* note 790, at 276–77.

801. “Atta was a finicky, dour man whose chief attributes were obedience and a capacity for detail.” McDermott, *The Mastermind*, *supra* note 790, at 49. “Where Atta was the dutiful striver, bin al-Shibh was an affable layabout who rarely held a job for more than a few weeks and found university study not worth his effort. A friend in Hamburg said Atta was impossible to like, but bin al-Shibh had charm to spare.” McDermott & Meyer, *supra* note 790, at 140.

802. The 9/11 Commission Report 162 (2004) (Atta and Bin al-Shibh moved in with hijacker Marwan al-Shehhi in April 1998); *Moussaoui*, 591 F.3d at 274; see James Risen, *U.S. Says Suspect Tied to 9/11 and Qaeda Is Captured in Raid*, N.Y. Times, Sept. 14, 2002, at A1; Soufan, *supra* note 790, at 271–73; John Tagliabue & Raymond Bonner, *German*

attacks and the pilot of the first plane to hit the World Trade Center.⁸⁰³ Bin al-Shibh apparently wired Moussaoui \$14,000,⁸⁰⁴ \$8,600 of which Moussaoui used for flight school.⁸⁰⁵ Ramzi Bin al-Shibh was also known as Ramzi Omar,⁸⁰⁶ and he too came to be suspected as the intended twentieth hijacker,⁸⁰⁷ but he was repeatedly denied a visa to enter the United States.⁸⁰⁸ He

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).

803. The 9/11 Commission Report 5 (2004) (Atta was “the only terrorist on board trained to fly a jet”); see Johnston & Shenon, *supra* note 791; Risen, *supra* note 802; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

804. The 9/11 Commission Report 246, 273 (2004); see Donahue, *supra* note 793, at 1, 28–29, 76; Johnston & Shenon, *supra* note 789.

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

806. See McDermott, *The Mastermind*, *supra* note 790, at 49; Soufan, *supra* note 790, at 272.

“His real name, he said, had no religious meaning, so he adopted the name of the prophet Mohammed’s successor, the second caliph of Islam. Many acquaintances in Hamburg didn’t even know Omar had another name.” McDermott, *Perfect Soldiers*, *supra* note 790, at 37.

807. See *New Theory*, *supra* note 789; Risen, *supra* note 802; Shenon, *supra* note 796; Tagliabue, *supra* note 803; see also Bravin, *supra* note 790, at 346 (reporting on an apparent military commission confession “that, as the government alleged, he, too, had aspired to be a Twentieth Hijacker”).

Another person designated a twentieth hijacker—Mohammed al-Qahtani—was released from Guantánamo Bay in 2022 to receive mental health care in Saudi Arabia. Transfer Notice, *Al-Qahtani v. Biden*, No. 1:05-cv-1971 (D.D.C. Mar. 8, 2022), D.E. 429; see Carol Rosenberg, *9/11 Suspect Is Sent to Saudi Arabia for Mental Health Care*, N.Y. Times, Mar. 8, 2022 at A18; see also Peter L. Bergen, *Manhunt* 95 (2012) (“the man al-Qaeda was grooming to be the twentieth hijacker in the months before the 9/11 attacks”); Bravin, *supra* note 790, at 252–55 (reporting that al-Qahtani was denied entry on August 4, 2011, at the Orlando airport); Mark Fallon, *American Torquemada*, Newsweek, Nov. 10, 2017, at 26, 29, 32; Jonathan Hafetz, *Habeas Corpus After 9/11* 38 (2011); Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1; Soufan, *supra* note 790, at 458–59; Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 154 (2008). He was declared “incompetent and unable to assist effectively in [his] case.” Docket Sheet, *Al-Qahtani*, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) (minute order, April 20, 2012). See generally Chapter 28: Guantánamo Bay, *infra* page 434.

808. The 9/11 Commission Report 161, 168, 225 (2004) (reporting that Bin al-Shibh could not persuade immigration officials that he would return home); see McDermott, *The Mastermind*, *supra* note 790, at 49 (“the American immigration system viewed him as a likely economic migrant”); Michael Moss, *A Traveler with Strong Views on the Right Kind of Islam and No Fear of Sharing Them*, N.Y. Times, Dec. 12, 2001, at B6; Soufan,

was captured in Karachi, Pakistan, on the eve of the first anniversary of September 11, held in Morocco in secret by the CIA, and eventually transferred to Guantánamo Bay.⁸⁰⁹ He is on trial there by military commission.⁸¹⁰

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.⁸¹¹

Indictment

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.⁸¹² Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court immediately appointed three attorneys to represent him.⁸¹³

supra note 790, at 272 (“The United States at the time was suspicious of Yemeni visa seekers, believing they’d attempt to become illegal immigrants.”); *id.* at 275.

809. See Donahue, *supra* note 793, at 29; Peter Finn, *9/11 Detainee’s Interrogation in Morocco Was Recorded*, Wash. Post, Aug. 18, 2010, at A4; Kamran Khan & Peter Finn, *Pakistanis Detail Capture of Key 9/11 Suspect*, Wash. Post, Sept. 15, 2002, at A1; Mark Mazzetti, *9/11 Suspect Was Detained and Taped in Morocco*, N.Y. Times, Aug. 18, 2010, at A4; Walter Pincus, *Binalshibh Said to Provide “Useful Information,”* Wash. Post, Oct. 4, 2002, at A17; Risen, *supra* note 802; Soufan, *supra* note 790, at 428, 484–88.

810. Office of Military Commission Cases, www.mc.mil/CASES.aspx; see Chapter 28: Guantánamo Bay, *infra* page 434; Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, Wash. Post, Apr. 5, 2011, at A1.

811. See Johnston & Shenon, *supra* note 791.

812. Indictment, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001), D.E. 1; *United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010); *United States v. Moussaoui*, 483 F.3d 220, 223 n.1 (4th Cir. 2007); see Donahue, *supra* note 793, at 1–2, 19; Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, Wash. Post, Dec. 12, 2001, at A1; Johnston & Shenon, *supra* note 789; Pohlman, *supra* note 793, at 192. See generally Karen J. Greenberg, *Rogue Justice* 18–20, 23–25, 77–86, 134–36 (2016).

Moussaoui was originally flown to New York, on September 14, 2001, for possible prosecution there. See Donahue, *supra* note 793, at 18–19 (“But the Department of Justice was going to ask for the death penalty, and the New York court had deadlocked on the death penalty for two of the East African embassy bombing suspects. A court near the Pentagon would more likely decide for the death penalty.”). Moussaoui was transported to Alexandria, Virginia, on December 13. See *id.* at 19.

813. Complex Case Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 27, 2001), D.E. 18, 2001 WL 1887910 (recognizing four capital counts); see Donahue, *supra* note 793, at 1, 19; Johnston & Shenon, *supra* note 789; David Johnston & Benjamin Weiser, *Government’s Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

The court assigned the case to Judge Leonie M. Brinkema.⁸¹⁴

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.”⁸¹⁵ Judge Brinkema, with the consent of Moussaoui’s lawyer, entered a plea of not guilty.⁸¹⁶ Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.⁸¹⁷

Moussaoui refused to honor the judge by standing when she entered or left the courtroom, so Judge Brinkema arranged proceedings so that she and he would enter and leave the courtroom at the same time.⁸¹⁸

Pro Se Defense

At a hearing on April 22 concerning Moussaoui’s conditions of confinement, the defendant raised his hand and, when recognized by Judge Brinkema, began a fifty-minute diatribe on Islam and the U.S. government’s conspiracy to kill him.⁸¹⁹ He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.⁸²⁰ Judge Brinkema said that he could represent himself if he were adjudged competent to do so, but that she

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

Tim Reagan interviewed Judge Brinkema for this case study in her chambers on January 5, 2007, and by telephone on March 26, 2008.

815. See David Johnston, *Not-Guilty Plea Is Set for Man in Terror Case*, N.Y. Times, Jan. 3, 2002, at A1; see also Libby Copeland, *A Glimpse at a Symbol of a Changed World*, Wash. Post, Jan. 3, 2002, at C1; Donahue, *supra* note 793, at 8, 20.

816. E.D. Va. Docket Sheet, *supra* note 814; *Moussaoui*, 591 F.3d at 267; see Copeland, *supra* note 815; Donahue, *supra* note 793, at 20; Johnston, *supra* note 815.

817. Complex Case Order, *supra* note 813, at 3 (setting a deadline of March 29, 2002); Death Penalty Notice, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 28, 2002), D.E. 89; *Moussaoui*, 483 F.3d at 223–24 n.1; see Donahue, *supra* note 793, at 23; Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. Times, Mar. 29, 2002, at A20.

818. See Donahue, *supra* note 793, at 9, 64.

819. See Pohlman, *supra* note 793, 193–94 (presenting excerpts from the speech); Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

820. *Moussaoui*, 591 F.3d at 269–70; *United States v. Moussaoui*, 333 F.3d 509, 512–13 (4th Cir. 2003); see Motion to Proceed Pro Se, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 25, 2002), D.E. 112 (handwritten motion dated April 22, 2002); Donahue, *supra* note 793, at 23–24, 36, 39–40, 166; Pohlman, *supra* note 793, at 192; Shenon, *supra* note 819.

recommended against it and would continue the appointment of his attorneys as backups.⁸²¹

The government filed a superseding indictment on June 19,⁸²² and at the arraignment six days later Moussaoui tried to plead no contest.⁸²³ 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.⁸²⁴

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.⁸²⁵ So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.⁸²⁶ At the July 18 arraignment on the new indictment, Moussaoui announced, “I, Moussaoui Zacarias, in the interests to preserve my life, enter with full conscience a plea of guilty, because I have knowledge and participated in Al Qaeda.”⁸²⁷ Judge Brinkema decided to give him a week to reconsider his guilty plea.⁸²⁸ 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.⁸²⁹

821. Mental Health Evaluation Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2002), D.E. 104, 2002 WL 1311722; see *Moussaoui*, 591 F.3d at 270; Donahue, *supra* note 793, at 24, 36, 54; Shenon, *supra* note 819.

822. Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 19, 2002), D.E. 199.

823. Order Denying No-Contest Plea, *id.* (July 9, 2002), D.E. 299, 2002 WL 1587025; see Neil A. Lewis, *Defendant in Sept. 11 Plot Accuses Judge of Trickery*, N.Y. Times, June 26, 2002, at A18.

824. Order Denying No-Contest Plea, *supra* note 823; E.D. Va. Docket Sheet, *supra* note 814; see Lewis, *supra* note 823.

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

826. Second Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 16, 2002), D.E. 340; *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); see Donahue, *supra* note 793, at 26; Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

827. *United States v. Moussaoui*, 591 F.3d 263, 270 (4th Cir. 2010); see Philip Shenon, *9/11 Defendant in Guilty Plea*, N.Y. Times, July 19, 2002, at A1; see also Donahue, *supra* note 793, at 26; Pohlman, *supra* note 793, at 194.

828. *Moussaoui*, 591 F.3d at 270; see Donahue, *supra* note 793, at 26; Shenon, *supra* note 827.

829. E.D. Va. Docket Sheet, *supra* note 814; *Moussaoui*, 591 F.3d at 270–71; see Donahue, *supra* note 793, at 27; Pohlman, *supra* note 793, at 194; Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

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.⁸³⁰ Judge Brinkema postponed the trial indefinitely to permit the government to appeal.⁸³¹ The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.⁸³² 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."⁸³³ After oral argument on June 3 before Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,⁸³⁴ 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.⁸³⁵

830. Bin al-Shibh Deposition Opinion, *supra* note 796, at 16–17 ("The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant's behalf—both as to guilt and potential punishment."); Bin al-Shibh Deposition Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 31, 2003), D.E. 732; *Moussaoui*, 382 F.3d at 458; *United States v. Moussaoui*, 333 F.3d 509, 513 (4th Cir. 2003); E.D. Va. Docket Sheet, *supra* note 814; see Donahue, *supra* note 793, at 28–29; Pohlman, *supra* note 793, at 194, 196; Susan Schmidt & Dana Priest, *Judge Orders Access to Detainee for Moussaoui's Lawyers*, Wash. Post, Feb. 1, 2003, at A9; Philip Shenon, *Moussaoui Case May Have to Shift from U.S. Court to Tribunal, Administration Says*, N.Y. Times, Feb. 7, 2003 (reporting that the government feared "that if Mr. Bin al-Shibh is questioned by Mr. Moussaoui's lawyers, he might divulge information about Al Qaeda that the government wants to keep secret.").

831. Order Vacating Trial Date, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 12, 2003), D.E. 752, 2003 WL 402249; see Donahue, *supra* note 793, at 29; Jerry Markon, *Moussaoui Trial Postponed for Third Time*, Wash. Post, Feb. 13, 2002, at A8; Philip Shenon, *Judge Grants the Government a Delay of Moussaoui's Trial*, N.Y. Times, Feb. 13, 2003, at A21.

832. *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018 (4th Cir. Apr. 14, 2003); *Moussaoui*, 382 F.3d at 458; see Donahue, *supra* note 793, at 29; Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Pohlman, *supra* note 793, at 194; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

833. Bin al-Shibh Substitution Opinion at 6, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 15, 2003), D.E. 925, 2003 WL 21277161; *Moussaoui*, 382 F.3d at 458–59; see Donahue, *supra* note 793, at 29; Jerry Markon, *Judge Rejects Bid to Block Access to Sept. 11 Planner*, Wash. Post, May 16, 2003, at A3; Philip Shenon, *Ruling Leaves Legal Standoff in 9/11 Case*, N.Y. Times, May 16, 2003, at A17.

834. *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.

835. *Moussaoui*, 333 F.3d at 512, 514, 517; *Moussaoui*, 382 F.3d at 459; see Donahue, *supra* note 793, at 29; Neil A. Lewis, *Bush Officials Lose Round in Prosecuting Terror Sus-*

On August 29, Judge Brinkema ordered the government to provide Moussaoui deposition access to Khalid Shaikh Mohammed (KSM)—regarded as the mastermind of the September 11 attacks—and Mustafa Ahmed al-Hawsawi—regarded as the paymaster for the September 11 attacks—as well.⁸³⁶ Bin al-Shibh and al-Hawsawi were identified as supporting conspirators in Moussaoui’s indictment and otherwise frequently mentioned there.⁸³⁷ KSM and al-Hawsawi were captured in Pakistan on February 27.⁸³⁸ The government refused to comply with the deposition orders,⁸³⁹ 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.⁸⁴⁰

pect, N.Y. Times, June 27, 2003, at A13; Jerry Markon, *Appeals Court Rebuffs U.S. in Moussaoui Case*, Wash. Post, June 27, 2003, at A1; Pohlman, *supra* note 793, at 198.

Over the dissent of five judges, the court decided not to rehear the appeal en banc. *United States v. Moussaoui*, 336 F.3d 279 (4th Cir. 2003); see Jerry Markon, *Moussaoui Prosecutors Defy Judge*, Wash. Post, July 15, 2003, at A1; Philip Shenon, *U.S. Will Defy Court’s Order in Terror Case*, N.Y. Times, July 15, 2003, at A1.

836. Mohammed and al-Hawsawi Deposition Opinion, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2003), D.E. 1033, 2003 WL 22258213; *Moussaoui*, 382 F.3d at 459; see Donahue, *supra* note 793, at 29; Eric Lichtblau, *New Ruling Favors Suspect in Terror Case*, N.Y. Times, Aug. 31, 2003, at 123; Jerry Markon, *Moussaoui Granted Access to Witnesses*, Wash. Post, Aug. 30, 2003, at A12; Susan Schmidt, *2nd Key Al Qaeda Suspect Identified*, Wash. Post, Mar. 5, 2003, at A1.

Ramzi Yousef, a principal in the first World Trade Center bombing, is KSM’s nephew. The 9/11 Commission Report 73, 145 (2004). “According to KSM, he started to think about attacking the United States after Yousef returned to Pakistan following the 1993 World Trade Center bombing.” *Id.* at 153; see Soufan, *supra* note 790, at 54 (“KSM had been yearning to get more actively involved in jihad ever since his nephew had earned notoriety for the World Trade Center bombing”); see also McDermott, *Perfect Soldiers*, *supra* note 790, at 128 (reporting that the uncle is three years older than the nephew).

837. Second Superseding Indictment, *supra* note 826.

838. See Donahue, *supra* note 793, at 29; Schmidt, *supra* note 836.

839. See Greenberg, *supra* note 812, at 80 (“The prosecution was unwilling and, as it turned out, unable to accede to defense lawyers’ requests for witnesses to take the stand. They were unable even to disclose where they were located and, in the event they were identified, to produce them in court.”).

840. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 481–82, 487 (E.D. Va. 2003); *Moussaoui*, 382 F.3d at 459–60; see Donahue, *supra* note 793, at 29–30; Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Pohlman, *supra* note 793, at 191, 198; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.⁸⁴¹ 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.⁸⁴² Judge Gregory dissented in part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.⁸⁴³

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.⁸⁴⁴ The government prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.⁸⁴⁵ 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."⁸⁴⁶ 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."⁸⁴⁷

Pro Se Privilege Discontinued

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

841. *Moussaoui*, 382 F.3d at 462–63.

842. *Id.* at 456–57, 479–82; see Donahue, *supra* note 793, at 122; Hafetz, *supra* note 807, at 227; Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5; Pohlman, *supra* note 793, at 191, 224–32. See generally Greenberg, *supra* note 812, at 84–86.

843. *Moussaoui*, 382 F.3d at 483–89 (Judge Gregory, concurring in part and dissenting in part); see Markon, *supra* note 842; Pohlman, *supra* note 793, at 226–27.

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

"Moussaoui managed to annoy everyone he came in contact with," said one of the captured Al Qaeda leaders held by the United States." Greenberg, *supra* note 812, at 135; see Benjamin Wittes, *Law and the Long War* 172 (2008) (describing Moussaoui as a "nut-case").

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

846. *Id.* at 478.

847. *Id.* at 479.

pro se.⁸⁴⁸ Seventeen months later, on April 22, 2005, one month after the Supreme Court denied his petition for a writ of certiorari,⁸⁴⁹ Moussaoui pleaded guilty to a conspiracy to kill Americans, but he denied involvement in the September 11 attacks.⁸⁵⁰

Bifurcated Penalty Trial

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.⁸⁵¹ Jury selection began on February 6, 2006.⁸⁵² The court sent summonses to more than one thousand residents within the district's Alexandria division.⁸⁵³ Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than five hundred potential jurors filled out.⁸⁵⁴

848. Order Vacating Pro Se Status at 3, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 14, 2003), D.E. 1120; *United States v. Moussaoui*, 591 F.3d 263, 271 (4th Cir. 2010); *Moussaoui*, 382 F.3d at 460 n.6; see Donahue, *supra* note 793, at 30–31, 36, 40; Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Pohlman, *supra* note 793, at 194; Philip Shenon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

849. *Moussaoui v. United States*, 544 U.S. 931 (2005); see Donahue, *supra* note 793, at 31; Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005, at A20; Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3; Pohlman, *supra* note 793, at 191.

850. Plea Statement, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2005), D.E. 1264; *Moussaoui*, 591 F.3d at 272; *United States v. Moussaoui*, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see Donahue, *supra* note 793, at 31; Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. Times, Apr. 23, 2005, at A1; Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, Wash. Post, Apr. 23, 2005, at A1; Pohlman, *supra* note 793, at 192, 246.

"Mr. Moussaoui's lawyers urged him not to plead guilty, but they could not tell him why." Adam Liptak, *The Right to Counsel, in the Right Situations*, N.Y. Times, Feb. 26, 2008, at A11.

851. *Moussaoui*, 591 F.3d at 275; Leonie M. Brinkema, *United States v. Moussaoui: Preliminary Venire Instructions* (Feb. 6, 2006), www.fjc.gov/sites/default/files/2014/TRVAE007.pdf; Leonie M. Brinkema, *United States v. Moussaoui: Jury Instructions for Penalty Phase Part Two* (Apr. 24, 2006), www.fjc.gov/sites/default/files/2014/TRVAE009.pdf; see Donahue, *supra* note 793, at 33–34, 65.

852. E.D. Va. Docket Sheet, *supra* note 814; see Donahue, *supra* note 793, at 34, 59; Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

853. Interview with Judge Leonie M. Brinkema, Mar. 26, 2008.

854. Trial Conduct Order 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006), D.E. 1500; Leonie M. Brinkema, *United States v. Moussaoui: Jury Questionnaire* (Feb. 6, 2006), www.fjc.gov/sites/default/files/2014/TRVAE008.pdf; Interview with Judge Leonie

Opening statements began on March 6.⁸⁵⁵ 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 2001.⁸⁵⁶ 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.⁸⁵⁷

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.⁸⁵⁸ Judge Brinkema ruled that the coached witnesses could not testify.⁸⁵⁹

M. Brinkema, Mar. 26, 2008; see Donahue, *supra* note 793, at 59 ("Beginning on Wednesday, February 15, the potential jurors were to arrive in smaller groups for individual questioning, or *voir dire*, in order to create a pool of 85 potential jurors."); *id.* at 61–62; Jerry Markon, *Terrorism Jury Faces Slew of Questions*, Wash. Post, Nov. 29, 2006, at B1.

855. E.D. Va. Docket Sheet, *supra* note 814; see Donahue, *supra* note 793, at 59, 65; Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14.

856. See Lewis, *supra* note 855; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

857. See Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006), D.E. 1638; Donahue, *supra* note 793, at 65–66; Timothy Dwyer, *9/11 Families to Watch Moussaoui Face Fate*, Wash. Post, Feb. 6, 2006, at A1; Neil A. Lewis, *At Satellite Court-houses, 9/11 Relatives Will Watch Moussaoui's Sentencing*, N.Y. Times, Mar. 5, 2006, at 118; see also Trial Conduct Order 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 3, 2006), D.E. 1646.

"During the trial, Judge Brinkema remarked that fewer people were watching from the off-site courtrooms than anticipated." Donahue, *supra* note 793, at 174.

858. See Donahue, *supra* note 793, at 69–70; Stephen Labaton & Matthew L. Wald, *Lawyer Thrust Into Spotlight After Misstep in Terror Case*, N.Y. Times, Mar. 15, 2006, at A1; Neil A. Lewis, *Judge Calls Halt to Penalty Phase of Terror Trial*, N.Y. Times, Mar. 14, 2006, at A1; Jerry Markon & Timothy Dwyer, *Judge Halts Terror Trial*, Wash. Post, Mar. 14, 2006, at A1.

859. Second Aviation Witness Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006), D.E. 1686; First Aviation Witness Order, *id.* (Mar. 14, 2006), D.E. 1681; see Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct That Nearly Derailed the Moussaoui Trial*, 20 Geo. J. Legal Ethics 463 (2007); Donahue, *supra* note 793, at 70; Neil A. Lewis, *Judge Gives Prosecutors New Chance in Terror Case*, N.Y. Times, Mar. 18, 2006, at A10; Neil A. Lewis, *Judge Penalizes Moussaoui Prosecutors by Barring Major Witnesses*, N.Y. Times, Mar. 15, 2006, at A24; Jerry Markon, *Moussaoui Prosecutors Get a Break*, Wash. Post, Mar. 18, 2006, at A1; Jerry Markon & Timothy Dwyer, *Federal Witnesses Banned in 9/11 Trial*, Wash. Post, Mar. 15, 2006, at A1.

The trial continued and jurors began to deliberate on Wednesday, March 29.⁸⁶⁰ After a weekend break,⁸⁶¹ on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.⁸⁶² On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,⁸⁶³ returning a verdict of life in prison on Wednesday, May 3.⁸⁶⁴ After interviews with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.⁸⁶⁵

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.⁸⁶⁶ Judge Brinkema denied his motion.⁸⁶⁷

860. E.D. Va. Docket Sheet, *supra* note 814; see Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

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

862. United States v. Moussaoui, 591 F.3d 263, 277 (4th Cir. 2010); Phase 1 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 3, 2006), D.E. 1739; see Donahue, *supra* note 793, at 85; Neil A. Lewis, *Jurors Permit Death Penalty for Moussaoui*, N.Y. Times, Apr. 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Moussaoui Found Eligible for Death*, Wash. Post, Apr. 4, 2006, at A1.

863. E.D. Va. Docket Sheet, *supra* note 814; see Donahue, *supra* note 793, at 99; Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

864. Phase 2 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 3, 2006), D.E. 1852; *Moussaoui*, 591 F.3d at 277, 302; United States v. Moussaoui, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); see Donahue, *supra* note 793, at 2, 100; Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. Times, May 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, Wash. Post, May 4, 2006, at A1.

On May 12, 2006, [Moussaoui] was flown by the US Marshals Service on a small jet operated by the Justice Prisoner and Alien Transportation System, more commonly known as "Con Air," to the Administrative Maximum security facility, or "Supermax" prison in Florence, Colorado. He now spends 23 hours a day alone in a cell, with another hour alone in exercise space.

Donahue, *supra* note 793, at 3.

865. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1; see Donahue, *supra* note 793, at 2–3, 102–03.

866. Motion to Withdraw Plea, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006), D.E. 1857; *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 793, at 102, 167; Neil A. Lewis, *Moussaoui's Move to Recant Guilty Plea Is Denied*, N.Y. Times, May 9, 2006, at A18; Jerry Markon, *Moussaoui Fails in Bid to Withdraw 9/11 Guilty Plea*, Wash. Post, May 9, 2006, at A16.

According to Moussaoui's affidavit,

The court of appeals affirmed her decision on January 4, 2010: “the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands.”⁸⁶⁸

Challenge: Attorney Appointment

Judge Brinkema initially appointed the Federal Public Defender and a private attorney to represent Moussaoui.⁸⁶⁹ “The relationship between Moussaoui and his appointed attorneys was strained at best, and Moussaoui almost immediately began demanding to proceed *pro se*, but with the assistance of Muslim counsel.”⁸⁷⁰ Moussaoui identified a Muslim attorney

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

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

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

Moussaoui Affidavit at 3, Motion to Withdraw Plea, *supra*; see Donahue, *supra* note 793, at 167.

867. Order Denying Plea Withdrawal, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006), D.E. 1858; *Moussaoui*, 591 F.3d at 278; see Donahue, *supra* note 793, at 102, 167; Lewis, *supra* note 866; Markon, *supra* note 866; Pohlman, *supra* note 793, at 247; see also Tom Jackman, *Judge in 9/11 Trial Touts Civilian Court*, Wash. Post, Sept. 11, 2021, at B1 (reporting also that Judge Brinkema said at a forum on the twentieth anniversary of the September 11, 2001, attacks “that the case was a perfect example of why terrorism cases should be tried in civilian court rather than before military tribunals”).

868. *Moussaoui*, 591 F.3d at 307; see Docket Sheet, *United States v. Moussaoui*, No. 06-4494 (4th Cir. May 15, 2006) [hereinafter May 15, 2006, 4th Cir. Docket Sheet].

The appeal was first heard on January 26, 2009. May 15, 2006, 4th Cir. Docket Sheet, *supra*; see Jerry Markon, *Moussaoui’s Attorneys Call Guilty Plea Invalid*, Wash. Post, Jan. 27, 2009, at A8. Judge Williams was on the panel that heard the appeal, but she assumed disability senior status before the panel issued an opinion, so the appeal was reheard on September 25, 2009. May 15, 2006, 4th Cir. Docket Sheet, *supra*; see *New Arguments in 9/11 Case*, N.Y. Times, July 15, 2009, at A11; Josh White & Jerry Markon, *Diagnosis of Early Alzheimer’s Forces Chief Judge to Retire*, Wash. Post, July 10, 2009, at B3.

869. *Moussaoui*, 591 F.3d at 267.

870. *Id.*

in Texas with whom he wanted to consult, but this attorney never made an appearance, never sought admission to the court's bar, and never consented to the screening required for the security clearance that would be needed to represent Moussaoui in court.⁸⁷¹

Moussaoui's relations with his appointed private attorney were more problematic than his relations with the federal defender's office, so Judge Brinkema appointed another private attorney.⁸⁷² "Although Moussaoui initially refused to communicate with any of his appointed counsel, he later testified that he began communicating with [the second private attorney] because [that attorney] was polite to him."⁸⁷³

Challenge: Pro Se Defendant

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.⁸⁷⁴ On June 13, 2002, Judge Brinkema granted Moussaoui's motion to represent himself, keeping appointed attorneys as standbys.⁸⁷⁵

Because of his pro se status, Moussaoui was eventually given three cells to accommodate his access to documents in this case.⁸⁷⁶

As a result of his disruptive filing behavior, however, Judge Brinkema withdrew the privilege of self-representation in November 2003.⁸⁷⁷

Challenge: Court Security

Security was enhanced at Moussaoui's arraignment.⁸⁷⁸ He arrived before 6:00 a.m., while it was still dark.⁸⁷⁹ Deputy marshals surrounded the court-

871. *Id.* at 269.

872. *Id.*

873. *Id.* at 271 n.6.

874. See Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11; see also Donahue, *supra* note 793, at 54.

875. Pro Se Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. June 14, 2002), D.E. 183, 2002 WL 1311738; *Moussaoui*, 591 F.3d at 274–75, 292–93; United States v. Moussaoui, 333 F.3d 509, 513 (4th Cir. 2003); see Donahue, *supra* note 793, at 24, 36, 54; Pohlman, *supra* note 793, at 192; Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

876. Interview with Judge Leonie M. Brinkema, Jan. 5, 2007.

877. Order Vacating Pro Se Status, *supra* note 848; *Moussaoui*, 591 F.3d at 271; United States v. Moussaoui, 382 F.3d 453, 460 n.6 (4th Cir. 2004).

878. See Copeland, *supra* note 815; Johnston, *supra* note 815.

879. See Copeland, *supra* note 815; see also Brooke A. Masters, *Alexandria's Logistical Juggling Act*, Wash. Post, Mar. 14, 2002, at T10 ("High-risk prisoners are being transport-

house, and extra metal detectors were stationed at the courtroom.⁸⁸⁰ 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.⁸⁸¹

Extra deputy marshals guarded the courthouse at subsequent appearances also.⁸⁸² It was reported that the courthouse had never seen such a level of security.⁸⁸³

On Friday, April 22, 2005, [at the hearing concerning Moussaoui's conditions of confinement where Moussaoui asked to proceed pro se,] security at the Alexandria Federal District Court was extremely tight. Two dogs and their handlers patrolled the street outside the courthouse, sniffing people's briefcases and purses for explosive devices. People entering the courthouse passed through a nuclear materials detector positioned just outside the doors. Up on the seventh floor, Courtroom 700 was closed off until 1:30 p.m. . . . At precisely 1:30 p.m. the guards let people take the elevators up from the second floor. The lawyers, press, family members of 9/11 victims, and the curious began to file in, again passing through another security checkpoint. IDs were checked, briefcases were x-rayed, people walked through metal detectors, men pulled their pant legs up to show that they had nothing hidden in their socks. At exactly 3:30 p.m. Judge Brinkema and Zacarias Moussaoui both entered the courtroom. Proceedings began.⁸⁸⁴

Challenge: Jury Security

Judge Brinkema used an anonymous jury.⁸⁸⁵ Jurors assembled in a secret location and were driven to the courthouse.⁸⁸⁶ The court set up a special

ed between the jail and the courthouse at night or in the early morning, and the streets are shut down to minimize the risks.”).

880. See Johnston, *supra* note 815.

881. See Copeland, *supra* note 815.

882. See Masters, *supra* note 879.

883. Libby Copeland & Richard Leiby, *The Moussaoui Circus Extends Its Run*, Wash. Post, July 26, 2002, at C1 (“‘This is the most security we’ve ever had to use here at the courthouse since it opened in 1996,’ said John Clark, acting U.S. Marshal for the Eastern District of Virginia.”).

884. Donahue, *supra* note 793, at 32.

885. Trial Conduct Order 1, *supra* note 854; see Markon, *supra* note 854.

886. Interview with Judge Leonie M. Brinkema, Jan. 5, 2007.

room for the jurors to eat lunch away from the public.⁸⁸⁷ They were never permitted to be in the building unsupervised.⁸⁸⁸

Judge Brinkema observed that it was important to work cooperatively with the marshal while maintaining ultimate responsibility.⁸⁸⁹

Challenge: Classified Evidence

The Eastern District of Virginia's experience handling classified materials in espionage cases was an important reason for the government's selecting that district over the Southern District of New York for Moussaoui's prosecution.⁸⁹⁰

Classified materials require extraordinary procedures, but Judge Brinkema tried to keep procedures as normal as possible.⁸⁹¹ She required all of her law clerks and other staff members to qualify for top-secret security clearances.⁸⁹²

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.⁸⁹³

Moussaoui himself was not supposed to have access to classified information.⁸⁹⁴ In June and July of 2002, however, the government inadvert-

887. *Id.*

888. *Id.*

889. *Id.*

890. See Greenberg, *supra* note 812, at 78 (reporting that the Eastern District of Virginia's reputation for fast case management, known as a "rocket docket," and its juries' greater comfort with capital sentences also were factors in the choice).

891. Interview with Judge Leonie M. Brinkema, Jan. 5, 2007.

892. *Id.*

893. *United States v. Moussaoui*, 591 F.3d 263, 267 (4th Cir. 2010); Protective Order and Memorandum of Understanding, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002), D.E. 54; see Donahue, *supra* note 793, at 23; Pohlman, *supra* note 793, at 194.

894. Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 23, 2002), D.E. 450, 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 850; Philip Shenon, *U.S. Gave Secrets to Terror Suspect*, N.Y. Times, Sept. 27, 2002, at A1.

ently included classified materials among documents produced to Moussaoui.⁸⁹⁵ On August 22, the government wrote to Judge Brinkema that two documents produced to Moussaoui had mistakenly not been classified and asking that a “walled-off FBI team” search Moussaoui’s cell to retrieve the documents.⁸⁹⁶

Judge Brinkema denied the FBI search.

[G]iven the massive amounts of material produced in this case, there is a significant danger that any agents sent to Mr. Moussaoui’s cell would have to 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.⁸⁹⁷

But Judge Brinkema did permit the Marshals Service, in consultation with the classified information security officer, to search Moussaoui’s cells for the two documents plus an additional five that the government identified in the interim as improperly produced.⁸⁹⁸ Of the seven searched for, five were found.⁸⁹⁹ By the following week, the government presented to Judge

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 (2020); Tom Jackman, *Moussaoui’s Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

895. Aug. 22, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 26, 2002), D.E. 575, 2002 WL 32001771; Interview with Judge Leonie M. Brinkema, Jan. 5, 2007; see Shenon, *supra* note 894.

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.

896. Aug. 22, 2002, Letter, *supra* note 895; see Shenon, *supra* note 894.

897. Aug. 23, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *supra* note 895.

898. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Feb. 3, 2010; see Aug. 29, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *supra* note 895; see also Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

899. Interview with Judge Leonie M. Brinkema, Jan. 5, 2007; see Aug. 29, 2002, Letter, *supra* note 898; Shenon, *supra* note 894.

Brinkema a list of forty-three improperly produced documents.⁹⁰⁰ 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.⁹⁰¹ Eventually, the documents were retrieved and properly classified.⁹⁰²

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.⁹⁰³

Challenge: Classified Arguments

Eastern District of Virginia

Moussaoui's appointed standby attorneys had security clearances; to ensure that they did not inadvertently put classified information into the public record, Judge Brinkema established a procedure in which they submitted filings to the classified information security officer, who was given forty-eight hours to identify any classified information that had to be redacted from the public record.⁹⁰⁴ These filings could not be shared with Moussaoui, because he did not have a security clearance, until they had been reviewed by the security officer.⁹⁰⁵ Unredacted filings containing classified information were filed with the security officer rather than the clerk.⁹⁰⁶ The government was responsible for classification reviews of its filings.⁹⁰⁷

900. See Sept. 5, 2002, Letter, *attached to* Classified Document Retrieval Unsealing Order, *supra* note 895; Shenon, *supra* note 894.

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

902. Classified Document Retrieval Unsealing Order, *supra* note 895, at 1.

903. Order Rescheduling Trial, *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 30, 2002), D.E. 585, 2002 WL 32001785; see Philip Shenon, *Judge Agrees to New Delay in Trial in Conspiracy Case*, N.Y. Times, Oct. 1, 2002, at A20.

904. Classified Filing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Oct. 3, 2002), D.E. 594; see *Moussaoui Motions to Be Cleared*, Wash. Post, Oct. 4, 2002, at A15 [hereinafter *Moussaoui Motions*].

905. Classified Filing Order, *supra* note 904, at 2; see *Moussaoui Motions*, *supra* note 904.

906. Classified Filing Order, *supra* note 904, at 2–3.

907. *Id.* at 2; see *Moussaoui Motions*, *supra* note 904.

One seventy-one-page government brief had fifty blank (redacted) pages, fifteen partially redacted pages, three full pages of text, and three head and end pages. Government Response Brief, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 13, 2003), D.E. 715; see Pohlman, *supra* note 793, at 194.

Fourth Circuit

The court of appeals' clerk's office anticipated that it was likely to eventually receive an appeal in Moussaoui's case, and that classified information would be part of the court record.⁹⁰⁸ So the clerk's office worked with the classified information security officers to (1) create a sensitive compartmented information facility (SCIF)—an especially secure storage facility suitable for storing sensitive compartmented information and other classified information—and (2) begin the process of obtaining security clearances for several staff members.⁹⁰⁹

The court's judges met in regular session in Richmond six times a year. There were safes in the court's SCIF for the Moussaoui case, with separate drawers allocated to each judge.⁹¹⁰ Cleared court staff members could bring classified documents from the SCIF to judges' Richmond chambers for review while the judges were in Richmond.⁹¹¹ Judge Gregory's home chambers are in Richmond, so cleared court staff members could bring him classified documents from the Richmond SCIF even when the court was not in session. Judge Gregory frequently visited the SCIF himself to retrieve documents.⁹¹² He observed that although it is convenient to have the documents stored near his chambers, he still must keep them within view at all times while they are out of the SCIF.⁹¹³

Judge Wilkins had chambers in Greenville, South Carolina, and the courthouse there had a SCIF.⁹¹⁴ Judge Williams had chambers in Orangeburg, South Carolina, which is approximately fifty miles south of Columbia. Either classified information security officers brought classified documents to her chambers in Orangeburg for her review while they were there, or she traveled to Columbia, where the FBI had a SCIF.⁹¹⁵ Judge Shedd's chambers were in Columbia, so he could review files at the FBI SCIF there or at the court in Richmond during a session.⁹¹⁶

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

909. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Feb. 3, 2010; *see* Reagan, *supra* note 898, at 22–23 (describing SCIFs).

910. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Feb. 3, 2010.

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

912. Interview with Judge Roger L. Gregory, Sept. 25, 2009.

913. *Id.*

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

915. *Id.*

916. Interview with Judge Dennis W. Shedd, Sept. 3, 2009.

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, the briefs were filed with the classified information security officer under seal.⁹¹⁷ Some information about their contents, however, was reported in the *Washington Post*.⁹¹⁸ In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs were filed with the classified information security officer under seal and redacted briefs were filed in the public record.⁹¹⁹

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.⁹²⁰ Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.⁹²¹ Moussaoui would give a document for the court of appeals to the jail where he was detained, and the jail would pass it on to a classified information security officer who notified the court.⁹²² The court docketed it as filed with the classified information security officer, who had it reviewed for classified information and then sent a redacted copy to the court for public filing.⁹²³ Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.⁹²⁴

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.⁹²⁵ Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.⁹²⁶ The court denied the petition.⁹²⁷

917. Docket Sheet, *United States v. Moussaoui*, No. 03-4162 (4th Cir. Feb. 12, 2003) [hereinafter Feb. 12, 2003, 4th Cir. 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").

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

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

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

921. *Id.*

922. *Id.*

923. *Id.*

924. *Id.*

925. *Id.*

926. *Id.*

The appeal of Moussaoui's guilty plea also included classified briefing.⁹²⁸ Judge Gregory observed that the most difficult issue presented to an appellate judge by the presence of classified information in a case is the difficulty of obtaining law clerk assistance.⁹²⁹ Judge Gregory did not have a career law clerk, and security clearances take such a large portion of a term law clerk's tenure to acquire that he relied on a court of appeals staff attorney, who had a security clearance, to help him with matters involving classified information.⁹³⁰

In August 2009, the court worked with the classified information security officer to establish a larger SCIF in Richmond, suitable for working and meeting in addition to storage.⁹³¹

Challenge: Closed Proceedings

Closed proceedings in district courts are not common, but they do occur, especially in cases involving classified information. Closed proceedings in appellate courts are more rare.

All four oral arguments before the court of appeals included a public session and a closed session at which classified information could be discussed.⁹³² At the public session, a classified information security officer and a CIA officer attended to monitor the proceeding in case it needed to be interrupted to prevent disclosure of classified information.⁹³³ At these public sessions, no interruption was necessary.⁹³⁴

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

927. Oct. 7, 2003, 4th Cir. Docket Sheet, *supra* note 919 (noting the denial of rehearing on October 13, 2004).

928. May 15, 2006, 4th Cir. Docket Sheet, *supra* note 868; Interview with Judge Roger L. Gregory, Sept. 25, 2009.

929. Interview with Judge Roger L. Gregory, Sept. 25, 2009.

930. *Id.*

931. *Id.*; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008, and Sept. 1, 2009; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Feb. 3, 2010.

932. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 919; Interview with Judge Roger L. Gregory, Sept. 25, 2009; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 28, 2009; *see* Pohlman, *supra* note 793, at 196, 217; *id.* at 197–98 (presenting a redacted transcript of the June 3, 2002, closed session).

933. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 28, 2009.

934. Interview with Judge Roger L. Gregory, Sept. 25, 2009.

granted the government's motion to seal the oral argument.⁹³⁵ But on a motion by news media to hold the oral argument in open court, the panel that would ultimately hear the appeal decided to bifurcate the argument: a public oral argument was held followed by a closed oral argument concerning classified information.⁹³⁶ The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.⁹³⁷ 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 twenty-four hours of the argument.⁹³⁸ A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.⁹³⁹

Challenge: Classified Opinion

Many opinions issued by the district court and the court of appeals in this case were redacted. Judge Gregory observed that in the appeal of Judge Brinkema's discovery sanction the majority's opinion and Judge Gregory's separate opinion came back from the redaction process looking like Swiss cheese.⁹⁴⁰ In the opinion issued by the court, redactions appear as white space equal in size to the amount of text redacted; in West's published version, the expression "[Redacted]" replaces redacted text, regardless of quantity.

Challenge: Terrorist Communications

Once Moussaoui declared in court that he wished to proceed pro se, he began to file with the court handwritten documents that the court regard-

935. Feb. 12, 2003, 4th Cir. Docket Sheet, *supra* note 917 (noting the grant, on March 24, 2003, of a motion to seal the argument); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Jerry Markon, *Moussaoui Hearing Closed to Public*, Wash. Post, Mar. 25, 2003, at A2.

936. *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2002) (order by Judges William W. Wilkins, H. Emory Widener, Jr., and Paul V. Niemeyer); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Philip Shenon, *In Shift, Appeals Court Opens Hearing on a 9/11 Suspect*, N.Y. Times, May 14, 2003, at A15.

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

938. *Moussaoui*, 65 F. App'x 881.

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

940. Interview with Judge Roger L. Gregory, Sept. 25, 2009; see *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

ed as motions.⁹⁴¹ The court initially filed these documents under seal.⁹⁴² 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.⁹⁴³ 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.⁹⁴⁴

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.⁹⁴⁵ Judge Brinkema determined that Moussaoui's filings included improper material.

The defendant's pleadings have been replete with irrelevant, inflammatory and insulting rhetoric, which would not be tolerated from an attorney practicing in this court. Because he has been warned numerous times that such writing would have to stop, the defendant may no longer hide behind his *pro se* status to avoid being held to appropriate pleading practice. Further, we find that the record supports the United States' concern that the defendant, who is charged with conspiracy to commit acts of terrorism transcending national boundaries among other offenses, is attempting to use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement.⁹⁴⁶

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."⁹⁴⁷ She sealed several, but not all, recent filings.⁹⁴⁸ She declined Moussaoui's suggestion that the court engage in the burdensome task of redact-

941. E.D. Va. Docket Sheet, *supra* note 814.

942. Pro Se Order, *supra* note 875, at 1.

943. *Id.* at 2.

944. Pro Se Filings Unsealing Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. June 17, 2002), D.E. 188, 2002 WL 1311764.

945. Letter, *id.* (Aug. 22, 2002) (portions redacted); see Philip Kennicott, *A Window on the Mind of Moussaoui*, Wash. Post, July 25, 2002, at C1 (reporting on the contents of Moussaoui's filings).

946. Pro Se Filings Sealing Order at 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), D.E. 465, 2002 WL 1990900.

947. *Id.* at 4.

948. *Id.* at 3–4.

ing 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.”⁹⁴⁹

On motion from news media, and after observing that “the defendant has filed fewer pleadings and has significantly toned down his inappropriate rhetoric,” Judge Brinkema modified her order so that all pro se filings would be sealed for ten days to give the government an opportunity “to advise the Court in writing whether the pleading should remain under seal or be unsealed with or without redactions.”⁹⁵⁰

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.⁹⁵¹

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.⁹⁵² 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.”⁹⁵³

949. *Id.* at 4 n.3.

950. Sept. 27, 2002, Pro Se Filings Sealing Order, *id.* (Sept. 27, 2002), D.E. 579, 2002 WL 32001783; see *News Media Win Ruling in Terror Trial*, N.Y. Times, Sept. 28, 2002, at A11.

951. Sept. 27, 2002, Pro Se Filings Sealing Order, *supra* note 950, at 4 n.1.

952. Videotape Production Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 5, 2002), D.E. 660, 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.

953. Videotape Production Order, *supra* note 952.

Chapter 7

American Taliban

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

An American citizen caught supporting Muslim forces in Afghanistan shortly after the terrorist attacks of September 11, 2001, was sentenced to twenty years in prison as part of a plea bargain. Extraordinary efforts to take testimony from a covert agent in court without compromising the agent's identity were made unnecessary at the last minute by the plea. The case also presented the court with the challenges of handling classified information, sensitive unclassified information, and information obtained from detainees housed at Guantánamo Bay. During incarceration, the defendant won judicial relief to protect his religious freedom.

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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.⁹⁵⁴ Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.⁹⁵⁵ Lindh⁹⁵⁶

954. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002); see Dan Eggen & Brooke A. Masters, *U.S. Won't Seek Death for Walker*, Wash. Post, Jan. 16, 2002, at A1; Chris Heffelfinger, *Radical Islam in America* xix (2011); David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y. Times, Jan. 16, 2002, at A1; Fredrick Kunkle, *Lindh Never Betrayed Homeland, Parents Say*, Wash. Post, July 16, 2002, at A10; Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail*, Wash. Post, Jan. 24, 2002, at A13; Jane Mayer, *Lost in the Jihad*, New Yorker, Mar. 10, 2003, at 50; Jesselyn Radack, *Traitor: The Whistleblower and the “American Taliban”* 28–29 (2012).

955. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; see Eggen & Masters, *supra* note 954; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 954; Kunkle, *supra* note 954; Vernon Loeb, *U.S. Soldiers Recount Smart Bomb's Blunder*, Wash. Post, Feb. 2, 2002, at A15; Radack, *supra* note 954, at 29; Carol Robinson, *“Mike Gave His Life for America's Free-*

was shot in the upper thigh during the uprising, and he denied involvement in Spann's death.⁹⁵⁷ Lindh and several dozen other surviving Taliban troops were recaptured on December 1 when the Northern Alliance flooded them out of a basement.⁹⁵⁸

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.⁹⁵⁹ He arrived in the Eastern District of Vir-

doms," Mobile Press-Register, Aug. 18, 2021, at A1; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 91–92 (2007); Rene Sanchez, *John Walker's Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

Spann's wife, also a CIA employee, was able to witness the engraving of a black star on the CIA's memorial wall to commemorate Spann's death in the line of duty. See Ian Shapira, *Shaping the Memorial to the CIA's Fallen*, Wash. Post, May 23, 2014, at A1.

956. 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 preferred to be identified by his father's last name. See *Walker No More*, N.Y. Times, Jan. 25, 2002, at A11.

957. *Lindh*, 227 F. Supp. 2d at 569; see Eggen & Masters, *supra* note 954; Johnston, *supra* note 954; see also Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Mayer, *supra* note 954; Radack, *supra* note 954, at 29; Romero & Temple-Raston, *supra* note 955, at 92–93.

958. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; see Johnston, *supra* note 954; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 955; Mayer, *supra* note 954; Radack, *supra* note 954, at 29–30; Romero & Temple-Raston, *supra* note 955, at 94.

Lindh played dead for a day before Taliban soldiers helped him and other wounded survivors into the basement of a building in a fortress, where they would spend the next six harrowing days. The Northern Alliance tried to flush out the unarmed, wounded, starving prisoners with gunfire, hand grenades, and ignited diesel fuel. Finally, the Northern Alliance flooded the basement with freezing water, which quickly became polluted with blood, human waste, and floating body parts.

Radack, *supra* note 954, at 29.

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 955, 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 955, at 144, 191 (reporting on *Hamdi*).

959. Docket Sheet, *United States v. Lindh*, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002) [hereinafter E.D. Va. Docket Sheet] (D.E. 1); see Eggen & Masters, *supra* note 954; Johnston, *supra* note 954; Masters & Davis, *supra* note 954; Romero & Temple-Raston, *supra* note 955, at 140 & fig. 7. See generally Karen J. Greenberg, *Rogue Justice* 43–53 (2016).

ginia for trial eight days later.⁹⁶⁰ An indictment filed on February 5 added related charges as well as a firearms charge.⁹⁶¹ The court assigned the case to Judge T.S. Ellis III.⁹⁶² Lindh pleaded not guilty on February 13.⁹⁶³ 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.⁹⁶⁴

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.⁹⁶⁵ John Walker Lindh was raised a Catholic, but he decided to convert to Islam at sixteen, taking the name Suleyman.⁹⁶⁶ At eighteen, he moved to

960. See Masters & Davis, *supra* note 954; see also Jess Bravin, *The Terror Courts* 118–19 (2013) (reporting that Lindh's prosecution was steered to the Eastern District of Virginia by repatriating him there).

961. *United States v. Lindh*, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 959 (D.E. 13); see Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 955, at 139.

962. E.D. Va. Docket Sheet, *supra* note 959; T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1611 (2013); see Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 955, at 142.

Tim Reagan interviewed Judge Ellis for this case study in his chambers on September 5, 2007.

963. E.D. Va. Docket Sheet, *supra* note 959; see Masters, *supra* note 962.

964. *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.

965. See Heffelfinger, *supra* note 954, at xiii–xiv; Kunkle, *supra* note 954; Loeb, *supra* note 958; 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 955, at 13, 15; Sanchez, *supra* note 955.

966. See Eggen & Masters, *supra* note 954 (reporting that Lindh took the name Suleyman al-Faris); Heffelfinger, *supra* note 954, at xiv–xv (“He asked that the name on his [high-school] diploma be changed to Suleyman al-Lindh, though he never picked it up.”); Kunkle, *supra* note 954; Loeb, *supra* note 958; Nieves, *supra* note 965 (reporting that Lindh took the name Suleyman al-Lindh); Radack, *supra* note 954, at 26; Romero & Temple-Raston, *supra* note 955, at 16 (reporting that “Suleyman” is equivalent to “Solomon”); Sanchez, *supra* note 955.

Yemen to study Arabic, and then he moved to Bannu, Pakistan, to attend a madrasah.⁹⁶⁷

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.⁹⁶⁸ He arrived on the Taliban's front line on September 6, 2001.⁹⁶⁹

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.⁹⁷⁰ Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.⁹⁷¹ Other photos apparently were destroyed.⁹⁷²

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.⁹⁷³ To protect from harm the employees at Brosnahan's law firm, Brosnahan kept the firm's name off of the case.⁹⁷⁴

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.⁹⁷⁵ But the government acknowl-

967. See Eggen & Masters, *supra* note 954; Heffelfinger, *supra* note 954, at xvi–xviii; Loeb, *supra* note 958; Mayer, *supra* note 954; Romero & Temple-Raston, *supra* note 955, at 17–19 (reporting that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 955.

968. See Eggen & Masters, *supra* note 954; Loeb, *supra* note 958; Mayer, *supra* note 954; Nieves, *supra* note 965; Radack, *supra* note 954, at 26–27; Romero & Temple-Raston, *supra* note 955, 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 955.

969. See Heffelfinger, *supra* note 954, at xiii; Romero & Temple-Raston, *supra* note 955, at 24.

970. See *Silenced* (Morninglight Films 2014); Romero & Temple-Raston, *supra* note 955, at 111 & fig. 5; Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9.

971. See Masters, *supra* note 970; Romero & Temple-Raston, *supra* note 955, at 114 (reporting that the obscenity was “shithead”).

972. See Masters, *supra* note 970; Romero & Temple-Raston, *supra* note 955, at 114.

973. See Eggen & Masters, *supra* note 954; Mayer, *supra* note 954; Romero & Temple-Raston, *supra* note 955, at 94, 111–14, 136–37; see also Radack, *supra* note 954, at 31, 38–39 (reporting that the government refused to recognize Brosnahan as Lindh's attorney until after Lindh was brought to the Eastern District of Virginia and that the government refused to inform Lindh that his parents had provided him with an attorney).

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

975. See Masters, *supra* note 962; Radack, *supra* note 954, at 29; Romero & Temple-Raston, *supra* note 955, at 140–41 (reporting that the government brought Spann's family to the courthouse).

edged at a hearing two months later that there was no evidence that Lindh killed or shot at any American citizen, including Spann.⁹⁷⁶

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.⁹⁷⁷ All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.⁹⁷⁸ 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.⁹⁷⁹ Lindh tearfully admitted making a mistake by joining the Taliban.⁹⁸⁰ Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.⁹⁸¹ Lindh was released on May 23, 2019.⁹⁸²

Challenge: Sensitive Unclassified Information

Early in the prosecution, the government determined that it had to disclose to the defendant “reports of interviews of detainees captured in Afghanistan and elsewhere who may have knowledge of al Qaeda or who may have been members of that organization and who are housed primarily at Guantanamo Bay, Cuba.”⁹⁸³ The reports were regarded as “unclassified information vital to national security.”⁹⁸⁴ The government submitted to the court *ex parte* and *in camera* both an unredacted set of reports and a

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

977. *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 959; Ellis, *supra* note 962, at 1611, 1613; see Jackman, *supra* note 955; Kunkle, *supra* note 954; Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. Times, July 16, 2002; Mayer, *supra* note 954; Romero & Temple-Raston, *supra* note 955, at 188.

978. *Lindh*, 227 F. Supp. 2d at 566; see Jackman, *supra* note 955; Lewis, *supra* note 977; Romero & Temple-Raston, *supra* note 955, at 188–89.

979. *Lindh*, 227 F. Supp. 2d at 571–72; E.D. Va. Docket Sheet, *supra* note 959; Ellis, *supra* note 962, at 1611; see *Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 955; Romero & Temple-Raston, *supra* note 955, at 12, 189–90.

980. Ellis, *supra* note 962, at 1611; see *Apologetic Lindh*, *supra* note 979; Romero & Temple-Raston, *supra* note 955, at 189.

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

982. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 45426-083); see Rachel Weiner, “American Taliban” Fighter Released from Prison, Wash. Post, May 24, 2019, at A2; see also Carol Rosenberg, *American Taliban, Held 17 Years, Nears Release*, N.Y. Times, May 22, 2019, at A1.

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

984. *Id.* at 742.

set with proposed redactions, omitting agent and case identifiers and information concerning other detainees not relevant to the defense.⁹⁸⁵

Judge Ellis granted the government's motion for a protective order.⁹⁸⁶

[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.⁹⁸⁷

Judge Ellis rejected the government's proposal that defense investigators and expert witnesses be prescreened before information contained in the redacted reports could be disclosed to them.⁹⁸⁸ Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.⁹⁸⁹

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.⁹⁹⁰

On motion, and without objection from the defendant, Judge Ellis subsequently modified the protective order to require of persons seeing the re-

985. *Id.* at n.2.

Later in the case, Judge Ellis agreed with the government that a set of additional detainee reports did not need to be disclosed to the defense. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974284 (E.D. Va. June 17, 2002).

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

987. *Id.* at 742.

988. *Id.*

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

990. *Id.* at 742–43.

ports 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.”⁹⁹¹

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.”⁹⁹²

Challenge: Classified Evidence

In order to determine what evidence the government had to produce to the defendant, Judge Ellis reviewed a substantial amount of classified material.⁹⁹³ It was stored in the court’s sensitive compartmented information facility (SCIF).⁹⁹⁴

Judge Ellis’s career law clerk had a top-secret security clearance, so she could assist the judge with reviews of classified information.⁹⁹⁵ The chambers had a rule requiring classified documents to be within eyesight at all times.⁹⁹⁶ Even a law clerk’s brief trip outside chambers required taking the classified documents securely along.⁹⁹⁷ But classified materials were *never* taken home.⁹⁹⁸

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.⁹⁹⁹ Judge Ellis denied counsel face-to-face access to the detainees, but he established

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

This type of court security officer is now known as a classified information security officer. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013).

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

993. Interview with Judge T.S. Ellis III, Sept. 5, 2007.

994. *Id.*; see Reagan, *supra* note 991, at 22–23 (describing SCIFs).

995. Interview with Judge T.S. Ellis III, Sept. 5, 2007.

996. *Id.*

997. *Id.*

998. *Id.*

999. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1298601, at *1 (E.D. Va. May 30, 2002); Ellis, *supra* note 962, at 1611; see Masters, *supra* note 957; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

“Justice Department prosecutors . . . felt the Pentagon nearly had sabotaged the cases of Lindh and Zacarias Moussaoui . . . by blocking access to Guantanamo detainees who

a procedure allowing counsel to submit questions to “firewall” attorneys who passed them on to the detainees.¹⁰⁰⁰

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.¹⁰⁰¹

Defense counsel submitted questions for each detainee to the firewall attorneys.¹⁰⁰² The firewall attorneys could object to any questions, and the court would resolve any objections on sealed noticed filings.¹⁰⁰³ Approved questions were submitted to interrogators who interwove the questions into the interrogations.¹⁰⁰⁴ Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.¹⁰⁰⁵ Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.¹⁰⁰⁶

Judge Ellis monitored the procedure to ensure that it protected Lindh’s rights to a defense.¹⁰⁰⁷

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.¹⁰⁰⁸ To protect the witness by shielding the witness’s identity, Judge

were potential witnesses. The Defense Department would not acknowledge any summons from a federal court directed to Guantanamo.” Bravin, *supra* note 960, at 121.

1000. *Lindh*, 2002 WL 1298601, at *1–2; Interview with Judge T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 962, at 1611–12; *see* Masters, *supra* note 957.

1001. *Lindh*, 2002 WL 1298601, at *1 & n.1.

1002. *Id.* at *1.

1003. *Id.*

1004. *Id.*

1005. *Id.*

1006. *Id.*

1007. *Id.*; *see* Masters, *supra* note 957.

1008. Interview with Judge T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 962, at 1613; *see* Jackman, *supra* note 955; Lewis, *supra* note 977; Mayer, *supra* note 954 (“The case was settled in a weekend-long flurry of negotiations that ended at 2 a.m. on the day that key evidence against Lindh was to be challenged in open court.”); Romero & Temple-Raston, *supra* note 955, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing). *See generally* Greenberg, *supra* note 959, at 49–51.

The bombshell plea agreement, which startled even the judge, was announced before a packed courtroom awaiting the start of what was to be a crucial evidentiary hearing on whether statements Lindh made while in custody in Afghanistan—the

Ellis worked with the classified information security officers and the Marshals Service to make adjustments to the courtroom.¹⁰⁰⁹ The courtroom was outfitted with special draperies and screens.¹⁰¹⁰ The witness box was shielded from the public, as was the path to the door through which prisoners often were brought—a door that would be used in this case for the witness.¹⁰¹¹

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.¹⁰¹² 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.¹⁰¹³

Challenge: Religious Accommodation

On January 11, 2013, Southern District of Indiana Judge Jane Magnus-Stinson granted summary judgment to Lindh in a civil action challenging his warden's refusal to permit group prayer.¹⁰¹⁴

ones I had advised the US against soliciting without counsel—could be used against him at his trial—which I had also advised against.

Radack, *supra* note 954, at 61 (report by a government ethics attorney who claimed that she suffered retaliation for leaking to the news media an alleged coverup of the government's failure to follow ethical advice with respect to Lindh's interrogation).

1009. Interview with Judge T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 6, 2007; *see* Reagan, *supra* note 991, at 21–22 (providing information about classified information security officers).

1010. Interview with Judge T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 6, 2007; *see* Jackman, *supra* note 955; Lewis, *supra* note 977.

1011. Interview with Judge T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 962, at 1612–13.

1012. *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 Judge T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 962, at 1613.

1013. Interview with Judge T.S. Ellis III, Sept. 5, 2007; Ellis, *supra* note 962, at 1613.

1014. Opinion, *Lindh v. Warden*, No. 2:09-cv-215 (S.D. Ind. Jan. 11, 2013), D.E. 200 [hereinafter Jan. 11, 2013, S.D. Ind. Opinion], 2013 WL 139699; *see* Opinion at 10, *id.* (Feb. 3, 2012), D.E. 121 [hereinafter Feb. 3, 2012, S.D. Ind. Opinion], 2012 WL 379737 (finding “as a matter of law that daily group prayer is a religious exercise motivated by Mr. Lindh’s sincerely held religious beliefs”). *See generally* Wadie E. Said, *Crimes of Terror* 140 (2015).

His scant, nonviolent disciplinary history during his incarceration has merited him a classification of low security. He is allowed to engage in contact sports, play cards, and watch movies and television, including Muslim videos in the Arabic language. In this matter, he seeks permission to engage in one more activity: congregate prayer in accordance with his sincerely held religious beliefs.¹⁰¹⁵

Judge Stinson found that the warden's policy violated the Religious Freedom Restoration Act of 1993.¹⁰¹⁶ She approved a stipulated award of \$160,607.52 in attorney fees and costs.¹⁰¹⁷

Lindh was not an original plaintiff in the case.¹⁰¹⁸ Of the two original plaintiffs in the June 18, 2009, complaint,¹⁰¹⁹ one was released¹⁰²⁰ and the other was transferred from the prison in Terre Haute, Indiana, to another prison.¹⁰²¹ Lindh was added by amendment on June 29, 2010.¹⁰²²

On April 10, 2013, Lindh filed a contempt motion challenging how the warden implemented Judge Stinson's decision.¹⁰²³ With Lindh appearing by videoconference, Judge Stinson heard the matter on June 27.¹⁰²⁴ Rather than issue a sanction for contempt, Judge Stinson issued an order on July 19 clarifying the warden's obligations to provide reasonable opportunities for group prayer.¹⁰²⁵ On August 7, Judge Stinson approved a stipulated award of \$8,200 for attorney fees and costs.¹⁰²⁶

1015. Jan. 11, 2013, S.D. Ind. Opinion, *supra* note 1014, at 1.

1016. *Id.* at 30; see 42 U.S.C. § 2000bb to 2000bb-4 (2020).

1017. Order, *Lindh*, No. 2:09-cv-215 (S.D. Ind. Apr. 9, 2013), D.E. 208; see Stipulation, *id.* (Apr. 8, 2013), D.E. 207.

1018. Feb. 3, 2012, S.D. Ind. Opinion, *supra* note 1014, at 6.

1019. Complaint, *Arnaout v. Warden*, No. 2:09-cv-215 (June 18, 2009), D.E. 1 (complaint by Enaam Arnaout and Randall T. Royer, see Chapter 11: Paintball, *infra* page 200).

1020. BOP Locator, *supra* note 982 (noting Arnaout's release from prison on February 8, 2011, reg. no. 14504-424).

1021. Order, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. May 26, 2010), D.E. 36 (dismissing Royer as a plaintiff because of his transfer to another prison); BOP Locator, *supra* note 982 (previously noting Royer's incarceration in Marion, Illinois; later noting his incarceration in Hopewell, Virginia; now noting his release from prison on December 12, 2016, reg. no. 46812-083).

1022. Amended Complaint, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. June 29, 2010), D.E. 40; Order, *id.* (June 28, 2010), D.E. 39 (permitting amendment).

1023. Motion, *Lindh v. Warden*, No. 2:09-cv-215 (S.D. Ind. Apr. 10, 2013), D.E. 209.

1024. Minutes, *id.* (June 27, 2013), D.E. 226.

1025. Order, *id.* (July 19, 2013), D.E. 227.

1026. Order, *id.* (Aug. 7, 2013), D.E. 233.

Chapter 8

Dirty Bomber

Padilla v. Rumsfeld (Michael B. Mukasey, S.D.N.Y.),
Padilla v. Hanft and Padilla v. Rumsfeld
(Henry F. Floyd, D.S.C.),
United States v. Hassoun (Marcia G. Cooke, S.D. Fla.),
and Hassoun v. Searls (Elizabeth A. Wolford, W.D.N.Y.)

The prosecution of U.S. citizen José Padilla began as material-witness detention, transitioned to enemy-combatant detention, and finished as inclusion in a pending criminal case. Judges faced the challenges of classified evidence and arguments and courthouse security. Access to counsel and the detainee's mental health also posed substantial challenges. Litigation about a codefendant's postrelease immigration status required the court's management of unclassified but sensitive evidence.

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Enemy Combatant

Padilla was born in Brooklyn to Puerto Rican parents.¹⁰²⁷ On May 8, 2002, upon his landing at O'Hare International Airport in Chicago on a trip from Pakistan, federal authorities arrested him on a material-witness warrant arising from a grand-jury investigation of the September 11, 2001, attacks.¹⁰²⁸

Padilla was flown to Manhattan for detention and possible grand-jury testimony.¹⁰²⁹ On June 10, at a press conference in Russia, Attorney Gen-

1027. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002); see United States v. Jayyousi, 657 F.3d 1085, 1096 (11th Cir. 2011) ("they referred to Padilla as 'the Puerto Rican' because of his Puerto Rican descent"); see also Dan Eggen & Susan Schmidt, "Dirty Bomb" Plot Uncovered, U.S. Says, Wash. Post, June 11, 2002, at A1; James Risen & Philip Shenon, U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb, N.Y. Times, June 11, 2002, at A1; Jo Thomas & Dana Canedy, A Hispanic's Odyssey Into the Arms of Islam, N.Y. Times, June 15, 2002, at A14; Jodi Wilgoren & Jo Thomas, From Chicago Gang to Possible Al Qaeda Ties, N.Y. Times, June 11, 2002, at A19.

1028. Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004); Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540, 545 (4th Cir. 2012); Padilla v. Hanft, 423 F.3d 386, 388–90 (4th Cir. 2005); Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003); Padilla, 233 F. Supp. 2d at 568–69, 571, 573; Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, at 235–37 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf; Michael B. Mukasey, Commencement Address—May 10, 2009, 88 N.C. L. Rev. 1, 4 (2009) ("Padilla was arrested when he landed on a warrant I had issued in New York, based on information contained in an affidavit. That information came in part from the harsh interrogation of Abu Zabaydah . . ."); see Jayyousi, 657 F.3d at 1094, 1101; see also Eggen & Schmidt, *supra* note 1027; John J. Gibbons, Commentary on the Terror on Trial Symposium, 28 Rev. Litig. 297, 304 (2008); Jonathan Hafetz, Habeas Corpus After 9/11 47, 73 (2011); Robert C. Herguth, Former Chicagoan "Trained with the Enemy," U.S. Says, Chi. Sun Times, June 10, 2002, at 3; Donna Newman, The Jose Padilla Habeas Case: A Modern Day Struggle to Preserve the Great Writ, 10 N.Y. City L. Rev. 333, 333 (2007) [hereinafter *Modern Day Struggle*]; Donna R. Newman, What the F— Is an "Enemy Combatant"?, in The Guantánamo Lawyers 361, 361 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) [hereinafter *What the F—*]; H.L. Pohlman, Terrorism and the Constitution 76 (2008); Risen & Shenon, *supra* note 1027; Larry Siems, The Torture Report 1–6 (2011) ("Five minutes before his flight from Zurich landed, then-U.S. District Court Judge Michael Mukasey signed a material witness warrant authorizing Padilla's arrest."); Ali H. Soufan, The Black Banners 407–08, 428 (2011), reprinted as The Black Banners (Declassified) (2020) (restoring redactions); Wilgoren & Thomas, *supra* note 1027.

"Intelligence agencies had learned of him through the coercive interrogations of high-level Al Qaeda operatives overseas." Benjamin Wittes, Law and the Long War 180 (2008).

1029. Padilla, 542 U.S. at 431; Padilla, 678 F.3d at 751; Padilla, 423 F.3d at 390; Padilla, 352 F.3d at 700 ("On May 15, 2002, he appeared before Chief Judge Mukasey, who

eral John Ashcroft announced that the government was holding in custody an enemy combatant who had been apprehended at O'Hare on suspicion of planning to build and detonate a "dirty bomb," which is a bomb made up of radioactive material and conventional explosives.¹⁰³⁰ The detainee was Padilla, and the government had transferred him the previous day to the high-security Consolidated Naval Brig in Charleston, South Carolina.¹⁰³¹ As a result of this transfer, Padilla was denied access to counsel.¹⁰³²

Padilla had been scheduled to appear on June 11 before the Southern District of New York's Chief Judge Michael B. Mukasey for a hearing on a motion to vacate the material-witness warrant.¹⁰³³ "[A material-witness

appointed Donna R. Newman, Esq., to represent Padilla."); see Eggen & Schmidt, *supra* note 1027; Gibbons, *supra* note 1028, at 304.

1030. *Padilla*, 233 F. Supp. 2d at 572–73; see *Padilla*, 678 F.3d at 751; Eggen & Schmidt, *supra* note 1027; Hafetz, *supra* note 1028, at 47; Herguth, *supra* note 1028; Newman, *What the F—*, *supra* note 1028, at 362; Risen & Shenon, *supra* note 1027; *Dirty Bomb*, Morning Edition (NPR radio broadcast June 10, 2002), www.npr.org/templates/story/story.php?storyId=1144759; see also Soufan, *supra* note 1028, at 408 (reporting that the attorney general was misinformed: "While Padilla was a committed terrorist set on trying to harm America, he was a brain transplant away from making a bomb, and there was no unfolding plot."); Clive Stafford Smith, *Eight O'Clock Ferry to the Windward Side* 49–80 (2007) (arguing that the alleged dirty bomb plot was "almost certainly a fantasy"); Wittes, *supra* note 1028, at 181 (describing the dirty bomb allegation as one "from which the government later had to back away and which greatly diminished its credibility"). But see Terry McDermott & Josh Meyer, *The Hunt for KSM 144* (2012) (reporting that Khalid Shaikh Mohammed "sent José Padilla, the hapless American son of Puerto Rican immigrants, back to the United States to research the possibility of building a dirty bomb and blowing up apartment buildings after filling them with gas."); *id.* at 187.

1031. *Padilla*, 542 U.S. at 431–32; *Padilla*, 678 F.3d at 751; *Lebron*, 670 F.3d at 545; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 569; see Eggen & Schmidt, *supra* note 1027; Gibbons, *supra* note 1028, at 304–05; Pohlman, *supra* note 1028, at 76–77; Risen & Shenon, *supra* note 1027.

1032. *Padilla*, 678 F.3d at 751; *Padilla*, 233 F. Supp. 2d at 574; see Newman, *Modern Day Struggle*, *supra* note 1028, at 336. See generally Karen J. Greenberg, *Rogue Justice* 63–76 (2016).

1033. *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; see Eggen & Schmidt, *supra* note 1027; Gibbons, *supra* note 1028, at 304–05; Risen & Shenon, *supra* note 1027; see also Soufan, *supra* note 1028, at 408 (noting that Judge Mukasey had signed the warrant).

Judge Mukasey had appointed counsel to represent Padilla in his material-witness case:

In May 2002, when it seemed that the smell of the debris and smoke from the demise of the Twin Towers had just cleared, I received a call from the courtroom deputy to the Honorable Michael B. Mukasey, then chief judge of the U.S. District Court for the Southern District of New York. He asked me to appear in court the

warrant] may not be used simply as a substitute for indefinite detention. When it was clear Padilla would not testify against his cohorts, he was transferred on order of the President to military custody as an unlawful combatant”¹⁰³⁴

As a result of Padilla’s change in status from material witness to enemy combatant, the government vacated the warrant.¹⁰³⁵ Padilla’s attorney filed a habeas corpus petition on his behalf.¹⁰³⁶ Judge Mukasey ruled that she had standing to do that as Padilla’s next friend¹⁰³⁷ and denied the government’s motion to transfer the habeas case to the District of South Carolina.¹⁰³⁸

Judge Mukasey ruled that the President had the power to detain Padilla as an enemy combatant,¹⁰³⁹ but he also ruled that Padilla had a right to consult counsel and pursue a habeas corpus petition challenging the grounds for the detention.¹⁰⁴⁰ The government would have to show “some evidence” to support its determination that Padilla was an enemy combat-

following week for an assignment representing a grand-jury material witness who was being held in connection with the grand jury sitting to investigate 9/11.

Newman, *What the F—*, *supra* note 1028, at 361.

Judge Mukasey retired from the bench on September 9, 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 Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1034. Mukasey, *supra* note 1028, at 4 (footnote and paragraph break omitted).

1035. *Padilla*, 542 U.S. at 432 n.3; *Padilla*, 233 F. Supp. 2d at 571; *see* Newman, *What the F—*, *supra* note 1028, at 362.

1036. *Padilla*, 542 U.S. at 432; *Lebron*, 670 F.3d at 545; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; Docket Sheet, *Padilla v. Rumsfeld*, No. 1:02-cv-4445 (S.D.N.Y. June 12, 2002) (D.E. 1); *see* Newman, *Modern Day Struggle*, *supra* note 1028, at 333; Newman, *What the F—*, *supra* note 1028, at 364–65; *see also* Gibbons, *supra* note 1028, at 305; Hafetz, *supra* note 1028, at 47; Pohlman, *supra* note 1028, at 77; Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect*, *Wash. Post*, June 13, 2002, at A11.

1037. *Padilla*, 233 F. Supp. 2d at 569, 575–78, 610; *see* Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, *N.Y. Times*, Dec. 5, 2002, at A24.

The court of appeals affirmed the ruling. *Padilla*, 352 F.3d at 702–04, 724.

1038. *Padilla*, 233 F. Supp. 2d at 569, 578–87, 610.

The court of appeals affirmed the denial. *Padilla*, 352 F.3d at 704–10, 724.

1039. *Padilla*, 233 F. Supp. 2d at 569, 587–99, 610; *see* Pohlman, *supra* note 1028, at 84–85; Weiser, *supra* note 1037.

1040. *Padilla*, 233 F. Supp. 2d at 569, 588, 599–605, 610; *see* Andrew G. Patel, *Accessing Padilla*, in *The Guantánamo Lawyers*, *supra* note 1028, at 364, 364–65; Pohlman, *supra* note 1028, at 84–85; Weiser, *supra* note 1037.

ant.¹⁰⁴¹ On reconsideration, Judge Mukasey upheld his original ruling on access to counsel.¹⁰⁴² At the government's request, a month later, Judge Mukasey certified the issue for interlocutory appeal.¹⁰⁴³

Over the dissent of Circuit Judge Richard C. Wesley, Circuit Judges Rosemary S. Pooler and Barrington D. Parker, Jr., determined Padilla's detention to be unlawful: "Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat."¹⁰⁴⁴ The court ordered Padilla released from military custody, and the court acknowledged that Padilla could be held either as a material witness or for criminal prosecution.¹⁰⁴⁵

On June 28, 2004, the Supreme Court reversed the release order, holding that Padilla should have brought his habeas corpus petition in the District of South Carolina, where he was held.¹⁰⁴⁶ On the same day, however, the court held that foreign nationals apprehended abroad and held at the Guantánamo Bay naval base in Cuba could challenge their detention through habeas corpus.¹⁰⁴⁷

1041. *Padilla*, 233 F. Supp. 2d at 570, 605–10; see Pohlman, *supra* note 1028, at 85; Weiser, *supra* note 1037.

Later, in another case, the Supreme Court determined that the "some evidence" standard was too lenient. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (four-justice plurality opinion); *id.* at 540–41 (Justice Souter, joined by Justice Ginsburg, concurring in part, dissenting in part, and concurring in the judgment, rejecting the government's proposed "some evidence" standard).

1042. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); see Pohlman, *supra* note 1028, at 85–86.

1043. *Padilla ex rel. Newman v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); see Benjamin Weiser, *New Turn in "Dirty Bomb" Case*, N.Y. Times, Apr. 10, 2003, at B15.

1044. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003); see Neil A. Lewis & William Glaberson, *U.S. Courts Reject Detention Policy in 2 Terror Cases*, N.Y. Times, Dec. 19, 2003, at A1 (reporting also that the U.S. Court of Appeals for the Ninth Circuit found judicial rights for Guantánamo Bay detainees); Patel, *supra* note 1040, at 365; Pohlman, *supra* note 1028, at 87–88.

1045. *Padilla*, 352 F.3d at 699, 724.

1046. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (Chief Justice Rehnquist delivered the opinion of the court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined); see Gibbons, *supra* note 1028, at 305; Linda Greenhouse, *Access to Courts*, N.Y. Times, June 29, 2004, at A1; Pohlman, *supra* note 1028, at 120.

1047. *Rasul v. Bush*, 542 U.S. 466 (2004) (Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined; Justice Kennedy

The court resolved a third case that day: a habeas corpus petition by Yaser Hamdi, who, like Padilla, was an American citizen held as an enemy combatant in a naval brig.¹⁰⁴⁸ But Hamdi was apprehended in Afghanistan.¹⁰⁴⁹ No opinion was endorsed by a majority of the court,¹⁰⁵⁰ but only Justice Thomas thought that Hamdi could be detained indefinitely without a meaningful opportunity to contest the factual basis for the detention before a neutral decisionmaker.¹⁰⁵¹

Approximately four weeks before the Supreme Court issued its opinion in Padilla's case, the government released newly declassified information on Padilla.¹⁰⁵² It was reported that Padilla admitted to attending a terrorist training camp, but his interest in a dirty bomb plot was only a ruse to avoid combat in Afghanistan.¹⁰⁵³

On July 2, 2004, Padilla's New York attorney filed a habeas corpus petition on his behalf in the District of South Carolina.¹⁰⁵⁴ The court assigned

filed an opinion concurring in the judgment; Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined); see Greenhouse, *supra* note 1046.

1048. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see Gibbons, *supra* note 1028, at 303; Greenhouse, *supra* note 1046; Pohlman, *supra* note 1028, at 76, 120. See generally Greenberg, *supra* note 1032, at 87–97.

1049. *Hamdi*, 542 U.S. at 510; see Gibbons, *supra* note 1028, at 303; Greenhouse, *supra* note 1046; Pohlman, *supra* note 1028, at 86.

1050. *Hamdi*, 542 U.S. 507 (Justice O'Connor announced the judgment of the court and delivered an opinion in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined; Justice Souter filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which Justice Ginsburg joined; Justice Scalia filed a dissenting opinion, in which Justice Stevens joined; Justice Thomas filed a dissenting opinion); see Pohlman, *supra* note 1028, at 120–21, 130.

1051. *Hamdi*, 542 U.S. at 579–99 (Justice Thomas, dissenting); see Gibbons, *supra* note 1028, at 303; Greenhouse, *supra* note 1046; Pohlman, *supra* note 1028, at 121.

Hamdi was released to his home in Saudi Arabia in October 2004 without charge. See Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 156 (2006).

1052. See Eric Lichtblau, *U.S. Spells Out Dangers Posed by Plot Suspect*, N.Y. Times, June 2, 2004, at A1; Pohlman, *supra* note 1028, at 119–20.

1053. SSCI Executive Summary, *supra* note 1028, at 237; Lichtblau, *supra* note 1052.

“The plots associated with Jose Padilla were assessed by the Intelligence Community to be infeasible.” SSCI Executive Summary, *supra* note 1028, at 225; see *Two Case Studies*, N.Y. Times, Dec. 10, 2014, at A1 (“Despite many administration statements to the contrary, C.I.A. officials never took Mr. Padilla's dirty bomb plot seriously.”).

1054. *Petition, Padilla v. Hanft*, No. 2:04-cv-2221 (D.S.C. July 2, 2004), D.E. 1; see *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir. 2012); *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005); *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005); see also Gibbons, *supra* note 1028, at 305; Hafetz, *supra* note 1028, at 144; Pohlman, *supra* note 1028, at 131.

the case to Judge Henry F. Floyd.¹⁰⁵⁵ On February 28, 2005, Judge Floyd declared Padilla's military detention improper.¹⁰⁵⁶ On September 9, a unanimous panel of the court of appeals reversed Judge Floyd's ruling, determining that the 2001 Authorization for Use of Military Force Joint Resolution gave the President the authority to indefinitely detain even U.S. citizens as enemy combatants.¹⁰⁵⁷

Terrorism Conspiracy

While Padilla's petition to the Supreme Court for a writ of certiorari was pending, on November 17, 2005, the government indicted him in the Southern District of Florida, adding him to a terrorism conspiracy case

1055. Docket Sheet, *Padilla*, No. 2:04-cv-2221 (D.S.C. July 2, 2004).

For this case study, Tim Reagan interviewed Judge Floyd, his law clerks Jeff Brown and Chase Samples, and the judge's judicial assistant Cindy Chapman on November 19, 2009, in Spartanburg, South Carolina, where Judge Floyd had his chambers.

Because of Judge Floyd's assignment to *Padilla v. Rumsfeld*, the court also assigned to him a later habeas petition filed by Ali Saleh Kahlal al-Marri. Docket Sheet, *Al-Marri v. Hanft*, No. 2:04-cv-2257 (D.S.C. July 8, 2004); see *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006) (dismissing the petition), *rev'd sub. nom.* *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc, holding that the President can detain a legal resident subject to judicial review of his status as an enemy combatant), *vacated sub. nom.* *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (ordering the appeal dismissed as moot in light of a February 26, 2009, indictment against the petitioner in the Central District of Illinois); see also Docket Sheet, *United States v. Al-Marri*, No. 1:09-cr-10030 (N.D. Ill. Feb. 26, 2009) (noting a plea agreement on April 30, 2009, and a sentence of eight years and four months); *Al-Marri v. Davis*, 714 F.3d 1183 (10th Cir. 2013) (affirming the denial of al-Marri's habeas petition for confinement credits), *cert. denied*, 571 U.S. 886 (2013). Al-Marri was released from prison on January 16, 2015, and deported to Qatar. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 12194-026); see Phil Luciano, *Peoria's Complicated Connection to 9/11*, *Peoria J. Star*, Sept. 11, 2021, at A1 (reporting also that al-Marri "renounces his guilty plea as a product of torture by the U.S. government").

Judge Floyd was elevated to the U.S. Court of Appeals for the Fourth Circuit on October 5, 2011. FJC Biographical Directory, *supra* note 1033.

1056. *Padilla*, 389 F. Supp. 2d 678; see Hafetz, *supra* note 1028, at 144; Neil A. Lewis, *Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant*, *N.Y. Times*, Mar. 1, 2005, at A14; Pohlman, *supra* note 1028, at 131.

1057. *Padilla*, 423 F.3d 386; see Pub. L. No. 107-40, 115 Stat. 224 (2001); see also Gibbons, *supra* note 1028, at 306; Hafetz, *supra* note 1028, at 144-45; Neil A. Lewis, *Court Gives Bush Right to Detain U.S. Combatant*, *N.Y. Times*, Sept. 10, 2005, at A1; Pohlman, *supra* note 1028, at 132.

pending for nearly two years against four other defendants.¹⁰⁵⁸ The case had been assigned to Judge Marcia G. Cooke.¹⁰⁵⁹

The court of appeals denied the government's motion to transfer Padilla to civilian authority in Florida.¹⁰⁶⁰

[A] short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary in the interest of national security, the government determined that it was no longer necessary that Padilla be held militarily. Instead, it announced, Padilla would be transferred to the custody of federal civilian law enforcement authorities and criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla.¹⁰⁶¹

The Supreme Court, however, granted the government's request to transfer Padilla.¹⁰⁶² In light of Padilla's removal from military detention, the court later denied his petition for a writ of certiorari.¹⁰⁶³

1058. Seventh Superseding Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 17, 2005), D.E. 141; Docket Sheet, *id.* (Jan. 8, 2004) [hereinafter *Hassoun Criminal Docket Sheet*]; *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 8 (2008) [hereinafter *Trying Cases*] (remarks by Judge Marcia G. Cooke); see Gibbons, *supra* note 1028, at 306; Hafetz, *supra* note 1028, at 145; Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. Times, Nov. 23, 2005, at A1; Pohlman, *supra* note 1028, at 131; Jay Weaver, *Padilla to Face Terror Charges Here*, Miami Herald, Nov. 23, 2005, at 1A; see also Mukasey, *supra* note 1028, at 6 ("the dirty bomb plot . . . couldn't be proved in a conventional trial where a defendant has access under conventional discovery rules not only to what evidence the government has but also how it is gathered"). See generally Wadie E. Said, *Crimes of Terror* 106–12 (2015).

The *Miami Herald* reported over a year earlier that Padilla might be indicted in Florida. Jay Weaver, *Padilla Could Be Charged in Miami*, Miami Herald, June 30, 2004, at 1A.

1059. *Hassoun Criminal Docket Sheet*, *supra* note 1058; *Trying Cases*, *supra* note 1058, at 8 (remarks by Judge Cooke); see Hafetz, *supra* note 1028, at 146.

Tim Reagan interviewed Judge Cooke for this case study in her chambers on October 8, 2009.

1060. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005); see Hafetz, *supra* note 1028, at 145–46; Neil A. Lewis, *Court Refuses U.S. Bid to Shift Terror Suspect*, N.Y. Times, Dec. 22, 2005, at A1; Pohlman, *supra* note 1028, at 132.

1061. *Padilla*, 432 F.3d at 584.

1062. *Hanft v. Padilla*, 546 U.S. 1084 (2006); see Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. Times, Jan. 5, 2006; Hafetz, *supra* note 1028, at 146; Pohlman, *supra* note 1028, at 133; Jay Weaver, *Dirty-Bomb Suspect Charged as Civilian*, Miami Herald, Jan. 6, 2006, at 5B ("Padilla was flown in a military jet to Homestead Air Base, then by helicopter to Watson Island, before a convoy of U.S. marshals escorted him to the Miami Federal Detention Center for his initial court hearing.").

First indicted on January 8, 2004, Adham Amin Hassoun was a Lebanese-born Palestinian charged with raising money and recruiting persons for jihad training.¹⁰⁶⁴ He and Padilla became friends when they both attended a Fort Lauderdale mosque in the 1990s.¹⁰⁶⁵ Added by superseding indictment on September 16, 2004, Mohamed Hesham Youssef was charged as one of Hassoun's recruits; he was in custody in Egypt on other charges.¹⁰⁶⁶ Kifah Wael Jayyousi and Kassem Daher were named in a sealed material-support complaint filed on December 1, 2004.¹⁰⁶⁷ The complaint was unsealed on March 30, 2005, when Jayyousi was apprehended in Detroit on his return from Qatar.¹⁰⁶⁸ Jayyousi was born in Jordan;¹⁰⁶⁹ Daher was a Canadian citizen in overseas custody.¹⁰⁷⁰ Jayyousi and Daher were added to the pending indictment on April 7, 2005.¹⁰⁷¹ Youssef and Daher remained fugitives.¹⁰⁷²

Even after Padilla was added to the indictment, there was no charge pertaining to a dirty bomb.¹⁰⁷³ The dirty bomb issue never arose at all in

1063. *Padilla v. Hanft*, 547 U.S. 1062 (2006); see Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. Times, Apr. 4, 2006, at A1; Hafetz, *supra* note 1028, at 146; Pohlman, *supra* note 1028, at 133.

1064. Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 8, 2004), D.E. 3; *Trying Cases*, *supra* note 1058, at 8 (remarks by Judge Cooke); see Abby Goodnough, *After 5 Years, Padilla Goes on Trial in Terror Case*, N.Y. Times, May 15, 2007, at A14; Jay Weaver, *2 Men Facing Terror Charges*, Miami Herald, Sept. 17, 2004, at 1B.

1065. See Weaver, *supra* note 1058.

1066. Second Superseding Indictment, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 16, 2004), D.E. 66; see Weaver, *supra* note 1064.

1067. Sealed Criminal Complaint, *United States v. Jayyousi*, No. 1:04-mj-3565 (S.D. Fla. Dec. 1, 2004), D.E. 3; Docket Sheet, *id.* (Apr. 4, 2005); see *Trying Cases*, *supra* note 1058, at 8 (remarks by Judge Cooke).

1068. See Hannah Sampson, *2 Men Held on Terror Charges*, Miami Herald, Mar. 30, 2005, at 9B.

1069. See Goodnough, *supra* note 1064.

1070. See Sampson, *supra* note 1068; Weaver, *supra* note 1062.

1071. Seventh Superseding Indictment, *supra* note 1058; see Jack Dolan, *Third Suspect Faces Terror Charges*, Miami Herald, Apr. 9, 2005, at 4B.

1072. *United States v. Jayyousi*, 657 F.3d 1085, 1091 n.1 (11th Cir. 2011); Order, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 23, 2006), D.E. 224 (transferring Youssef and Daher to the court's fugitive case list).

1073. See *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); see also Pohlman, *supra* note 1028, at 133; Weaver, *supra* note 1058. See generally Greenberg, *supra* note 1032, at 124–28 (reporting that discovery of Padilla's connection to Hassoun and Jayyousi allowed the government to prosecute Padilla without relying on possibly inadmissible evidence, such as evidence obtained by torture, or revealing secret detention and interrogation programs).

the case.¹⁰⁷⁴ But there was the following allegation: “On or about July 24, 2000, Padilla filled out a ‘Mujahideen Data Form’ in preparation for violent jihad training in Afghanistan.”¹⁰⁷⁵ The government claimed that it was found in Afghanistan among dozens of other applications late in 2001.¹⁰⁷⁶

Hassoun and Jayyousi, the only two defendants in local custody, were held in solitary confinement because they were terrorism suspects.¹⁰⁷⁷ They complained of improper detention practices: not being permitted family visits on weekends when family members did not have to work; not being permitted family visits in the evenings, which meant that out-of-town family members had to pay for overnight lodging; not being permitted long-distance telephone calls to family members at times when the family members would be awake; severe mail delays; and various inconveniences in meetings with attorneys.¹⁰⁷⁸ Judge Cooke denied the defendants’ motion to be relieved of solitary confinement, but she said she would “hold the government’s feet to the fire.”¹⁰⁷⁹

A few months later, deciding that he was not a flight risk, Judge Cooke granted Jayyousi’s request for bail, setting the bond at \$1.3 million and imposing electronic monitoring.¹⁰⁸⁰

On August 18, 2006, Judge Cooke dismissed the first count of the eleven-count indictment—a charge that the defendants conspired to murder, kidnap, and maim persons in a foreign country—as impermissibly multi-

1074. *Trying Cases*, *supra* note 1058, at 7 (remarks by Judge Cooke); Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1075. Seventh Superseding Indictment, *supra* note 1058; *see Jayyousi*, 657 F.3d at 1093; Weaver, *supra* note 1062.

1076. *See Jay Weaver, We Found al Qaeda Inquiry, U.S. Says*, Miami Herald, Jan. 13, 2006, at 2B; *see also Jayyousi*, 657 F.3d at 1093.

1077. *See Jay Weaver, Two Men Claim Prison Abuse*, Miami Herald, June 18, 2005, at 1B.

1078. Motion, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. June 15, 2005), D.E. 120 [hereinafter June 15, 2005, Joint Motion].

1079. Order, *id.* (Sept. 21, 2005), D.E. 135 [hereinafter Sept. 21, 2005, Order]; *see Jay Weaver, Judge Backs Confinement of Two Terror Suspects*, Miami Herald, Sept. 17, 2005, at 3B.

1080. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006), D.E. 185; *see Weaver, supra* note 1062.

plicitous of other counts.¹⁰⁸¹ But the court of appeals reversed her decision.¹⁰⁸²

On January 4, 2007, the *New York Times* printed a front-page story based in part on discovery information that Padilla's attorneys improperly provided to the newspaper:

Tens of thousands of conversations were recorded. Some 230 phone calls form the core of the government's case, including 21 that make reference to Mr. Padilla, prosecutors said. But Mr. Padilla's voice is heard on only seven calls. And on those seven, which The Times obtained from a participant in the case, Mr. Padilla does not discuss violent plots.¹⁰⁸³

Padilla's attorneys said that the error resulted from a person in the federal defender's office's not understanding the operable protective order, and Judge Cooke reprimanded the attorneys.¹⁰⁸⁴

Jury selection began on April 16, 2007.¹⁰⁸⁵ Judge Cooke had decided that the court should send out three thousand jury duty letters for the trial.¹⁰⁸⁶ Jurors were selected from a pool of approximately three hundred.¹⁰⁸⁷ Voir dire lasted four weeks.¹⁰⁸⁸ Judge Cooke decided to use a jury questionnaire.¹⁰⁸⁹ On May 8, 2007, the jury was selected from a culled pool of eighty-eight potential jurors.¹⁰⁹⁰

1081. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Aug. 18, 2006), D.E. 535, 2006 WL 2415946; see Jay Weaver, *Padilla Terror Count Tossed*, Miami Herald, Aug. 22, 2006, at 1B.

1082. *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007); see *United States v. Jayyousi*, 657 F.3d 1085, 1091 (11th Cir. 2011); see also Jay Weaver, *Key Charge Against Padilla Restored*, Miami Herald, Jan. 31, 2007, at 1B.

1083. Deborah Sontag, *In Padilla Wiretaps, Murky View of "Jihad" Case*, N.Y. Times, Jan. 4, 2007, at A1; see Jay Weaver, *Padilla Lawyers Blasted for Wiretap Leak*, Miami Herald, Jan. 23, 2007, at 5B.

1084. See Jay Weaver, *Judge Scolds Padilla's Lawyers for Leak*, Miami Herald, Jan. 25, 2007, at 6B.

1085. *Hassoun* Criminal Docket Sheet, *supra* note 1058; *Jayyousi*, 657 F.3d at 1091; see Jay Weaver, *Padilla Jury Picking Could Last 3 Weeks*, Miami Herald, Apr. 17, 2007, at 7B.

1086. *Trying Cases*, *supra* note 1058, at 10 (remarks by Judge Cooke); see *3,000 in Jury Pool for Terror Trial*, Miami Herald, Oct. 27, 2006.

1087. *Trying Cases*, *supra* note 1058, at 10 (remarks by Judge Cooke); see Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. Times, May 9, 2007, at A18; Weaver, *supra* note 1085.

1088. See Goodnough, *supra* note 1087.

1089. Interview with Judge Marcia G. Cooke, Oct. 8, 2009; see Jay Weaver, *Padilla Terror Trial Is Ready to Unfold*, Miami Herald, Apr. 15, 2007, at 1A.

1090. See Jay Weaver, *Angry Lawyers Finally Pick Jury*, Miami Herald, May 9, 2007, at 1B.

After about three weeks of testimony, it was discovered that one of the jurors was not a U.S. citizen.¹⁰⁹¹ The jury summons was meant for his son, who had the same name.¹⁰⁹² Another juror was excused because of injuries suffered when he tried to prevent a break-in of his daughter's car.¹⁰⁹³ Another juror's sister died, but the juror asked only for an early dismissal on Friday so that she could attend a memorial service in North Carolina on Saturday.¹⁰⁹⁴

The jury convicted all three defendants on August 16, 2007, one day after beginning deliberations.¹⁰⁹⁵ Three months later, Hassoun attempted suicide.¹⁰⁹⁶ On January 22, 2008, Judge Cooke sentenced Padilla to seventeen years and four months, Hassoun to fifteen years and eight months, and Jayyousi to twelve years and eight months.¹⁰⁹⁷ The court of appeals, over a dissent, affirmed the convictions but remanded Padilla's case for a harsher sentence.¹⁰⁹⁸ On September 9, 2014, Judge Cooke resentenced Padilla to twenty-one years.¹⁰⁹⁹

1091. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1092. *Id.*

1093. *Id.*

1094. *Id.*

1095. *United States v. Jayyousi*, 657 F.3d 1085, 1091–92 (11th Cir. 2011); *see Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012); *see also* Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. Times, Aug. 17, 2007, at A1; Hafetz, *supra* note 1028, at 146; Pohlman, *supra* note 1028, at 133; Jay Weaver & Larry Lebowitz, *Miami Jury Convicts Padilla*, Miami Herald, Aug. 17, 2007, at 1A; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, Wash. Post, Aug. 17, 2007, at A1.

1096. *See* Jay Weaver, *Padilla Codefendant Tries to Kill Himself*, Miami Herald, Dec. 4, 2007, at 5B.

1097. *Jayyousi*, 657 F.3d at 1092; *Hassoun Criminal Docket Sheet*, *supra* note 1058; *see* Hafetz, *supra* note 1028, at 146; Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. Times, Jan. 23, 2008, at A14; Jay Weaver, *Padilla Gets 17 Years in "Jihad" Conspiracy*, Miami Herald, Jan. 23, 2008, at 1A; Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years*, Wash. Post, Jan. 23, 2008, at A3.

1098. *Jayyousi*, 657 F.3d at 1119 (opinion by Judge Joel F. Dubina, joined by Judge William H. Pryor, Jr.), *cert. denied*, 567 U.S. 938 (petition by Padilla), 567 U.S. 946 (petition by Hassoun), and 567 U.S. 946 (2012) (petition by Jayyousi); *see id.* at 1119–35 (dissenting opinion by Judge Rosemary Barkett, who would have suppressed Padilla's statements before he was read his *Miranda* rights, who would have suppressed lay opinion testimony, and who determined that Padilla's sentence was reasonable); *see also Padilla*, 678 F.3d at 751; Lizette Alvarez, *Sentence for Terrorist Is Too Short, Court Rules*, N.Y. Times, Sept. 20, 2011, at A12; Said, *supra* note 1058, at 132–36; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 521–24 (2014).

1099. Amended Judgment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 9, 2014), D.E. 1458; Transcript at 54–55, *id.* (Sept. 9, 2014, filed Dec. 24, 2014), D.E.

Padilla's Additional Civil Suits

During his criminal prosecution in Florida, Padilla filed civil suits challenging his conditions of confinement while designated an enemy combatant.¹¹⁰⁰ On February 17, 2011, Judge Richard Mark Gergel dismissed a 2007 action for nominal damages that Padilla and his mother filed in the District of South Carolina against the government.¹¹⁰¹ The court originally assigned the action to Judge Floyd, but the action was transferred to Judge Gergel when he joined the bench.¹¹⁰² The court of appeals affirmed the dismissal on January 23, 2012: “The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages.”¹¹⁰³

On January 4, 2008, Padilla and his mother filed an action in the Northern District of California against Boalt Hall law professor John Yoo claiming that mistreatment of Padilla while in custody resulted from improperly crafted legal opinions that Yoo wrote when he worked for the Justice Department’s Office of Legal Counsel.¹¹⁰⁴ The court assigned the case to Judge Jeffrey S. White,¹¹⁰⁵ who denied Yoo’s motion to dismiss the complaint.¹¹⁰⁶ The court of appeals, however, determined that Professor Yoo was entitled to qualified immunity, because the rights of suspected terrorists held in military detention as enemy combatants were not beyond

1459 (“credit for time served in civilian custody only”); see BOP Locator, *supra* note 1055 (noting a release date of June 3, 2026, reg. no. 20796-424); see also Said, *supra* note 1058, at 134; Jay Weaver, *Terrorist Recruit Gets Tougher Sentence*, Miami Herald, Sept. 10, 2014, at 1B.

1100. See Charlie Savage, *Power Wars* 152–57 (2015).

1101. *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787 (D.S.C. 2011); see *Padilla*, 678 F.3d at 755–56; see also *Judge Tosses Out Padilla Torture Suit*, Wash. Post, Feb. 18, 2011, at A2; Siems, *supra* note 1028, at 1–6 (also describing Judge Gergel’s hearing).

1102. Docket Sheet, *Padilla v. Rumsfeld*, No. 2:07-cv-410 (D.S.C. Feb. 9, 2007) (noting a transfer on Aug. 18, 2010); FJC Biographical Directory, *supra* note 1033 (noting the judge’s commission on August 9, 2010).

1103. *Lebron v. Rumsfeld*, 670 F.3d 540, 547 (4th Cir.), *cert. denied*, 567 U.S. 906 (2012); see *Padilla*, 678 F.3d at 756–57.

1104. Complaint, *Padilla v. Yoo*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008), D.E. 1; see Amended Complaint, *id.* (June 2, 2008), D.E. 22; see also *Padilla*, 678 F.3d at 751–54.

1105. Docket Sheet, *Padilla*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008).

1106. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); *Padilla*, 678 F.3d at 754–55; see Adam Liptak, *Padilla Sues U.S. Lawyer Over Detention*, N.Y. Times, Jan. 5, 2008, at A9.

debate, and it was not clearly established at the time that Padilla's treatment qualified as torture.¹¹⁰⁷

Hassoun's Immigration Detention

When Hassoun was indicted in 2004, he was subject to an order of deportation.¹¹⁰⁸ So when he was released from prison on October 10, 2017,¹¹⁰⁹ he was transferred to immigration custody.¹¹¹⁰ It was difficult for the government to establish a travel destination for Hassoun, who was a Palestinian born in Lebanon but not a Lebanese citizen.¹¹¹¹ He filed a habeas corpus petition in the Western District of New York, where he was detained, on May 22, 2018.¹¹¹² On January 2, 2019, Judge Frank P. Geraci, Jr., ordered Hassoun released by March 1.¹¹¹³ It was undisputed that the six-month presumptively reasonable period for immigration detention had passed.¹¹¹⁴

1107. *Padilla*, 678 F.3d at 750; see *California: Court Throws Out Suit Against Bush Lawyer*, N.Y. Times, May 3, 2012, at A20; Erwin Chemerinsky, *The Case Against the Supreme Court* 215–17 (2014); Howard Mintz, *Court Rules for UC Professor in Torture Lawsuit*, San Jose Mercury News, May 3, 2012, at 6B.

1108. *Hassoun v. Searls*, 976 F.3d 121, 125–26 (2d Cir. 2020) (“In 2003, Hassoun was ordered removed from the United States for violating the terms of his non-immigrant visa.”); *Hassoun v. Searls*, 968 F.3d 190, 192–93 (2d Cir. 2020); *Hassoun v. Searls*, 469 F. Supp. 3d 69, 75 (W.D.N.Y. 2020) (“Removal proceedings were instituted against [Hassoun] in 2002, after he failed to comply with the conditions of his student visa, and his final order of removal became administratively final in 2003.”); Opinion at 2, *Hassoun v. Sessions*, No. 1:18-cv-586 (W.D.N.Y. Jan. 2, 2019), D.E. 46 [hereinafter *Geraci Release Opinion*], 2019 WL 78984.

1109. BOP Locator, *supra* note 1055 (reg. no. 72433-004).

1110. *Hassoun*, 976 F.3d at 126; *Hassoun*, 968 F.3d at 193–94; *Hassoun*, 469 F. Supp. 3d at 75; see Phil Fairbanks, *UB Legal Clinic Filed a Suit Seeking Hassoun's Release*, Buffalo News, Mar. 18, 2019, at A9. See generally *Vital Interests Podcast: Jonathan Hafetz and the Politicization of Justice, American-Style* (podcast season 1, Aug. 4, 2020) [hereinafter *Jonathan Hafetz*], vitalinterestspodcast.org/episodes/jonathan-hafetz-and-the-politicization-of-justice-american-style (a conversation with one of Hassoun's attorneys).

1111. *Hassoun*, 968 F.3d at 192–94 (“a stateless alien” “born in Lebanon in 1962 to Palestinian refugee parents”); *Geraci Release Opinion*, *supra* note 1108.

1112. Docket Sheet, *Hassoun*, No. 1:18-cv-586 (W.D.N.Y. May 22, 2018) (briefing sealed) [hereinafter *First W.D.N.Y. Hassoun Habeas Corpus Docket Sheet*]; *Hassoun*, 968 F.3d at 194; *Hassoun*, 469 F. Supp. 3d at 75.

1113. *Geraci Release Opinion*, *supra* note 1108; *Hassoun*, 976 F.3d at 126; *Hassoun*, 968 F.3d at 193–94 (“The government did not appeal that decision.”); *Hassoun*, 469 F. Supp. 3d at 75.

1114. *Geraci Release Opinion*, *supra* note 1108, at 8.

In addition, there was “no significant likelihood of removal in the reasonably foreseeable future.”¹¹¹⁵

Judge Geraci’s release order stated that it did “not preclude [the government] from continuing to detain Petitioner on any other permissible basis under applicable statutes and regulations.”¹¹¹⁶ On February 22, the government notified the court that it would detain Hassoun pursuant to 8 C.F.R. § 241.14(d).¹¹¹⁷ Section 241.14 of the Code of Federal Regulations authorizes the government “to continue detention of particular removable aliens on account of special circumstances even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.”¹¹¹⁸ Subsection (d) covers “Aliens Detained on Account of Security or Terrorism Concerns.”¹¹¹⁹

Judge Geraci declined to retain jurisdiction over a challenge to detention for the new reason.¹¹²⁰ So Hassoun filed a new habeas corpus petition in the Western District on March 15.¹¹²¹ On August 19, the government declared Hassoun detainable also pursuant to section 412 of the USA PATRIOT Act.¹¹²²

1115. *Id.* at 9; see *Hassoun*, 968 F.3d at 193.

1116. Geraci Release Opinion, *supra* note 1108, at 15 (provision 5); see *Hassoun*, 968 F.3d at 194.

1117. First W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet, *supra* note 1112 (sealed notice, D.E. 55); see Notice of Intent and Factual Basis to Continue Detention (Feb. 22, 2019), ex. C, Habeas Corpus Petition, *Hassoun v. Searls*, No. 1:19-cv-370 (W.D.N.Y. Mar. 15, 2019, filed unsealed Mar. 22, 2019), D.E. 6-1 [hereinafter Second W.D.N.Y. *Hassoun* Habeas Petition] (“continued detention as an alien whose release presents a significant threat to the national security or a significant risk of terrorism”); see also *Hassoun*, 976 F.3d at 126; *Hassoun*, 968 F.3d at 194; *Hassoun*, 469 F. Supp. 3d at 75.

1118. 8 C.F.R. § 241.14(a) (2021).

1119. *Id.* § 241.14(d).

1120. Opinion, *Hassoun v. Sessions*, No. 1:18-cv-586 (W.D.N.Y. Mar. 5, 2019), D.E. 60.

1121. Second W.D.N.Y. *Hassoun* Habeas Petition, *supra* note 1117; *Hassoun*, 976 F.3d at 126; *Hassoun*, 968 F.3d at 194; *Hassoun*, 469 F. Supp. 3d at 75–76; see Charlie Savage, *Detaining Palestinian, U.S. Tests Novel Power*, N.Y. Times, Mar. 27, 2019, at A8; see also Jonathan Hafetz, *supra* note 1110. See generally *The National Security Law Podcast: This Podcast Can Only Be Detained for Six Months* (podcast episode 116, Apr. 2, 2019) [hereinafter *Six Months*], www.nationalsecuritylawpodcast.com/episode-116-this-podcast-can-only-be-detained-for-six-months/.

1122. *Hassoun*, 968 F.3d at 194–95; *Hassoun*, 469 F. Supp. 3d at 76; Opinion at 7, *Hassoun*, No. 1:19-cv-370 (W.D.N.Y. Dec. 13, 2019), D.E. 55 [hereinafter Dec. 13, 2019, Wolford Opinion]; see *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No.

Judge Elizabeth A. Wolford determined on December 13 that (1) regulation section 241.14(d) did not have statutory support and (2) an evidentiary hearing was required to determine the lawfulness of Hassoun's detention under section 412 of the Patriot Act.¹¹²³

The evidentiary hearing was scheduled for April 28, 2020, but on April 10, Judge Wolford indefinitely postponed the hearing because of social distancing and travel restrictions made necessary by the global COVID-19 infectious pandemic.¹¹²⁴ On May 1, she set the hearing for June 24.¹¹²⁵ But following discovery, the government asked her to rule on papers alone, which she did on June 29.¹¹²⁶ She ordered Hassoun released to home confinement effective July 2.¹¹²⁷

Respondent has conceded that at this point in time, and taking into account the Court's evidentiary rulings, he cannot demonstrate—by clear and convincing evidence or even by a preponderance of the evidence—that Petitioner's release would threaten the national security of the United States or the safety of the community of any person.¹¹²⁸

The parties agreed to an administrative stay issued by the court of appeals,¹¹²⁹ and then the court of appeals granted the government's stay motion on July 16.¹¹³⁰ The court of appeals issued a published opinion on July

107-56, § 412, 115 Stat. 272, 350 (amending Immigration and Nationality Act § 236A, 8 U.S.C. § 1226a (2020)).

1123. Dec. 13, 2019, Wolford Opinion, *supra* note 1122; *Hassoun*, 976 F.3d at 126; *Hassoun*, 968 F.3d at 195; *Hassoun v. Searls*, 524 F. Supp. 3d 101, 105 (W.D.N.Y. 2021); *Hassoun*, 469 F. Supp. 3d at 76; *see* Opinion, *Hassoun*, No. 1:19-cv-370 (W.D.N.Y. Jan. 24, 2020), D.E. 75, 2020 WL 408349 (addressing the parameters of the evidentiary hearing).

1124. *Hassoun v. Searls*, 453 F. Supp. 3d 612 (W.D.N.Y. 2020).

1125. Docket Sheet, *Hassoun*, No. 1:19-cv-370 (W.D.N.Y. Mar. 15, 2019) [hereinafter Second W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet] (text order, D.E. 158); *Hassoun*, 469 F. Supp. 3d at 76.

1126. *Hassoun*, 469 F. Supp. 3d 69; *Hassoun*, 976 F.3d at 125; *Hassoun*, 968 F.3d at 193, 195; *see* Second W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet, *supra* note 1125 (sealed motion, D.E. 226); *see also* Jonathan Hafetz, *supra* note 1110.

1127. *Hassoun*, 469 F. Supp. 3d 69; *Hassoun*, 524 F. Supp. 3d at 105; *see* Gary Craig, *Judge to Free Man Once Jailed for Terrorism*, Rochester Democrat & Chron., July 1, 2020, at A2; Phil Fairbanks, *Judge Rejects Bid to Detain Inmate in Terrorism Case*, Buffalo News, July 1, 2020, at A1.

1128. *Hassoun*, 469 F. Supp. 3d at 79.

1129. Order, *Hassoun v. Searls*, No. 20-2056 (2d Cir. July 1, 2020), D.E. 16; *Hassoun*, 976 F.3d at 126; *Hassoun*, 524 F. Supp. 3d at 105–06; *see* *Batavia Detainee Must Remain Held, Federal Appeals Court Rules*, Buffalo News, July 3, 2020, at C21.

1130. Order, *Hassoun*, No. 20-2056 (2d Cir. July 16, 2020), D.E. 60; *Hassoun*, 976 F.3d at 126; *Hassoun*, 524 F. Supp. 3d at 106.

30 explaining that regulation section 241.14(d) had sufficient statutory support.¹¹³¹

But the government had notified the court of appeals on July 22 that it had succeeded in deporting Hassoun on July 21.¹¹³² It was reported that Hassoun was removed to Rwanda.¹¹³³

Section 412 of the Patriot Act vests the U.S. Court of Appeals for the District of Columbia Circuit with exclusive jurisdiction over appeals of section 412 rulings.¹¹³⁴ The section 412 appeal was dismissed as moot on October 13.¹¹³⁵

Judge Wolford awarded Hassoun \$40,000 on May 17, 2021, as a discovery sanction.¹¹³⁶

Jayyousi and Communications Management Units

The U.S. Court of Appeals for the District of Columbia Circuit held on February 25, 2022, that a 2010 action by Jayyousi challenging his placement in communications management units (CMUs), which impose severe restrictions on contact with persons outside the prison, became moot when Jayyousi was released from prison on September 15, 2017.¹¹³⁷

1131. *Hassoun*, 968 F.3d 190; see *Hassoun*, 976 F.3d at 126; *Hassoun*, 524 F. Supp. 3d at 106; see *Six Months*, *supra* note 1121.

1132. Docket Sheet, *Hassoun*, No. 20-2056 (2d Cir. June 30, 2020); *Hassoun*, 976 F.3d at 125–26; *Hassoun*, 968 F.3d at 192 n.1; see Gary Craig, *Immigrant Convicted of Terrorism Crimes Deported*, Canandaigua Daily Messenger, July 24, 2020, at A29.

1133. *E.g.*, Spencer Ackerman, *Reign of Terror* 331 (2021); *Six Months*, *supra* note 1121; *Jonathan Hafetz*, *supra* note 1110.

1134. 8 U.S.C. § 1226a(b)(3) (2020).

1135. Order, *Hassoun v. Searls*, No. 20-5191 (D.C. Cir. Oct. 13, 2020); *Hassoun*, 524 F. Supp. 3d at 106.

1136. Stipulated Order, *Hassoun v. Searls*, No. 1:19-cv-370 (W.D.N.Y. May 17, 2021), D.E. 315; see *Hassoun*, 524 F. Supp. 3d 101.

1137. Opinion Aref v. Garland, No. 20-5368 (D.C. Cir. Feb. 25, 2022), 2022 WL 605726, *vacating* Opinion, Aref v. Barr, No. 1:10-cv-539 (D.D.C. Oct. 13, 2020), D.E. 212, 2020 WL 7251386 (holding “that the process by which Jayyousi was designated to the CMU was constitutionally adequate”); BOP Locator, *supra* note 1055 (reg. no. 39551-039); see Order, *Aref*, No. 1:10-cv-539 (D.D.C. Apr. 21, 2022), D.E. 215 (dismissing the case); see also Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) (holding that prisoners have a liberty interest in avoiding transfer into a communications management unit); Aref v. Holder, 953 F. Supp. 2d 133, 137 (D.D.C. 2013) (“Because Plaintiff Kifah Jayyousi has alleged a plausible claim for retaliation for engaging in protected First Amendment activity, his claim against Defendants in their official capacity will proceed.”); Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011) (denying in part a motion to dismiss the action); Nausheen Husain, “Guantanamo North” Prisons Under Fire for Harsh Conditions, Chi. Trib., Dec. 6, 2019, at C1.

Challenge: Attorney–Client Contacts

Padilla was transferred from New York to South Carolina without notice to his attorney.¹¹³⁸ Once Padilla was designated an enemy combatant, the government denied him access to counsel, arguing that access to counsel would interfere with Padilla’s interrogation and that Padilla might use contacts with counsel to communicate with other terrorists.¹¹³⁹ Judge Mukasey ruled this restriction improper.¹¹⁴⁰

[A]ccess to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so; no general right to counsel in connection with questioning has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent.¹¹⁴¹

Judge Mukasey characterized concerns about using the attorney as a communication conduit to terrorists “gossamer speculation.”¹¹⁴² “[T]here is no reason that military personnel cannot monitor Padilla’s contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one.” Further, there is nothing to suggest that members of the court’s Criminal Justice Act panel, such as Padilla’s attorney, “would ever be inclined to act as conduits for their client, even if he wanted them to do so.”¹¹⁴³

Unwilling to allow Padilla access to counsel, the government filed a reconsideration motion, violating local rules by filing the motion late and submitting a supporting affidavit without leave of court.¹¹⁴⁴ The government argued that access to counsel would interfere with the psychological pressure on Padilla employed as part of the interrogation process and access to counsel was furthermore unnecessary because the court could rely on the government’s evidence alone to decide Padilla’s habeas corpus petition.¹¹⁴⁵ Judge Mukasey was not persuaded.¹¹⁴⁶

1138. See Chris Hedges, *Speaking for Terror Suspect, and for the Constitution*, N.Y. Times, Feb. 11, 2003, at B2.

1139. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

1140. *Id.* at 569, 599–605, 610; see Weiser, *supra* note 1037.

1141. Padilla, 233 F. Supp. 2d at 603.

1142. *Id.* at 604.

1143. *Id.*

1144. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 43–49 (S.D.N.Y. 2003).

1145. *Id.* at 43.

1146. *Id.* at 43, 53–57; see Benjamin Weiser, *Judge Is Angered by U.S. Stance in Case of “Dirty Bomb” Suspect*, N.Y. Times, Jan. 16, 2003, at A16.

Because the court of appeals ordered Padilla released, it did not reach the issue of his right to counsel, and the government continued to deny him counsel access until his case was pending before the Supreme Court, at which time the government argued that the counsel legal issue was moot.¹¹⁴⁷

In Florida, Hassoun and Jayyousi complained of insufficient access to counsel.¹¹⁴⁸ Judge Cooke ordered that they be permitted two fifteen-minute telephone calls with their attorneys each week: “During these legal telephone calls the [Federal Detention Center] officials shall stay a reasonable distance away from the Defendant to allow for sufficient privacy.”¹¹⁴⁹ As trial approached, Judge Cooke ordered the detention center to provide a bigger conference table for meetings between the defendants and their attorneys.¹¹⁵⁰

Challenge: Mental Health During Detention

One month before the scheduled commencement of trial, Padilla’s attorneys filed a motion to determine whether their client was competent to stand trial: “he appears to be incapacitated by post traumatic stress disorder, stemming from the circumstances surrounding his time at the Naval Brig and, as a result of this incapacitation, is unable to assist his attorneys by providing relevant information to his defense.”¹¹⁵¹

Special administrative measures (SAMs) for Padilla’s detention made his psychiatric evaluation difficult,¹¹⁵² so Judge Cooke had the evaluation conducted in her courtroom.¹¹⁵³ Judge Cooke was not present for the evaluation.¹¹⁵⁴

Judge Cooke found Padilla competent to stand trial.¹¹⁵⁵

1147. See Patel, *supra* note 1040, at 365–65.

1148. June 15, 2005, Joint Motion, *supra* note 1078.

1149. Sept. 21, 2005, Order, *supra* note 1079.

1150. See Jay Weaver, *Padilla Judge: I Don’t Want to Run a Prison*, Miami Herald, Feb. 4, 2006, at 1B.

1151. Motion for a Mental Competency Hearing, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Dec. 13, 2006), D.E. 716; see Deborah Sontag, *Federal Judge Is Asked to Decide if Padilla Is Competent for Trial*, N.Y. Times, Dec. 14, 2006, at A24; Jay Weaver, *Terror Suspect to Undergo Mental Testing*, Miami Herald, Dec. 19, 2006, at 4B.

1152. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1153. *Id.*; see Jay Weaver, *Padilla Mental Evaluation to Be Done in Court*, Miami Herald, Dec. 22, 2006, at 5B.

1154. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1155. Competency Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 1, 2007), D.E. 889, 2007 WL 610175; see Greenberg, *supra* note 1032, at 150–51; Deborah Sontag, *U.S.*

For Padilla's scheduled December 3, 2012, resentencing, Padilla was transferred from the supermax facility in Florence, Colorado, to Florida.¹¹⁵⁶ Padilla's attorney requested a delay in sentencing for the benefit of Padilla's mental health.¹¹⁵⁷ "While in Florence, Jose's family, who are of limited means, only have been able to visit him on one occasion. . . . The undersigned is clearly concerned about Jose's mental health and believes that multiple family visits, prior to the resentencing, will be beneficial to his mental health" ¹¹⁵⁸ Judge Cooke delayed sentencing until April 8, 2013,¹¹⁵⁹ on which day two sealed docket entries were entered in the case.¹¹⁶⁰ Padilla was resentenced on September 9, 2014.¹¹⁶¹

Challenge: Classified Arguments

In response to Padilla's habeas corpus petition in New York, the government submitted both a public redacted declaration describing evidence supporting the designation of Padilla as an enemy combatant and an *ex parte* in camera classified unredacted declaration.¹¹⁶² Judge Mukasey reviewed the classified declaration to assess the validity of the government's denial of Padilla's access to counsel.¹¹⁶³ The only information in the unredacted declaration not in the public declaration was the identity of sources and some circumstantial evidence corroborating facts in the redacted declaration.¹¹⁶⁴ The classified declaration did not refer to conduct by Padilla not described in the redacted declaration.¹¹⁶⁵

Judge Finds Padilla Competent to Face Trial, N.Y. Times, Mar. 1, 2007, at A11; Jay Weaver, *Judge Rules Padilla Fit for Trial*, Miami Herald, Mar. 1, 2007, at 1B; Peter Whoriskey, *Judge Rules Padilla Is Competent to Stand Trial*, Wash. Post, Mar. 1, 2007, at A3.

1156. See Resentencing Motion at 2, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 6, 2012), D.E. 1415.

1157. *Id.* at 1–4; Transcript, *id.* (Nov. 28, 2012, filed Dec. 20, 2012), D.E. 1429; see Transcript at 2–3, *id.* (Feb. 12, 2014, filed Feb. 24, 2014), D.E. 1441.

1158. Resentencing Motion, *supra* note 1156, at 2–3.

1159. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 28, 2013), D.E. 1431.

1160. *Hassoun* Criminal Docket Sheet, *supra* note 1058.

1161. Amended Judgment, *supra* note 1099; see Transcript, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Apr. 28, 2014, filed May 8, 2014), D.E. 1448 (discussing the review of classified discovery before sentencing).

1162. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 569–70, 572–73, 604–10 (S.D.N.Y. 2002); see Benjamin Weiser, *Lawyers for Detainee Ask Judge Not to Review Classified Papers*, N.Y. Times, Oct. 24, 2002, at A15.

1163. *Padilla*, 233 F. Supp. 2d at 604.

1164. *Id.* at 609.

1165. *Id.*

Judge Mukasey ruled that it was proper to deny Padilla access to the classified declaration unless Padilla rebutted the facts in the redacted declaration justifying his designation as an enemy combatant and fairness demanded his access to the unredacted declaration, at which time the government could elect to withdraw the unredacted declaration instead of granting Padilla access to it.¹¹⁶⁶

The government also presented in camera an ex parte unredacted declaration to support its motion to reconsider Judge Mukasey's granting Padilla access to counsel.¹¹⁶⁷ The court of appeals reviewed both unredacted declarations, but it did not rely on them.¹¹⁶⁸

In the Eleventh Circuit appeal by Padilla, Hassoun, and Jayyousi, the court instructed the parties to give notice whether classified matters would be presented at oral argument.¹¹⁶⁹ None was.¹¹⁷⁰ Much of the information that was classified during the district court case, such as statements made while Padilla was designated an enemy combatant, had been declassified by the time of the appeal.¹¹⁷¹ Hassoun's appellate brief included some still-classified information.¹¹⁷²

Challenge: Witness Security

To show a chain of custody for Padilla's alleged Mujahideen Data Form, the government offered testimony from the CIA agent who found it.¹¹⁷³ The government asked that the witness's identity be protected by use of (1) a pseudonym; (2) light disguise (which "may involve the witness wearing a wig, eyeglasses or minor facial hair"); (3) a separate entrance; (4) a prohibition on sketch artists showing the witness's likeness; and (5) a prohibition on "questioning the witness in a manner that would expose either his classified identity, the classified identities of other covert CIA personnel, or the specific location of the covert CIA site in Qandahar, Afghanistan where the witness worked."¹¹⁷⁴

1166. *Id.* at 608–10.

1167. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

1168. Padilla v. Rumsfeld, 352 F.3d 695, 701 n.4 (2d Cir. 2003).

1169. Docket Sheet, United States v. Jayyousi, No. 08-10494 (11th Cir. Feb. 4, 2008).

1170. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 19, 2010.

1171. *Id.*

1172. *Id.*

1173. Motion in Limine, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Mar. 22, 2007), D.E. 928.

1174. *Id.* at 1–2; see Jay Weaver, *Padilla Trial CIA Witness May Testify in Disguise*, Miami Herald, Mar. 22, 2007.

At trial, the witness wore black-rimmed glasses and a closely cropped beard.¹¹⁷⁵ He came to the courtroom from the basement by way of the prisoner elevator.¹¹⁷⁶

Challenge: Court Security

For Padilla's Miami trial, federal deputy marshals were brought in from around the country.¹¹⁷⁷ An extra metal detector was set up outside Judge Cooke's courtroom.¹¹⁷⁸

Challenge: Jury Security

To shield potential jurors from the public during jury selection, the court erected a screen in the courthouse lobby.¹¹⁷⁹ The jury was semi-sequestered.¹¹⁸⁰ Their identities were known to the court and the parties, but identifying information was not presented in open court or otherwise made public.¹¹⁸¹ Jurors did not report directly to the courthouse; each reported to a specific secret location—one on the north side of town and one on the south side—from which they were shuttled to the courthouse.¹¹⁸² Instead of going their own way for lunch, they always ate together.¹¹⁸³ Once a week or so, the deputy marshals took them out for lunch.¹¹⁸⁴

Restrooms on the courtroom's floor were reserved for use by jurors and court staff only.¹¹⁸⁵ Cubicle walls were used to screen off a rest area outside the jury room, a table and chairs were set up outside on a porch, and extra games and magazines were brought in.¹¹⁸⁶

1175. See Greenberg, *supra* note 1032, at 151; Jay Weaver, "Secret Agent" Testifies about Padilla Document, Miami Herald, May 16, 2007, at 3A.

1176. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1177. See Goodnough, *supra* note 1064.

1178. See Weaver, *supra* note 1085.

1179. See *id.*

1180. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1181. *Id.*

1182. *Id.*

1183. *Id.*

1184. *Id.*

1185. *Id.*

1186. *Id.*

Challenge: Classified Evidence

District of South Carolina

Padilla's attorneys wanted his habeas petition decided on legal grounds rather than factual grounds, so evidence was never an important issue in the case.¹¹⁸⁷ Because this could not be known with certainty at the outset, Judge Floyd's two law clerks and his judicial assistant obtained security clearances.¹¹⁸⁸ Judge Floyd sat in Spartanburg, but he anticipated a possible evidentiary hearing at the larger courthouse in Charleston, about two hundred miles away.¹¹⁸⁹ For this reason, a courtroom deputy and a court reporter there obtained security clearances.¹¹⁹⁰ As it happened, oral arguments were held in Spartanburg, and they did not refer to classified information.¹¹⁹¹

Judge Floyd examined some classified evidence at a sensitive compartmented information facility (SCIF) at the courthouse in Charleston, but there was no need for his staff to do so.¹¹⁹²

Southern District of Florida

All defense attorneys in the criminal case received security clearances.¹¹⁹³ There was already a SCIF in the basement of the courthouse, and defense attorneys could review classified information there.¹¹⁹⁴

More than two years after Padilla's indictment, Judge Cooke granted him access to classified evidence created during his military confinement.¹¹⁹⁵ Although it is common to grant defense attorneys access to classified evidence relevant to a prosecution, it is very unusual for courts to grant such access to terrorism defendants. Both Judge Cooke and defense

1187. Interview with Judge Henry F. Floyd, Nov. 19, 2009.

1188. *Id.*

1189. *Id.*

1190. *Id.*

1191. *Id.*

1192. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1193. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1194. *Id.*

1195. Order, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. July 5, 2006), D.E. 464; see *Judge Allows Padilla to See Secrets*, Wash. Post, July 14, 2006, at A12.

attorneys viewed classified videos of Padilla's interrogation in the basement SCIF.¹¹⁹⁶

For Padilla's 2014 resentencing, defense counsel planned to use classified evidence, and the government agreed to "accommodate defense counsel's requests by coordinating with the government agencies who own the classified information the defense seeks to use."¹¹⁹⁷

All of Judge Cooke's staff received security clearances for this case.¹¹⁹⁸ The last of her cleared law clerks left in 2009, but her permanent staff—her assistant, courtroom deputy, and court reporter—all retained top-secret clearances.¹¹⁹⁹ During this case, Judge Cooke did not use interns, because they would not have security clearances.¹²⁰⁰

Challenge: FISA Evidence

FISA surveillance orders resulted in evidence against each of the defendants.¹²⁰¹ On February 14, 2006, Hassoun moved the court

to undertake a careful review of all applications for electronic surveillance of defendant Hassoun conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as well as applications for such surveillance of any third-party target which intercepted defendant, and based upon that review, disclose the applications [and] orders to the defense, hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and, as [a] result, suppress all intercepts of defendant Hassoun derived from illegally authorized FISA surveillance.¹²⁰²

Judge Cooke referred the matter to Magistrate Judge Stephen T. Brown,¹²⁰³ who "examined *in camera* every application from which the

1196. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1197. Joint Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. July 7, 2014), D.E. 1450.

1198. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1199. *Id.*

1200. *Id.*

1201. *Trying Cases*, *supra* note 1058, at 8 (remarks by Judge Cooke); Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1202. Hassoun FISA Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 13, 2006), D.E. 200; *see Franks v. Delaware*, 438 U.S. 154 (1978) (requiring a hearing on a showing that the foundation for a search warrant included intentionally or recklessly false information).

1203. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Apr. 4, 2007), D.E. 954 [hereinafter FISA Order], 2007 WL 1068127.

Judge Brown retired on April 11, 2012. Judicial Milestones, www.uscourts.gov/judicial-milestones/stephen-thomas-brown.

Government has indicated that it derived evidence that will be used in its case against the Defendants.”¹²⁰⁴ Judge Brown found

that each individual application contains probable cause that the subject of the surveillance was “an agent of a foreign power.” The Court additionally finds that with respect to any target who is a “United States person,” the probable cause finding(s) were not based solely on activities which are protected under the First Amendment.¹²⁰⁵

On April 4, 2007, Judge Cooke affirmed Judge Brown’s findings: “Although the Magistrate Judge carefully reviewed the FISA applications and other materials that are the subject of the instant motions, I also reviewed the applications. On review, I agree with Magistrate Judge Brown.”¹²⁰⁶ When she was not looking at them, Judge Cooke stored the FISA applications in an approved safe in her chambers.¹²⁰⁷

Judge Cooke was also called upon to review an evidentiary substitute for classified evidence, as provided by the Classified Information Procedures Act (CIPA).¹²⁰⁸ An agent of the intelligence agency with authority over the evidence brought the original evidence to the classified information security officer, who delivered it to Judge Cooke in chambers for her private review in her office while the agent and the security officer waited outside her door.¹²⁰⁹

Challenge: Sensitive Unclassified Evidence

Much of the record in Hassoun’s two habeas corpus petitions—following his immigration detention after he served his terrorism sentence—is unavailable to the public electronically. Federal Rule of Civil Procedure 5.2(c) limits public access to the court file in immigration cases to physical visits to the courthouse, except for the docket sheet and court orders.

About fifteen weeks into her case, Judge Wolford approved a consent motion to allow the government to file documents containing law-

1204. Report and Recommendation at 3, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Dec. 15, 2006), D.E. 727, 2007 WL 1068127.

1205. *Id.*

1206. FISA Order, *supra* note 1203.

1207. Interview with Judge Marcia G. Cooke, Oct. 8, 2009.

1208. *Id.*; see 18 U.S.C. app. 3 (2020) (text of CIPA); Reagan, *supra* note 1192 (discussing CIPA).

1209. Interview with Judge Marcia G. Cooke, Oct. 8, 2009; Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Oct. 18, 2011; see Reagan, *supra* note 1192, at 21–22 (providing information about classified information security officers).

enforcement information under seal.¹²¹⁰ Over the next eight months, she issued three similar orders, expanding the protection to include national security information and instructing the parties to prepare redacted documents for the public record.¹²¹¹

In March 2020, Judge Wolford reminded the parties that the sealing of court records must be narrowly tailored and that deadlines for filing redacted versions should be honored.¹²¹² Judge Wolford continued to grant sealing motions, expanding the protection to include information about confidential informants and Hassoun's medical history.¹²¹³

Three days before her release order, Judge Wolford denied a sealing motion for material that she would have to rely on in her opinion and about which the parties had not provided specific and sufficient justifications for sealing.¹²¹⁴ At about that time, Judge Wolford also ordered previously sealed documents unsealed.¹²¹⁵ Remote electronic access, however, remains restricted by Rule 5.2(c).

Judge Wolford's opinion supporting her release order has a few redactions relating to the specifics of Hassoun's anticipated home confinement.¹²¹⁶

1210. Order, *Hassoun v. Searls*, No. 1:19-cv-370 (W.D.N.Y. July 1, 2019), D.E. 19.

1211. Second W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet, *supra* note 1125 (D.E. 69, 80); Order, *Hassoun*, No. 1:19-cv-370 (W.D.N.Y. Nov. 15, 2019), D.E. 45.

1212. Second W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet, *supra* note 1125 (D.E. 93, 100).

1213. *Id.* (D.E. 107, 115, 116, 143, 156, 167, 186, 198, 211, 214, 215).

1214. Opinion, *Hassoun*, No. 1:19-cv-370 (W.D.N.Y. June 26, 2020), D.E. 246.

1215. Second W.D.N.Y. *Hassoun* Habeas Corpus Docket Sheet, *supra* note 1125 (D.E. 252, 255)

1216. *Hassoun v. Searls*, 469 F. Supp. 3d 69, 79–80 (W.D.N.Y. 2020).

Chapter 9

Lackawanna

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

Six men from Lackawanna, New York, attended a terrorist training camp in Afghanistan in 2001, decided it was not for them, returned to New York, and eventually pleaded guilty to terrorism charges. Although the case did not proceed to trial, the court still faced the challenges of court security, classified evidence, and religious accommodation.

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In May 2001, the Buffalo office of the FBI received an anonymous tip that six young men of Yemeni descent in Lackawanna had been to an Al-Qaeda training camp in Afghanistan that spring.¹²¹⁷ The men—all American citizens—were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.¹²¹⁸ The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.¹²¹⁹ 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.¹²²⁰

1217. See *Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) [hereinafter *Chasing the Sleeper Cell*], www.pbs.org/wgbh/pages/frontline/shows/sleeper/ (transcript); Michael Powell, *No Choice but Guilty*, Wash. Post, July 29, 2003, at A1; Matthew Purdy & Lowell Bergman, *Where the Trail Led*, N.Y. Times, Oct. 12, 2003, at 11; Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror* 153 (2007).

1218. See *United States v. Goba*, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, N.Y. Times, May 20, 2003, at A17; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 4.

1219. See *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217.

1220. See Powell, *supra* note 1217; Purdy, *supra* note 1218; Purdy & Bergman, *supra* note 1217; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. Times, Oct. 22, 2002, at A19.

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.¹²²¹ Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.¹²²² In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yasein Taher, Mukhtar al-Bakri, Shafal Mosed, and Faysal Galab.¹²²³

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.¹²²⁴ The sermon, and Derwish's encouragement, persuaded the “Lackawanna Six” to travel to Afghanistan to train for jihad.¹²²⁵ They told their families and friends, however, that they were going to Pakistan for religious study.¹²²⁶

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28.¹²²⁷ Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.¹²²⁸ Derwish, who had moved his family to Yemen, ar-

1221. See *Chasing the Sleeper Cell*, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Ali H. Soufan, *The Black Banners* 507 (2011), *reprinted as* *The Black Banners* (Declassified) (2020) (restoring redactions); Temple-Raston, *supra* note 1217, at 31–32, 44–46.

1222. See Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 37.

1223. See Temple-Raston, *supra* note 1217, at 44–45.

1224. See Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 81–87.

“Dossari had a certain touch with the youth, able to make radical ideology approachable. He could give an incendiary sermon calling for jihad to avenge the repression of Muslims, then have lunch at Fuddrucker's and go sightseeing at Niagara Falls.” Jess Bravin, *The Terror Courts* 260 (2013).

1225. See *Chasing the Sleeper Cell*, *supra* note 1217; Chris Heffelfinger, *Radical Islam in America* 115 (2011); Temple-Raston, *supra* note 1217, at 88–89.

1226. See *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 89.

1227. *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; see also Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 94.

1228. *Goba*, 240 F. Supp. 2d at 252; *Goba*, 220 F. Supp. 2d at 189; see *id.* at 197–98, 202, 216; see also *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 94.

ranged for the six to cross into Afghanistan to attend the al-Farooq training camp near Kandahar.¹²²⁹

Shortly after arriving, the men began to look for opportunities to leave.¹²³⁰ “The six made excuses about needing to go home to make arrangements for their wives.”¹²³¹ Alwan had an exit interview with Osama Bin Laden, who asked about the willingness of other Muslims with U.S. passports to do martyrdom missions.¹²³² Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June; Goba returned in August.¹²³³

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.¹²³⁴ Bahraini authorities arrested him from his wedding bed on September 9.¹²³⁵ The other five men were arrested back home on September 13 and 14 on a criminal complaint for material support of terrorism.¹²³⁶

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 16.¹²³⁷ All six defendants received appointed counsel; Judge Schroeder made a deliberate effort to appoint well-known and well-

1229. See Powell, *supra* note 1217; Temple-Raston, *supra* note 1217, at 88–89, 99–109; see also Gordon Cucullu, *Inside Gitmo* 214 (2009) (reporting that the men became friends at the camp with Australian David Hicks, who would become a Guantánamo Bay detainee).

1230. See *Chasing the Sleeper Cell*, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 110–25.

1231. Bravin, *supra* note 1224, at 260.

1232. See *id.*

1233. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; see *id.* at 211; see also *Chasing the Sleeper Cell*, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 129.

1234. See Temple-Raston, *supra* note 1217, at 7.

1235. See *Chasing the Sleeper Cell*, *supra* note 1217; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Lou Michel, “*I Did My Share of Suffering*,” Buffalo News, Nov. 25, 2012, at A1; Purdy & Bergman, *supra* note 1217; Santora, *supra* note 1220; Temple-Raston, *supra* note 1217, at 1, 3, 154, 205.

1236. *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 *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Santora, *supra* note 1220; Temple-Raston, *supra* note 1217, at 160–61.

1237. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 1236.

Tim Reagan interviewed Judge Schroeder for this case study in his chambers on October 31, 2007.

respected attorneys, appointing the Federal Public Defender to represent Goba and attorneys from the court's Criminal Justice Act panel to represent the other defendants.¹²³⁸

All pretrial matters in criminal cases were referred to magistrate judges in this district.¹²³⁹ On September 18 through 20, Judge Schroeder held a detention hearing in the court's large ceremonial courtroom.¹²⁴⁰ 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 one hundred 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.¹²⁴¹ Public picketers also occupied space in the plaza and around the courthouse; a popular picket read, "Jail, No Bail."¹²⁴² 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.¹²⁴³ Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.¹²⁴⁴

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.¹²⁴⁵ Told that supporters were willing to post \$600,000 bond per defendant, Judge Schroeder set Alwan's bail at

1238. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 1236; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1239. Interview with Judge William M. Skretny, Oct. 31, 2007; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

Tim Reagan interviewed Judge Skretny for this case study in Judge Schroeder's chambers after a private interview with Judge Schroeder.

1240. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 1236; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1241. Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1242. *Id.*

1243. *Id.*

1244. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 1236; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1245. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 1236; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

\$600,000.¹²⁴⁶ But Alwan was unable to post such an amount after all, so he remained detained.¹²⁴⁷

The six men were indicted on October 21.¹²⁴⁸ The court assigned the case to District Judge William M. Skretny for trial.¹²⁴⁹

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002,¹²⁵⁰ and an indictment against him on December 15, 2003.¹²⁵¹ He traveled to Yemen instead of returning from Afghanistan and became one of the FBI's most-wanted terrorism suspects.¹²⁵² He was arrested in Yemen by Yemeni authorities in 2004, but he escaped two years later.¹²⁵³ In May 2007, he surrendered to Yemeni authorities, who agreed not to extradite him to the U.S.¹²⁵⁴ He was observed in

1246. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 1236; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1247. Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

1248. *Goba*, 240 F. Supp. 2d at 244; *see* Heffelfinger, *supra* note 1225, at 129; Purdy & Bergman, *supra* note 1217; Santora, *supra* note 1220; Temple-Raston, *supra* note 1217, at 193.

1249. *Goba* Docket Sheet, *supra* note 1236.

1250. Docket Sheet, *United States v. Elbaneh*, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002).

1251. Docket Sheet, *United States v. Elbaneh*, No. 1:03-cr-255 (W.D.N.Y. Dec. 15, 2003) [hereinafter *Elbaneh* Docket Sheet].

1252. Federal Bureau of Investigation, *Most Wanted Terrorists*, www.fbi.gov/wanted/wanted_terrorists; *see Chasing the Sleeper Cell*, *supra* note 1217; Temple-Raston, *supra* note 1217, at 200, 206–10; *U.S. Fugitive Born in Yemen Surrenders in Terror Case*, N.Y. Times, May 25, 2007, at A11 [hereinafter *U.S. Fugitive*]; Craig Whitlock, *Al-Qaeda Operative Loses Freedom in Yemen*, Wash. Post, May 19, 2008, at A10; Jerry Zremski, *Officials Confident Money Will Yield Granville's Killers*, Buffalo News, Feb. 28, 2013, at 1 (“Elbaneh . . . remains at large despite a \$5 million bounty on his head.”); *see also* Soufan, *supra* note 1221, at 512 (noting that only indicted terrorists appear on the FBI's most wanted terrorists site).

1253. *See* Dan Herbeck, *Yemen Holds Lackawanna 6 Figure*, Buffalo News, Jan. 21, 2010, at A1 (“he and 22 other men, including many with alleged ties to terrorism, escaped [in February 2006] after digging a tunnel below a high-security prison in Sana, Yemen's capital”); Whitlock, *supra* note 1252; Craig Whitlock, *Bounties a Bust in Hunt for Al-Qaeda*, Wash. Post, May 17, 2008, at A1 [hereinafter *Bounties*].

1254. *See* Herbeck, *supra* note 1253 (reporting that “Yemen has no extradition agreement with the United States” and that “Yemen's government has refused requests from the U.S. government to extradite him”); Temple-Raston, *supra* note 1217, at 254; *U.S. Fugitive*, *supra* note 1252; Whitlock, *supra* note 1252; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

public in Yemen in February 2008.¹²⁵⁵ Yemeni authorities arrested him again following American press reports of his boasting that his freedom was protected by Yemen's president.¹²⁵⁶ On January 15, 2010, Judge Skretny appointed an attorney to represent him in U.S. court, should he ever appear.¹²⁵⁷ Judge Skretny has held hearings approximately twice a year since then to see if there is any change in the case.¹²⁵⁸

A significant obstacle to the other men's defense was the government's refusal, for national-security reasons, to allow them to seek interviews with Derwish and al-Dosari.¹²⁵⁹ This matter, however, was not presented to the court.¹²⁶⁰

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.¹²⁶¹ It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.¹²⁶²

Galab, the first to plead, was sentenced to the shortest term—seven years.¹²⁶³ Mosed and Taher each were sentenced to eight years; Alwan was

1255. See Whitlock, *Bounties*, *supra* note 1253; Worth, *supra* note 1254.

1256. See Whitlock, *supra* note 1252; Whitlock, *Bounties*, *supra* note 1253; see also Herbeck, *supra* note 1253 (reporting that Elbaneh was sentenced to ten years in Yemen's prison system for crimes in Yemen).

1257. Order, *United States v. Elbaneh*, No. 1:03-cr-255 (W.D.N.Y. Jan. 15, 2010), D.E. 16; see Herbeck, *supra* note 1253.

1258. *Elbaneh* Docket Sheet, *supra* note 1251 (e.g., due diligence hearing minutes, June 1, 2022, D.E. 65).

Tim Reagan attended by videoconference a June 9, 2021, hearing. The defendant's attorney never had contact with his client, who was believed to still be in Yemen, where there was no FBI presence or even a U.S. embassy.

1259. See Temple-Raston, *supra* note 1217, at 189, 193.

1260. Interview with Judge William M. Skretny, Oct. 31, 2007; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1261. *Goba* Docket Sheet, *supra* note 1236; see Temple-Raston, *supra* note 1217, at 198–205.

1262. Powell, *supra* note 1217 (“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 1217, at 200 (“The threat was unspoken . . .”).

1263. *Goba* Docket Sheet, *supra* note 1236; see David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 1217, at 198–99.

Galab was released from prison on October 17, 2008. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 11871-055); see Lou Michel, *U.S. Gives Half of the Lackawanna Six a Fresh Start*, Buffalo News, June 13, 2009, at A1.

sentenced to nine and one-half years.¹²⁶⁴ Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.¹²⁶⁵ As a reward for subsequent assistance in other prosecutions, Goba and Alwan's sentences were reduced to nine years.¹²⁶⁶

As one example of Goba's cooperation, on May 18, 2007, Goba testified at the trial of José Padilla about the terrorist training camp that Padilla allegedly applied to join.¹²⁶⁷ In 2014, Alwan testified against Sulaiman Abu Ghayth, Osama Bin Laden's son-in-law.¹²⁶⁸

1264. Goba Docket Sheet, *supra* note 1236; see David Staba, *Last in Group Gets Sentence for Aiding Al Qaeda*, N.Y. Times, Dec. 18, 2003, at A41; David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. Times, Dec. 10, 2003, at A28; David Staba, *Qaeda Trainee Is Sentenced to 8-Year Term*, N.Y. Times, Dec. 5, 2003, at A32 [hereinafter *Qaeda Trainee*]; Temple-Raston, *supra* note 1217, at 199.

Mosed was released from prison on September 1, 2009. BOP Locator, *supra* note 1263 (reg. no. 11875-055).

1265. Sentence Reduction Order at 1, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Dec. 14, 2007), D.E. 288; Goba Docket Sheet, *supra* note 1236; see United States v. Goba, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); see also Purdy & Bergman, *supra* note 1217; David Staba, *Judge Questions Sentence in al Qaeda Case*, N.Y. Times, Dec. 11, 2003, at A37; Staba, *Qaeda Trainee*, *supra* note 1264; Temple-Raston, *supra* note 1217, at 199.

"The Lackawanna Six . . . proved faint-hearted jihadists. They quickly made plea bargains, promising cooperation in exchange for prison terms capped at ten years." Bravin, *supra* note 1224, at 259.

Al-Bakri was the last to plead. See Purdy, *Sixth Man Pleads*, *supra* note 1218. He was released from prison on July 1, 2011. BOP Locator, *supra* note 1263 (reg. no. 11879-055); see Michel, *supra* note 1235 (reporting on al-Bakri's difficulties in obtaining a visa for his wife and his inability to visit her because of the terms of his supervised release); see also Satisfaction, Goba, No. 1:02-cr-214 (W.D.N.Y. June 25, 2014), D.E. 313 (noting al-Bakri's payment of his fine and assessment).

1266. Amended Judgment, Goba, No. 1:02-cr-214 (W.D.N.Y. June 29, 2010), D.E. 306 (Alwan); Amended Judgment, *id.* (Jan. 3, 2008), D.E. 289 (Goba); Sentence Reduction Order, *supra* note 1265; see Sentence Reduction Motion, Goba, No. 1:02-cr-214 (W.D.N.Y. May 20, 2010), D.E. 299; Order, *id.* (Jan. 7, 2008), D.E. 292 (denying Goba's motion for a further reduction of his sentence).

1267. United States v. Jayyousi, 657 F.3d 1085, 1094 (11th Cir. 2011); see Abby Goodnough, *Witness Describes Training Padilla Reportedly Received*, N.Y. Times, May 19, 2007, at A9; Jay Weaver, *Jihadist Testifies in Padilla Trial*, Miami Herald, May 19, 2007, at 3A; Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A6; see also Chapter 8: Dirty Bomber, *supra* page 156.

1268. See Benjamin Weiser, *Witness Says Defendant Spoke to Qaeda Trainees*, N.Y. Times, Mar. 7, 2014, at 22; see also Chapter 2: Kenya and Tanzania, *supra* page 38.

It was reported that Goba, Alwan, and Taher were offered entry into the witness protection program.¹²⁶⁹

Derwish, also known as Ahmed Hijazi, was killed in Yemen in a November 5, 2002, U.S. drone strike on a jeep carrying Abu Ali al-Harithi, who was believed to be one of the 2000 USS *Cole* bombing planners.¹²⁷⁰ Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.¹²⁷¹ He attempted suicide several times while there.¹²⁷² The government released him to Saudi Arabia on July 16, 2007.¹²⁷³

Challenge: Classified Evidence

As a precaution in case Judge Schroeder was called upon to review classified evidence, classified information security officers discreetly facilitated a background check on him.¹²⁷⁴ Article III judges are automatically cleared

1269. Michel, *supra* note 1263.

In May 2012, there were 700 active participants in the witness protection program. See Greg Miller, *Terrorist Witnesses Flew on U.S. Airlines*, Wash. Post, May 17, 2013, at A8; see also Charlie Savage, *Justice Dept. Lost Track of Terrorists, Report Says*, N.Y. Times, May 17, 2013, at A12 (“just two former known or suspected terrorists have been admitted into the program in the past six years”).

1270. See Bravin, *supra* note 1224, at 261; *Chasing the Sleeper Cell*, *supra* note 1217; Herbeck, *supra* note 1253; Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Charlie Savage, *Power Wars* 281 (2015); Jeremy Scahill, *Dirty Wars* 75–78 (2013) (reporting that DNA tests confirmed Derwish’s identity); Scott Shane, *Objective Troy* 77–81 (2015) (“Was it worrisome that the United States government had killed an American without knowing it or intending it?”); Soufan, *supra* note 1221, at 506–07; Temple-Raston, *supra* note 1217, at 195–98, 249–50, 252.

1271. See Bravin, *supra* note 1224, at 68; *Chasing the Sleeper Cell*, *supra* note 1217; Powell, *supra* note 1217; Purdy & Bergman, *supra* note 1217; Temple-Raston, *supra* note 1217, at 139–40, 148.

1272. See Mahvish Rukhsana Khan, *My Guantánamo Diary* 210, 298 (2008); Temple-Raston, *supra* note 1217, at 247–49.

1273. Transfer Notice, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 16, 2007), D.E. 179; see Khan, *supra* note 1272, at 252; see also Chapter 28: Guantánamo Bay, *infra* page 434.

1274. Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

to see classified evidence, but magistrate judges are not.¹²⁷⁵

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.¹²⁷⁶ Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.¹²⁷⁷

Challenge: Court Security

For this high-profile terrorism prosecution, the marshal established extra security at the courthouse doors.¹²⁷⁸ The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.¹²⁷⁹ During the days of pleas and sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.¹²⁸⁰

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.¹²⁸¹ But the defendants' pleas before Judge Skretny were taken by affirmation.¹²⁸²

1275. Interview with Judge William M. Skretny, Oct. 31, 2007; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 24, 2007; *see* Reagan, *supra* note 1274, at 2.

1276. Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1277. *Id.*

1278. Interview with Judge William M. Skretny, Oct. 31, 2007.

1279. *Id.*; Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1280. Interview with Judge William M. Skretny, Oct. 31, 2007.

1281. Interview with Judge H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1282. Interview with Judge William M. Skretny, Oct. 31, 2007.

Chapter 10

A Plot to Kill President Bush

*United States v. Abu Ali (Gerald Bruce Lee, E.D. Va.)*¹²⁸³

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding Al-Qaeda.¹²⁸⁴ Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.¹²⁸⁵ Classified evidence, classified argument, foreign evidence, and witness security were among the challenges that he and the court of appeals faced.

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Abu Ali was born of Jordanian parents in Houston, Texas, and raised in Falls Church, Virginia.¹²⁸⁶ He was a 1999 valedictorian at the Islamic

1283. An appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

Tim Reagan interviewed Judge Traxler for this case study at the Federal Judicial Center on November 12, 2008.

1284. Sentencing Order at 1 & n.1, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006), D.E. 396, 2006 WL 1102835; see Caryle Murphy, *Man Given 30 Years in Plot Against Bush*, Wash. Post, Mar. 30, 2006, at A3; David Stout, *American Is Sentenced to 30 Years in Terror Case*, N.Y. Times, Mar. 30, 2006, at A18. See generally Human Rights Watch, *Illusion of Justice* 5, 79–81, 109, 190–91, 198–200 (2014); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after Abu Ali*, 88 Tex. L. Rev. 1501 (2010).

1285. 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 1284; Lloyd Smith, *An Interview with Judge Gerald Bruce Lee*, *Landslide*, Nov./Dec. 2013, at 7; Stout, *supra* note 1284; see also Gerald Bruce Lee, *United States v. Abu Ali: Jury Questionnaire* (Oct. 25, 2005), www.fjc.gov/sites/default/files/2014/TRVAE005.pdf; Gerald Bruce Lee, *United States v. Abu Ali: Preliminary Venire Instructions* (Oct. 25, 2005), www.fjc.gov/sites/default/files/2014/TRVAE004.pdf.

Tim Reagan and Joy Richardson interviewed Judge Lee for this report in the judge's chambers on October 2, 2006. Judge Lee retired on September 30, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

1286. *United States v. Abu Ali*, 528 F.3d 210, 221 (4th Cir. 2008); Sentencing Order, *supra* note 1284; see Paul Bradley, *Prosecutors Say Terror Suspect Lied*, *Richmond Times–*

Saudi Academy, a school funded by Saudi Arabia in Alexandria, Virginia, and he studied engineering at the University of Maryland.¹²⁸⁷ In 2002, he went to Saudi Arabia to attend the University of Medina.¹²⁸⁸ Apparently he had significant contacts with Al-Qaeda.¹²⁸⁹ He was arrested in Saudi Arabia by officers of Saudi Arabia's counterterrorism Mabath on June 8, 2003, as part of an investigation of bombings that occurred on May 12, 2003, in Riyadh.¹²⁹⁰

On July 28, 2004, Abu Ali's parents sought release of their son, filing a habeas corpus petition in the U.S. District Court for the District of Columbia.¹²⁹¹ On December 16, Judge John D. Bates denied the government's motion to dismiss the petition for lack of jurisdiction,¹²⁹² but on September 19, 2005, Judge Bates dismissed the petition as moot, because Abu Ali had been indicted and transferred to Virginia.¹²⁹³

Abu Ali was held in Saudi Arabia until February 21, 2005, following a February 3 indictment in the United States for conspiracy to establish terrorist operations.¹²⁹⁴ The indictment later was expanded to include con-

Dispatch, Feb. 24, 2005, at A5; Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32; Murphy, *supra* note 1284; Stout, *supra* note 1284.

Abu Ali's father was a computer analyst for Saudi Arabia's embassy. *Abu Ali*, 528 F.3d at 221; *see* Isikoff, *supra*.

1287. *Abu Ali*, 528 F.3d at 221; Sentencing Order, *supra* note 1284, at 7; *see* 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.

1288. *Abu Ali*, 528 F.3d at 221; *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005); Sentencing Order, *supra* note 1284, at 12; *see* Meyer, *supra* note 1287; Stout, *supra* note 1284.

1289. *Abu Ali*, 528 F.3d at 221–24; *see* Isikoff, *supra* note 1286; Mowbray, *supra* note 1287.

1290. *Abu Ali*, 528 F.3d at 223–24, 238; *Abu Ali*, 395 F. Supp. 2d at 341, 344, 367, 384; *see* *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 30 (D.D.C. 2004); *see also* Bradley, *supra* note 1286; Isikoff, *supra* note 1286; Murphy, *supra* note 1284; Stout, *supra* note 1284. *See generally* Wadie E. Said, *Crimes of Terror* 84–87 (2015).

1291. Docket Sheet, *Abu Ali v. Ashcroft*, No. 1:04-cv-1258 (D.D.C. July 28, 2004); *see* Jonathan Hafetz, *Habeas Corpus After 9/11* 196 (2011).

1292. *Abu Ali*, 350 F. Supp. 2d 28; *see* Hafetz, *supra* note 1291, at 196–97.

1293. *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005); *see* Hafetz, *supra* note 1291, at 197. *See generally* Karen J. Greenberg, *Rogue Justice* 122–24 (2016).

1294. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 395 F. Supp. 2d at 341 & n.1, 357, 367, 385; *United States v. Abu Ali*, 396 F. Supp. 2d 703, 704 (E.D. Va. 2005); *see* Bradley, *supra* note 1286; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 1284.

spiracy to kill the President.¹²⁹⁵ The defendant argued unsuccessfully that his confession was inadmissible because he was tortured while held in Saudi Arabia.¹²⁹⁶

Although sentencing guidelines specified a life sentence, Judge Lee sentenced him on March 29, 2006, to thirty years in prison followed by thirty years of supervised release.¹²⁹⁷ The court of appeals vacated the sentence;¹²⁹⁸ although Judge Diana Gribbon Motz determined that the sentence was within Judge Lee's discretion,¹²⁹⁹ Judges J. Harvie Wilkinson III and William B. Traxler, Jr., determined that the sentence insufficiently reflected the gravity of the crime.¹³⁰⁰ On July 27, 2009, Judge Lee resentenced Abu Ali to life in prison.¹³⁰¹ The court of appeals affirmed the life sentence.¹³⁰²

1295. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 396 F. Supp. 2d at 704.

1296. *Abu Ali*, 528 F.3d at 231–34; *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; see Bradley, *supra* note 1286; Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647, 649 (2008); Hafetz, *supra* note 1291, at 197; Isikoff, *supra* note 1286; Jerry Markon, *Conviction Upheld in Terror Plot*, Wash. Post, June 7, 2008, at B3; Markon & Priest, *supra* note 1294; Meyer, *supra* note 1287; Murphy, *supra* note 1284.

Portions of the confession were included in an NBC News report. *U.S. Citizen Confesses to Assassination Plot* (Nov. 30, 2005), www.msnbc.msn.com/id/10266654/, archived at web.archive.org/web/20060102054152/www.msnbc.msn.com/id/10266654/.

1297. Sentencing Order, *supra* note 1284; see Stout, *supra* note 1284.

1298. *Abu Ali*, 528 F.3d at 269, *cert. denied*, 555 U.S. 1170 (2009); see Markon, *supra* note 1296; Said, *supra* note 1290, at 129–31; Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 518–19 (2014).

1299. *Abu Ali*, 528 F.3d at 269–82 (Judge Motz, dissenting).

1300. *Id.* at 258–69 (opinion of the court).

1301. E.D. Va. Docket Sheet, *supra* note 1285; see Hafetz, *supra* note 1291, at 197; Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, Wash. Post, July 28, 2009, at A3.

Abu Ali was sent to the supermax prison in Florence, Colorado, but his conditions of confinement later were downgraded to medium security. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 70250-083); see Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to "Superjail"*, London Times, June 20, 2006, at 8.

1302. *United States v. Abu Ali*, 410 F. App'x 673 (4th Cir. 2011).

On October 28, 2013, Judge Lee denied Abu Ali's petition to vacate his sentence because of ineffective trial and appellate counsel. Opinion, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Oct. 28, 2013), D.E. 461, 2013 WL 5797855, *appeal dismissed*, 584 F. App'x 135 (4th Cir. 2014).

Challenge: Foreign Evidence and Witness Security

To decide whether Abu Ali's confession should be suppressed, Judge Lee arranged for seven days of video depositions of Mabath officers in Saudi Arabia.¹³⁰³ Because the identities of Mabath officers are secret,¹³⁰⁴ the Saudi government would not permit them to come to the United States to testify.¹³⁰⁵ There also was the risk that dangerous groups in Saudi Arabia would object to the officers' cooperation with an American prosecution.¹³⁰⁶

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.¹³⁰⁷ A live video feed was established between Saudi Arabia and the United States; the judge, additional counsel for both sides, and the court reporter were in Alexandria.¹³⁰⁸ The video image was displayed as a split screen with the defendant on one side and the witness on the other, so the defendant could see the witness and the witness could see the defendant.¹³⁰⁹

1303. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005); Order at 2, *Abu Ali*, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005), D.E. 195 [hereinafter Sept. 16, 2005, E.D. Va. Order]; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006; see David H. Laufman, Opinion Essay, *Terror Trials Work*, Legal Times, Nov. 5, 2007, at 58 (observation by the prosecuting attorney in the case that "for the first time, the Saudi government permitted Saudi security officers (including a general) to testify in an American criminal proceeding and to face rigorous cross-examination by defense attorneys—even though the officers would have to answer questions about Saudi interrogation methods said to violate international human rights standards"); Said, *supra* note 1290, at 85 (noting that "the structure of the proceedings provided no guarantee against the agents lying. For example, how would a court hold a Saudi officer accountable if it discovered he had testified falsely?"); Vladeck, *supra* note 1284, at 1510 ("Over Abu Ali's objection, such depositions were taken in July 2005 using procedures that, whatever their merits, were certainly novel.").

1304. Sept. 16, 2005, E.D. Va. Order, *supra* note 1303; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

The Mabath is the Saudi domestic security service. Sept. 16, 2005, E.D. Va. Order, *supra* note 1303.

1305. *Abu Ali*, 528 F.3d at 239; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006; see Sept. 16, 2005, E.D. Va. Order, *supra* note 1303, at 2.

1306. Interview with Judge Gerald Bruce Lee, Oct. 2, 2006; see Sept. 16, 2005, E.D. Va. Sept. Order, *supra* note 1303, at 5.

1307. *Abu Ali*, 528 F.3d at 239; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1308. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1309. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Judge 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 Mabath officers when Abu Ali was transported from Saudi Arabia to the United States), expert witnesses, and other percipient witnesses.¹³¹⁰ The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.¹³¹¹ So the split-screen video deposition evidence was played to the jury as well.¹³¹²

The Mabath officers testified pseudonymously.¹³¹³ 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.¹³¹⁴

Taking the video depositions of foreign witnesses was challenging for several reasons.¹³¹⁵ First, there was a substantial difference in time zones.¹³¹⁶ Second, a secure communication line was necessary, and the availability of a secure line was not reliable.¹³¹⁷ Third, the heat in Saudi Arabia sometimes caused technical difficulties.¹³¹⁸

Judge Lee acknowledged something he would do differently if he had it to do over: He would send at least one more interpreter.¹³¹⁹ One interpreter was not enough, because, at the very least, interpreters need breaks.¹³²⁰

Challenge: Attorney–Client Contacts

During the video depositions of the Mabath officers, “Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings. In addition, the court was

1310. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1311. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1312. Interview with Judge Gerald Bruce Lee, Oct. 2, 2006; *see Abu Ali*, 528 F.3d at 238–39.

1313. *Abu Ali*, 395 F. Supp. 2d at 344; Sept. 16, 2005, E.D. Va. Order, *supra* note 1303, at 4–5; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1314. Sept. 16, 2005, E.D. Va. Order, *supra* note 1303, at 4, 7, 9–10; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1315. Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1316. *Id.*

1317. *Id.*

1318. *Id.*

1319. *Id.*

1320. *Id.*

willing to stop the depositions if Abu Ali's counsel in Saudi Arabia wanted to consult with their client."¹³²¹

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali's trial was classified.¹³²² Classified evidence was stored in the court's sensitive compartmented information facility (SCIF).¹³²³ One of Abu Ali's attorneys was denied a security clearance and the other did not apply for one, so the court appointed an attorney who already had one.¹³²⁴ Only the cleared attorney—not Abu Ali or either uncleared attorney—was allowed to see classified evidence.¹³²⁵

The court of appeals held that it was improper, but harmless error in this case, for the district court to permit the jury to see classified evidence that the defendant could not see.¹³²⁶ At issue were two messages that the government claimed were coded communications between the defendant and fellow jihadists.¹³²⁷

The government produced unredacted copies of the messages to cleared counsel.¹³²⁸ Uncleared counsel and the defendant received declassified copies complete in content and designating the dates of the messages, but "redacted to omit certain identifying and forensic information."¹³²⁹ Uncleared counsel were concerned that the redacted information might be relevant to when the government acquired the messages, which would be material to the defendant's ultimately unsuccessful argument that the government's cooperation with Saudi Arabia triggered a requirement of *Miranda* warnings upon Abu Ali's arrest.¹³³⁰ The district court denied un-

1321. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008).

1322. Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1323. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1324. *Abu Ali*, 528 F.3d at 248–49; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1325. *Abu Ali*, 528 F.3d at 248–55; Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

1326. *Abu Ali*, 528 F.3d at 248–57.

1327. *Id.* at 236–37, 248.

1328. *Id.* at 249.

1329. *Id.*

1330. *Id.* at 250; see *id.* at 227–31 (holding that *Miranda* warnings were not required); see *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring informed consent to police questioning).

cleared counsel access to the classified evidence at a hearing pursuant to the Classified Information Procedures Act (CIPA), from which Abu Ali and his uncleared counsel were excluded, and at which Abu Ali was represented by cleared counsel.¹³³¹

Although the defendant was only permitted to see redacted messages, the jury was shown unredacted versions, which the court of appeals held “was clearly contrary to the rights guaranteed to Abu Ali by the Confrontation Clause.”¹³³²

If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial. However, the government must at a minimum provide the same version of the evidence to the defendant that is submitted to the jury. We do not balance a criminal defendant’s right to see the evidence which will be used to convict him against the government’s interest in protecting that evidence from public disclosure. If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.¹³³³

The court held, however, that the error was harmless beyond a reasonable doubt.¹³³⁴

Challenge: Classified Arguments

In the appeal, part of the record and part of the briefing concerning classified evidence were classified.¹³³⁵ Classified materials were filed through the

1331. *Abu Ali*, 528 F.3d at 250; see 18 U.S.C. app. 3 (2020) (text of CIPA); see also Reagan, *supra* note 1323 (describing CIPA procedures).

1332. *Abu Ali*, 528 F.3d at 253; see *id.* at 255 (“CIPA does not . . . authorize courts to provide classified documents to the jury when only . . . substitutions are provided to the defendant.”).

1333. *Id.* at 255.

1334. *Id.* at 255–57; *id.* at 256 (“In this case, we are satisfied that the jury’s decision to convict Abu Ali was not substantially swayed by the jury’s access to the limited information redacted from the documents given to Abu Ali.”).

1335. *Id.* at 244 n.13; Interview with 4th Cir. Clerk’s Office Staff, Feb. 26, 2008; see, e.g., Order, *United States v. Abu Ali*, No. 06-4521 (4th Cir. Nov. 27, 2006), D.E. 48 [hereinafter 4th Cir. Classified Briefing Order] (appeal by the government, accepting for filing

classified information security officer.¹³³⁶ Part of oral argument was conducted in closed session.¹³³⁷

All of Judge Traxler's law clerks were career clerks, and two of them had top-secret security clearances.¹³³⁸ One of the two clerks with security clearances was assigned to help with the case.¹³³⁹ Judge Traxler reviewed most of the classified materials for the case in his chambers in Greenville, South Carolina;¹³⁴⁰ there was a SCIF in the Greenville courthouse.¹³⁴¹ Occasionally, classified material was submitted at a time when Judge Traxler was in Richmond, Virginia, to hear other matters, and he reviewed the materials in his Richmond chambers.¹³⁴² Some material presented to the judges in this appeal was for judges' eyes only, and even law clerks with security clearances could not see it.¹³⁴³

Judge Traxler observed two important challenges presented by classified materials: (1) constraints on communication and (2) burdens on protecting documents. The second challenge requires, for example, a law clerk at lunch to leave classified materials she is working with in the judge's office under his watch.¹³⁴⁴ Or a judge or law clerk taking a break to get coffee must take classified documents along.¹³⁴⁵ The communication challenge

classified portions of the appellant's brief and joint appendix); Order, *United States v. Abu Ali*, No. 06-4334 (4th Cir. Nov. 27, 2006), D.E. 70 (appeal by the defendant, same); Docket Sheet, *Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) [hereinafter 4th Cir. Government Appeal Docket Sheet] (noting *Abu Ali*'s filing of a classified supplemental brief on March 5, 2007, and a classified supplemental appendix on March 6, 2007, and noting the government's filing of a classified supplemental brief and a classified supplemental appendix on April 27, 2007); Docket Sheet, *Abu Ali*, No. 06-4334 (4th Cir. Apr. 10, 2006) (same).

1336. 4th Cir. Classified Briefing Order, *supra* note 1335; see Reagan, *supra* note 1323, at 21–22 (providing information about classified information security officers).

An "under seal, in camera, ex parte notice" was filed in the district court on April 27, 2007. 4th Cir. Government Appeal Docket Sheet, *supra* note 1335 (noting that an original document was filed with the classified information security officer).

1337. *Abu Ali*, 528 F.3d at 244 n.13; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Larry O'Dell, *Torture Alleged in Bush-Plot Case*, Richmond Times-Dispatch, June 24, 2007, at B3.

1338. Interview with Judge William B. Traxler, Jr., Nov. 12, 2008.

1339. *Id.*

1340. *Id.*

1341. *Id.*; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

1342. Interview with Judge William B. Traxler, Jr., Nov. 12, 2008.

1343. *Id.*

1344. *Id.*

1345. *Id.*

has many forms: (1) conversations in chambers about classified portions of the case must be held behind closed doors, excluding staff members not cleared; (2) judges'-eyes-only material cannot be discussed even with cleared clerks; and (3) communications among members of the panel about classified matters can generally happen only in person or by secure fax—the latter was accomplished by Judge Traxler's cleared clerk taking documents to the FBI's office in town for faxing.¹³⁴⁶

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."¹³⁴⁷ The court also ordered that the security officer and all who participate in the classification review be "walled off from government counsel" and "otherwise protect the confidentiality of . . . internal court documents during the pendency of this appeal and thereafter."¹³⁴⁸

While the appeal was pending, the government filed in the district court an *in camera ex parte* notice, and the court of appeals denied Abu Ali's motion to compel disclosure of it.¹³⁴⁹

1346. *Id.*

1347. Order at 2, *United States v. Abu Ali*, No. 06-4521 (4th Cir. Aug. 29, 2007), D.E. 139 [hereinafter 4th Cir. Classification Review Order]; Order at 2, *United States v. Abu Ali*, No. 06-4334 (4th Cir. Aug. 29, 2007), D.E. 164.

Classified information security officers, who help courts handle classified information, were formerly known by the ambiguous term "court security officers." See Introduction, *supra* page 1.

1348. 4th Cir. Classification Review Order, *supra* note 1347, at 1–2.

1349. E.D. Va. Docket Sheet, *supra* note 1285.

Chapter 11

Paintball

United States v. Royer and United States v. Al-Timimi (Leonie M. Brinkema), United States v. Chandia (Claude M. Hilton), and United States v. Benkahla (James C. Cacheris) (E.D. Va.); Royer v. Federal Bureau of Prisons (Royce C. Lamberth, D.D.C.); Chapman v. Federal Bureau of Prisons (Wiley Y. Daniel, D. Colo.)

On June 27, 2003, the United States began arresting and charging eleven men who had been playing paintball to train for jihad since 2000 in Spotsylvania County, Virginia, about sixty miles south of Washington, D.C.¹³⁵⁰ Among the challenges that their prosecution presented to the court were classified evidence and arguments, communication restrictions imposed on the defendants, and physical health during detention.

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1350. *United States v. Chandia*, 675 F.3d 329, 332 (4th Cir. 2012); *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008); *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); Docket Sheet, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. June 25, 2003) [hereinafter *Royer* Docket Sheet]; see *Royer v. United States*, 324 F. Supp. 3d 719, 722–23 & n.1 (E.D. Va. 2018); *Khan v. United States*, 330 F. Supp. 3d 1076, 1080 (E.D. Va. 2018); *Chapman v. United States*, 326 F. Supp. 3d 228, 230–31 (E.D. Va. 2018); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 32 (D.D.C. 2004); Opinion at 2, *Royer*, No. 1:03-cr-296 (E.D. Va. May 12, 2011), D.E. 742 [hereinafter *Khan Habeas Relief Opinion*]; see also Chris Heffelfinger, *Radical Islam in America* 84, 91–92, 101, 129–31 (2011); Eric Lichtblau, *Group of Muslims Charged With Plotting Against India*, N.Y. Times, June 28, 2003, at A7; Jerry Markon, “Virginia Jihad” Defendant Sentenced, San Jose Mercury News, Aug. 26, 2006, at A7; Milton Viorst, *The Education of Ali al-Timimi*, Atlantic Monthly, June 2006, at 69, 77.

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The indictment listed thirty-two terrorism counts.¹³⁵¹ 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.¹³⁵² One related case was prosecuted before Judge Brinkema,¹³⁵³ and another related case was prosecuted before Judge Claude M. Hilton.¹³⁵⁴ Three defendants were released years ahead of their sentenced terms after the Supreme Court held that criminal penalties for “crimes of violence” are unconstitutionally vague.

1351. *United States v. Khan*, 461 F.3d 477, 485 n.3 (4th Cir. 2006); *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); *Khan Habeas Relief Opinion*, *supra* note 1350, at 3; *see Royer*, 324 F. Supp. 3d at 723; *Khan*, 330 F. Supp. 3d at 1080; *Chapman*, 326 F. Supp. 3d at 231.

1352. *Chandia*, 675 F.3d at 332; *Benkahla*, 530 F.3d at 303–04; *Chandia*, 514 F.3d at 370; *Khan*, 461 F.3d at 485–86; *Khan*, 330 F. Supp. 3d at 1080; *Chapman*, 326 F. Supp. 3d at 231; *Khan*, 309 F. Supp. 2d 789; *Khan Habeas Relief Opinion*, *supra* note 1350, at 3; *see* Paul Bradley, *Lengthy Sentences for Two in “VA Jihad,”* *Richmond Times–Dispatch*, June 16, 2004, at B1; Jerry Markon, *“Va. Jihad” Case Hailed as Key in War on Terror*, *Wash. Post*, June 8, 2006, at A3 [hereinafter *Case Hailed*]; Markon, *supra* note 1350; Larry O’Dell, *Court Hears Appeal of Jihad Cases*, *Richmond Times–Dispatch*, May 26, 2006, at B10; *see also Royer*, 324 F. Supp. 3d at 723.

Tim Reagan interviewed Judge Brinkema for this case study in her chambers on January 5, 2007, and September 4, 2014.

1353. Docket Sheet, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter *Al-Timimi* Docket Sheet].

1354. Docket Sheet, *United States v. Chandia*, No. 1:05-cr-401 (E.D. Va. Sept. 14, 2005) [hereinafter *Chandia* Docket Sheet].

Ahmed Omar Abu Ali apparently was at one time a suspect in the paintball case. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005); *see* Michael Isikoff, *A Tangled Web*, *Newsweek*, Mar. 7, 2005, at 32. Subsequently he was tried for other crimes. *See* Chapter 10: A Plot to Kill President Bush, *supra* page 191.

Nine defendants were American citizens, and three served in the U.S. military.¹³⁵⁵ At core, they were charged with conspiracy, in violation of the Neutrality Act,¹³⁵⁶ to support Lashkar-e-Taiba (LeT), a militant group that opposes Indian rule over Kashmir.¹³⁵⁷ The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.¹³⁵⁸

Judge Brinkema tried four defendants in one bench trial,¹³⁵⁹ acquitting one on February 20, 2004,¹³⁶⁰ and convicting three on March 4.¹³⁶¹ The convicted defendants were sentenced on June 15,¹³⁶² and they were resentenced on July 29, 2005,¹³⁶³ in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.¹³⁶⁴

In 2018, Judge Brinkema reviewed the convictions of two defendants with long prison terms in light of Supreme Court decisions in 2015 and

1355. See Lichtblau, *supra* note 1350.

1356. 18 U.S.C. § 960 (2020).

1357. *Chandia*, 675 F.3d at 332; *Khan*, 461 F.3d at 484; *Khan*, 330 F. Supp. 3d at 1080; *Chapman*, 326 F. Supp. 3d at 230–31; *Khan Habeas Relief Opinion*, *supra* note 1350, at 2–3; see Heffelfinger, *supra* note 1350, at 91–93; Lichtblau, *supra* note 1350; Markon, *supra* note 1350; Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1; Mary Beth Sheridan, *Hardball Tactics in an Era of Threats*, Wash. Post, Sept. 3, 2006, at A1.

The name of the group means “army of the pure.” See Brendan Smith, *Chandia Challenges Law on Terror Group*, Legal Times, Oct. 29, 2007, at 10. It was designated a terrorist organization in 2001 after a deadly attack on India’s parliament building in New Delhi. See *id.*

1358. *United States v. Khan*, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); *Khan*, 330 F. Supp. 3d at 1080–81; *Chapman*, 326 F. Supp. 3d at 231; see Lichtblau, *supra* note 1350.

“[T]he vast majority of the group’s firearms training in the United States was conducted legally and no specific plans were uncovered to carry out an attack inside the United States or to specifically target Americans.” Heffelfinger, *supra* note 1350, at 93.

1359. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 330 F. Supp. 3d at 1080; *Chapman*, 326 F. Supp. 3d at 231; *Khan*, 309 F. Supp. 2d at 796; *Khan Habeas Relief Opinion*, *supra* note 1350, at 3.

1360. *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*].

1361. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827; *Khan Habeas Relief Opinion*, *supra* note 1350, at 3–4.

1362. *Royer Docket Sheet*, *supra* note 1350; *Khan Habeas Relief Opinion*, *supra* note 1350, at 4; see Bradley, *supra* note 1352.

1363. *Khan*, 461 F.3d at 486; *Royer Docket Sheet*, *supra* note 1350; *Khan Habeas Relief Opinion*, *supra* note 1350, at 4.

1364. 543 U.S. 220 (2005) (decided on January 12, 2005).

2018 that invalidated some criminal sentences for crimes of violence.¹³⁶⁵ In *Johnson v. United States*, the Supreme Court held that a sentencing enhancement for firearm possession by someone with three or more previous convictions for a “violent felony” was unconstitutionally vague.¹³⁶⁶ The Court invalidated a deportation statute three years later, in *Sessions v. Dimaya*, that defined “aggravated felony” with reference to “a crime of violence.”¹³⁶⁷

Masoud Ahmad Khan Convicted

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.¹³⁶⁸ Khan spent time at an LeT training camp in Pakistan.¹³⁶⁹ 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.¹³⁷⁰ Beginning in 1999, LeT’s primary focus was combating India’s control in Kashmir.¹³⁷¹ But Judge Brinkema 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.¹³⁷² At the training camp, Khan fired an AK-47 rifle, an antiaircraft gun, and a rocket-propelled grenade.¹³⁷³ By December 2001, the United States had substantially defeated the Taliban¹³⁷⁴ and declared LeT a terrorist organization.¹³⁷⁵

1365. *Khan v. United States*, 330 F. Supp. 3d 1076 (E.D. Va. 2018); *Chapman v. United States*, 326 F. Supp. 3d 228 (E.D. Va. 2018).

1366. 576 U.S. 591 (2015).

1367. 584 U.S. ___, 138 S. Ct. 1204 (2018).

1368. *Khan*, 461 F.3d at 486; *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); *Khan Habeas Relief Opinion*, *supra* note 1350, at 4; *see Bradley*, *supra* note 1352; *Sheridan*, *supra* note 1357.

1369. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807; *Khan*, 330 F. Supp. 3d at 1081; *Khan Habeas Relief Opinion*, *supra* note 1350, at 25 (“During the several weeks he stayed in [LET] camps, [Khan] engaged in paramilitary training and after returning to the United States he stayed in touch with an LET operative and purchased military equipment for him.”).

1370. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

1371. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; *see Sheridan*, *supra* note 1357.

1372. *Khan*, 309 F. Supp. 2d at 810; *see Heffelfinger*, *supra* note 1350, at 93.

1373. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811; *Khan Habeas Relief Opinion*, *supra* note 1350, at 27.

1374. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

Khan returned to the United States that month.¹³⁷⁶ 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.¹³⁷⁷ Judge Brinkema found Khan guilty of conspiracy, conspiracy to levy war against the United States, conspiracy to contribute services to the Taliban, conspiracy to provide material support to LeT, conspiracy to possess and use firearms in connection with a crime of violence, and three counts of using and discharging a weapon in relation to a crime of violence.¹³⁷⁸ In 2011, on habeas corpus review, Judge Brinkema and the government agreed that one of the conspiracy convictions and sentences should be vacated, but Khan remained sentenced to life in prison.¹³⁷⁹ Later, Judge Brinkema vacated four of Khan's crime-of-violence convictions on August 1, 2018, in light of *Johnson and Dimaya*.¹³⁸⁰ He was released from prison that day.¹³⁸¹

Hammad Abdur-Raheem Convicted

Judge Brinkema convicted Hammad Abdur-Raheem—who resided in Falls Church, Virginia, and who had been a soldier in the U.S. Army—of three counts, and she sentenced him to four and one-third years in prison.¹³⁸² Judge Brinkema found Abdur-Raheem guilty of conspiracy, conspiracy to provide material support to LeT, and conspiracy to possess and use fire-

1375. *Khan*, 309 F. Supp. 2d at 812; Khan Habeas Relief Opinion, *supra* note 1350, at 2.

1376. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1377. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14; Khan Habeas Relief Opinion, *supra* note 1350, at 17; *see* United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008).

1378. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820–21, 823, 826–27; *Khan v. United States*, 330 F. Supp. 3d 1076, 1082 (E.D. Va. 2018); Khan Habeas Relief Opinion, *supra* note 1350, at 4; *Royer* Docket Sheet, *supra* note 1350 (court verdict against Masoud Ahmad Khan, Mar. 4, 2004, D.E. 469).

1379. Khan Habeas Relief Opinion, *supra* note 1350, at 2, 31 & n.2, *certificate of appealability denied*, 451 F. App'x 262 (4th Cir. 2011); *Khan*, 330 F. Supp. 3d at 1082.

1380. *Khan*, 330 F. Supp. 3d 1076.

1381. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 46810-083).

1382. *Khan*, 309 F. Supp. 2d at 796, 803, 814; *see* Bradley, *supra* note 1352. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1350 (minute entry, July 29, 2005); *see* Heffelfinger, *supra* note 1350, at 96.

arms in connection with a crime of violence.¹³⁸³ Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded the case for resentencing,¹³⁸⁴ Judge Brinkema reimposed the same sentence of four years and four months, determining that she had not clearly articulated her reasons for the downward departure the first time.¹³⁸⁵ The government appealed again,¹³⁸⁶ but it withdrew the appeal¹³⁸⁷ in light of the Supreme Court's holding on December 10, 2007, in *Gall v. United States*, that even sentences outside Sentencing Guidelines are reviewed for abuse of discretion.¹³⁸⁸ Abdur-Raheem was released on November 30, 2007.¹³⁸⁹

Seifullah Chapman Convicted

Judge Brinkema convicted Seifullah Chapman, a former Marine and police officer residing in Alexandria, Virginia, of five counts and sentenced him to sixty-five years in prison.¹³⁹⁰ Chapman also spent time at the LeT training camp in Pakistan.¹³⁹¹ In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LeT member.¹³⁹² Judge Brinkema found Chapman guilty of conspiracy, con-

1383. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 1350 (court verdict against Hammad Abdur-Raheem, Mar. 4, 2004, D.E. 471).

1384. *Khan*, 461 F.3d at 483, 498–501; see Jerry Markon, *Resentencing Is Ordered for "Jihad" Defendant*, Wash. Post, Sept. 2, 2006, at B5.

1385. Transcript, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. Aug. 16, 2007, filed Sept. 14, 2006), D.E. 665 [hereinafter Aug. 16, 2007, *Royer* Transcript]; *Royer* Docket Sheet, *supra* note 1350 (noting resentencing on August 16, 2007). Resentencing was delayed by a petition to the Supreme Court for certiorari, which the Court denied on May 21, 2007. *Chapman v. United States*, 550 U.S. 956 (2007).

1386. Docket Sheet, *United States v. Abdur-Raheem*, No. 07-4941 (4th Cir. Oct. 2, 2007).

1387. Government Motion to Dismiss, *id.* (Dec. 18, 2007), D.E. 23.

1388. 552 U.S. 38 (2007).

1389. BOP Locator, *supra* note 1381 (reg. no. 46814-083); see Aug. 16, 2007, *Royer* Transcript, *supra* note 1385.

1390. *United States v. Khan*, 461 F.3d 477, 486 (4th Cir. 2006); *United States v. Khan*, 309 F. Supp. 2d 789, 796, 803, 816 (E.D. Va. 2004); see Bradley, *supra* note 1352; Heffelfinger, *supra* note 1350, at 96–97; Markon, *supra* note 1352; Sheridan, *supra* note 1357. The original sentence of eighty-five years was reduced to sixty-five years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1350 (minute entry, July 29, 2005).

1391. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811; *Chapman v. United States*, 326 F. Supp. 3d 228, 231 (E.D. Va. 2018).

1392. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13; *Chapman*, 326 F. Supp. 3d at 231.

spiracy 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.¹³⁹³ In 2006, the court of appeals affirmed the convictions of Khan, Abdur-Raheem, and Chapman.¹³⁹⁴

In light of the subsequent Supreme Court crime-of-violence rulings, Judge Brinkema vacated Chapman's conviction on three of the five counts on July 19, 2018.¹³⁹⁵ Chapman was released from prison on the following day.¹³⁹⁶

Caliph Basha Ibn Abdur-Raheem Acquitted

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem of Arlington, Virginia.¹³⁹⁷

Six Guilty Pleas

Randall Todd Royer pleaded guilty and was sentenced on April 9, 2004, to twenty years in prison for using firearms and explosives in relation to a crime of violence.¹³⁹⁸ Royer was born in St. Louis; he converted to Islam at age nineteen and eventually became president of the Muslim Student Association at American University in Washington, D.C.¹³⁹⁹ In April 2000, Royer attended an LeT training camp in Pakistan, where he fought on the

1393. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823–24, 826–27; *Chapman*, 326 F. Supp. 3d at 232; *Royer* Docket Sheet, *supra* note 1350 (court verdict against Seifullah Chapman, Mar. 4, 2004, D.E. 470).

A 2008 petition for habeas corpus relief was unsuccessful. Opinion, *United States v. Chapman*, 396 F. App'x 971 (4th Cir. 2010); *Royer* Docket Sheet, *supra* note 1350 (dismissal of the petition, Dec. 23, 2009, D.E. 725).

1394. *Khan*, 461 F.3d 477; see Markon, *supra* note 1384; Sheridan, *supra* note 1357. The Supreme Court denied petitions for certiorari on May 21, 2007. *Chapman v. United States*, 550 U.S. 956 (2007); *Khan v. United States*, 550 U.S. 956 (2007).

1395. *Chapman*, 326 F. Supp. 3d 228; see Rachel Weiner, *Sentence for Backing Terrorism Is Reduced*, Wash. Post, July 20, 2018, at B5.

1396. BOP Locator, *supra* note 1381 (reg. no. 46868-083); see also Opinion, *United States v. Chapman*, No. 1:03-cr-296-6 (E.D. Va. Jan. 22, 2020), D.E. 948 (ordering early termination of supervised release).

1397. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; see *Judge Acquits*, *supra* note 1360.

1398. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 1350; *Royer v. United States*, 324 F. Supp. 3d 719, 723–24 (E.E. Va. 2018); see *Royer v. Fed. Bureau of Prisons*, 808 F. Supp. 2d 274, 276 (D.D.C. 2011) (noting that the defendant was also known as Ismail Royer); see also Shane, *supra* note 1357; Sheridan, *supra* note 1357.

1399. See Heffelfinger, *supra* note 1350, at 97.

front lines against India and fired AK-47 and PK weapons.¹⁴⁰⁰ He was released from prison on December 12, 2016, three days after Judge Brinkema granted a sealed government pleading.¹⁴⁰¹ Judge Brinkema vacated the crime-of-violence conviction on August 2, 2018.¹⁴⁰²

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to fifteen years in prison.¹⁴⁰³ Al-Hamdi attended an LeT training camp in Pakistan.¹⁴⁰⁴ He was released on September 6, 2017.¹⁴⁰⁵

Yong Ki Kwon, who resided in Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to eleven and one-half years in prison.¹⁴⁰⁶ After Kwon cooperated with the government, his sentence was reduced to three years and two months.¹⁴⁰⁷ He was released from prison in 2006.¹⁴⁰⁸ Kwon attended an LeT training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹⁴⁰⁹

Khwaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to eleven and one-quarter years in prison.¹⁴¹⁰ After Hasan cooperated with the government, his sentence was re-

1400. *Khan*, 309 F. Supp. 2d at 796, 808; *see Royer*, 324 F. Supp. 3d at 723–24; *Khan v. United States*, 330 F. Supp. 3d 1076, 1082 (E.D. Va. 2018).

1401. *Royer* Docket Sheet, *supra* note 1350 (D.E. 867, 871, 873); *see BOP Locator, supra* note 1381 (reg. no. 46812-083); *Royer*, 324 F. Supp. 3d at 725; *see also* Deb Riechmann, *Should Freeing U.S. Terrorism Convicts Alarm Americans?*, Miami Herald, Aug. 6, 2017, at 18A.

1402. *Royer*, 324 F. Supp. 3d at 719.

1403. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer* Docket Sheet, *supra* note 1350; *see* Jerry Markon, *Judge Slashes Sentences of 2 in “Va. Jihad,”* Wash. Post, Feb. 25, 2006, at B1; Sheridan, *supra* note 1357.

1404. *Khan*, 309 F. Supp. 2d at 807, 811.

1405. BOP Locator, *supra* note 1381 (reg. no. 46583-083).

1406. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

1407. Aug. 16, 2007, *Royer* Transcript, *supra* note 1385; *Royer* Docket Sheet, *supra* note 1350 (reduction-of-sentence order, Feb. 24, 2006, D.E. 639); *see* Sheridan, *supra* note 1357; *see also* Witness Statement, filed as Ex., Government Discovery Response, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Aug. 14, 2013), D.E. 308 (some of Kwon’s cooperating evidence).

1408. *See* Markon, *supra* note 1403; Viorst, *supra* note 1350, at 77.

1409. *Khan*, 309 F. Supp. 2d at 811.

1410. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer* Docket Sheet, *supra* note 1350.

duced to three years and one month.¹⁴¹¹ He was released on March 24, 2006.¹⁴¹² Hasan attended an LeT training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.¹⁴¹³

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to ten and one-half years in prison.¹⁴¹⁴ After he cooperated with the government, his sentence was reduced to three years and two months.¹⁴¹⁵ He was released from prison on March 31, 2006.¹⁴¹⁶

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.¹⁴¹⁷ After he cooperated with the government, his sentence was reduced to one year and eleven months.¹⁴¹⁸ He was released from prison on February 14, 2006.¹⁴¹⁹

Sabri Benkahla Acquitted, Interrogated, and Convicted for Perjury

Judge Brinkema acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.¹⁴²⁰ Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.¹⁴²¹

1411. Aug. 16, 2007, *Royer Transcript*, *supra* note 1385; *Royer Docket Sheet*, *supra* note 1350 (reduction-of-sentence order, Feb. 24, 2006, D.E. 638); *see* Markon, *supra* note 1403.

1412. BOP Locator, *supra* note 1381 (reg. no. 46866-083); *see* Sheridan, *supra* note 1357 (reporting that Hasan spent less than three years in jail); Viorst, *supra* note 1350, at 77.

1413. *Khan*, 309 F. Supp. 2d at 811.

1414. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer Docket Sheet*, *supra* note 1350.

1415. Aug. 16, 2007, *Royer Transcript*, *supra* note 1385; *Royer Docket Sheet*, *supra* note 1350 (reduction of sentence for Muhammed Aatique, Aug. 26, 2005, D.E. 612); *see* Sheridan, *supra* note 1357.

1416. BOP Locator, *supra* note 1381 (reg. no. 57593-066).

1417. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 1350; *see* Heffelfinger, *supra* note 1350, at 97; Sheridan, *supra* note 1357.

1418. Aug. 16, 2007, *Royer Transcript*, *supra* note 1385; *Royer Docket Sheet*, *supra* note 1350 (D.E. 630).

1419. BOP Locator, *supra* note 1381 (reg. no. 46809-083).

1420. *United States v. Benkahla*, 530 F.3d 300, 303–04 (4th Cir. 2008); *Khan*, 461 F.3d at 485; *United States v. Benkahla*, 437 F. Supp. 2d 541, 544–46 (E.D. Va. 2006); *Khan*, 309 F. Supp. 2d at 796 n.2; *Khan Habeas Relief Opinion*, *supra* note 1350, at 3 n.2; *Royer Docket Sheet*, *supra* note 1350; *see* Matthew Barakat, *Va. Man Convicted of Lying in Terror Probe*, *Richmond Times–Dispatch*, Feb. 6, 2007, at B2; Heffelfinger, *supra* note 1350, at 93.

1421. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544–45.

Judge Brinkema found that Benkahla attended an LeT training camp, but the government did not prove that he did so at a time when LeT was designated a terrorist organization or at a place in Afghanistan under Taliban control, as alleged in the indictment.¹⁴²² In 2004, 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 16.¹⁴²³ His Fifth Amendment right not to testify was removed by a grant of use immunity, which would prevent the government from prosecuting him for truthful revelations.¹⁴²⁴ He denied attending any training camp, and he denied using any firearms.¹⁴²⁵ On February 9, 2006, he was indicted for perjury during his grand-jury testimony and for obstruction of justice.¹⁴²⁶ On July 13, the indictment was expanded to charge him for false statements to the FBI.¹⁴²⁷ The court assigned Benkahla's perjury case to Judge James C. Cacheris,¹⁴²⁸ who told the jury at various times during the trial that it was a perjury case, not a terrorism case, that they were deciding.¹⁴²⁹ The jury found Benkahla guilty on February 5, 2007; Judge

1422. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 545–46; see Matthew Barakat, *Jihadist Suspect on Trial*, Richmond Times–Dispatch, Jan. 30, 2007, at B2 [hereinafter *Jihadist Suspect*]; Barakat, *supra* note 1420.

1423. *Benkahla*, 530 F.3d at 303; *United States v. Benkahla*, 501 F. Supp. 2d 748, 750–51 (E.D. Va. 2007); Opinion at 1–3, *United States v. Benkahla*, No. 1:06-cr-9 (E.D. Va. Oct. 2, 2006), D.E. 57 [hereinafter *Benkahla* Dismissal Denial], 2006 WL 2871234; see Barakat, *Jihadist Suspect*, *supra* note 1422.

1424. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544 n.1 & 555; *Benkahla*, 501 F. Supp. 2d at 750 n.1; see Barakat, *supra* note 1420.

1425. *Benkahla*, 530 F.3d at 304–05; Opinion at 2–3, *Benkahla*, No. 1:06-cr-9 (E.D. Va. July 8, 2010), D.E. 182 [hereinafter *Benkahla* Habeas Denial Opinion], 2010 WL 2721384, *appeal dismissed*, 420 F. App'x 275 (4th Cir. 2011); *Benkahla*, 437 F. Supp. 2d at 544–45; see Barakat, *supra* note 1420.

1426. *Benkahla*, 530 F.3d at 305; *Benkahla*, 437 F. Supp. 2d at 544; Docket Sheet, *Benkahla*, No. 1:06-cr-9 (E.D. Va. Feb. 9, 2006) [hereinafter *Benkahla* Docket Sheet] (D.E. 1); see Jerry Markon, *Va. “Jihad” Probe Sees New Charge*, Wash. Post, Feb. 23, 2006, at B4.

1427. *Benkahla*, 530 F.3d at 305; *Benkahla* Habeas Denial Opinion, *supra* note 1425, at 3; *Benkahla* Dismissal Denial, *supra* note 1423, at 1, 3–4; *Benkahla* Docket Sheet, *supra* note 1426 (D.E. 49).

1428. Tim Reagan interviewed Judge Cacheris for this case study in his chambers on November 6, 2008. Judge Cacheris retired on January 26, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1429. Interview with Judge James C. Cacheris, Nov. 6, 2008; see James C. Cacheris, *United States v. Benkahla: Voir Dire Questions* (Jan. 25, 2007), www.fjc.gov/sites/default/files/2014/TRVAE048.pdf.

Cacheris sentenced him on July 24 to ten years and one month in prison.¹⁴³⁰ The court of appeals affirmed the judgment.¹⁴³¹

On the one hand, there is some potential for abuse in the government's procedure of acquittal, questioning on matters related to the acquittal, and second prosecution for some form of perjury. . . . [P]rosecutors frustrated at an acquittal should not lightly be able to take a second bite at the apple by bringing perjury charges afterwards. . . .

On the other hand, a defendant does not win with acquittal a license to commit perjury.¹⁴³²

Benkahla was released from prison on May 5, 2016.¹⁴³³

Ali al-Timimi Convicted by a Jury

Ali al-Timimi was regarded as the paintballers' spiritual leader.¹⁴³⁴ Reportedly a person of international fame,¹⁴³⁵ 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.¹⁴³⁶

On September 16, 2001, five days after terrorists attacked the Pentagon and World Trade Center, [al-Timimi] attended a group dinner meeting with several of [the paintballers] to speak about the events. Upon arriving, [al-Timimi] first instructed those present to disconnect the phones and draw the blinds. He then proceeded to advise the men that it would become necessary to defend Islam by engaging in violent jihad against

1430. *Benkahla*, 530 F.3d at 305–06; *Benkahla* Habeas Denial Opinion, *supra* note 1425, at 6; *United States v. Benkahla*, 501 F. Supp. 2d 748, 751, 762 (E.D. Va. 2007); *Benkahla* Docket Sheet, *supra* note 1426; *see* Barakat, *supra* note 1420; Human Rights Watch, *Illusion of Justice* 128–29, 153–54, 190–91, 199 (2014); Jerry Markon, *10-Year Sentence for Perjury*, *Wash. Post*, July 25, 2007, at B5.

1431. *Benkahla*, 530 F.3d 300, *cert. denied*, 555 U.S. 1120 (2009).

1432. *Id.* at 306; *see id.* at 308 (“the investigations in which Benkahla was interviewed and the questions he was asked show no sign of having been manufactured for the sake of a second prosecution”).

1433. BOP Locator, *supra* note 1381 (reg. no. 46867-083).

1434. *See Khan v. United States*, 330 F. Supp. 3d 1076, 1081 (E.D. Va. 2018); *see also* Markon, *Case Hailed*, *supra* note 1352; Markon, *supra* note 1350; Jeremy Scahill, *Dirty Wars* 71–72 (2013); Viorst, *supra* note 1350, at 69, 79.

1435. Heffelfinger, *supra* note 1350, at 88, 91.

1436. *United States v. Chandia*, 514 F.3d 365, 369 (4th Cir. 2008); Opinion at 1, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Apr. 28, 2014), D.E. 350 [hereinafter *Al-Timimi* Discovery Opinion]; *Benkahla* Habeas Denial Opinion, *supra* note 1425, at 1; *United States v. Khan*, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004); *see* Heffelfinger, *supra* note 1350, at 92, 94.

enemies of their faith, including the United States military in Afghanistan.¹⁴³⁷

Al-Timimi was born in the United States to Iraqi immigrants.¹⁴³⁸ His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.¹⁴³⁹ When al-Timimi was a teenager, his family spent some time in Saudi Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Islam.¹⁴⁴⁰ A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.¹⁴⁴¹

On July 13, 2005, Judge Brinkema sentenced al-Timimi to life in prison on a jury-trial conviction of soliciting others to wage war against the United States and providing services to the Taliban.¹⁴⁴² His appeal was interrupted when the court of appeals remanded the case to the district court on April 25, 2006, for a determination of whether the prosecution relied on undisclosed surveillance.¹⁴⁴³ After reviewing classified *ex parte* briefs,

1437. *Al-Timimi* Discovery Opinion, *supra* note 1436, at 1–2.

1438. See Heffelfinger, *supra* note 1350, at 94; Viorst, *supra* note 1350, at 69.

1439. See Sheridan, *supra* note 1357; Viorst, *supra* note 1350, at 69.

1440. See Sheridan, *supra* note 1357; Viorst, *supra* note 1350, at 72.

1441. See Viorst, *supra* note 1350, at 73.

1442. *Al-Timimi* Docket Sheet, *supra* note 1353; *United States v. Chandia*, 514 F.3d 365, 369 n.1 (4th Cir. 2008); *Al-Timimi* Discovery Opinion, *supra* note 1436, at 3; see Markon, *Case Hailed*, *supra* note 1352; Markon, *supra* note 1350; Viorst, *supra* note 1350, at 78; see also *United States v. Khan*, 309 F. Supp. 2d 789, 821 (E.D. Va. 2004) (“As we have found, the government’s evidence established beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon’s house to heed the call of Mullah Omar for all Muslims to help defend the Taliban.”); Katherine C. Donahue, *Slave of Allah* 168 (2007) (“Dr. Ali al-Timimi was sentenced to life in prison for urging young men at a dinner party to go on jihad.”); Heffelfinger, *supra* note 1350, at 93; Scott Shane, *Objective Troy* 155 (2015) (“a sentence that shocked many civil libertarians”).

To select jurors for al-Timimi’s trial, Judge Brinkema used a jury questionnaire. Leonie M. Brinkema, *United States v. Al-Timimi: Jury Questionnaire* (Mar. 28, 2005), www.fjc.gov/sites/default/files/2014/TRVAE006.pdf; see Transcript, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Apr. 1, 2005, filed Aug. 5, 2014), D.E. 380 (post-questionnaire voir dire); Transcript, *id.* (Mar. 31, 2005, filed Aug. 5, 2014), D.E. 379 (same); Transcript, *id.* (Mar. 23, 2005, filed July 16, 2014), D.E. 377 (working with the attorneys to draft the questionnaire).

1443. Order, *United States v. Al-Timimi*, No. 05-4761 (4th Cir. Apr. 25, 2006), D.E. 74 [hereinafter 2006 *Al-Timimi* Remand Order]; *Al-Timimi* Discovery Opinion, *supra* note 1436, at 3–4; Transcript, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Jan. 16, 2007, filed May 17, 2007), D.E. 220 [hereinafter Jan. 16, 2007, *Al-Timimi* Transcript]; see *Al-Timimi* Docket Sheet, *supra* note 1353 (noting reopening of the district court case on May 19, 2006); see

Judge Brinkema ruled on April 28, 2014, that the government had not improperly denied al-Timimi any discovery.¹⁴⁴⁴

The court of appeals again remanded the case on August 4, 2015, to consider implications of a document released in March.¹⁴⁴⁵ The case was stayed pending Supreme Court resolution of *Johnson* in 2015, *Dimya* in 2018, and *United States v. Davis* in 2019.¹⁴⁴⁶ The last case invalidated as unconstitutionally vague a sentencing enhancement for using a firearm while committing a crime of violence.¹⁴⁴⁷

On August 18, 2020, Judge Brinkema ordered al-Timimi released from prison pending conclusion of his appeal, finding that he was unlikely to flee or harm others, new facts and law made appellate relief likely, and continued confinement of someone with his medical condition was risky during a global COVID-19 infectious pandemic.¹⁴⁴⁸ He was released to home confinement on September 1.¹⁴⁴⁹

A Separate Jury Conviction for Ali Asad Chandia

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.¹⁴⁵⁰ Chandia was indicted separately, because although he was associated with the paintballers he did not actually play the game.¹⁴⁵¹ Judge Hilton sentenced him to fifteen years in prison on August 25, 2006,

also Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

1444. *Al-Timimi* Discovery Opinion, *supra* note 1436.

1445. Order, *United States v. Al-Timimi*, No. 14-4451 (4th Cir. June 6, 2014), D.E. 56.

1446. Status Report, *id.* (Aug. 1, 2022), D.E. 139 [hereinafter 4th Cir. *Al-Timimi* Status Report].

1447. 588 U.S. ___, 139 S. Ct. 2319 (2019).

1448. Opinion, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Aug. 18, 2020), D.E. 519, 2020 WL 4810120, *aff'd*, Order, *United States v. Al-Timimi*, No. 20-4441 (4th Cir. Aug. 31, 2020), D.E. 27, 2020 WL 8618188.

1449. See BOP Locator, *supra* note 1381 (reg. no. 48054-083).

1450. *United States v. Chandia*, 675 F.3d 329, 333 (4th Cir. 2012); *United States v. Chandia*, 514 F.3d 365, 370 (4th Cir. 2008); see Matthew Barakat, *Teacher Convicted of Aiding Terror Group*, Cincinnati Post, June 7, 2006, at A9; Jerry Markon, *Final Defendant Guilty in "Va. Jihad,"* Wash. Post, June 7, 2006, at A12 [hereinafter *Final Defendant*]; Markon, *Case Hailed*, *supra* note 1352; Markon, *supra* note 1350; Sheridan, *supra* note 1357; Smith, *supra* note 1357 ("Chandia provided material support to LET by paying \$622 to ship 50,000 paintballs to Pakistan.").

1451. *Chandia*, 675 F.3d at 332; *Chandia*, 514 F.3d at 373; see Barakat, *supra* note 1450.

applying a terrorism sentencing enhancement.¹⁴⁵² The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in Chandia's case.¹⁴⁵³ 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.¹⁴⁵⁴ On May 2, 2008, Judge Hilton again sentenced Chandia to fifteen years in prison, and the court of appeals again remanded for more factfinding.¹⁴⁵⁵ On April 6, 2012, the court of appeals affirmed a third sentencing to fifteen years.¹⁴⁵⁶ Chandia, a Pakistani citizen, taught third grade at an Islamic school called the Al-Huda School in College Park, Maryland.¹⁴⁵⁷ He was released from prison on July 19, 2019.¹⁴⁵⁸

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.¹⁴⁵⁹ Judge Brinkema conducted a sealed CIPA hearing on January 19, 2005, and issued a sealed protective order on March 21, ten days before the commencement of voir dire.¹⁴⁶⁰

According to the 2006 remand order, "The motion to vacate and to remand raises appellant's concern, based on recent developments, that the

1452. *Chandia*, 675 F.3d at 331; *Chandia*, 514 F.3d at 370–71; *Chandia* Docket Sheet, *supra* note 1354; see Markon, *supra* note 1350.

1453. *Chandia* Docket Sheet, *supra* note 1354 (D.E. 222, 223).

1454. *Chandia*, 514 F.3d at 369, 375–77; *Chandia*, 675 F.3d at 331.

1455. *Chandia*, 675 F.3d at 331; *Chandia* Docket Sheet, *supra* note 1354 (D.E. 249); *United States v. Chandia*, 395 F. App'x 53 (4th Cir. 2010).

1456. *Chandia*, 675 F.3d 329, *cert. denied*, 568 U.S. 1011 (2012).

1457. See Barakat, *supra* note 1450; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 1450; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing Profiles of Accused Jihad Network Member*, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 1357.

1458. BOP Locator, *supra* note 1381 (reg. no. 46811-083).

1459. *Al-Timimi* Docket Sheet, *supra* note 1353 (sealed motion, Dec. 23, 2004, D.E. 32; CIPA notice, Dec. 29, 2004, D.E. 36); see 18 U.S.C. app. 3 (2020) (text of CIPA); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2–22* (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

1460. *Al-Timimi* Docket Sheet, *supra* note 1353.

government may have undisclosed intercepts of either the appellant or various individuals material to his trial.”¹⁴⁶¹

A problem that developed for the court in determining whether all discoverable information had been disclosed to al-Timimi’s attorneys was the fact that the attorneys representing the government in the case did not necessarily have access to all of the information.¹⁴⁶²

Another difficulty arose from the government’s refusal to allow Judge Brinkema’s law clerk, who had a security clearance, to see classified information that the government showed the judge.¹⁴⁶³

I have still not gotten my law clerk who is assigned to this case cleared to have access to all of the documents to which the Court has had access. I will not and do not function that way. That means I cannot have the assistance of my clerk in drafting any opinions, in having my own in-house person to discuss any legal or other issues. I have been asking the government for several probably months at this point. She has a full clearance but is not cleared for the particular issues involved in this case. Until that is done, this Court is not going to rule definitively on any of those issues that require that information be addressed.¹⁴⁶⁴

Judge Brinkema relied on staff for the typing of opinions, so the denial of the law clerk’s access to materials that Judge Brinkema needed to review in order to rule interfered with Judge Brinkema’s judicial work.¹⁴⁶⁵ At an October 4, 2013, hearing, Judge Brinkema announced that she had figured out a way to opine on the matters that only she could see.¹⁴⁶⁶ She was unable, however, to prepare for the court of appeals as detailed a record of her review as she otherwise would have.¹⁴⁶⁷

Following the 2015 remand, the government was unwilling to disclose to cleared counsel an unredacted version of the document that triggered

1461. 2006 *Al-Timimi* Remand Order, *supra* note 1443, at 1; *see Al-Timimi* Docket Sheet, *supra* note 1353 (referring to a warrant under the Foreign Intelligence Surveillance Act, D.E. 182).

1462. Transcript, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. July 21, 2006, filed July 24, 2006), D.E. 183 [hereinafter July 21, 2006, *Al-Timimi* Transcript].

1463. *Al-Timimi* Discovery Opinion, *supra* note 1436, at p.4 n.1.

1464. Transcript at 4–5, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Feb. 19, 2009, filed Sept. 19, 2012), D.E. 297 [hereinafter Feb. 19, 2009, *Al-Timimi* Transcript].

1465. Interview with Judge Leonie M. Brinkema, Sept. 4, 2014 (noting that the government said that it would allow the clerk to view the material were the clerk a permanent law clerk rather than a term law clerk).

1466. Transcript at 27, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 4, 2013, filed Nov. 13, 2013), D.E. 340.

1467. Interview with Judge Leonie M. Brinkema, Sept. 4, 2014.

the remand.¹⁴⁶⁸ The document has since been declassified, but some “sensitive” redactions remain undisclosed to the defense attorneys.¹⁴⁶⁹

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.¹⁴⁷⁰ Another sealed proceeding was held on January 16, 2007, and its transcript was unsealed seven months later.¹⁴⁷¹ The transcript of a closed proceeding held on October 23, 2008, was unsealed only seven days after the event.¹⁴⁷² A partial transcript of a closed February 19, 2009, proceeding¹⁴⁷³ was unsealed in 2012.¹⁴⁷⁴

The presence of al-Timimi in court sometimes necessitated cryptic dialogue. On one occasion, for example, Judge Brinkema, observed, “I want to try to do this hearing as much as possible with Mr. Timimi present, because obviously, it’s his case, and he has a right to be present as much as possible, so we may have to talk elliptically, all right?”¹⁴⁷⁵

Challenge: Classified Arguments

On November 6, 2007, in al-Timimi’s case, the government filed a “Classified Supplemental Memorandum in Support of Government’s Response to Defendant’s Post-Remand Motions Concerning Surveillance by the Na-

1468. 4th Cir. *Al-Timimi* Status Report, *supra* note 1446.

1469. *Id.*

1470. *Al-Timimi* Docket Sheet, *supra* note 1353 (unsealing of the transcript, Aug. 14, 2006, D.E. 183); see Matthew Barakat, *Eavesdropping Did Not Taint Case*, Richmond Times-Dispatch, July 22, 2006, at B8.

Appearing at the hearing were four attorneys and a special agent for the government and one attorney for al-Timimi. July 21, 2006, *Al-Timimi* Transcript, *supra* note 1462. 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.*

1471. Jan. 16, 2007, *Al-Timimi* Transcript, *supra* note 1443; *Al-Timimi* Docket Sheet, *supra* note 1353 (unsealing of the transcript, Aug. 16, 2007, D.E. 228).

By the time of this hearing, both defense attorneys had obtained secret clearances. Jan. 16, 2007, *Al-Timimi* Transcript, *supra* note 1443.

1472. *Al-Timimi* Docket Sheet, *supra* note 1353 (D.E. 272).

1473. *Id.* (minutes).

1474. Feb. 19, 2009, *Al-Timimi* Transcript, *supra* note 1464.

1475. Transcript, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 23, 2008, filed Oct. 30, 2008), D.E. 272.

tional Security Agency.”¹⁴⁷⁶ A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.¹⁴⁷⁷ 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.¹⁴⁷⁸

Classified filings in al-Timimi’s case were filed with the classified information security officer, and redacted versions were sometimes subsequently filed in the public record.¹⁴⁷⁹ On June 13, 2014, Judge Brinkema ordered the government to have another look at all classified filings “to allow the placement of those documents on the public docket in whole or in redacted form.”¹⁴⁸⁰ The government filed seven redacted documents on September 19¹⁴⁸¹ and another eleven on the following March 27.¹⁴⁸²

Challenge: FISA Evidence

After the court of appeals’ 2006 remand of al-Timimi’s case, the government presented to Judge Brinkema ex parte and in camera surveillance orders and applications for surveillance orders pursuant to the Foreign Intelligence Surveillance Act (FISA) that were related to al-Timimi’s case.¹⁴⁸³

Challenge: Attorney–Client Contacts

The court of appeals noted in its 2006 *Al-Timimi* remand order that the “appellant has also raised questions relating to alleged violations of attor-

1476. *Al-Timimi* Docket Sheet, *supra* note 1353 (D.E. 243).

1477. 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.

1478. See Lichtblau, *supra* note 1477; Markon, *supra* note 1477.

1479. *Al-Timimi* Docket Sheet, *supra* note 1353; see Reagan, *supra* note 1459, at 21–22 (providing information about classified information security officers).

1480. Order, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. June 13, 2014), D.E. 363; see Motion, *id.* (June 12, 2014), D.E. 361 (“This motion is being made in anticipation of the transmission of the record to the United States Court of Appeals for the Fourth Circuit and to facilitate appellate review.”).

1481. *Al-Timimi* Docket Sheet, *supra* note 1353 (D.E. 381 to 387).

1482. *Id.* (D.E. 394 to 404).

1483. Government Brief, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Oct. 2, 2006, filed Sept. 19, 2014), D.E. 381 (redacted).

ney–client communications and access to evidence claimed as classified by the government.”¹⁴⁸⁴

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.¹⁴⁸⁵ Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.¹⁴⁸⁶

Challenge: Terrorist Communications

In 2006, the Bureau of Prisons adopted a policy of curtailing communication rights of inmates associated with terrorism.¹⁴⁸⁷ Judge Brinkema transferred Royer’s February 17, 2010, pro se complaint challenging the new policy to the district court for the District of Columbia on November 19, 2010.¹⁴⁸⁸ On May 23, 2013, Judge Royce C. Lamberth consolidated the transferred case with a July 15, 2010, pro se action alleging that the new policy violated notice and comment requirements.¹⁴⁸⁹ An attorney appeared for Royer in the cases five days after the consolidation.¹⁴⁹⁰ The cases were resolved by stipulation on July 17, 2014, with a payment to Royer of \$12,000 plus attorney fees.¹⁴⁹¹

1484. 2006 *Al-Timimi* Remand Order, *supra* note 1443, at 1.

It was reported that “authorities” obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 1350, at 78.

1485. July 21, 2006, *Al-Timimi* Transcript, *supra* note 1462.

1486. *Al-Timimi* Docket Sheet, *supra* note 1353 (D.E. 182); July 21, 2006, *Al-Timimi* Transcript, *supra* note 1462.

1487. See *Royer v. Fed. Bureau of Prisons*, 808 F. Supp. 2d 274, 276 (D.D.C. 2011); see also Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1.

1488. Opinion, *Royer v. Fed. Bureau of Prisons*, No. 1:10-cv-146 (E.D. Va. Nov. 19, 2010), 2010 WL 4827727; *Royer v. Fed. Bureau of Prisons*, 933 F. Supp. 2d 170, 174 (D.D.C. 2013).

1489. *Royer v. Fed. Bureau of Prisons*, 292 F.R.D. 60 (D.D.C. 2013); see *Royer*, 808 F. Supp. 2d at 276 (noting an allegation that the notice and comment requirements were circumvented to avoid strong public objections).

1490. Notice of Appearance, *Royer v. Fed. Bureau of Prisons*, No. 1:10-cv-1996 (D.D.C. May 28, 2013), D.E. 115; Notice of Appearance, *Royer v. Fed. Bureau of Prisons*, No. 1:10-cv-1196 (D.D.C. May 28, 2013), D.E. 81.

1491. Stipulated Dismissal, *Royer*, No. 1:10-cv-1196 (D.D.C. July 17, 2014), D.E. 127.

Challenge: Religious Accommodation

Judge Brinkema was concerned about possible bias against witnesses depending upon whether they swore on a Bible or a Quran before they offered testimony to a jury.¹⁴⁹² Therefore, Judge Brinkema decided to take testimony in all cases from all witnesses by affirmation rather than by oath.¹⁴⁹³

Challenge: Physical Health During Detention

District of Colorado Judge Wiley Y. Daniel denied prison officials qualified immunity on January 25, 2018, from a February 9, 2015, suit brought by Chapman for failure to provide him with proper diabetes treatment,¹⁴⁹⁴ and the court of appeals affirmed the denial on February 13, 2020.¹⁴⁹⁵ Judge Brinkema took into account Chapman's serious health condition when she considered whether to vacate his conviction on counts that became questionable in light of subsequent Supreme Court holdings, noting that if the conviction were invalid, keeping him in prison any longer would be "a terrible miscarriage of justice."¹⁴⁹⁶ Chapman was released on July 20, 2018.¹⁴⁹⁷

The medical treatment litigation was complicated by Chapman's transfer—after he filed his complaint—from the supermax prison in Florence, Colorado, to a prison with better medical care resources in Terre Haute,

1492. Interview with Judge Leonie M. Brinkema, Jan. 5, 2007.

1493. *Id.*

1494. *Chapman v. Fed. Bureau of Prisons*, 291 F. Supp. 3d 1260 (D. Colo. 2018); see Second Amended Complaint, *Chapman v. Fed. Bureau of Prisons*, No. 1:15-cv-279 (D. Colo. May 15, 2017), D.E. 253; First Amended Complaint, *id.* (May 22, 2015), D.E. 24; Complaint, *id.* (Feb. 9, 2015), D.E. 1.

Judge Daniel died on May 10, 2019. FJC Biographical Directory, *supra* note 1428.

1495. *Chapman v. Santini*, 805 F. App'x 548 (10th Cir. 2020).

1496. Transcript at 6, *United States v. Royer*, No. 1:03-cr-296 (E.D. Va. May 27, 2016, filed June 27, 2016), D.E. 855.

Denying a motion to stay her release order, Judge Brinkema observed that

it's uncontestable that Mr. Chapman has suffered from a very severe case of diabetes for years. He had it throughout our trial. As I recall, he was the one, I believe, who had a motorcycle accident or some sort of accident and his spleen is gone, and so he doesn't have any naturally produced or de minimis amount of insulin.

Transcript at 10, *id.* (filed July 20, 2018, Aug. 7, 2018), D.E. 934.

1497. Notice, *Chapman*, No. 1:15-cv-279 (D. Colo. July 21, 2018), D.E. 400.

Indiana.¹⁴⁹⁸ Judge Daniel transferred the case to the Southern District of Indiana on December 8, 2016,¹⁴⁹⁹ but Southern District of Indiana Judge William T. Lawrence transferred the case back to the District of Colorado on January 27, 2017,¹⁵⁰⁰ where Judge Daniel D. Domenico set the case for trial beginning April 4, 2022.¹⁵⁰¹ The trial was postponed pending resolution of a defendant's own health issues.¹⁵⁰²

On June 1, Chapman filed a third amended complaint,¹⁵⁰³ and the case was terminated as settled.¹⁵⁰⁴

1498. Joint Status Report, *id.* (Nov. 6, 2015), D.E. 109 (noting transfer from Florence to Oklahoma City to Terre Haute on November 5–6, 2015); Status Report, *id.* (Oct. 29, 2015), D.E. 100 (“approved for a transfer to a Care Level 3 institution”).

1499. Opinion, *id.* (Dec. 8, 2016), D.E. 189, 2016 WL 10837863.

1500. Chapman v. Fed. Bureau of Prisons, 235 F. Supp. 3d 1066 (S.D. Ind. 2017).

1501. Order, *Chapman*, No. 1:15-cv-279 (D. Colo. Jan. 13, 2022), D.E. 500.

1502. Docket Sheet, *id.* (Feb. 9, 2015) [hereinafter D. Colo. *Chapman* Docket Sheet] (D.E. 506); *see* Motion, *id.* (Feb. 9, 2022), D.E. 505.

1503. Third Amended Complaint, *id.* (June 1, 2022), D.E. 526; *see* Redlined Third Amended Complaint, *id.* (June 1, 2022), D.E. 527.

1504. D. Colo. *Chapman* Docket Sheet, *supra* note 1502 (D.E. 529); Stipulation, *Chapman*, No. 1:15-cv-279 (D. Colo. June 1, 2022), D.E. 528.

Chapter 12

Minneapolis

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

The prosecution of a Minneapolis man for attending Al-Qaeda training camps required the judge to review classified evidence and consider the defendant's mental health during solitary detention.

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On December 8, 2003, the FBI interviewed Mohamed Abdullah Warsame, a Canadian citizen born in Mogadishu, Somalia, and studying at Minneapolis Community and Technical College as a permanent U.S. resident.¹⁵⁰⁵ He lived in Minneapolis with his wife—a naturalized U.S. citizen—and their daughter.¹⁵⁰⁶ The interview was prompted by information obtained by secretly monitoring Warsame's telecommunications and searching his home.¹⁵⁰⁷ On December 9, Warsame was arrested as a material witness in a Southern District of New York grand-jury investigation.¹⁵⁰⁸

FBI agents approached Warsame's home on December 8 at a time they knew he would be alone.¹⁵⁰⁹ Warsame invited the agents in.¹⁵¹⁰ The agents

1505. *United States v. Warsame*, 488 F. Supp. 2d 846, 849–50 (D. Minn. 2007); see Pam Louwagie, *Warsame, Al-Qaida Link Detailed*, Minneapolis–St. Paul Star Trib., Feb. 10, 2004, at 1A; Howie Padilla, Pam Louwagie & Greg Gordon, *Al-Qaida Suspect Identified*, Minneapolis–St. Paul Star Trib., Dec. 12, 2003, at 1A (noting that the Twin-Cities area has one of the largest Somali communities in the United States); Susan Schmidt, *Canadian Held for Alleged Al Qaeda Ties*, Wash. Post, Jan. 22, 2004, at A3.

1506. *Warsame*, 488 F. Supp. 2d at 849; see Todd Nelson, *Suspect Faces N.Y. Extradition*, St. Paul Pioneer Press, Dec. 13, 2003, at A1.

1507. *Warsame*, 488 F. Supp. 2d at 850; see Pam Louwagie, *Terror Suspect's Case Debated in U.S. District Court*, Minneapolis–St. Paul Star Trib., Nov. 16, 2005, at 1B.

1508. *Warsame*, 488 F. Supp. 2d at 854; see Greg Gordon & Howie Padilla, *Al-Qaida Associate Held in Hennepin County Jail*, Minneapolis–St. Paul Star Trib., Dec. 10, 2003, at 1A; Pam Louwagie & Howie Padilla, *Student Accused of Link to Al-Qaida*, Minneapolis–St. Paul Star Trib., Jan. 22, 2004, at 1A; Schmidt, *supra* note 1505.

1509. *Warsame*, 488 F. Supp. 2d at 850.

told Warsame that he was on a terrorist watch list and that an interview would enable them to take him off the list.¹⁵¹¹ During the interview, Warsame first denied having visited Pakistan and Afghanistan, but then admitted he had when he learned that the agents already knew it.¹⁵¹²

In early 2000, Warsame illegally entered Afghanistan from Pakistan to attend an Al-Qaeda training camp near Kabul.¹⁵¹³ That summer, Warsame trained at another Al-Qaeda training camp, in Kandahar, which was led by Osama Bin Laden.¹⁵¹⁴ In 2001, Warsame returned to the United States, maintaining communication and financial contacts with Al-Qaeda.¹⁵¹⁵

After substantial questioning during the December 2003 interview, the FBI agents asked Warsame to pack a bag and accompany them to a more secure location.¹⁵¹⁶ Warsame consented.¹⁵¹⁷ The agents drove Warsame to Camp Ripley, an army national guard military base in Little Falls, Minnesota, but they did not disclose to Warsame where they were taking him.¹⁵¹⁸ After a night's sleep on the base, Warsame said that he wanted to go home.¹⁵¹⁹ For that reason, and because the several hours of questioning that day were immediately followed by an arrest, Judge John R. Tunheim—on May 31, 2007—suppressed fruits of that day's interview.¹⁵²⁰

On the day of his arrest, Warsame appeared before Magistrate Judge Earl Cudd at a closed proceeding, and Warsame's name was not reported publicly until a couple of days later.¹⁵²¹ It was subsequently reported that Warsame's public identification thwarted the government's intentions to

1510. *Id.*

1511. Interview with Judge John R. Tunheim, Aug. 18, 2009.

Tim Reagan interviewed Judge Tunheim for this case study at the Federal Judicial Center.

1512. *Warsame*, 488 F. Supp. 2d at 851; see Bob von Sternberg, *Warsame's Statements Suppressed*, Minneapolis–St. Paul Star Trib., June 1, 2007, at 4B.

1513. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009) (quoting the plea agreement).

1514. *Id.* at 980.

1515. *Id.*

1516. *Warsame*, 488 F. Supp. 2d at 851.

1517. *United States v. Warsame*, 547 F. Supp. 2d 982, 984 (D. Minn. 2008); *Warsame*, 488 F. Supp. 2d at 851.

1518. *Warsame*, 488 F. Supp. 2d at 850–51; see Von Sternberg, *supra* note 1512.

1519. *Warsame*, 488 F. Supp. 2d at 853.

1520. *Id.* at 861; see Von Sternberg, *supra* note 1512.

1521. See Gordon & Padilla, *supra* note 1508; Padilla et al., *supra* note 1505.

Judge Cudd died on April 20, 2005. See Randy Furst, *J. Earl Cudd*, Minneapolis–St. Paul Star Trib., Apr. 22, 2005, at 1B; David Hawley, *Federal Magistrate Judge, J. Earl Cudd*, St. Paul Pioneer Press, Apr. 22, 2005, at B8.

use him as an informant.¹⁵²² At another closed proceeding, on December 16, 2003, the government received permission to transfer Warsame to Manhattan for grand-jury testimony.¹⁵²³

A Minnesota grand jury indicted Warsame on January 20, 2004, for providing material support to Al-Qaeda by attending training camps in Afghanistan.¹⁵²⁴ Warsame returned to Minnesota on the following day.¹⁵²⁵ The court assigned the case to Judge Tunheim.¹⁵²⁶ A superseding indictment was filed about a year and a half later.¹⁵²⁷ Warsame's attorneys claimed that he went to Afghanistan in search of Muslim utopia, but he left after becoming disillusioned.¹⁵²⁸

The government appealed a suppression order by Judge Tunheim, and the court of appeals heard arguments on March 13, 2008.¹⁵²⁹ The case could not be brought to trial while the appeal was pending.¹⁵³⁰

Midway through his sixth year of detention, Warsame and the government agreed to a plea bargain.¹⁵³¹ On July 9, 2009, Judge Tunheim sen-

1522. Greg Gordon, *FBI Hoped Warsame Would Act as Spy*, Minneapolis-St. Paul Star Trib., Feb. 14, 2004, at 1B; Schmidt, *supra* note 1505.

1523. See Pam Louwagie, *Balancing Security and Freedom*, Minneapolis-St. Paul Star Trib., Jan. 5, 2004, at 1A; Pam Louwagie, Howie Padilla & Margaret Zack, *Jailed Student Headed to N.Y.*, Minneapolis-St. Paul Star Trib., Dec. 17, 2003, at 1B; Todd Nelson, *Extradition to New York Approved for Warsame*, St. Paul Pioneer Press, Dec. 17, 2003, at B3.

1524. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009); Docket Sheet, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Jan. 20, 2004) [hereinafter D. Minn. Docket Sheet]; see Bill Gardner, *Student Indicted in Terror Probe*, St. Paul Pioneer Press, Jan. 22, 2004, at A1; Eric Lichtblau, *Terror Indictment*, N.Y. Times, Jan. 22, 2004, at A16; Louwagie, *supra* note 1505; Louwagie & Padilla, *supra* note 1508; Schmidt, *supra* note 1505.

1525. See Schmidt, *supra* note 1505.

1526. D. Minn. Docket Sheet, *supra* note 1524.

1527. *Warsame*, 651 F. Supp. 2d at 979; D. Minn. Docket Sheet, *supra* note 1524; *United States v. Warsame*, 537 F. Supp. 2d 1005, 1009 (D. Minn. 2008); see Pam Louwagie, *Charges Added for Terror Suspect*, Minneapolis-St. Paul Star Trib., June 23, 2005, at 1A; Beth Silver, *New Charges Filed in Al-Qaida Case*, St. Paul Pioneer Press, June 23, 2005, at B3.

1528. See Pam Louwagie, *Terror Suspect's Case Questioned*, Minneapolis-St. Paul Star Trib., Aug. 29, 2005, at 1B.

1529. Docket Sheet, *United States v. Warsame*, No. 07-2560 (8th Cir. June 29, 2007).

1530. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1531. *Warsame*, 651 F. Supp. 2d at 979; see Pam Louwagie, *Terror Suspect Pleads Guilty*, Minneapolis-St. Paul Star Trib., May 21, 2009, at 1B.

tenced Warsame to seven years and eight months in prison and signed a stipulated deportation order.¹⁵³²

Warsame was released from prison on October 8, 2010, and deported to Canada.¹⁵³³

Challenge: Mental Health During Detention

Detention of terrorism suspects frequently amounted to solitary confinement.¹⁵³⁴ Concerned about the defendant's mental health, Judge Tunheim encouraged Warsame's attendance at proceedings to afford him time outside his cell and in the presence of other people under secure conditions.¹⁵³⁵ Judge Tunheim observed that visits by the Canadian consulate were also helpful.¹⁵³⁶

Challenge: Attorney–Client Contacts

For over a month, between Warsame's extradition to New York and a couple of weeks after his indictment, contact between Warsame and his attorneys was prevented by the government's insistence on conditions to which the attorneys would not agree.¹⁵³⁷ Warsame was represented by the Federal Public Defender's office, and the problematic restrictions would

1532. *Warsame*, 651 F. Supp. 2d 978 (sentencing judgment); Order for Removal, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. July 9, 2009), D.E. 176; Transcript, *id.* (July 9, 2009, filed Aug. 10, 2009), D.E. 179.

In light of the plea bargain, the court of appeals dismissed the government's pending suppression appeal. Judgment, *Warsame*, No. 07-2560 (8th Cir. Aug. 12, 2009).

1533. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 11355-041); see Sandro Contenta, *Terrorist Supporter Might Make Toronto His Home*, *Toronto Star*, Oct. 10, 2010, at A6.

1534. Interview with Judge John R. Tunheim, Aug. 18, 2009; see Contenta, *supra* note 1533 ("Warsame spent 5½ years in solitary confinement during pre-trial custody. He was let out of his cell only one hour a day.").

1535. Interview with Judge John R. Tunheim, Aug. 18, 2009; see Human Rights Watch, *Illusion of Justice* 109, 115, 198–200 (2014); see also Atul Gawande, *Hellhole*, *New Yorker*, Mar. 30, 2009, at 36 (describing mental health deterioration resulting from solitary confinement).

1536. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1537. See Lisa Donovan, *Civil Rights, Terror on Trial*, St. Paul Pioneer Press, Feb. 9, 2004, at B1 [hereinafter *Civil Rights*]; Lisa Donovan, *Warsame Has First Hearing in Open Courtroom*, St. Paul Pioneer Press, Feb. 3, 2004, at B2.

have curtailed who in the office could communicate with Warsame.¹⁵³⁸ In time, attorneys for both sides were able to strike an agreement.¹⁵³⁹

Challenge: Classified Evidence

The case against Warsame relied on classified evidence, and a substantial amount of classified information was discoverable.¹⁵⁴⁰ Warsame's attorneys and Judge Tunheim's staff all obtained security clearances.¹⁵⁴¹ A protective order governed defense handling of classified materials.¹⁵⁴² Judge Tunheim decided to preside over pretrial matters rather than refer them to a magistrate judge to spare another chambers' having to obtain security clearances.¹⁵⁴³

Supporters of Warsame thought that retained counsel would provide better representation than the federal defender's office, so they hired a law professor in Chicago to represent Warsame.¹⁵⁴⁴ Because the professor could not identify local counsel likely to obtain a security clearance, however, Judge Tunheim continued the appointment of the federal defender's office as second counsel.¹⁵⁴⁵

Early in the case, the government produced to defense counsel discoverable classified evidence, and Warsame's attorneys had to review the classified material in a secure room at the courthouse, which included a safe suitable for storing classified materials.¹⁵⁴⁶ The attorneys had to prepare any documents based on or referring to classified material in the secure room.¹⁵⁴⁷ The court reporter, who had a security clearance, also had to work on transcripts containing classified information in this room and

1538. See Pam Louwagie, *Feds Want Restrictions in Terror Case*, Minneapolis–St. Paul Star Trib., Feb. 3, 2004, at 1B.

1539. Interview with Judge John R. Tunheim, Aug. 18, 2009; see Donovan, *Civil Rights*, *supra* note 1537; Lisa Donovan, *Warsame's Attorneys, Prosecutors Strike Deal*, St. Paul Pioneer Press, Feb. 5, 2004, at B4; Pam Louwagie, *Warsame, Lawyer Will Be Allowed to Confer on Case*, Minneapolis–St. Paul Star Trib., Feb. 5, 2004, at 3B.

1540. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1541. *Id.*

1542. Protective Order, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005), D.E. 27.

1543. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1544. *Id.*

1545. *Id.*

1546. *Id.*; see Louwagie, *supra* note 1528.

1547. Interview with Judge John R. Tunheim, Aug. 18, 2009; see Louwagie, *supra* note 1528.

store computer equipment she used for such transcripts in the safe.¹⁵⁴⁸ Judge Tunheim could keep classified materials in a safe in his chambers office.¹⁵⁴⁹

Later in the case, the government's presentation of classified evidence was mostly to Judge Tunheim for his approval of what could be presented at trial.¹⁵⁵⁰ Some information the government was willing to declassify, and for other information the government proposed unclassified substitutions—modifications to the evidence intended to redact classified information while retaining evidentiary value.¹⁵⁵¹ Judge Tunheim compared all proposed substitutions with their corresponding originals and frequently asked for modifications.¹⁵⁵² On reflection, Judge Tunheim thought that it would have been better for him to keep the originals for possible later reference rather than let the government retrieve them.¹⁵⁵³ As a result of this process, Warsame's attorneys saw only declassified evidence or unclassified substitutions.¹⁵⁵⁴

Challenge: FISA Evidence

Some evidence against Warsame was obtained as a result of surveillance orders granted pursuant to the Foreign Intelligence Surveillance Act (FISA).¹⁵⁵⁵ The FISA court issued secret orders for surveillance of persons with whom Warsame was communicating, and it later approved a tap of Warsame's telephone and a physical search of his apartment.¹⁵⁵⁶ The gov-

1548. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1549. *Id.*

1550. *Id.*

1551. *Id.*; Substitution Protective Order 3, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. July 9, 2009), D.E. 173 (approving specific unclassified substitutions as providing the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information); Substitution Protective Order 2, *id.* (Oct. 3, 2008), D.E. 144 (same); Substitution Protective Order 1, *id.* (Mar. 8, 2005), D.E. 27 (same).

1552. Interview with Judge John R. Tunheim, Aug. 18, 2009.

1553. *Id.*

1554. *Id.*

1555. *United States v. Warsame*, 547 F. Supp. 2d 982, 984–85 (D. Minn. 2008); *see United States v. Warsame*, 488 F. Supp. 2d 846, 850 n.1 (D. Minn. 2007); *see also Pam Louwagie, Eavesdropping Debate Touches Local Case*, *Minneapolis–St. Paul Star Trib.*, Dec. 22, 2005, at 1B.

1556. *Warsame*, 547 F. Supp. 2d at 984; Interview with Judge John R. Tunheim, Aug. 18, 2009.

ernment notified Warsame that it intended to use some of this evidence against him at trial.¹⁵⁵⁷

In camera, Judge Tunheim conducted an ex parte “comprehensive and careful review of the FISA applications, orders, and other related materials,” reviewing probable-cause determinations de novo, and he determined that FISA procedures were followed properly.¹⁵⁵⁸

1557. *Warsame*, 547 F. Supp. 2d at 985–86.

1558. *Id.*, 547 F. Supp. 2d 982.

Chapter 13

Ashland and Moscow¹⁵⁵⁹

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

A prosecution for charitable support of terrorism in Oregon resulted in a reversed conviction for a misleading summary of classified evidence. A related prosecution of a computer scientist for material support of terrorism in Idaho resulted in an acquittal. An associate detained as a material witness on the basis of false information received a settlement with the government. Two defendants became discovery defendants in civil litigation in New York arising from the September 11, 2001, attacks. Judges faced the challenges of classified information, closed proceedings, classified opinions, and foreign evidence.

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1559. Christopher Krewson provided research assistance for this case study.

Challenge: FISA Evidence 251

On February 19, 2004, the government froze the assets of Al-Haramain Islamic Foundation, a charity headquartered in Ashland, Oregon.¹⁵⁶⁰ The charity and two of its founders—Pete Seda and Soliman al-Buthe—had been on an FBI terrorism watch list for a couple of years.¹⁵⁶¹ On September 9, the Department of the Treasury designated Al-Haramain and al-Buthe (whose name was sometimes spelled al-Buthi) global agents of terrorism.¹⁵⁶²

An Iranian who was born Perouz Sedaghaty, Seda immigrated to the United States in the early 1970s to study at Southern Oregon University.¹⁵⁶³ He remained in the United States following the 1979 Iranian revolution and became a tree trimmer in Ashland, where he was known as a skilled arborist who saved heritage trees.¹⁵⁶⁴ He also became a U.S. citizen.¹⁵⁶⁵ In 1989, Seda established a foundation to distribute Islamic books to American prisoners.¹⁵⁶⁶ This caught the attention of Al-Haramain Is-

1560. *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 686 F.3d 965, 970–71, 973 (9th Cir. 2012); *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 585 F. Supp. 2d 1233, 1245 (D. Or. 2008); see Les Zaitz, *U.S. Freezes Assets of Charity in Ashland*, *Oregonian*, Feb. 20, 2004, at A1.

1561. *Al Haramain Islamic Found.*, 686 F.3d at 971; see Beth Quinn, *Ashland Friends Defend Muslim*, *Oregonian*, June 4, 2004, at A1; Les Zaitz, *Saudi Charity in Ashland on Terrorism "Watch List"*, *Oregonian*, Nov. 9, 2003, at A1 [hereinafter "Watch List"]; Zaitz, *supra* note 1560.

Although he was living in Iran at the time, Seda's home was searched on February 18 pursuant to a February 13 warrant. Order at 1–2, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 13, 2010), D.E. 324 [hereinafter *Sedaghaty* Suppression Denial Order], 2010 WL 1490306.

1562. *Al Haramain Islamic Found.*, 686 F.3d at 970, 973–74, 977 *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243, 1245–46; see Les Zaitz, *U.S. Closing Oregon Islamic Charity It Calls Terror Link*, *Oregonian*, Sept. 10, 2004, at A1; see also Chapter 35: Warrantless Wiretaps, *infra* page 748.

1563. *United States v. Sedaghaty*, 728 F.3d 885, 893 (9th Cir. 2013); see Quinn, *supra* note 1561 (reporting that his birth name was Pervouz Sada Gaty); Les Zaitz, *Charity Boss Is Back to Face Charges*, *Oregonian*, Aug. 16, 2007, at A4 [hereinafter *Charity Boss*]; Zaitz, "Watch List," *supra* note 1561.

1564. *Sedaghaty*, 728 F.3d at 893; see Quinn, *supra* note 1561; Zaitz, "Watch List," *supra* note 1561.

1565. See Bill Bishop, *Charity's Fugitive Leader Arraigned*, *Eugene Reg.-Guard*, Aug. 16, 2007, at A1.

1566. *Sedaghaty*, 728 F.3d at 893, 897; see Zaitz, *Charity Boss*, *supra* note 1563; Zaitz, "Watch List," *supra* note 1561.

lamic Foundation in Saudi Arabia.¹⁵⁶⁷ Al-Haramain Saudi Arabia was the charitable arm of the Muslim World League, which was founded in 1962.¹⁵⁶⁸

Al-Haramain Saudi Arabia helped Seda found Al-Haramain Oregon on October 22, 1997.¹⁵⁶⁹ In addition to operating a prayer house in Ashland and distributing Islamic literature, Al-Haramain established a mosque in Springfield, Missouri, in 2000.¹⁵⁷⁰ In 2003, Seda traveled to Saudi Arabia, after which he settled first in Dubai and then in Iran.¹⁵⁷¹

At one time, Al-Haramain Saudi Arabia had affiliates in approximately fifty countries.¹⁵⁷² From 2002 through 2004, the U.S. Treasury Department identified as specially designated global terrorists Al-Haramain organizations in Afghanistan, Albania, Bangladesh, Bosnia-Herzegovina, the Comoros Islands, Ethiopia, Indonesia, Kenya, the Netherlands, Pakistan, Somalia, and Tanzania.¹⁵⁷³ The Saudi government shut down Al-Haramain Saudi Arabia in 2004,¹⁵⁷⁴ but the U.S. Treasury Department did not identify it as a specially designated global terrorist until June 19, 2008.¹⁵⁷⁵

Aqeel Abdul Aziz al-Aqeel, director of Al-Haramain Saudi Arabia, co-founded Al-Haramain Oregon.¹⁵⁷⁶ He was president of Al-Haramain Ore-

1567. *Sedaghaty*, 728 F.3d at 893; see Zaitz, *Charity Boss*, *supra* note 1563.

1568. See Chris Heffelfinger, *Radical Islam in America* 57–59 (2011).

1569. *Sedaghaty*, 728 F.3d at 891 n.1, 893; *Al Haramain Islamic Found. v. U.S. Dep’t of Treas.*, 585 F. Supp. 2d 1233, 1243 (D. Or. 2008); see Zaitz, *Charity Boss*, *supra* note 1563; Zaitz, “*Watch List*,” *supra* note 1561; Les Zaitz, *Tax Case Ends Against Charity*, *Oregonian*, Aug. 5, 2005, at D1 [hereinafter *Tax Case Ends*]; Zaitz, *supra* note 1562; Zaitz, *supra* note 1560.

1570. *Al Haramain Islamic Found. v. U.S. Dep’t of Treas.*, 686 F.3d 965, 971 (9th Cir. 2012); *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243; see Zaitz, “*Watch List*,” *supra* note 1561.

1571. See Bill Bishop, *Charity’s Fugitive Leader Arraigned*, *Eugene Reg.-Guard*, Aug. 16, 2007, at A1; Quinn, *supra* note 1561; Zaitz, “*Watch List*,” *supra* note 1561; Zaitz, *Tax Case Ends*, *supra* note 1569.

1572. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241.

1573. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241.

1574. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 686 F.3d at 971, 973; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241; see Zaitz, *supra* note 1562.

1575. *Al Haramain Islamic Found.*, 686 F.3d at 975; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1576. *Sedaghaty*, 728 F.3d at 893; *Al Haramain Islamic Found.*, 686 F.3d at 971, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242; see *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 3; see also Zaitz, “*Watch List*,” *supra* note 1561; Zaitz, *supra* note 1562.

gon until his resignation in March 2003.¹⁵⁷⁷ His procedural challenge to the U.S. Treasury Department's June 2004 identification of him as a specially designated global terrorist was unsuccessful.¹⁵⁷⁸

Al-Buthe was also an Al-Haramain Saudi Arabia official and was the only one other than Seda who had access to Al-Haramain Oregon's bank account.¹⁵⁷⁹

Idaho Prosecution

Sarni Omar al-Hussayen, an associate of al-Buthe's, was acquitted on June 10, 2004, of terrorism material-support charges in Idaho.¹⁵⁸⁰

Al-Hussayen was indicted on February 13, 2003, for failure to disclose as part of his student visa applications that he provided internet development assistance to the Islamic Assembly of North America.¹⁵⁸¹ The U.S. District Court for the District of Idaho assigned the case to Judge Edward J. Lodge.¹⁵⁸²

The indictment was filed in the district's central division, which held court in Moscow, but the case was transferred to Boise for trial because of the great publicity that the case received locally.¹⁵⁸³ In Boise, the court reduced its burdens arising from news media interest by designating one member of the media as a liaison.¹⁵⁸⁴ This helped ensure that all members of the media had prompt and complete information at the same time.¹⁵⁸⁵

1577. *Al Haramain Islamic Found.*, 686 F.3d at 971, 973, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242, 1245; see *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 3; see also Zaitz, "Watch List," *supra* note 1561; Zaitz, *supra* note 1562.

1578. *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008); see *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1579. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242–43.

1580. *Id.* at 1243; Verdict, *United States v. Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 10, 2004), D.E. 671 [hereinafter *Al-Hussayen* Verdict]; see *No Conviction for Student in Terror Case*, N.Y. Times, June 11, 2004, at A14 [hereinafter *No Conviction*].

1581. Indictment, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003), D.E. 1 [hereinafter *Al-Hussayen* Indictment]; see Susan Schmidt, *5 Tied to Islamic Charity Indicted in N.Y., Idaho*, Wash. Post, Feb. 27, 2003, at A2 (reporting on the unsealing of the indictment).

1582. Docket Sheet, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003); see Timothy Egan, *Computer Student on Trial Over Muslim Web Site Work*, N.Y. Times, Apr. 27, 2004, at A16.

For this case study, Tim Reagan interviewed Judge Lodge and his law clerk Lauri Thompson in the judge's chambers on October 17, 2012.

1583. Interview with Judge Edward J. Lodge, Oct. 17, 2012.

1584. *Id.*

1585. *Id.*

This effort proved successful, and the liaison acted as media liaison in one of Judge Lodge's subsequent cases.¹⁵⁸⁶

Additional precautions by Judge Lodge to avoid improper prejudice included a proscription on references to terrorism in general, September 11, the Islamic faith, and similar matters unless they were directly related to the case.¹⁵⁸⁷ Judge Lodge did not find it necessary to sequester the Boise jury; he might have had to sequester a Moscow jury.¹⁵⁸⁸

Al-Hussayen was a Saudi citizen and the son of a retired education minister; the Saudi government paid for his defense.¹⁵⁸⁹ In 1999, al-Hussayen entered a Ph.D. program in computer science at the University of Idaho in Moscow, Idaho.¹⁵⁹⁰ On January 9, 2004, a superseding indictment added a charge of material support to terrorism and an allegation of association with Al-Haramain.¹⁵⁹¹ A March 4 second superseding indictment expanded the material-support allegations to three counts.¹⁵⁹² On June 10, the jury found him not guilty of the material-support charges and some of the visa fraud charges and was unable to reach a verdict on the other visa fraud charges.¹⁵⁹³ The government dismissed the counts on which the jury was hung upon al-Hussayen's agreeing to deportation.¹⁵⁹⁴

1586. *Id.*

1587. *Id.*

1588. *Id.* (noting that jurors perform better if they can return home every day).

1589. See Egan, *supra* note 1582 (also reporting, "Not long after the terrorist attacks of Sept. 11, 2001, a group of Muslim students led by a Saudi Arabian doctoral candidate held a candlelight vigil in the small college town of Moscow, Idaho, and condemned the attacks as an affront to Islam.").

1590. *Al-Hussayen* Indictment, *supra* note 1581; see Egan, *supra* note 1582.

1591. Superseding Indictment, *United States v. Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Jan. 9, 2004), D.E. 378.

1592. Second Superseding Indictment, *id.* (Mar. 4, 2004), D.E. 486; see Egan, *supra* note 1582.

1593. *Al-Hussayen* Verdict, *supra* note 1580; see Timothy Egan, *Sensing the Eyes of Big Brother, and Pushing Back*, N.Y. Times, Aug. 8, 2004, at 120 ("One juror, John Steger, said in an interview that the jury believed Mr. Hussayen's activities were matters of free speech, protected by the First Amendment."); *No Conviction*, *supra* note 1580 (also reporting that al-Hussayen "has been jailed since his February 2003 arrest, but continued to work toward his doctorate from his cell. His wife and their children returned to Saudi Arabia this year rather than fight deportation.").

1594. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 1, 2004), D.E. 684; see U.S. Drops Charges for Saudi Student, N.Y. Times, July 1, 2004, at A12; see also *Judge Allows Deportation for Saudi Grad Student*, Wash. Post, Apr. 26, 2003, at A10 (reporting on al-Hussayen's 2003 deportation order).

Judge Lodge transferred al-Hussayen to the custody of immigration authorities on July 2,¹⁵⁹⁵ and al-Hussayen was immediately deported.¹⁵⁹⁶

Material-Witness Detention

Abdulla al-Kidd—a “Kansas-born former University of Idaho running back”¹⁵⁹⁷—was held as a material witness in al-Hussayen’s prosecution, but he was never called to testify.¹⁵⁹⁸

According to al-Kidd’s arrest warrant application, from March 2000 to November 2001 he and his wife received over \$20,000 from al-Hussayen and his associates.¹⁵⁹⁹ The application also claimed that he had a one-way first-class ticket to Saudi Arabia departing from Dulles International Airport in Virginia on March 16, 2003.¹⁶⁰⁰ He was arrested at the airport on that date.¹⁶⁰¹

Al-Kidd was held in the Alexandria Detention Center for eight days.¹⁶⁰² On March 24, he was transferred to Oklahoma, and he was transferred to Boise, Idaho, on March 25.¹⁶⁰³ Following a March 31 hearing in Boise, he was released to the custody of his wife in Nevada.¹⁶⁰⁴ Conditions of release

1595. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 2, 2004), D.E. 685.

1596. Interview with Judge Edward J. Lodge, Oct. 17, 2012.

1597. Richard Serrano, *U.S. Apologizes to Post-9/11 Detainee*, Chi. Trib., Feb. 9, 2015, at C12.

1598. Opinion at 3, *Al-Kidd v. Gonzales*, No. 1:05-cv-93 (D. Idaho Sept. 18, 2006), D.E. 78 [hereinafter *Al-Kidd* Opinion Denying Motion to Dismiss], 2006 WL 2682346; Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 16, 2004), D.E. 680.

1599. Application Affidavit at 2, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Mar. 17, 2003), D.E. 34.

1600. *Id.* at 3; *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1598, at 2.

1601. Opinion at 1–2, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 19, 2006), D.E. 74 [hereinafter *Dunning Transfer Opinion*], 2006 WL 2038592; see Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at A1 (“Abdullah al Kidd was on his way to Saudi Arabia to work on his doctorate in Islamic studies in March 2003 when he was arrested as a material witness in a terrorism investigation.”); Susan Schmidt, *Fourth Man Arrested in Probe of Idaho Group*, Wash. Post, Mar. 18, 2003, at A21.

1602. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1598, at 3; see Schmidt, *supra* note 1601 (reporting, “The FBI has been seeking to interview [al-Kidd] about payments of about \$20,000 he allegedly received from al-Hussayen and his associates.”)

1603. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1598, at 3.

1604. *Id.*; see Liptak, *supra* note 1601 (“a federal judge ordered [al-Kidd] to move in with his in-laws in Las Vegas, where his wife was planning to stay until she joined him in Saudi Arabia”); Adam Liptak, *Justices Will Decide Whether Ashcroft May Be Sued in 2003 Detention Case*, N.Y. Times, Oct. 19, 2010, at A19 (“Abdullah al-Kidd, born in Kansas

were removed on June 16, 2004, following the conclusion of al-Hussayen's trial.¹⁶⁰⁵

On March 15, 2005, al-Kidd filed a civil action against various government officials, alleging that he was unlawfully detained as a terrorism suspect rather than as a material witness.¹⁶⁰⁶ He also claimed that his arrest warrant was based on false information.¹⁶⁰⁷

[The warrant application falsely stated that the plane ticket] was a first class, one-way ticket to Saudi Arabia, costing \$5,000 when in reality it was a round trip ticket with no scheduled return date, coach class, costing approximately \$2,000. In addition, [there were] several omissions from the warrant application: 1) Plaintiff's prior cooperation with the FBI, 2) Plaintiff was a native-born United States citizen with a wife, son, and other family living in the United States, 3) Plaintiff was not informed that his testimony may be needed or that he should not travel, 4) Plaintiff was not told to inform the FBI prior to any overseas travel, and 5) Plaintiff [had a history of cooperating with the FBI, but he] had not been contacted by the FBI in over eight months.¹⁶⁰⁸

Judge Lodge determined that the Idaho court did not have personal jurisdiction over the warden of the Alexandria Detention Center, so he transferred the claims against him to the Eastern District of Virginia,¹⁶⁰⁹

and once a star running back at the University of Idaho, spent 16 days in federal detention in three states in 2003, sometimes naked and sometimes shackled hand and foot.”).

1605. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1598, at 3; Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 16, 2004), D.E. 680.

“By the time al-Kidd's confinement and supervision ended, fifteen months after his arrest, he had been fired from his job as an employee of a government contractor and had separated from his wife.” Erwin Chemerinsky, *The Case Against the Supreme Court* 212 (2014).

1606. Complaint, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Mar. 15, 2005), D.E. 1; see Ethan Bronner, *Citizen Held After 9/11 Wins Right to Be Tried*, N.Y. Times, Sept. 29, 2012, at A16.

1607. Amended Complaint at 15, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Nov. 18, 2005), D.E. 40 (denying the government's motion to dismiss); *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1598, at 8.

1608. Opinion at 3–4, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2012), D.E. 350 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Opinion], 2012 WL 4470776.

Agents ceased seeking al-Kidd's voluntary cooperation so as to preserve the confidentiality of their investigations. Report and Recommendation at 6, *id.* (June 18, 2012), D.E. 336 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Report and Recommendation], 2012 WL 4470852.

1609. Dunning Transfer Opinion, *supra* note 1601.

where Judge Claude M. Hilton granted the warden summary judgment.¹⁶¹⁰ Judge Lodge also adopted¹⁶¹¹ Magistrate Judge Mikel H. Williams's recommended summary judgment¹⁶¹² for the Ada County sheriff respecting al-Kidd's conditions of confinement in Idaho. These matters settled on appeal.¹⁶¹³

On September 27, 2006, Judge Lodge denied Attorney General John Ashcroft's motion to dismiss the complaint on the grounds of absolute immunity and qualified immunity.¹⁶¹⁴ The court of appeals affirmed Judge Lodge's decision on September 4, 2009.¹⁶¹⁵ On May 31, 2011, however, the Supreme Court determined that Attorney General Ashcroft was protected from al-Kidd's suit by qualified immunity.¹⁶¹⁶

Agreeing with Judge Williams's report and recommendation, Judge Lodge awarded al-Kidd summary judgment on September 27, 2012, against the agent who prepared justifications for the arrest warrant application.¹⁶¹⁷ Judge Lodge, however, awarded the agent who presented the warrant application summary judgment against al-Kidd, because the warrant application was not facially deficient.¹⁶¹⁸ Judge Lodge also adopted

1610. Docket Sheet, *Al-Kidd v. Dunning*, No. 1:06-cv-871 (E.D. Va. July 27, 2006) (summary judgment, May 11, 2007, D.E. 156).

1611. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 17, 2008), D.E. 248, 2008 WL 2795137.

1612. Opinion, *id.* (Feb. 13, 2008), D.E. 230, 2008 WL 553777.

Judge Williams retired on March 29, 2008. *Judicial Milestones*, The Third Branch, Apr. 2008, at 8.

1613. Order, *Al-Kidd v. Gonzales*, No. 08-35692 (9th Cir. Aug. 24, 2009), D.E. 23; Order, *Al-Kidd v. Dunning*, No. 07-1564 (4th Cir. Aug. 20, 2008), D.E. 30; see Robert Barnes, *Ashcroft Not Liable in Man's Detention*, Wash. Post, June 1, 2011, at A2.

1614. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2006), D.E. 79, 2006 WL 5429570; see Dan Eggen, *Ashcroft Is Denied Immunity in Case*, Wash. Post, Sept. 29, 2006, at A12.

1615. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009); see Carrie Johnson, *Court Allows Lawsuit Against Ashcroft*, Wash. Post, Sept. 5, 2009, at A3; John Schwartz, *Federal Court Rules Against Ashcroft in 9/11 Case*, N.Y. Times, Sept. 5, 2009, at A10.

1616. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); see *Al-Kidd v. Ashcroft*, 653 F.3d 982 (9th Cir. 2011) (remanding the case to the district court); see also Barnes, *supra* note 1610; Adam Liptak, *Justices Block Suit Over Use of Material Witness Law Against Detainee*, N.Y. Times, June 1, 2011, at A17; Stephen I. Vladeck, *The New National Security Canon*, 61 Am. U. L. Rev. 1295, 1326 (2012).

1617. *Al-Kidd* Summary Judgment Against FBI Agents Opinion, *supra* note 1608, at 3–14, 23.

1618. *Id.* at 15–24; see *Al-Kidd* Summary Judgment Against FBI Agents Report and Recommendation, *supra* note 1608, at 32–38 (deferring to Judge Lodge the question of

Judge Williams's grant of summary judgment against the government on al-Kidd's Federal Tort Claims Act claim of false imprisonment.¹⁶¹⁹ While the case was on appeal,¹⁶²⁰ it settled on January 5, 2015, for approximately \$400,000 and an apology.¹⁶²¹

A \$150,000 Donation

In February 2000, Mahmoud Talaat el-Fiki, an Egyptian physician, donated \$150,000 to Al-Haramain Oregon to support Muslims fighting Russian rule in Chechnya.¹⁶²² On March 7, al-Buthe traveled from Saudi Arabia to Ashland, where, on March 10, he and Seda converted a wire transfer into 130 \$1,000 travelers checks—which was the bank's entire inventory—and the remaining amount to a cashier's check, which would be more difficult to convert overseas.¹⁶²³ Al-Buthe returned to Saudi Arabia with the money without declaring it as required.¹⁶²⁴

The charity was indicted on February 17, 2005, for falsely claiming on its 2000 tax return that the money was used to acquire the Missouri mosque.¹⁶²⁵ Seda was included in the indictment as Perouz Sedaghaty.¹⁶²⁶

whether the warrant application was facially deficient, because the issue called into question the competence of Judge Williams).

1619. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2012), D.E. 351, 2012 WL 4470782; see Report and Recommendation, *id.* (June 26, 2012), D.E. 337, 2012 WL 4470860.

1620. Docket Sheet, *Al-Kidd v. United States*, No. 12-35957 (9th Cir. Nov. 19, 2012) (oral argument, May 14, 2014, D.E. 39).

1621. Dismissal, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Jan. 13, 2015), D.E. 366 (retaining jurisdiction to enforce the settlement); Order, *Al-Kidd*, No. 12-35957 (9th Cir. Jan. 6, 2015), D.E. 50; see Matt Apuzzo & Steven Erlanger, *Patriot Act Idea Rises in France, and Is Ridiculed*, N.Y. Times, Jan. 17, 2015, at 1 (\$385,000); *Man Settles Lawsuit Over Post-9/11 Arrest*, Wash. Post, Jan. 17, 2015, at A3 (same); Serrano, *supra* note 1597 (\$415,000).

1622. *United States v. Sedaghaty*, 728 F.3d 885, 893 (9th Cir. 2013); *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 585 F. Supp. 2d 1233, 1243–44 (D. Or. 2008); *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 3; see *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 686 F.3d 965, 973, 978, 985 (9th Cir. 2012); see also Zaitz, *Charity Boss*, *supra* note 1563; Zaitz, *supra* note 1560.

1623. *Sedaghaty*, 728 F.3d at 893–94; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1244; *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 4; see Zaitz, *Charity Boss*, *supra* note 1563; Zaitz, *supra* note 1562; Zaitz, *supra* note 1560.

1624. See Zaitz, *supra* note 1560.

"Al Buthe cashed the 130 \$1,000 traveler's checks on about March 25, 2000, at a bank in Riyadh and deposited the \$21,000 cashier's check." *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 4.

1625. Indictment, *United States v. Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Feb. 17, 2005), D.E. 1 [hereinafter *Al Haramain Indictment*]; *Sedaghaty*, 728 F.3d

Al-Buthe, who lived in Saudi Arabia and who had not been in the United States since 2001, was the third defendant.¹⁶²⁷ The indictment was filed in the Eugene Division of the U.S. District Court for the District of Oregon, and the court assigned the case to Judge Michael R. Hogan.¹⁶²⁸ The charity was dismissed as a defendant on September 8, because it was only a “functionless shell.”¹⁶²⁹

Al-Haramain’s Civil Actions

On April 26, 2006, Al-Haramain filed a lawsuit against the government seeking return of 155 cartons of religious pamphlets seized as part of the 2004 asset freeze.¹⁶³⁰

at 893; *Sedaghaty* Suppression Denial Order at 1–2, 4 *supra* note 1561; see Bishop, *supra* note 1565; Zaitz, *Tax Case Ends*, *supra* note 1569; Zaitz, *supra* note 1560; see also Al-Buthe Declaration, attached as ex. Y, Declaration in Support of Discovery Sanctions, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Jan. 14, 2013), D.E. 2655 (“I reside in Riyadh, Saudi Arabia, and am currently the General Director of Environmental Health for the Capital City of Riyadh, Saudi Arabia.”).

Seda had an accountant prepare records showing the donation used to acquire the Springfield, Missouri, mosque. *Sedaghaty* Suppression Denial Order, *supra* note 1561, at 4–5.

1626. *Al Haramain* Indictment, *supra* note 1625; *Sedaghaty*, 728 F.3d at 891 & n.1; see Bishop, *supra* note 1565; Zaitz, *Charity Boss*, *supra* note 1563; Zaitz, *Tax Case Ends*, *supra* note 1569.

1627. *Al Haramain* Indictment, *supra* note 1625; *Sedaghaty*, 728 F.3d at 891 n.1, 895; see Zaitz, *Tax Case Ends*, *supra* note 1569.

“Mr. Al-Buthe is unable to participate any further in this litigation due to his inability to sit for a deposition outside Saudi Arabia.” Letter, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Feb. 5, 2020), D.E. 5863 [hereinafter Feb. 5, 2020, Letter re Al-Buthe] (filed in civil litigation for damages from alleged supporters of the September 11, 2001, terrorists); see also Chapter 30: September 11 Damages, *infra* page 655.

1628. Docket Sheet, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Feb. 17, 2005) [hereinafter D. Or. *Sedaghaty* Docket Sheet].

For this case study, Tim Reagan interviewed Judge Hogan and his law clerk David Baker in the judge’s chambers on September 20, 2012. Judge Hogan retired on November 1, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1629. Transcript, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 8, 2005, filed Sept. 16, 2005), D.E. 21; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1628; Redacted Indictment, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 21, 2005), D.E. 22; *Sedaghaty*, 728 F.3d at 895; see Zaitz, *Tax Case Ends*, *supra* note 1569.

1630. Complaint, *Al-Haramain Islamic Found. v. United States*, No. 6:06-cv-553 (D. Or. Apr. 26, 2006), D.E. 1; see Ashbel S. Green, *Islamic Charity Sues Feds Over Seized Pamphlets*, *Oregonian*, Apr. 28, 2006, at B5.

On July 21, the government agreed to return the pamphlets,¹⁶³¹ so the action was dismissed.¹⁶³²

On August 6, 2007, Al-Haramain sued in the District of Oregon's Portland Division to reverse its designation as a terrorist organization.¹⁶³³ Nine days later, Seda returned to the United States to defend himself against the 2005 indictment.¹⁶³⁴

Two months after freezing Al-Haramain Oregon's assets, the government provided the charity with unclassified information supporting its findings, but withheld supporting classified information.¹⁶³⁵

By mistake, among the supplemental documents produced to Al-Haramain's lawyers was a top-secret document that apparently is evidence that the lawyers' communications with persons overseas were surveilled without warrants in March and April of 2004.¹⁶³⁶ The lawyers sued the government on February 28, 2006, after the *New York Times* reported on a warrantless surveillance program conducted by the National Security Agency.¹⁶³⁷ The government removed the mistakenly produced document from the administrative record.¹⁶³⁸ On August 7, 2012, the court of appeals

1631. See Ashbel S. Green, *Islamic Charity Will Get Literature Back*, *Oregonian*, July 22, 2006, at D2.

1632. Judgment, *Al-Haramain Islamic Found.*, No. 6:06-cv-553 (D. Or. July 27, 2006), D.E. 13.

1633. *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 686 F.3d 965, 970 (9th Cir. 2012); *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 585 F. Supp. 2d 1233, 1239 (D. Or. 2008); Complaint, *Al-Haramain Islamic Found. v. U.S. Dep't of Treas.*, No. 3:07-cv-1155 (D. Or. Aug. 6, 2007), D.E. 1; see Supplemental Complaint, *id.* (Feb. 13, 2008), D.E. 43; see also Bishop, *supra* note 1565; Les Zaitz, *Ex-charity Sues Over Terrorist Labeling*, *Oregonian*, Aug. 7, 2007, at B1.

1634. Transcript, *Al-Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Aug. 15, 2007, filed July 21, 2008), D.E. 114 (arraignment); Order at 17 n.4, *id.* (Aug. 10, 2011), D.E. 570 [hereinafter *Sedaghaty New Trial Denial*], 2011 WL 3563145; see Bishop, *supra* note 1565; Zaitz, *Charity Boss*, *supra* note 1563.

1635. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1245.

1636. Opinion at 4, *Al Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. June 5, 2008), D.E. 69, 2008 WL 2381640; see Susan Goldsmith, *Islamic Charity, Lawyers File Wiretapping Lawsuit*, *Oregonian*, Mar. 1, 2006, at E5; Ashbel S. Green, *Sealed Document Reportedly Backs Up Eavesdropping Suit*, *Oregonian*, Mar. 4, 2006, at E7.

1637. See Goldsmith, *supra* note 1636; Green, *supra* note 1636; see also Chapter 35: Warrantless Wiretaps, *infra* page 748.

1638. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1247 n.7.

reversed a judgment against the government in favor of the lawyers, determining that the government had sovereign immunity.¹⁶³⁹

Although it was eventually transferred to the Northern District of California as part of multidistrict centralization, the 2006 action by the lawyers was originally assigned to Judge Garr M. King.¹⁶⁴⁰ The 2007 action by Al-Haramain Oregon was assigned to Judge King as a related case.¹⁶⁴¹

To support a February 6, 2008, redesignation, the government provided Al-Haramain with additional unclassified supporting information and provided the court, *ex parte* and *in camera*, with additional classified supporting information.¹⁶⁴²

On November 6, 2008, Judge King determined that the government violated Al-Haramain's due-process rights by not giving it adequate notice of the reasons for its designation as a terrorist organization.¹⁶⁴³ However, Judge King determined, after additional briefing, that this due-process violation was harmless.¹⁶⁴⁴ The court of appeals affirmed both rulings on September 23, 2011.¹⁶⁴⁵

The court of appeals determined that the government's seizure of Al-Haramain's assets without a warrant also violated due process and remanded the case to the district court for a determination of whether Al-Haramain was entitled to a remedy.¹⁶⁴⁶ On remand, Al-Haramain conceded that no remedy for the due-process violation would be effective.¹⁶⁴⁷

1639. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); see Chapter 35: Warrantless Wiretaps, *infra* page 748.

1640. Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006).

For this case study, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on September 19, 2012. Judge King died on February 5, 2019. FJC Biographical Directory, *supra* note 1628.

1641. Interview with Judge Garr M. King, Sept. 19, 2012.

1642. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1246.

1643. *Id.* at 1253–57, 1272–73; see Ashbel S. Green, *Judge Won't Lift Charity's Terrorist Designation*, *Oregonian*, Nov. 8, 2008, at B1.

1644. Opinion at 18–19, *Al-Haramain Islamic Found. v. U.S. Dep't of Treas.*, No. 3:07-cv-1155 (D. Or. Nov. 5, 2009), D.E. 118, 2009 WL 3756363.

1645. *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 686 F.3d 965, 970, 979–90, 1001 (9th Cir. 2012), *amending* 660 F.3d 1019 (2011); see *Officials Improperly Seized Assets of Islamic Charity, Court Finds*, N.Y. Times, Sept. 24, 2011, at A13 [hereinafter *Officials Improperly Seized Assets*].

1646. *Al Haramain Islamic Found.*, 686 F.3d at 970, 990–95, 1001; see *Officials Improperly Seized Assets*, *supra* note 1645.

1647. Opinion at 13, *Al-Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. Dec. 12, 2012), D.E. 141.

In addition, the court of appeals held that the Multicultural Association of Southern Oregon's First Amendment right to advocate on behalf of Al-Haramain's interests was unconstitutionally constrained by an executive order prohibiting the contribution of services for the benefit of organizations designated as terrorist organizations.¹⁶⁴⁸ On August 21, 2013, Judge King awarded the association \$17,228.69 in attorney fees and costs.¹⁶⁴⁹

Seda's Conviction Reversed

Four weeks after Seda's return to the United States, Magistrate Judge Thomas M. Coffin agreed to release Seda pending trial, finding the government's argument that Seda posed a risk of dangerousness or flight to be unpersuasive.¹⁶⁵⁰ On the following day, Judge Hogan heard an appeal of Judge Coffin's decision.¹⁶⁵¹ On November 30, Judge Hogan agreed that Seda could be released.¹⁶⁵²

As the only magistrate judge in Eugene, Judge Coffin handled all pre-trial detention matters there, and this was one of only a few release orders issued in twenty years on the bench that the government appealed.¹⁶⁵³

Seda was convicted on September 9, 2010.¹⁶⁵⁴ Following the conviction, the government disclosed that it had withheld from the defendant evi-

1648. *Al Haramain Islamic Found.*, 686 F.3d at 970, 995–1001; see Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); see also Mark Freeman, *Court Rules for Pro-Seda Group in Civil Rights Case*, Medford Mail Trib., Sept. 27, 2011.

1649. Order, *Al-Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. Aug. 21, 2013), D.E. 162.

1650. Transcript, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 10, 2007, filed Sept. 11, 2007), D.E. 41 (3:32 p.m. proceeding); D. Or. *Sedaghaty* Docket Sheet, *supra* note 1628 (D.E. 39); see Bill Bishop, *Fraud Suspect Released Before Trial*, Eugene Reg.-Guard, Sept. 11, 2007, at C1.

Tim Reagan interviewed Judge Coffin for this case study in his chambers on September 20, 2012. Judge Coffin retired on February 24, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/thomas-m-coffin.

1651. Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 11, 2007, filed Oct. 22, 2007), D.E. 51; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1628 (D.E. 42); see Bill Bishop, *In Reversal, Suspect Tied to Terror Group Ordered Held*, Eugene Reg.-Guard, Sept. 12, 2007, at A1.

1652. Release Order, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 30, 2007), D.E. 66; see Bill Bishop, *Court Sets Founder of Islamic Charity Free*, Eugene Reg.-Guard, Dec. 1, 2007, at D41.

1653. Interview with Judge Thomas M. Coffin, Sept. 20, 2012.

1654. Verdict, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2010), D.E. 466; Transcript, *id.* (Sept. 9, 2010, filed Sept. 16, 2010), D.E. 473; see *United States v. Sedaghaty*, 728

dence that one of the government's witnesses was a paid informant.¹⁶⁵⁵ The government had intended to use her husband as a witness—he had a more extensive relationship with the government as an informant—but he died before trial.¹⁶⁵⁶ Judge Hogan determined that although the government had committed a discovery violation, the witness's testimony was more related to sentence, a matter for the court, than to the jury's determination of guilt.¹⁶⁵⁷ On September 27, 2011, Judge Hogan sentenced Seda to two years and nine months in prison.¹⁶⁵⁸ Seda reported to a low-security prison near Denver, Colorado, on February 29, 2012.¹⁶⁵⁹

On August 23, 2013, Seda was released to home confinement to serve the few remaining months of his sentence.¹⁶⁶⁰ On the same day, the court of appeals determined, over a dissent, that the discovery violation required a new trial.¹⁶⁶¹ In addition, the court of appeals ruled that an unclassified substitution offered by the government and approved by Judge Hogan for exculpatory classified evidence did not “provide the defendant with substantially the same ability to make his defense as would disclosure of the

F.3d 885, 897 (9th Cir. 2013); *see also* Bryan Denson, *Evidence Withheld, Lawyers Say*, Oregonian, Jan. 13, 2011. *See generally* Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stanford L. Rev. 1173, 1208–09, 1216 (2015); Human Rights Watch, *Illusion of Justice* 87–89, 111, 196–97 (2014).

1655. *Sedaghaty* New Trial Denial, *supra* note 1634, at 14–22; *Sedaghaty*, 728 F.3d at 897–99; *see* Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. June 7, 2011, filed June 23, 2011), D.E. 563 (evidentiary hearing on a motion for a new trial); Transcript, *id.* (Mar. 1, 2011, filed Mar. 2, 2011), D.E. 542 (oral argument on a motion for a new trial).

1656. *Sedaghaty*, 728 F.3d at 898–99 & n.7; *Sedaghaty* New Trial Denial, *supra* note 1634, at 15, 17–19 & n.3.

1657. *Sedaghaty* New Trial Denial, *supra* note 1634, at 17, 20–22.; *see Sedaghaty*, 728 F.3d at 898.

1658. Judgment, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 22, 2011), D.E. 599; Transcript at 11–12, *id.* (Sept. 27, 2011, filed Oct. 5, 2011), D.E. 588; *see Sedaghaty*, 728 F.3d at 897; *see also* Mark Freeman, *Pete Seda Sentenced to Nearly Three Years*, Medford Mail Trib., Sept. 28, 2011.

1659. *See* Mark Freeman, *Seda Starts 33-Month Sentence Today*, Medford Mail Trib., Feb. 29, 2012.

1660. Release Motion at 2, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Aug. 30, 2013), D.E. 630.

1661. *Sedaghaty*, 728 F.3d at 892–93, 898–903 (opinion by Judge M. Margaret McKeown, joined by Judge Mary M. Schroeder); *see id.* at 918–32 (Judge Richard C. Tallman, dissenting); *see* Cassman, *supra* note 1654, at 1209.

specific classified information,” as required by the Classified Information Procedures Act (CIPA).¹⁶⁶²

Following Judge Hogan’s November 1, 2012, retirement, the court re-assigned Seda’s case to Judge Ann Aiken.¹⁶⁶³ On August 30, 2013, Judge Aiken approved an unopposed motion to release Seda from confinement pending further proceedings.¹⁶⁶⁴ On July 29, 2014, Judge Aiken granted a government motion to dismiss Seda’s indictment and accepted a plea of guilty from Al-Haramain to a superseding information.¹⁶⁶⁵

September 11 Damages

Various Al-Haramain organizations were among the defendants in actions to recover damages for the September 11, 2001, attacks from alleged supporters of the hijackers.¹⁶⁶⁶ On June 17, 2011, September 11 plaintiffs

1662. *Sedaghaty*, 728 F.3d at 892, 903–08; see 18 U.S.C. app. 3 § 6(c)(1) (2020); see also Cassman, *supra* note 1654, at 1209.

The court of appeals also found that evidence against Seda derived from a search that exceeded the applicable search warrant. *Sedaghaty*, 728 F.3d at 892, 910–15.

1663. Notice, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Dec. 5, 2012), D.E. 627.

1664. Release Order, *id.* (Aug. 30, 2013), D.E. 631; see Federal Bureau of Prisons Inmate Locator, www.bop.gov (noting release from prison on August 30, 2013, reg. no. 69971-065).

1665. Dismissal, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. July 29, 2014), D.E. 660; Judgment, *id.* (Aug. 6, 2014), D.E. 662 (sentencing Al-Haramain to three years of probation); Superseding Information, *id.* (July 29, 2014), D.E. 652; D. Or. *Sedaghaty* Docket Sheet, *supra* note 1628 (D.E. 654).

1666. Docket Sheet, *World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, *Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, *Cantor Fitzgerald & Co. v. Akida Bank Private Ltd.*, No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); Docket Sheet, *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); Docket Sheet, *O’Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003); Docket Sheet, *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); Docket Sheet, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, *Salvo v. Al Qaeda Islamic Army*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); Docket Sheet, *Adone v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002); Docket Sheet, *Iwachi v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, *Tremsky v. Bin Laden*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, *Mayore Estates, L.L.C. v. Al Qaeda Islamic Army*, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002); Docket Sheet, *Schneider v. Al Qaeda Islamic Army*, No. 1:02-cv-7209 (S.D.N.Y.

sought relief from the U.S. District Court for the Southern District of New York from Seda's failure to produce documents in response to a December 10, 2010, discovery request.¹⁶⁶⁷ On November 22, 2011, Magistrate Judge Frank Maas overruled Seda's objections that the discovery request infringed a Fifth Amendment privilege against self-incrimination, because the criminal trial was over, and Judge Maas overruled Seda's objections that the discovery request violated a protective order in the criminal case, because the protective order only covered information provided to Seda's attorneys that was not available to Seda from other sources.¹⁶⁶⁸ On January 11, 2012, District Judge George B. Daniels approved Judge Maas's ruling,¹⁶⁶⁹ and the court of appeals denied Seda's petition for mandamus relief from the discovery order on March 28.¹⁶⁷⁰

Magistrate Judge Sarah Netburn, following Judge Maas's retirement, issued a discovery sanction against Seda on February 15, 2017, precluding him "from introducing any documents or evidence arguably responsive to Plaintiffs' document requests that he has not produced in discovery" and awarding discovery-motion attorney fees.¹⁶⁷¹ A bankruptcy case for Seda was filed on April 26 and discharged on September 25.¹⁶⁷²

On April 16, 2013, The U.S. Court of Appeals for the Second Circuit overturned a September 13, 2010, personal-jurisdiction dismissal of al-Buthe from the September 11 civil litigation in New York, and the court remanded the matter for jurisdictional discovery.¹⁶⁷³ Unwilling to sit for a deposition outside Saudi Arabia for fear of extradition to the United States

Sept. 10, 2002); see Zaitz, "Watch List," *supra* note 1561; Chapter 30: September 11 Damages, *infra* page 655.

1667. Motion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 17, 2011), D.E. 2486.

1668. Order, *id.* (Nov. 22, 2011), D.E. 2491.

Judge Maas retired on September 29, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/frank-s-maas.

1669. Order, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 11, 2012), D.E. 2529, 2012 WL 104512.

1670. Order, *In re Sedaghaty*, No. 11-5371 (2d Cir. Mar. 28, 2012), D.E. 30.

1671. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Feb. 15, 2017), D.E. 3447, 2017 WL 634706; Docket Sheet, *id.* (Dec. 10, 2003); see Transcript, *id.* (July 8, 2016, filed July 25, 2016), D.E. 3320 (Judge Maas's orally granting the plaintiffs relief).

1672. Docket Sheet, *Sedaghaty*, No. 3:17-bk-31541 (Bankr. D. Or. Apr. 26, 2017); see Suggestion of Bankruptcy, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Apr. 26, 2017), D.E. 3531.

1673. *In re Terrorist Attacks* on Sept. 11, 2001, 714 F.3d 659, 665–67 (2d Cir. 2013), *vacating in part* 740 F. Supp. 2d 494 (S.D.N.Y. 2010).

for criminal prosecution, al-Buthe accepted a default judgment against himself, claiming insufficient assets to satisfy a judgment.¹⁶⁷⁴

On June 10, 2020, Judge Aiken approved the government's motion to dismiss without prejudice the indictment against al-Buthe in the District of Oregon.¹⁶⁷⁵

Challenge: Classified Evidence

Judge King

For this litigation and for other criminal cases, Judge King's law clerks and court reporter had security clearances.¹⁶⁷⁶

In response to Al-Haramain's legal challenge to its identification as a specially designated global terrorist, the government compiled an administrative record and redesignated Al-Haramain.¹⁶⁷⁷ The government shared unclassified portions of its administrative case file with Al-Haramain.¹⁶⁷⁸ The government shared some classified portions of the case file with the court *ex parte* and *in camera*.¹⁶⁷⁹ The intelligence community allowed some information to be declassified so that it could be shared with Al-Haramain.¹⁶⁸⁰ The intelligence community did not permit the government to share some classified information with the court, and the government assured the court that it did not rely on this information for redesignation or include it in the administrative record.¹⁶⁸¹

The government refused counsel's request to obtain security clearances for access to classified portions of the record.¹⁶⁸² Judge King determined, "The government's interest in keeping materials secret takes precedence over [Al-Haramain Oregon's] due process right to review the record against it. . . . It is not required by the Constitution to give [Al-Haramain

1674. Default Judgment, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 22, 2020), D.E. 6054; Feb. 5, 2020, Letter re Al-Buthe, *supra* note 1627.

1675. Order, *United States v. Al-Buthe*, No. 6:05-cr-60008-3 (D. Or. June 10, 2020), D.E. 668, ; *see* Motion, *id.* (June 9, 2020), D.E. 667.

1676. Interview with Judge Garr M. King, Sept. 19, 2012 (noting that the judge's judicial assistant had not sought or needed a security clearance).

1677. *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 585 F. Supp. 2d 1233, 1246 (D. Or. 2008).

1678. *Id.*

1679. *Id.*

1680. *Id.*

1681. *Id.*

1682. *Id.* at 1259.

Oregon] access to the classified record or to try to give the attorneys security clearances.”¹⁶⁸³

The court of appeals opined that the government should have tried harder to provide Al-Haramain with the substance of the classified evidence against it:

To the extent that an unclassified summary could provide helpful information, such as the subject matter of the agency’s concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable.

...

... [A]n unclassified summary, by definition, does not implicate national security because it is unclassified. Similarly, a lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance.¹⁶⁸⁴

Judge Hogan

All members of Judge Hogan’s chambers staff obtained security clearances to work on this case, and the classified information security officer delivered to Judge Hogan a safe for storing classified material and a laptop computer to use when preparing documents based on classified information.¹⁶⁸⁵ Some material in the case was designated for the judge’s eyes only.¹⁶⁸⁶ Some sensitive compartmented information (SCI) was stored in the FBI’s sensitive compartmented information facility (SCIF) in Portland.¹⁶⁸⁷ Some SCI was also stored under the classified information security officer’s control in Washington, D.C.¹⁶⁸⁸

So that only one judge’s chambers had to deal with the security precautions required for classified materials, Judge Hogan, instead of Magistrate

1683. *Id.* at 1260.

1684. *Al Haramain Islamic Found. v. U.S. Dep’t of Treas.*, 686 F.3d 965, 982–83 (9th Cir. 2012).

1685. Transcript at 5–6, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 18, 2008, filed July 21, 2008), D.E. 120 [hereinafter Mar. 18, 2008, *Sedaghaty* Transcript]; Transcript at 13, *id.* (Jan. 23, 2008, filed July 21, 2008), D.E. 119; Interview with Judge Michael R. Hogan, Sept. 20, 2012 (noting that the cleared court reporter sometimes worked as needed in other districts); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

1686. Interview with Judge Michael R. Hogan, Sept. 20, 2012.

1687. *Id.*; see Reagan, *supra* note 1685, at 22–23 (describing SCIFs).

1688. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, July 20, 2011.

Judge Coffin, handled discovery issues pertaining to classified information.¹⁶⁸⁹ Judge Hogan had the defense submit ex parte a memorandum of its theory of the case to guide the judge's review of classified material for decisions on what needed to be disclosed to the defense in discovery.¹⁶⁹⁰

While the case was in trial, the lock on Judge Hogan's safe broke.¹⁶⁹¹ While the safe's door was being repaired, the classified information security officer arranged for classified papers to be stored in a safe in the marshal's office.¹⁶⁹²

Seda was represented by the federal defender, who already had a secret security clearance, and a private attorney, who did not have a security clearance.¹⁶⁹³ Seda's attorneys argued that they needed security clearances in order to discuss with the court matters related to the top-secret document mistakenly produced to Al-Haramain.¹⁶⁹⁴ The government's initial position was that defense counsel should not receive security clearances because the government did not intend to use classified evidence against Seda.¹⁶⁹⁵ The classified information security officer informed Judge Hogan that the federal defender's clearance could be upgraded if necessary and the clearance process could begin for the other attorney.¹⁶⁹⁶

As part of Seda's defense, his attorneys sought discovery of potentially exculpatory classified information, including discovery related to the mistakenly produced top-secret document.¹⁶⁹⁷ On advice of the government as to national security interests concerning the document, Judge Hogan or-

1689. Mar. 18, 2008, *Sedaghaty* Transcript, *supra* note 1685, at 8–9.

"The district judge, now retired, was meticulous in his review of the classified material." *United States v. Sedaghaty*, 728 F.3d 885, 909 (9th Cir. 2013).

1690. Interview with Judge Michael R. Hogan, Sept. 20, 2012.

1691. Transcript at 259–60, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 1, 2010, filed Sept. 11, 2010), D.E. 458.

1692. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Dec. 19, 2012.

1693. Transcript at 9, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 29, 2008, filed July 2, 2008), D.E. 111.

1694. *Id.* at 7–8.

1695. *Id.* at 10–11.

1696. *Id.* at 14.

1697. Discovery Motion, *id.* (Mar. 17, 2008), D.E. 90; *see* Brief, *id.* (Oct. 10, 2008), D.E. 136 (renewing a motion for access to the top-secret document).

There is no reason to believe the activity on the part of the government regarding possible warrantless surveillance, to the extent such activity exists and was illegal, resulted in any information being used in the affidavit in support of the search warrant [for Seda's residence] or prompted the decision to seek the warrant.

Sedaghaty Suppression Denial Order, *supra* note 1561, at 6–7.

dered the attorneys not to discuss further, orally or in writing, the contents of the document, even with each other.¹⁶⁹⁸ The court of appeals denied Seda's petition for a writ of mandamus.¹⁶⁹⁹

On September 5, 2008, the government filed three public notices that it was providing the court with in camera, ex parte submissions pursuant to CIPA.¹⁷⁰⁰ Four days later, Seda's attorneys filed a motion to establish a suitable procedure for them to present potentially classified information to the court.¹⁷⁰¹ Judge Hogan allowed the attorneys to submit the intended filing to the classified information security officer for a classification review.¹⁷⁰² The filing had to be prepared on a computer provided by the security officer.¹⁷⁰³

In March 2009, Judge Hogan examined the government's classified submissions in Washington, D.C., when he was there for a celebration of the Eugene courthouse's winning a building award.¹⁷⁰⁴ Judge Hogan ruled that the defendant was not entitled to discovery of classified information, and Judge Hogan approved, pursuant to CIPA, unclassified summaries of classified information in the government's possession as providing the defendant with substantially the same ability to make his defense as would disclosure of the original classified information.¹⁷⁰⁵

1698. Transcript at 4–13, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. July 15, 2008, filed June 30, 2009), D.E. 187; Minute Order, *id.* (May 16, 2008), D.E. 103; *see* *United States v. Sedaghaty*, 728 F.3d 885, 909–10 (9th Cir. 2013).

"The records and representations of the Classified Information Security Officers entrusted with the material reflect that no one has accessed the documents except the court and the Classified Information Security Officer on one occasion, and the defense counsel together with the Classified Information Security Officer, on another occasion." *Sedaghaty*, 728 F.3d at 910 n.15.

1699. Order, *Sedaghaty v. U.S. Dist. Court (United States)*, No. 09-73924 (9th Cir. May 12), D.E. 22, *cert. denied*, 562 U.S. 867 (2010).

1700. Notices, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 5, 2008), D.E. 127 to 129; *see* 18 U.S.C. app. 3 (2020) (text of CIPA); *see also* Reagan, *supra* note 1685.

1701. Filing Motion, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008), D.E. 131.

1702. D. Or. *Sedaghaty* Docket Sheet, *supra* note 1628 (submission order, Sept. 10, 2008, D.E. 133).

1703. Transcript at 4–10, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008, filed June 30, 2009), D.E. 189 [hereinafter Sept. 9, 2008, *Sedaghaty* Transcript].

1704. *See* Transcript, *id.* (Feb. 26, 2009, filed Sept. 22, 2011), D.E. 576; Transcript, *id.* (Jan. 6, 2009, filed Jan. 28, 2009), D.E. 150; Sept. 9, 2008, *Sedaghaty* Transcript, *supra* note 1703, at 3.

1705. Orders, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 20, 2009), D.E. 160, 161; *see also* Order, *id.* (July 1, 2009), D.E. 191, 2009 WL 1916712 (denying renewed motions for access to classified information).

As trial approached, it was determined that the government should provide defense counsel with some classified information: “a classified summary in lieu of disclosure of original classified materials.”¹⁷⁰⁶ Judge Hogan issued a protective order specifying how defense counsel would handle classified information.¹⁷⁰⁷

Had Judge Hogan to do it over again, he would have made a greater effort to look at classified information earlier.¹⁷⁰⁸ Litigation over classified materials tended to slow down the case.¹⁷⁰⁹

The court of appeals ruled that one substitution approved by Judge Hogan did not afford Seda an adequate defense.¹⁷¹⁰ “After careful review of the materials at issue, we conclude that the substitution’s language unfairly colored presentation of the information and, even more problematic, that the substitution omitted facts helpful to Seda’s defense.”¹⁷¹¹ “[I]t is a fundamental principle underlying CIPA that the summary should be even-handed, worded in a neutral fashion and not tilted or shaded to the government’s advantage.”¹⁷¹²

Judge Lodge

It was necessary to establish secure space in the Boise courthouse to store and review classified material.¹⁷¹³ This included establishment of a SCIF for storage.¹⁷¹⁴ The Justice Department paid for required construction, but the court had to find space for the project, and court staff members had to devote some of their time to coordination of the effort.¹⁷¹⁵ Judges can often review classified material in chambers; the court also had to find space for defense counsel to review protected material.¹⁷¹⁶

1706. Order, *id.* (Feb. 26, 2010), D.E. 278.

1707. Protective Order, *id.* (Mar. 19, 2010), D.E. 297.

1708. Interview with Judge Michael R. Hogan, Sept. 20, 2012.

1709. *Id.*

1710. *United States v. Sedaghaty*, 728 F.3d 885, 892, 905–08 (9th Cir. 2013).

“The defense [filed] an ex parte submission outlining its theory of the defense to aid the court in its review of the classified material. *Id.* at 906.

1711. *Id.* at 905; *see id.* at 906 (“It is no surprise that Seda ultimately chose not to use the substitution at trial.”).

1712. *Id.* at 906.

1713. Interview with Judge Edward J. Lodge, Oct. 17, 2012.

1714. *Id.*

1715. *Id.*

1716. *Id.*

Challenge: Classified Arguments

In the terrorist designation challenge, the government submitted to Judge King, ex parte and in camera, classified versions of documents supporting its summary-judgment motion, and the government filed public notices of lodging to that effect.¹⁷¹⁷

The court of appeals reviewed the classified record.¹⁷¹⁸ The appeal was heard by Judges Dorothy W. Nelson, who has chambers in Pasadena, California; Sidney R. Thomas, who has chambers in Billings, Montana; and Susan P. Graber, who has chambers in Portland, Oregon.¹⁷¹⁹ Classified information in this case included information designated SCI, which cannot be stored in an ordinary safe but must be stored in a SCIF.¹⁷²⁰

There was no SCIF in Billings, so the classified information security officer flew SCI materials to Judge Thomas for his review and flew them out the same day.¹⁷²¹ In Portland, the U.S. Attorney had a SCIF, in which classified information security officers had their own safes, under their exclusive control, for storing SCI while Judge Graber was not reviewing it.¹⁷²² There was no SCIF in Pasadena, but the district court in downtown Los Angeles had one that could be used to store SCI for Pasadena judges.¹⁷²³

Challenge: Closed Proceedings

Seda's prosecution included several closed proceedings from which Seda was excluded.¹⁷²⁴ Seda was not cleared for access to classified information and could not be present during discussions of procedural matters at which classified information might be discussed.¹⁷²⁵

One procedure Judge Hogan used for conducting a hearing partially in open court and partially in closed session was to retire to a jury room for

1717. Notice, *Al-Haramain Islamic Found. v. U.S. Dep't of Treas.*, No. 3:07-cv-1155 (D. Or. June 12, 2008), D.E. 76; Notice, *id.* (Feb. 7, 2008), D.E. 39.

1718. *Al Haramain Islamic Found. v. U.S. Dep't of Treas.*, 686 F.3d 965, 979 (9th Cir. 2012).

1719. *Id.*, 686 F.3d 965; Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 20, 2011.

1720. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 20, 2011.

1721. *Id.*

1722. *Id.*

1723. *Id.*

1724. *Sedaghaty New Trial Denial*, *supra* note 1634, at 13.

1725. *Id.* ("Precluding defendant, who does not have a security clearance, from these conferences was necessary and did not violate his rights to be present and to a public trial.").

the closed session at which classified information was discussed.¹⁷²⁶ During trial, Judge Hogan used a jury room on another floor.¹⁷²⁷ The classified information security officer ensured that the room was safe for these purposes.¹⁷²⁸

Seda's appeal was heard on December 3, 2012.¹⁷²⁹ Following an open session, the court met in consecutive closed sessions to hear the parties' classified arguments: one session including both sides, an ex parte session with the prosecution, and an ex parte session with another government attorney, and not the prosecution, on whether the prosecution had access to classified information that the defense had submitted to the court.¹⁷³⁰

Challenge: Classified Orders and Opinions

The court of appeals issued both a public published opinion and a sealed classified supplemental opinion explaining its remand of Seda's conviction for a new trial.¹⁷³¹ The court's dissenting judge also issued both public and classified opinions.¹⁷³²

On occasion, Judge Lodge asked the classified information security officer to review his orders and opinions to make sure he had not inadvertently included classified information.¹⁷³³

Challenge: Foreign Evidence

Seda's prosecution "involved substantial evidence from abroad, which presented obstacles for both parties. Nevertheless, both parties conducted in-

1726. Transcript at 27, 39–40, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 1, 2010, filed Apr. 1, 2010), D.E. 313.

1727. Transcript at 95, *id.* (Sept. 3, 2010, filed Sept. 11, 2010), D.E. 461; Transcript at 277, *id.* (Sept. 2, 2010, filed Sept. 11, 2010), D.E. 460.

1728. Interview with Judge Michael R. Hogan, Sept. 20, 2012.

1729. Oral Argument, *United States v. Sedaghaty*, No. 11-30342 (9th Cir. Dec. 3, 2012), D.E. 71, www.ca9.uscourts.gov/media/audio/?20121203/11-30342/ (audio recording).

1730. *United States v. Sedaghaty*, 728 F.3d 885, 891–92 n.2 (9th Cir. 2013); Order, *Sedaghaty*, No. 11-30342 (9th Cir. Nov. 28, 2012), D.E. 69; *see* Appellee Brief at 135, *id.* (Aug. 3, 2012) (noting that the defendant's "concern that the prosecution accessed the sealed document the defense had placed in a sensitive compartmented information facility" was addressed at a classified ex parte second supplemental brief stating that "the prosecution did not access the sealed document").

1731. *Sedaghaty*, 728 F.3d at 891, 905.

1732. *Id.* at 918 n.1 (Judge Richard C. Tallman, dissenting).

1733. Interview with Judge Edward J. Lodge, Oct. 17, 2012.

vestigations overseas and were able to obtain some evidence from foreign countries”¹⁷³⁴

Seda sought testimony from the Egyptian donor el-Fiki.¹⁷³⁵ He asked the court to either (1) compel the government to obtain el-Fiki’s trial or deposition testimony pursuant to a Mutual Legal Assistance Treaty, signed in 1998 and effective since 2001, or (2) obtain the testimony by letters rogatory to the Egyptian courts.¹⁷³⁶ Judge Hogan denied the request.¹⁷³⁷ He determined that it would be improper for the court to impose on the executive branch’s treaty relationship,¹⁷³⁸ and the court of appeals agreed.¹⁷³⁹ Judge Hogan declined to issue letters rogatory because el-Fiki’s testimony concerning his charitable intentions would not negate a false tax return.¹⁷⁴⁰ The court of appeals affirmed that decision as well.¹⁷⁴¹

Judge Hogan, however, did issue letters rogatory to the courts of Saudi Arabia for testimony by Sami ‘Abd al-‘Aziz al-Sanad.¹⁷⁴² The Saudi Arabian courts did not respond.¹⁷⁴³

The government issued a subpoena to the Saudi Arabian bank at which al-Buthe cashed the travelers checks and cashier’s check at issue in the claim for a false tax return.¹⁷⁴⁴ The bank moved to quash the subpoena in the U.S. District Court for the District of Columbia, and that court granted the government a stay pending resolution of the subpoena issued by Judge Hogan.¹⁷⁴⁵ Judge Hogan overruled the bank’s objection that the subpoena

1734. *Sedaghaty*, 728 F.3d at 916.

1735. *Id.* at 917; Opinion at 3, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Jan. 26, 2010), D.E. 252 [hereinafter MLAT and Letters Rogatory Opinion]; Transcript, *id.* (Jan. 19, 2010, filed Feb. 8, 2010), D.E. 260.

1736. *Sedaghaty*, 728 F.3d at 916–17; MLAT and Letters Rogatory Opinion, *supra* note 1735, at 1–4.

1737. MLAT and Letters Rogatory Opinion, *supra* note 1735, at 9–10, 12.

1738. *Id.* at 5–10.

1739. *Sedaghaty*, 728 F.3d at 916–17.

1740. MLAT and Letters Rogatory Opinion, *supra* note 1735, at 10–12.

1741. *Sedaghaty*, 728 F.3d at 917. *See generally* T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory* (Federal Judicial Center 2014).

1742. Letters Rogatory, *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 16, 2010), D.E. 327-2; *Sedaghaty*, 728 F.3d at 917.

1743. *Sedaghaty*, 728 F.3d at 917.

1744. Opinion at 1–3, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Feb. 26, 2010), D.E. 277 [hereinafter Saudi Arabian Bank Subpoena Opinion]; Transcript, *id.* (Feb. 16, 2010, filed Feb. 17, 2010), D.E. 270.

1745. Docket Sheet, *In re Administrative Subpoena to Al-Rajhi Banking & Inv. Corp.*, No. 1:10-mc-55 (D.D.C. Jan. 19, 2010) (noting the granting of a stay on February 9, 2010).

asked the bank to violate Saudi Arabian privacy laws, holding that the government was free to pursue U.S. sanctions against the bank for failure to comply.¹⁷⁴⁶ Compliance with the subpoena was worked out while the issue was on appeal.¹⁷⁴⁷

Judge Hogan took long-distance video testimony for Seda's sentencing hearing from a colonel in Russia's Federal Security Service.¹⁷⁴⁸ The witness accommodated time-zone issues by testifying at 1:00 in the morning his time.¹⁷⁴⁹

Challenge: FISA Evidence

In al-Kidd's civil action challenging his detention as a material witness, the government notified the court and the plaintiff that it intended to offer evidence in the case derived from surveillance orders issued by the Foreign Intelligence Surveillance Court.¹⁷⁵⁰

The government disclosed to al-Kidd all information obtained pursuant to the Foreign Intelligence Surveillance Act (FISA) in an investigation of al-Hussayen that referred to, mentioned, related to, or involved al-Kidd.¹⁷⁵¹ Magistrate Judge Williams reviewed other FISA information on al-Hussayen and determined that it was properly obtained.¹⁷⁵² Moreover, Judge Williams determined that as to al-Kidd the information was privileged.¹⁷⁵³

Judge Williams's review of the FISA materials was delayed by several months, because an appropriate review facility had to be constructed at the courthouse.¹⁷⁵⁴ The FISA documents were produced to a classified information security officer on January 14, 2008, but a review facility was not established until July 31.¹⁷⁵⁵

1746. Saudi Arabian Bank Subpoena Opinion, *supra* note 1744, at 19.

1747. Order, *United States v. Sedaghaty*, No. 10-30061 (9th Cir. July 12, 2010), D.E. 41 (dismissing the appeal as moot); *see* Order, *Administrative Subpoena*, No. 1:10-mc-55 (D.D.C. Mar. 2, 2010), D.E. 5 (dismissing the motion to quash as moot).

1748. Transcript at 17-94, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 23, 2010, filed Nov. 29, 2010), D.E. 510.

1749. Interview with Judge Michael R. Hogan, Sept. 20, 2012.

1750. Notice, *Al-Kidd v. Gonzales*, No. 1:05-cv-93 (D. Idaho Sept. 13, 2007), D.E. 173.

1751. Opinion at 4, *id.* (Dec. 4, 2008), D.E. 267, 2008 WL 5123009.

1752. *Id.* at 10.

1753. *Id.* at 12; *see id.* at 4 (noting the government's assertion of the state-secrets, law-enforcement, and official-files privileges).

1754. *Id.* at 2.

1755. *Id.*

Chapter 14

Prosecution of a Charity

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

Prosecution of a charity and its officers for providing funds to Hamas resulted first in a mistrial and then in convictions and sentences ranging from fifteen to sixty-five years. The court of appeals affirmed the charity's conviction, although the charity was not represented by counsel at trial and the court of appeals did not acknowledge representation of the charity on appeal. Challenges for the court included witness security and classified evidence, including classified information mistakenly disclosed to defense counsel.

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Indictment of a Charity

On July 27, 2004, the government indicted the Holy Land Foundation for Relief and Development, once the largest Islamic charity in the United States, and seven of its leaders, for providing funds to Hamas.¹⁷⁵⁶ The U.S.

1756. *United States v. El-Mezain*, 664 F.3d 467, 483, 485, 573 (5th Cir. 2011); Indictment, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004), D.E. 1 [hereinafter *Holy Land Found. Indictment*]; see James Brooke & Elaine Sciolino, *U.S. Muslims Say Their Aid Pays for Charity, Not Terror*, N.Y. Times, Aug. 16, 1995, at 1; Eric Lichtblau, *Arrests Tie Charity Group to Palestinian Terrorists*, N.Y. Times, July 28, 2004, at A10; Michelle Mittelstadt, Matt Stiles & Frank Trejo, *Muslim Charity, Leaders Indicted*

District Court for the Northern District of Texas assigned the case to Judge A. Joe Fish.¹⁷⁵⁷

The Occupied Land Fund was established in the late 1980s by Shukri Abu Baker and Ghassan Elashi; in 1991, the fund reorganized as the Holy Land Foundation.¹⁷⁵⁸ The foundation was an offshoot of the Islamic Association for Palestine, an information group.¹⁷⁵⁹ Both groups were headquartered in Richardson, Texas, approximately fifteen miles north of Dallas.¹⁷⁶⁰ The FBI had been investigating the foundation's ties to Hamas since shortly after the foundation's reorganization.¹⁷⁶¹

The foundations's codefendants were CEO Abu Baker; chairman Elashi; Mohammed el-Mezain, director of endowments; Mufid Abdulqader, a top fundraiser; Abdulrahman Odeh, the foundation's New Jersey representative; Haitham Maghawri; and Akram Mishal.¹⁷⁶² Maghawri and Mishal were living abroad and considered fugitives.¹⁷⁶³

U.S. Says, Dallas Morning News, July 28, 2004, at 1A. See generally Nancy Hollander, *The Holy Land Foundation Case: The Collapse of American Justice*, 20 Wash. & Lee J. Civil Rts. & Soc. Just. 45 (2013); Human Rights Watch, *Illusion of Justice* 65–67, 91–94, 96, 105, 128, 172, 199 (2014); Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L.J. 477, 509–12 (2014).

1757. Docket Sheet, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004) [hereinafter N.D. Tex. *Holy Land Found.* Docket Sheet].

Tim Reagan interviewed Judge Fish for this case study in his chambers on October 6, 2009.

1758. *El-Mezain*, 664 F.3d at 486; *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003); *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); Representation Order at 18, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 24, 2010), D.E. 1447; see Brooke & Sciolino, *supra* note 1756; Steve McGonigle, *Tie to Hamas Leader Minimized*, Dallas Morning News, Dec. 16, 2001, at 35A; Gayle Reaves & Steve McGonigle, *Paper Trail Leads to Hamas*, Dallas Morning News, Apr. 8, 1996, at 1A.

1759. *El-Mezain*, 664 F.3d at 486; see Brooke & Sciolino, *supra* note 1756; Reaves & McGonigle, *supra* note 1758.

1760. *El-Mezain*, 664 F.3d at 485; see Brooke & Sciolino, *supra* note 1756; Reaves & McGonigle, *supra* note 1758.

1761. See Todd J. Gillman, *FBI Looks Into Islamic Fund Raising*, Dallas Morning News, Nov. 18, 1994, at 29A; Steve McGonigle, *Charity Inquiry Dated to 1989*, Dallas Morning News, Dec. 20, 2002, at 33A; Jason Trahan, *Stakes High in Holy Land Trial*, Dallas Morning News, July 16, 2007, at 1A; Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, Wash. Post, Oct. 23, 2007, at A3.

1762. *El-Mezain*, 664 F.3d at 485–86; *Holy Land Found.* Indictment, *supra* note 1756; see Mittelstadt et al., *supra* note 1756; Trahan, *supra* note 1761.

1763. See Mittelstadt et al., *supra* note 1756; Trahan, *supra* note 1761.

Civil Liability

The foundation and its principals had already been parties in other cases. Parents of David Boim, a seventeen-year-old boy killed in a 1996 terrorist attack in Israel, filed a federal civil action in Chicago in 2000 against the Holy Land Foundation and other defendants, alleging that the defendants provided financial support to Hamas, whom the parents alleged had killed their son.¹⁷⁶⁴

On November 29, 2004, the district court granted the plaintiffs summary judgment on liability against some of the defendants, including the foundation.¹⁷⁶⁵ The jury returned a damages verdict of \$52 million,¹⁷⁶⁶ which the court statutorily trebled to \$156 million.¹⁷⁶⁷ However, on December 3, 2008, the court of appeals, sitting en banc, reversed the district court's summary judgment against the foundation, because the district court had improperly given preclusive effect to another district court's affirming a seizure of the foundation's assets.¹⁷⁶⁸ The district court again granted the plaintiffs summary judgment against the foundation on August 31, 2012, finding that the foundation "knew about the character of Hamas and that it provided material support to Hamas during the relevant time period."¹⁷⁶⁹ Magistrate Judge Arlander Keys reinstated the \$156 mil-

1764. Complaint, *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000), D.E. 1; *see Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 547–48 (7th Cir. 2021); *Boim v. Holy Land Found.*, 549 F.3d 685, 687 (7th Cir. 2008); *Boim v. Quranic Literacy Inst.*, 349 F. Supp. 2d 1097 (N.D. Ill. 2004) (resolving motions in limine); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004) (resolving motions for summary judgment); *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying motions to dismiss), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *see also* Steve McGonigle, *Suit Accuses Islamic Groups of Aiding in Terrorist Attack*, Dallas Morning News, May 13, 2000, at 29A; Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, Chi. Trib., May 15, 2000, Metro Chi., at 1.

1765. *Boim*, 549 F.3d at 688; *Boim*, 340 F. Supp. 2d 885; *see* Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, Chi. Trib., Nov. 11, 2004, Metro Chi., at 1; Steve McGonigle, *Former Richardson Charities Tied to Hamas, Judge Rules*, Dallas Morning News, Nov. 11, 2004, at 14A.

1766. *Boim*, 549 F.3d at 688; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004), D.E. 666.

1767. *Boim*, 549 F.3d at 688; Amended Judgment, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Feb. 25, 2005), D.E. 692; *see* 18 U.S.C. § 2333(a) (2020); *see also Boim*, 9 F.4th at 547–48; Matt O'Connor, *\$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

1768. *Boim*, 549 F.3d at 691, *cert. denied*, 558 U.S. 981 (2009).

1769. Opinion at 27, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Aug. 31, 2012), D.E. 883.

lion damages award.¹⁷⁷⁰ On May 17, 2022, Judge Gary Feinerman declined to dismiss a suit to recover damages from the defendants' alleged successors or alter egos.¹⁷⁷¹

Designation as a Terrorist Organization

In December 2001, the Treasury Department's Office of Foreign Asset Control designated the foundation a terrorist organization and froze its assets.¹⁷⁷² On March 11, 2002, the foundation challenged the designation and the freezing in the U.S. District Court for the District of Columbia.¹⁷⁷³ On June 20, 2003, the court of appeals affirmed a judgment in the government's favor.¹⁷⁷⁴

1770. Order, *id.* (Oct. 12, 2012), D.E. 889.

Judge Keys retired on May 30, 2014. Court Information Release (Mar. 20, 2014), www.ilnd.uscourts.gov/_assets/_news/AK%20statement.pdf; see JAMS Neutrals, jamsadr.com/keys/.

1771. Opinion, *Boim v. Am. Muslims for Palestine*, No. 1:17-cv-3591 (N.D. Ill. May 17, 2022), D.E. 250, 2022 WL 1556085; see Status Report, *id.* (June 21, 2022), D.E. 258 (noting discovery deadlines); Amended Complaint, *id.* (Dec. 17, 2019), D.E. 178 (sealed); Complaint, *id.* (May 12, 2017), D.E. 1; see also *Boim*, 9 F.4th 545 (recognizing subject matter jurisdiction because of the federal statute supporting the claims), *rev'g* Opinion, *Boim*, No. 1:17-cv-3591 (N.D. Ill. Oct. 20, 2020), D.E. 215, 2020 WL 6149572 (dismissing the complaint on jurisdictional grounds for failure to demonstrate continuity); Opinion, *Boim*, No. 1:17-cv-3591 (N.D. Ill. Aug. 18, 2017), D.E. 41, 2017 WL 3581141 (dismissing the original complaint for insufficient allegations supporting relief); Patrick O'Connell, *Parents Sue Palestinian Groups for Jury Award*, Chi. Trib., May 14, 2017, at C4.

1772. *United States v. El-Mezain*, 664 F.3d 467, 488 (5th Cir. 2011); *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 159–60 (D.C. Cir. 2003); *Holy Land Found. v. Ashcroft*, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002); Representation Order, *supra* note 1758, at 18; see *United States v. Holy Land Found.*, 493 F.3d 469, 471 n.3 (5th Cir. 2007); see also Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. Times, Oct. 23, 2007, at A1; David Jackson, *Holy Land Charity Shut Down*, Dallas Morning News, Dec. 5, 2001, at 1A; Whoriskey, *supra* note 1761.

Hamas, a word meaning “zeal” in Arabic, is an acronym for “Harakat al-Muqawama al-Islamiyya,” which means “The Islamic Resistance Movement.” *Holy Land Found.*, 493 F.3d at 471 n.1; see *El-Mezain*, 664 F.3d at 485; see also Tom Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Reaves & McGonigle, *supra* note 1758. The government declared Hamas a terrorist organization on January 23, 1995. *El-Mezain*, 664 F.3d at 483, 487; *Holy Land Found.*, 333 F.3d at 159; *Holy Land Found.*, 219 F. Supp. 2d at 64 n.2.

1773. Docket Sheet, *Holy Land Found. v. Ashcroft*, No. 1:02-cv-442 (D.D.C. Mar. 8, 2002); see *Holy Land Found.*, 219 F. Supp. 2d at 64.

1774. *Holy Land Found.*, 333 F.3d 156; see *Holy Land Found.*, 219 F. Supp. 2d 57; see also Michelle Mittelstadt, *Ruling Keeps Charity's Assets Frozen*, Dallas Morning News, June 21, 2003, at 1A.

Prosecution of a Family Computer Company

On December 17, 2002, the government indicted Elashi in a separate case against his family's computer company, Infocom, alleging that the Elashis and their company (1) violated export regulations in their export of goods to Libya and Syria and (2) funneled money to Hamas through a cousin's husband, Mousa Abu Marzook, a leader of Hamas's political branch.¹⁷⁷⁵ Ghassan Elashi's indictment was included in a superseding indictment in a case against the computer company and Ghassan's brothers Bayan and Basman Elashi and Ihsan Elashyi, which was filed on February 20, 2002.¹⁷⁷⁶ Also included in the superseding indictment were a fifth brother, Hazim Elashi; the men's cousin, Nadia Elashi; and her husband Abu Marzook.¹⁷⁷⁷ The court assigned the case to Judge Sam A. Lindsay.¹⁷⁷⁸

On July 7, 2004, a jury found the brothers and their company guilty of export improprieties.¹⁷⁷⁹ On April 13, 2005, a separate jury found Ghassan, Bayan, and Basman Elashi and their company guilty of funneling funds to terrorists.¹⁷⁸⁰ Judge Lindsay sentenced Ghassan Elashi to a term of six years and eight months on October 16, 2006.¹⁷⁸¹ The other brothers' sentences ranged from five to seven years.¹⁷⁸² Nadia Elashi and Abu Marzook were

1775. United States v. Elashyi, 554 F.3d 480, 489–91 & n.2 (5th Cir. 2008); United States v. Elashi, 440 F. Supp. 2d 536, 541–43 (N.D. Tex. 2007); Docket Sheet, United States v. Elashi, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002) [hereinafter N.D. Tex. *Elashi* Docket Sheet] (D.E. 1); see *El-Mezain*, 664 F.3d at 486; see also David Brooks, Opinion Essay, *No War Is an Island*, N.Y. Times, July 29, 2014, at 21; Eric Lichtblau & Judith Miller, *5 Brothers Charged with Aiding Hamas*, N.Y. Times, Dec. 19, 2002, at A19; Cam Simpson, *Tech Company Execs, Chief in Hamas Indicted by U.S.*, Chi. Trib., Dec. 19, 2002, News, at 14.

1776. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1775.

1777. *Id.*; see *El-Mezain*, 664 F.3d at 488 & n.3; see also Chapter 15: Chicago Fundraising, *infra* page 267 (reporting on Abu Marzook's 2004 indictment in the Northern District of Illinois).

1778. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1775.

1779. *Id.*

1780. *Elashi*, 440 F. Supp. 2d at 544; N.D. Tex. *Elashi* Docket Sheet, *supra* note 1775; see Roy Appleton & Matt Stiles, *3 Guilty of Terror Dealings*, Dallas Morning News, Apr. 14, 2005, at 1B.

1781. Judgment, United States v. Elashi, No. 3:02-cr-52 (N.D. Tex. Oct. 16, 2006), D.E. 441; see Michael Grabel, *Holy Land Founder Gets 6 Years*, Dallas Morning News, Oct. 13, 2006, at 5B.

1782. Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 1, 2006), D.E. 373 (Hazim); Judgment, *id.* (Jan. 26, 2006), D.E. 371 (Ihsan); Judgment, *id.* (Oct. 16, 2006), D.E. 428 (Bayan); Judgment, *id.* (Oct. 16, 2006), D.E. 437 (Basman); see Michael Grabel, *Richard-*

fugitives.¹⁷⁸³ Ghassan's brothers were released from prison in 2008 and 2009.¹⁷⁸⁴

The Charity's First Criminal Trial

Jury selection in the Holy Land Foundation trial began on July 16, 2007.¹⁷⁸⁵ Judge Fish used a jury questionnaire.¹⁷⁸⁶

During the first few days of jury selection, Judge Fish conducted proceedings to establish waivers of conflict relating to defense attorneys' representing both the Holy Land Foundation and Abu Baker, its CEO.¹⁷⁸⁷ Elashi had signed a waiver of conflict on behalf of the foundation, but his attorney announced during these proceedings that he may not have had the authority to speak for the foundation.¹⁷⁸⁸ The foundation's attorney said that she did not think there existed anyone who could speak for the

son Man Gets 7 Years in '04 Export Case, Dallas Morning News, Oct. 12, 2006, at 11B; Tim Wyatt, *2 Sentenced for InfoCom Exports*, Dallas Morning News, Jan. 26, 2006, at 9B.

1783. See N.D. Tex. *Elashi* Docket Sheet, *supra* note 1775; see also Appleton & Stiles, *supra* note 1780.

The U.S. District Court for the Southern District of Florida issued a default judgment against Abu Marzook in a 2017 civil action for damages arising from Abu Marzook's indicted activity. Default Judgment, *Weinstock v. Abu Marzook*, No. 1:17-cv-23202 (S.D. Fla. Apr. 3, 2019), D.E. 51, 2019 WL 1470245.

1784. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting releases from prison on April 14, 2008, for Hazim, reg. no. 29685-177; October 8, 2008, for Basman, reg. no. 29686-177; January 22, 2009, for Bayan, reg. no. 29688-177; and January 30, 2009, for Ihsan, reg. no. 28265-177).

1785. Representation Order, *supra* note 1758, at 4; see Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. Times, July 17, 2007, at A14; Trahan, *supra* note 1761.

In advance of jury selection, Judge Fish granted the defendants' motion for information on how the grand and petit juries were constituted so that the defendants could assess whether there was a structural or statistical bias against Arabs or Muslims. Opinion, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), D.E. 550, 2007 WL 1452489.

1786. A. Joe Fish, *United States v. Holy Land Foundation: Jury Questionnaire* (July 16, 2007), www.fjc.gov/sites/default/files/2014/TRTXN004.pdf.

1787. *United States v. El-Mezain*, 664 F.3d 467, 574 (5th Cir. 2011); Representation Order, *supra* note 1758, at 4–5; Transcript at 1013–16, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 20, 2007, filed Sept. 25, 2008), D.E. 1195 [hereinafter July 20, 2007, N.D. Tex. *Holy Land Found.* Transcript]; Transcript at 821–23, *id.* (July 18, 2007, filed Sept. 25, 2008), D.E. 1193 [hereinafter July 18, 2007, N.D. Tex. *Holy Land Found.* Transcript]; Transcript at 523–26, *id.* (July 17, 2007, filed Sept. 25, 2008), D.E. 1192; Interview with Judge A. Joe Fish, Oct. 6, 2009.

1788. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1758, at 4–5; July 18, 2007, N.D. Tex. *Holy Land Found.* Transcript, *supra* note 1787, at 822.

foundation, so Judge Fish granted her firm's request to withdraw from representation of the foundation, and trial proceeded without the foundation's having counsel.¹⁷⁸⁹

On September 19, the jury began to deliberate.¹⁷⁹⁰ Jurors deliberated on 197 counts for nineteen days.¹⁷⁹¹ On Thursday, October 18, the jury announced a partial verdict, but Judge Fish was at a judges' conference out of town.¹⁷⁹² So the verdict was presented to Magistrate Judge Paul D. Stickney, who kept it sealed until Judge Fish's return.¹⁷⁹³

On Monday, Judge Fish unsealed the verdict.¹⁷⁹⁴ One defendant was acquitted, but the jury was deadlocked on some charges for each of the other defendants.¹⁷⁹⁵ When the judge polled the jury, three jurors said that the verdict did not represent their views, so Judge Fish ordered the jury to resume deliberations.¹⁷⁹⁶ After additional deliberation, the jury returned that day deadlocked on counts against all defendants, so Judge Fish declared a mistrial.¹⁷⁹⁷ El-Mezain, the foundation's former chairman, was ac-

1789. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1758, at 5, 13; July 20, 2007, N.D. Tex. *Holy Land Found.* Transcript, *supra* note 1787, at 1013–16; Interview with Judge A. Joe Fish, Oct. 6, 2009; see Jason Trahan, *Lawyers Debate Holy Land Foundation's Right to Attorney for Appeal*, Dallas Morning News, Jan. 13, 2010, at B7.

1790. See Jason Trahan, *Jury in Complex Holy Land Case Begins Deliberations*, Dallas Morning News, Sept. 20, 2007, at 11B; see also A. Joe Fish, *United States v. Holy Land Foundation: Jury Instructions* (Sept. 19, 2007), www.fjc.gov/sites/default/files/2014/TRTXN001.pdf.

1791. *El-Mezain*, 664 F.3d at 559; see Leslie Eaton, *Reading of Verdict in Terror Case Is Delayed*, N.Y. Times, Oct. 19, 2007, at A18; Jason Trahan, *Holy Land Verdict Sealed*, Dallas Morning News, Oct. 19, 2007, at 1A.

1792. See Eaton, *supra* note 1791; Trahan, *supra* note 1791.

Judge Fish was at an annual conference for judges handling multidistrict centralizations. Interview with Judge A. Joe Fish, Oct. 6, 2009.

1793. Interview with Judge A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1791; Trahan, *supra* note 1791.

Because they knew that Judge Fish would be out of town, several of the government's attorneys in the case also were away. See Trahan, *supra* note 1791.

Judge Stickney retired on January 10, 2018. Judicial Milestones, www.uscourts.gov/judicial-milestones/paul-d-stickney.

1794. Interview with Judge A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 1772; Jason Trahan, "There Was Not Enough Evidence," Dallas Morning News, Oct. 23, 2007, at 1A; Whoriskey, *supra* note 1761.

1795. *El-Mezain*, 664 F.3d at 559.

1796. *Id.* at 559–60; see Eaton, *supra* note 1772.

1797. *El-Mezain*, 664 F.3d at 485, 560; see Eaton, *supra* note 1772; Trahan, *supra* note 1794; Whoriskey, *supra* note 1761.

quitted of all but one charge.¹⁷⁹⁸ The jury was deadlocked on counts against all of the other defendants.¹⁷⁹⁹

The Charity's Retrial

On November 12, 2007, Judge Fish assumed senior status and took himself out of the draw for criminal cases, so Judge Jorge A. Solis assumed responsibilities for the retrial.¹⁸⁰⁰ Judge Solis also used a jury questionnaire.¹⁸⁰¹

Opening arguments in the retrial began on September 22, 2008.¹⁸⁰² On November 24, after eight days of deliberation, the jury found all defendants guilty on all 108 counts included in the retrial.¹⁸⁰³ Judge Solis sentenced Ghassan Elashi to sixty-five years in prison, a sentence to be served consecutive to the sentence in his computer-company prosecution.¹⁸⁰⁴ Abu

1798. *El-Mezain*, 664 F.3d at 560; Jury Verdicts, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. Oct. 22, 2007), D.E. 863 to 868; see Eaton, *supra* note 1772; Trahan, *supra* note 1794.

1799. *El-Mezain*, 664 F.3d at 560; see Eaton, *supra* note 1772; Trahan, *supra* note 1794.

1800. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges; Interview with Judge A. Joe Fish, Oct. 6, 2009; see Jason Trahan, *For Holy Land Judge, a Change*, Dallas Morning News, Nov. 13, 2007, at 1B; Jason Trahan, *Senate Attorney Named U.S. Judge*, Dallas Morning News, Nov. 26, 2007, at 1B.

Tim Reagan interviewed Judge Solis for this case study in his chambers on October 6, 2009. Judge Solis retired on May 1, 2016, and died on October 8, 2021. FJC Biographical Directory, *supra*.

1801. Jorge A. Solis, United States v. Holy Land Foundation: Jury Questionnaire (Sept. 4, 2008), www.fjc.gov/sites/default/files/2014/TRTXN005.pdf.

1802. See Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, Wash. Post, Sept. 21, 2008, at A2.

1803. *El-Mezain*, 664 F.3d at 483, 485, 490, 574; see Tanya Eiserer & Jason Trahan, *5 Ex-Leaders Guilty in Holy Land Trial*, Dallas Morning News, Nov. 25, 2008, at 1A; Gretel C. Kovach, *U.S. Wins Convictions in Retrial of Terrorism-Financing Case*, N.Y. Times, Nov. 25, 2008, at A16; see also Jorge A. Solis, United States v. Holy Land Foundation: Supplemental Jury Instructions (Nov. 24, 2008), www.fjc.gov/sites/default/files/2014/TRTXN003.pdf; Jorge A. Solis, United States v. Holy Land Foundation: Jury Instructions (Nov. 10, 2008), www.fjc.gov/sites/default/files/2014/TRTXN002.pdf; Opinion, Abdulqader v. United States, No. 3:13-cv-4300 (N.D. Tex. Apr. 7, 2015), D.E. 46, 2015 WL 1551080 (denying Abdulqader habeas relief); Opinion, Odeh v. United States, No. 3:13-cv-4299 (N.D. Tex. Mar. 30, 2015), D.E. 43, 2015 WL 1442836 (denying all defendants habeas relief).

1804. Judgment, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. May 29, 2009), D.E. 1298; *El-Mezain*, 664 F.3d at 490; see BOP Locator, *supra* note 1784 (noting a release date of June 24, 2068, reg. no. 29687-177); see also Jason Trahan, *5 Decry Jail Terms in Holy Land Case*, Dallas Morning News, May 28, 2009, at 1A.

Baker was also sentenced to sixty-five years; Abdulqader was sentenced to twenty years; el-Mezain and Odeh were each sentenced to fifteen years.¹⁸⁰⁵ The court of appeals affirmed the judgments.¹⁸⁰⁶ El-Mezain and Odeh were released from prison in 2021.¹⁸⁰⁷

Third-Party Confidentiality

On July 1, 2009, Judge Solis resolved a third-party matter of judicial confidentiality.¹⁸⁰⁸ In preparation for the first trial, the government filed a trial brief on May 29, 2007.¹⁸⁰⁹ As an attachment, to lay the foundation for possible admissible hearsay during trial, the government included a list of 246 individuals and organizations headed “Unindicted Co-conspirators and/or Joint Venturers.”¹⁸¹⁰ Three organizations on the list asked the court to remove from the public record all references to them.¹⁸¹¹ Judge Solis agreed to seal the trial brief attachment, but declined to excise other references to the organizations in the trial record.¹⁸¹² Judge Solis sealed his order and all documents pertaining to the organizations’ requests for relief.¹⁸¹³ Not only were the documents sealed, but their docket entries were also omitted from the public docket sheet. One organization appealed the sealing of the order, and on October 20, 2010, the court of appeals ordered it un-

The court of appeals held that Elashi’s wife’s wages could be garnished to pay Elashi’s \$3,500 special assessment. *United States v. Elashi*, 789 F.3d 547 (5th Cir. 2015).

1805. *El-Mezain*, 664 F.3d at 490; Judgment, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009), D.E. 1299 (Baker); Judgment, *id.* (May 28, 2009), D.E. 1294 (Abdulqader); Judgment, *id.* (May 28, 2009), D.E. 1293 (el-Mezain); Judgment, *id.* (May 28, 2009), D.E. 1295 (Odeh); see BOP Locator, *supra* note 1784 (noting release dates of December 12, 2025, for Abdulqader, reg. no. 32590-177, and April 3, 2064, for Abu Baker, reg. no. 32589-177); see also Trahan, *supra* note 1804.

Abdulqader’s 2013 suit for loss of personal property in prison was barred by sovereign immunity. *Abdulqader v. United States*, 596 F. App’x 515 (7th Cir. 2015).

1806. *El-Mezain*, 664 F.3d at 484, 579, *cert. denied*, 568 U.S. 977 (2012); see Jason Trahan, *Holy Land Verdicts Upheld*, Dallas Morning News, Dec. 8, 2011, at B3. See generally Wadie E. Said, Crimes of Terror 127–29 (2015).

1807. See BOP Locator, *supra* note 1784 (noting releases from prison on August 21, 2021, for Odeh, reg. no. 26548-050, and September 17, 2021, for el-Mezain, reg. no. 92412-198).

1808. Sealing Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 1, 2009), D.E. 1356; see *United States v. Holy Land Found.*, 624 F.3d 685, 689 (5th Cir. 2010).

1809. Trial Brief, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2007), D.E. 656; see *Holy Land Found.*, 624 F.3d at 688.

1810. *Holy Land Found.*, 624 F.3d at 688.

1811. *Id.* at 688–89 & n.1; Trial Brief, *supra* note 1809, at 1–2.

1812. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1808.

1813. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1808, at 20.

sealed.¹⁸¹⁴ Docket entries for the other sealed documents then became public, showing only the filing dates of sealed documents.¹⁸¹⁵ No one challenged the sealing of the trial brief attachment, and it remains sealed.¹⁸¹⁶ In May 2011, however, Judge Solis granted a motion by two of the listed organizations to unseal their filings so that they could provide them to a congressional investigation.¹⁸¹⁷

Conviction Without Representation

On September 24, 2009, the court of appeals remanded the case to Judge Solis for findings on the prosecution of the foundation without representation.¹⁸¹⁸ Because the docket sheet showed the foundation to still be represented by its original attorneys, Judge Solis did not know that the foundation was not represented at trial until sentencing.¹⁸¹⁹ On May 24, 2010, Judge Solis appointed a University of Texas law professor to represent the foundation pro bono and ruled that the foundation had been effectively represented de facto during the trials.¹⁸²⁰ The court of appeals determined that because no one could speak for the foundation, no one could authorize an appeal.¹⁸²¹

1814. *Holy Land Found.*, 624 F.3d 685; see Jason Trahan, *Judge's Ruling: Release of List Violated Group's Rights*, Dallas Morning News, Nov. 7, 2010, at B1.

1815. N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1757.

1816. *Holy Land Found.*, 624 F.3d at 689 n.3; N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1757 (D.E. 656-1).

1817. Order, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 2, 2011), D.E. 1484.

1818. Order, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Sept. 24, 2009); see *United States v. El-Mezain*, 664 F.3d 467, 575 (5th Cir. 2011).

1819. Representation Order, *supra* note 1758, at 12; Interview with Judge Jorge A. Solis, Oct. 6, 2009; see *El-Mezain*, 664 F.3d at 575.

1820. Representation Order, *supra* note 1758, at 14–19; see Trahan, *supra* note 1789.

1821. *El-Mezain*, 664 F.3d at 576–78; see *id.* at 578 (“Our foregoing analysis regarding a district court’s authority to authorize a notice of appeal is expressly confined to the facts of this case.”).

The Holy Land Foundation appealed the decision that it had been represented de facto at trial. Docket Sheet, *United States v. Holy Land Found.*, No. 10-10590 (5th Cir. June 15, 2009); see also Docket Sheet, *United States v. Holy Land Found.*, No. 10-10661 (5th Cir. June 29, 2010) (third-party appeal). The government appealed Judge Solis’s appointment of an attorney to represent the Holy Land Foundation. Docket Sheet, *United States v. Holy Land Found.*, No. 10-10690 (5th Cir. July 13, 2010). The attorney whom Judge Fish had permitted to withdraw from representing the Holy Land Foundation appealed Judge Solis’s characterization of her as being less than candid with the court about whether the Holy Land Foundation was represented at the second trial. Docket Sheet, *United States v. Abu Baker*, No. 10-10586 (5th Cir. June 15, 2009).

Judge Solis entered a final order of forfeiture against the Holy Land Foundation on January 7, 2014.¹⁸²²

Challenge: Classified Evidence

Some of the government's evidence concerning the defendants was classified.¹⁸²³ This included information obtained under the Foreign Intelligence Surveillance Act (FISA) and information provided by the government of Israel.¹⁸²⁴

Judge Fish's law clerks obtained security clearances.¹⁸²⁵ Judge Fish could store classified documents in chambers safes.¹⁸²⁶ All defense counsel also obtained security clearances,¹⁸²⁷ but they were not allowed to reveal classified information to the defendants.¹⁸²⁸ Judge Fish had to find space in the courthouse that could be fitted as a room for defense attorneys to store and review classified documents.¹⁸²⁹ A separate safe was established for each defendant.¹⁸³⁰

1822. Order, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Jan. 7, 2014).

On June 25, 2013, the U.S. Court of Appeals for the Fifth Circuit held that winners of a 2004 judgment against Hamas for a September 4, 1997, suicide bombing in Jerusalem could not recover frozen funds from the Holy Land Foundation in satisfaction of the judgment. *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013).

1823. Opinion at 4, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Nov. 2, 2006), D.E. 443 [hereinafter Nov. 2, 2006, Opinion]; see also *id.* at 13 ("the defendants have thousands of pages of classified documents that they need to translate and digest in order to prepare for trial").

1824. *Id.* at 3.

1825. Interview with Judge A. Joe Fish, Oct. 6, 2009.

1826. *Id.*

1827. *United States v. El-Mezain*, 664 F.3d 467, 518 (5th Cir. 2011); Opinion at 5–6, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Dec. 8, 2006), D.E. 484 [hereinafter Dec. 8, 2006, Opinion]; Nov. 2, 2006, Opinion, *supra* note 1823, at 17; see Steve McGonigle, *Attorney: Terror Case Not Derailed*, Dallas Morning News, Feb. 17, 2006, at 1B.

Some classified information reviewed by the court was classified above defense counsels' security clearance level. *El-Mezain*, 664 F.3d at 568.

1828. Dec. 8, 2006, Opinion, *supra* note 1827, at 3; Nov. 2, 2006, Opinion, *supra* note 1823, at 17; see *El-Mezain*, 664 F.3d at 518–19.

1829. Interview with Judge A. Joe Fish, Oct. 6, 2009; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Oct. 18, 2011.

Because of the level of classification of the documents with which defense attorneys worked, the secure room did not have to satisfy all of the technical specifications of a sensitive compartmented information facility (SCIF). Interview with Dep't of Just. Litig. Sec. Grp. Staff, Oct. 23, 2009; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act*,

Members of Judge Solis's staff also obtained security clearances, including a career law clerk, the courtroom deputy, and the court reporter.¹⁸³¹ Judge Solis also kept classified documents in a chambers safe.¹⁸³²

Challenge: FISA Evidence

Evidence against the defendants was based in part on surveillance authorized by the FISA court.¹⁸³³

In April 2005, the government mistakenly disclosed to cleared defense counsel the contents of FISA surveillance order applications.¹⁸³⁴ This is not the usual procedure for affording a defendant an opportunity to challenge evidence based on FISA surveillance orders.¹⁸³⁵ The usual procedure is for the government to present the FISA order records to the district judge *ex parte*.¹⁸³⁶ In fact, Judge Fish spent several days conducting an *in camera* review of FISA orders leading to evidence the government sought to use in the case.¹⁸³⁷ The court of appeals also reviewed the FISA orders *in camera* and *ex parte*.¹⁸³⁸

Judge Fish was at a conference in another city when—in the lobby of his hotel—he received an emergency motion from the FBI stating that FISA applications had been inadvertently disclosed to defense attorneys.¹⁸³⁹ The FBI asked the judge for relief because the attorneys refused to return them.¹⁸⁴⁰ Judge Fish issued an order preserving the status quo, and then ultimately he substantially granted the FBI the requested relief.¹⁸⁴¹

The government also produced to defense counsel evidence obtained as a result of the FISA orders.¹⁸⁴² Much of this evidence was in the form of declassified “tech-cuts,” which are English-language summaries of record-

and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1830. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Oct. 18, 2011.

1831. Interview with Judge Jorge A. Solis, Oct. 6, 2009.

1832. *Id.*

1833. *El-Mezain*, 664 F.3d at 485, 487, 563–70; see McGonigle, *supra* note 1827.

1834. See McGonigle, *supra* note 1827.

1835. See *id.*

1836. *El-Mezain*, 664 F.3d at 565, 567; see McGonigle, *supra* note 1827.

1837. Opinion at 5, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), D.E. 710, 2007 WL 2011319.

1838. *El-Mezain*, 664 F.3d at 567.

1839. Interview with Judge A. Joe Fish, Oct. 6, 2009.

1840. *Id.*

1841. *Id.*

1842. Nov. 2, 2006, Opinion, *supra* note 1823, at 3.

ed conversations.¹⁸⁴³ Defense counsel discovered some errors in the summaries, and Judge Fish declared the errors to be “disturbing,” but the defendants did not present evidence of sufficient inaccuracies to require a remedy.¹⁸⁴⁴

The government also declassified some of the defendants’ recorded conversations, and that evidence could be shared with the defendants.¹⁸⁴⁵ The court approved an offer by the government to seek declassification of additional conversations, which were in Arabic, that defense counsel, who did not speak Arabic, could specifically identify.¹⁸⁴⁶ Defense counsel argued that the offer was unconstitutional because it required them to reveal too much about their own conversations with their clients and their trial strategy.¹⁸⁴⁷ Judge Fish overruled this objection.¹⁸⁴⁸

It was understood that any FISA evidence that the government presented at trial would have to be declassified and provided to the individual defendants before trial.¹⁸⁴⁹

Challenge: Witness Security

Two trial witnesses testified under cover.¹⁸⁵⁰ Judge Fish agreed to exclude the public from the courtroom during their testimony, permit the witnesses to enter and exit the courtroom through a nonpublic door, and permit the witnesses to testify under pseudonyms.¹⁸⁵¹ The defendants and their

1843. Dec. 8, 2006, Opinion, *supra* note 1827, at 7; Nov. 2, 2006, Opinion, *supra* note 1823, at 3, 18 n.6; see *El-Mezain*, 664 F.3d at 518.

1844. Opinion at 5, *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), D.E. 550, 2007 WL 628059.

1845. *El-Mezain*, 664 F.3d at 518; Nov. 2, 2006, Opinion, *supra* note 1823, at 17.

1846. *El-Mezain*, 664 F.3d at 519; Dec. 8, 2006, Opinion, *supra* note 1827, at 5–6; Nov. 2, 2006, Opinion, *supra* note 1823, at 17, 22.

1847. Nov. 2, 2006, Opinion, *supra* note 1823, at 17; see Opinion at 5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 5, 2007), D.E. 704, 2007 WL 1974769 (“as of the end of February[2007,] defense counsel had presented no classified communications to the government for declassification”); Nov. 2, 2006, Opinion, *supra* note 1823, at 4 (“To the court’s knowledge, the defendants have yet to request that any specific FISA intercepts be declassified.”).

1848. Nov. 2, 2006, Opinion, *supra* note 1823, at 19–20.

1849. Dec. 8, 2006, Opinion, *supra* note 1827, at 6.

1850. *El-Mezain*, 664 F.3d at 490–94.

1851. *Id.* at 490; Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), D.E. 709, 2007 WL 2004458; Opinion, *id.* (May 4, 2007), D.E. 628 [hereinafter May 4, 2007, Opinion]; see Jason Trahan, *Another Anonymous Witness Testifies in Holy Land Case*, Dallas Morning News, Aug. 16, 2007, at 17B [hereinafter *Another Anonymous Wit-*

immediate family members were permitted to see the witnesses, but members of the press and public could only listen to an audio feed in another courtroom.¹⁸⁵² The witnesses' identities were not disclosed to defense counsel.¹⁸⁵³

Judge Fish also approved a government proposal, to which the defendants did not object, that the secret witnesses be permitted to consult counsel before answering questions under cross-examination that called on them to reveal classified information.¹⁸⁵⁴ Judge Fish observed that "information that is classified under Israeli law is also classified under American law."¹⁸⁵⁵

One witness was a lawyer in the counterterrorism section of the Israel Security Agency (ISA), also known as Shin Bet, who was to testify as an expert on Hamas financing.¹⁸⁵⁶ Israeli law prohibits the disclosure of ISA agents' identities.¹⁸⁵⁷ He testified under the alias "Avi."¹⁸⁵⁸ The other witness worked for the Israeli Defense Forces, which looks to ISA rules for the protection of its personnel.¹⁸⁵⁹ He testified as a fact witness under the alias "Major Lior."¹⁸⁶⁰

Both witnesses testified under cover in the retrial as well.¹⁸⁶¹

ness]; Jason Trahan, *Holy Land Trial Turns to Israeli Agent*, Dallas Morning News, Aug. 10, 2006, at 7B [hereinafter *Israeli Agent*]; Whoriskey, *supra* note 1761.

1852. May 4, 2007, Opinion, *supra* note 1851; see Trahan, *Israeli Agent*, *supra* note 1851.

Judge Fish observed that an advantage of providing a space for members of the public to watch a live audiovisual presentation of the trial was that members of the news media could use electronic devices without disturbing the proceedings. Interview with Judge A. Joe Fish, Oct. 6, 2009.

1853. *El-Mezain*, 664 F.3d at 490, 493; see Trahan, *Israeli Agent*, *supra* note 1851.

1854. May 4, 2007, Opinion, *supra* note 1851.

1855. *Id.* at 6; see *El-Mezain*, 664 F.3d at 492.

1856. *El-Mezain*, 664 F.3d at 489–90; Opinion at 3–5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 16, 2007), D.E. 717, 2007 WL 2059722; May 4, 2007, Opinion, *supra* note 1851; see Trahan, *Another Anonymous Witness*, *supra* note 1851.

1857. May 4, 2007, Opinion, *supra* note 1851; see *El-Mezain*, 664 F.3d at 490.

1858. *El-Mezain*, 664 F.3d at 489–90; see Said, *supra* note 1806, at 102–04; Trahan, *Another Anonymous Witness*, *supra* note 1851.

1859. *El-Mezain*, 664 F.3d at 490; May 4, 2007, Opinion, *supra* note 1851; see Trahan, *Israeli Agent*, *supra* note 1851.

1860. *El-Mezain*, 664 F.3d at 490; see Trahan, *Israeli Agent*, *supra* note 1851.

1861. *El-Mezain*, 664 F.3d at 489–90; see Jason Trahan, *Jurors to Hear Key Israeli Witnesses*, Dallas Morning News, Oct. 20, 2008, at 1B.

Challenge: Jury Security

So that jurors would not have to pass through a gauntlet of reporters, Judge Fish had them meet at a secret location from which they were shuttled to the courthouse, and they came to the courtroom floor in a secure elevator.¹⁸⁶² Even Judge Fish did not know where the jurors met each morning.¹⁸⁶³ Jurors took lunch in the jury room.¹⁸⁶⁴

Judge Solis chose not to implement special procedures for jurors in the retrial so as not to communicate to the jurors that the case was unusual.¹⁸⁶⁵

1862. Interview with Judge A. Joe Fish, Oct. 6, 2009.

1863. *Id.*

1864. *Id.*

1865. Interview with Judge Jorge A. Solis, Oct. 6, 2009.

Chapter 15

Chicago Fundraising

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

A prosecution for material support to Hamas resulted in convictions for obstruction of justice but acquittals for material support. Classified evidence and witness security were among the court's challenges.

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On August 19, 2004, the United States indicted three men for helping to fund Hamas: Muhammad Abdul Hamid Khalil Salah, Abdelhaleem Hassan Abdelraziq Ashqar, and Mousa Mohammed Abu Marzook.¹⁸⁶⁶ The

¹⁸⁶⁶ United States v. Marzook, 435 F. Supp. 2d 778, 779–80 (N.D. Ill. 2006) (denying Ashqar's motion to suppress evidence derived from a warrantless search of his home); United States v. Marzook, 435 F. Supp. 2d 708, 711–12 (N.D. Ill. 2006) (denying Salah's motion to suppress his confession); United States v. Marzook, 426 F. Supp. 2d 820 (N.D. Ill. 2006) (denying Salah's motion to dismiss count I); United States v. Abu Marzook, 412 F. Supp. 2d 913, 915 (N.D. Ill. 2006) (granting a motion to close a hearing); United States v. Marzook, 383 F. Supp. 2d 1056, 1057 (N.D. Ill. 2005) (denying Salah's motion to dismiss count II); Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 894 (N.D. Ill. 2004) (related civil action); Second Superseding Indictment, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004), D.E. 59; see Eric Lichtblau, *U.S. Indicts 3 on Charges of Helping Militant Group*, N.Y. Times, Aug. 21, 2004, at A6; Todd Lighty & Laurie Cohen, *Hamas Probe Nearly Fell Apart*, Chi. Trib., Aug. 22, 2004, Metro, at 1; Matt O'Connor & Laurie Cohen, *U.S. Says Bridgeview Man, 2 Others Financed, Recruited for Terror Group*, Chi. Trib., Aug. 21, 2004, News, at 1. See generally Human Rights Watch, *Illusion of Justice* 78–79, 96, 105, 112, 126, 190–91, 196–97 (2014).

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.¹⁸⁶⁷

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 1970.¹⁸⁶⁸ He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip checkpoint and charged with providing aid to Hamas.¹⁸⁶⁹ Police found \$97,400 in his Jerusalem YMCA hotel room.¹⁸⁷⁰ In January 1995, after a trial lasting a year, he pleaded guilty in an Israeli military

1867. Docket Sheet, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter N.D. Ill. *Abu Marzook* Docket Sheet]; see Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, Chi. Trib., Nov. 4, 2003, Metro, at 1; *Palestinian Activist Faces New Charge*, Chi. Trib., June 26, 2004, Metro, at 16 [hereinafter *New Charge*].

The indictment against Salah, Ashqar, and Marzook was filed as the second superseding indictment in the preexisting case against Ashqar.

Tim Reagan interviewed Judge St. Eve for this case study in her chambers on July 2, 2007. Judge St. Eve was elevated to the U.S. Court of Appeals for the Seventh Circuit on May 23, 2018. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

1868. See Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, Chi. Trib., June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 1866; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, N.Y. Times, Oct. 20, 2006, at A16.

1869. *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 1868.

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.”).

1870. *One 1997 E35 Ford Van*, 50 F. Supp. 2d at 794; see Jackson et al., *supra* note 1869 (reporting \$96,400 found); Sander, *2 Men Cleared*, *supra* note 1869 (reporting \$97,000 found); Sander, *supra* note 1868 (same).

court to channeling funds to Hamas's military operation and was sentenced to five years in prison.¹⁸⁷¹ He was released in November 1997.¹⁸⁷²

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."¹⁸⁷³ On June 9, 1998, the government filed a civil forfeiture action against Salah and the Quranic Literacy Institute, for whom Salah volunteered, alleging that they laundered money for Hamas.¹⁸⁷⁴

1871. *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 1869; Sander, *supra* note 1868.

1872. *One 1997 E35 Ford Van*, 50 F. Supp. 2d at 795.

Previously a used-car dealer and a grocer in the suburban Chicago community of Bridgeview, more recently Salah drove dialysis patients to and from treatment. See Jackson et al., *supra* note 1869; Sander, *supra* note 1868. 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 1868; Lighty & Cohen, *supra* note 1866. 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 1866.

1873. *Boim*, 340 F. Supp. 2d at 917; *One 1997 E35 Ford Van*, 50 F. Supp. 2d at 793; see Laurie Cohen, Stephen Franklin & Sam Roe, *Struggle for the Soul of Islam*, Chi. Trib., Feb. 8, 2004, News, at 1; Matt O'Connor, *FBI Seizes \$1 Million Linked to Terrorism*, Chi. Trib., June 10, 1998, News, at 1.

1874. Docket Sheet, *United States v. One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998); see Cohen, et al., *supra* note 1873; William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Jackson et al., *supra* note 1869; Lighty & Cohen, *supra* note 1866.

The Quranic Literacy Institute's stated purpose was to translate Islamic texts. *One 1997 E35 Ford Van*, 50 F. Supp. 2d at 794; see Andrew Martin, *Religious Group Denies Terrorist Link*, Chi. Trib., Oct. 20, 1998, Metro Chi., at 4.

The U.S. District Court for the Northern District of Illinois assigned the forfeiture action to Judge Wayne R. Andersen. Docket Sheet, *supra*; see Matt O'Connor, *Bridgeview Family Challenges Seizure*, Chi. Trib., June 16, 1998, Metro Chi., at 3. On November 20, 2009, Judge Andersen signed a stipulated resolution of the action approving the forfeiture and permitting Salah's wife to buy from the government his forfeited share of their house. Stipulation, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. Nov. 20, 2009), D.E. 88 (approving forfeiture of \$1 million and a van against the Quranic Literacy Institute and forfeiture of \$1.2 million and a house against Salah); see Transcript, *id.* (Nov. 20, 2009, filed Jan. 26, 2010), D.E. 104. The court of appeals denied a third-party appeal, Opinion, *United States v. Kadi*, No. 10-1758 (7th Cir. May 21, 2010), D.E. 22, *cert. denied*, 562 U.S. 1221 (2011).

Judge Andersen retired on July 31, 2010. FJC Biographical Directory, *supra* note 1867.

In 2000, Salah and the Quranic Literacy Institute were among the defendants in a civil action for the alleged 1996 Hamas killing of David Boim.¹⁸⁷⁵ The parents attached to their complaint the government's forfeiture action against Salah and the institute.¹⁸⁷⁶ On December 3, 2008, the court of appeals reversed a summary judgment against Salah, because he was in an Israeli prison between the time that providing material support to Hamas became a crime and Boim's killing.¹⁸⁷⁷

Abdelhaleem Ashqar

Ashqar, also a Palestinian born on the West Bank,¹⁸⁷⁸ was jailed in Manhattan on February 23, 1998, for refusing to testify before a grand jury investigating Hamas funding.¹⁸⁷⁹ Although offered immunity, Ashqar refused to cooperate, and he was jailed for civil contempt.¹⁸⁸⁰ Ashqar protested his jailing with a hunger strike.¹⁸⁸¹ 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.¹⁸⁸² He was released after six months

1875. See Chapter 14: Prosecution of a Charity, *supra* page 252.

1876. Complaint, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998), D.E. 1, attached as ex. A, Complaint, *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000), D.E. 1.

1877. *Boim v. Holy Land Found.*, 549 F.3d 685, 691 (7th Cir. 2008), *cert. denied*, 558 U.S. 981 (2009); Transcript at 4, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Mar. 6, 2009, filed May 23, 2011), D.E. 863 (noting dismissal of the complaint against Salah); see also Opinion, *id.* (Oct. 27, 2010), D.E. 854, 2010 WL 4504876 (denying Salah's petition for costs).

1878. Opinion, *Ashqar v. Hott*, No. 1:19-cv-716 (E.D. Va. June 5, 2019), D.E. 8 [hereinafter E.D. Va. Opinion], 2019 WL 2712276; Report and Recommendation, *Ashqar v. LaRose*, No. 4:18-cv-1141 (N.D. Ohio Mar. 26, 2019), D.E. 37 [hereinafter N.D. Ohio Report and Recommendation], 2019 WL 1793000.

1879. *United States v. Ashqar*, 582 F.3d 819, 821 (7th Cir. 2009); *In re Grand Jury Subpoena*, 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 1869; Sander, *supra* note 1868. He came to the United States on an academic fellowship. See Sander, *supra* note 1868.

1880. *Ashqar*, 582 F.3d at 821; *Grand Jury Subpoena*, 150 F.3d at 171; see Weiser, *supra* note 1879.

1881. *Ashqar*, 582 F.3d at 821; *Grand Jury Subpoena*, 150 F.3d at 171; see Weiser, *supra* note 1879.

1882. *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.

in prison on a finding that continued confinement would not induce testimony.¹⁸⁸³

On June 25, 2003, Ashqar refused to testify before a Chicago grand jury investigating links to Middle East terrorism, and he was jailed for civil contempt on September 5.¹⁸⁸⁴ Ashqar again protested his imprisonment for contempt with a hunger strike.¹⁸⁸⁵ After the court of appeals affirmed the holding of civil contempt against Ashqar,¹⁸⁸⁶ the government indicted him for criminal contempt.¹⁸⁸⁷ Judge St. Eve released Ashqar to home detention in Virginia on bail after two months of confinement.¹⁸⁸⁸ On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.¹⁸⁸⁹ Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.¹⁸⁹⁰

Mousa Abu Marzook

Not tried, Abu Marzook was the third man named in the case, a Palestinian, and a senior Hamas official.¹⁸⁹¹ He was an American resident detained

1883. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Proceedings*, 347 F.3d 197, 200 (7th Cir. 2003); see *Court Upholds Jailing of Activist*, Chi. Trib., Oct. 5, 2003, Metro, at 3 [hereinafter *Jailing*] (reporting that Ashqar lost about fifty pounds in prison).

1884. *Ashqar*, 582 F.3d at 821–22; *Grand Jury Proceedings*, 347 F.3d at 201; see Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003), D.E. 1 [hereinafter *Ashqar Indictment*]; see also *Jailing*, *supra* note 1883.

1885. See *Jailing*, *supra* note 1883; Franklin & Cohen, *supra* note 1879.

1886. *Grand Jury Proceedings*, 347 F.3d 197; see *Jailing*, *supra* note 1883.

1887. *Ashqar Indictment*, *supra* note 1884; see *Ashqar*, 582 F.3d at 822; see also Franklin & Cohen, *supra* note 1879.

1888. See N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1867; see also O'Connor, *supra* note 1867; Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

1889. Superseding Indictment, *Ashqar*, No. 1:03-cr-978 (N.D. Ill. June 24, 2004), D.E. 47; see *Ashqar*, 582 F.3d at 822; see also *New Charge*, *supra* note 1867.

1890. 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.

1891. *In re Extradition of Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996); *Marzook v. Christopher*, No. 1:96-cv-4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996); see *United States v. El-Mezain*, 664 F.3d 467, 486 (5th Cir. 2011); see also Alan Cowell, *European Court Reverses Designation of Hamas as a Terrorist Organization*, N.Y. Times, Dec. 18, 2014 (referring to Abu Marzook as a senior Hamas leader); Stephen Franklin, *Terror Bombs Rip Hopes in Mideast*, Chi. Trib., July 31, 1997, News, at 1 (identifying Abu Marzook as Hamas's former political leader); Youssef M. Ibrahim, *Hamas Political Chief Says Group Can't Curb Terrorists*, N.Y. Times, Mar. 9, 1996, at 5 ("in his first interview since his detention, Mr. Abu Marzook, 45, a businessman, said he was the head of the political

in New York as a suspected terrorist on July 25, 1995, while returning from a five-month trip abroad.¹⁸⁹² During his trip, he was expelled from Jordan at the United States's urging after setting up a Hamas support office in Amman.¹⁸⁹³ Five days after his detention, Israel decided to seek his extradition.¹⁸⁹⁴ On May 7, 1996, the district court in Manhattan approved extradition.¹⁸⁹⁵

While his appeal was pending, Abu Marzook decided to stop challenging his extradition, which meant that he would have to be extradited or

bureau of Hamas"); Dina Kraft, Laura King & Hana Salah, *Israel Rebuffs Pressure to Halt Fighting*, L.A. Times, May 20, 2021, at A1 (referring to Abu Marzook as a senior Hamas political leader); 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").

1892. *Marzook*, 924 F. Supp. at 574; *Marzook*, 1996 WL 583378, at *1; see *United States v. Elashyi*, 554 F.3d 480, 490 (5th Cir. 2008); see also 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.

1893. See Greenhouse, *supra* note 1892; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 1892.

1894. See Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

1895. *Marzook*, 924 F. Supp. 565; see *Marzook*, 1996 WL 583378, at *2; see also Don Van Natta, Jr., *Judge Orders Hamas Leader Extradited to Israel*, N.Y. Times, May 9, 1996, at 9.

Abu Marzook became a specially designated terrorist on August 16, 1995. *Elashyi*, 554 F.3d at 490, 498.

Judge Kevin Thomas Duffy also denied Abu Marzook's petition for habeas corpus relief. *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 U.S. Court of Appeals for the Second Circuit 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).

Judge Judge Duffy retired on September 30, 2016, and died on April 1, 2020. FJC Biographical Directory, *supra* note 1867.

freed within sixty days.¹⁸⁹⁶ A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.¹⁸⁹⁷ Fearing retaliatory terrorist attacks in Israel, Prime Minister Benjamin Netanyahu told the United States on April 2, 1997, that Israel no longer wanted Abu Marzook extradited to Israel.¹⁸⁹⁸ Abu Marzook remained detained pending immigration exclusion proceedings, and one month later Jordan announced that it would accept Abu Marzook back.¹⁸⁹⁹ He was deported to Jordan on May 5.¹⁹⁰⁰

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.¹⁹⁰¹ Jordan deported him in 1999.¹⁹⁰² He was reported to be in Syria in 2001.¹⁹⁰³ In 2002, the fugitive Abu Marzook was indicted in the Northern District of Texas for conspiring with a computer business owned by his wife's cousins to fund terrorism.¹⁹⁰⁴ From 2006 through 2011, identified as the deputy political bureau chief of Hamas, he published opinion essays in the *Wash-*

1896. See Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

1897. See Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

1898. See Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

1899. 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 1892; 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.

1900. See MacFarquhar, *supra* note 1892.

1901. 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.

1902. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006–07 (N.D. Ill. 2001).

1903. 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).

1904. *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying co-defendants' posttrial motions for acquittal); Docket Sheet, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002); see Chapter 14: Prosecution of a Charity, *supra* page 252; Lichtblau & Miller, *supra* note 1775; Simpson, *supra* note 1775.

ington Post,¹⁹⁰⁵ the *Los Angeles Times*,¹⁹⁰⁶ and the *Guardian*.¹⁹⁰⁷ He resettled in Cairo.¹⁹⁰⁸

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.¹⁹⁰⁹ 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.¹⁹¹⁰

Salah's prosecution was based in part on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.¹⁹¹¹ But Salah argued that the confession was obtained by more than fifty days of torture by the Israeli secret police.¹⁹¹² Salah also argued that his financial activity was humanitarian, intended to aid the Palestinian people and not to support terrorism.¹⁹¹³ Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.¹⁹¹⁴

1905. Mousa Abu Marzook, Opinion Essay, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections).

1906. Mousa Abu Marzook, Opinion Essay, *Palestinian Statehood: What Is the U.N.'s Role?*, L.A. Times, June 12, 2011, at 30 (promoting a U.N. resolution recognizing a Palestinian state); Mousa Abu Marzook, Opinion Essay, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at 15 (inviting the President to visit a Palestinian refugee camp); Mousa Abu Marzook, Opinion Essay, *Hamas' Stand*, L.A. Times, July 10, 2007 (concerning the release of a BBC journalist).

1907. Mousa Abu Marzook, Opinion Essay, *Hamas Is Ready to Talk*, Guardian (London), Aug. 16, 2007, at 34 (extolling the virtues of Hamas's governing).

1908. See David D. Kirkpatrick & Isabel Kershner, *Israel Is Anxiously Watching Egyptian Vote*, N.Y. Times, May 26, 2012, at 11; Jodi Rudoren, *Hamas Emerges Buoyant Despite Bloodshed and Devastation in Gaza*, N.Y. Times, Sept. 4, 2014, at 5.

1909. See Lichtblau, *supra* note 1866; Lighty & Cohen, *supra* note 1866; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 1866.

1910. See O'Connor, *supra* note 1909.

1911. 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 1869; Sander, *supra* note 1868.

1912. See Sander, *2 Men Cleared*, *supra* note 1869; Sander, *supra* note 1868.

1913. See Eggen, *supra* note 1879; Jackson et al., *supra* note 1869; Sander, *2 Men Cleared*, *supra* note 1869; Sander, *supra* note 1868.

1914. 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.

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 1993.¹⁹¹⁵ 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.¹⁹¹⁶

The trial began on October 12, 2006.¹⁹¹⁷ The jury began to deliberate on January 11, 2007,¹⁹¹⁸ and on February 1 the jury acquitted Salah and Ashqar of aiding terrorists.¹⁹¹⁹ The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.¹⁹²⁰ Judge St. Eve sentenced Salah to one year and nine months in prison,¹⁹²¹ and she sentenced Ashqar to eleven years and three months.¹⁹²² The court of appeals affirmed the convictions and sentences.¹⁹²³ Salah was

1915. *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 1869.

1916. *Marzook*, 435 F. Supp. 2d at 788–94.

1917. Minute Entry, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006), D.E. 767.

1918. Minute Entry, *id.* (Jan. 11, 2007), D.E. 882; see Jury Instructions, *id.* (Jan. 12, 2007), D.E. 881; see also Azam Ahmed, *Deliberations Begin in Hamas Case*, Chi. Trib., Jan. 12, 2007, Metro, at 8.

1919. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007), D.E. 908; see *United States v. Ashqar*, 582 F.3d 819, 822 (7th Cir. 2009); see also Rudolph Bush & Jeff Coen, *Two Found Not Guilty of Supporting Hamas*, Chi. Trib., Feb. 2, 2007, News, at 1; Eggen, *supra* note 1879; Sander, *2 Men Cleared*, *supra* note 1869.

1920. *Ashqar*, 582 F.3d at 822; see Bush & Coen, *supra* note 1919; Eggen, *supra* note 1879; Sander, *2 Men Cleared*, *supra* note 1869.

Salah's conviction for obstruction of justice was for false answers to interrogatories in the Boims' civil case against him. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 25, 2007), D.E. 948; see Bush & Coen, *supra* note 1919; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

1921. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2007), D.E. 973; see Michael Higgins, *21-Month Sentence for Salah*, Chi. Trib., July 12, 2007, Metro, at 1; Sander, *American Gets Prison*, *supra* note 1920.

1922. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007), D.E. 1031; see *Ashqar*, 582 F.3d at 822; see also *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

1923. *Ashqar*, 582 F.3d at 821, 827, *cert. denied*, 559 U.S. 974 (2010).

released from prison on April 10, 2009.¹⁹²⁴ Salah was diagnosed with stage four kidney cancer in June 2010.¹⁹²⁵ In September 2011, Judge St. Eve terminated Salah's supervised release seven months early.¹⁹²⁶ He died in April 2016.¹⁹²⁷

Ashqar was released on June 13, 2017, and transferred to immigration authorities for deportation to Jordan pursuant to a 2003 removal order.¹⁹²⁸ Jordan, however, declined to accept him.¹⁹²⁹ It also declined permission for Ashqar to travel through Jordan to get to the West Bank.¹⁹³⁰ So Ashqar was released from immigration detention, with supervision, on December 21, 2018.¹⁹³¹

On June 4, 2019, however, Ashqar was again detained.¹⁹³² While Ashqar was on a plane bound for Israel with a planned refueling stop in Vienna, Asqar's attorney filed a habeas corpus petition in the Eastern District of Virginia at about 6:30 p.m.¹⁹³³ Judge T.S. Ellis III heard a motion for a temporary restraining order at 10:00 that evening and ordered the government not to deliver Ashqar to Israel until the court could rule on the motion.¹⁹³⁴ So Ashqar was flown back to the United States.¹⁹³⁵ On June

Judge St. Eve denied Ashqar's habeas corpus petition alleging ineffective assistance of counsel. Opinion, *Ashqar v. United States*, No. 1:11-cv-569 (N.D. Ill. Sept. 29, 2011), D.E. 26, 2011 WL 4540729.

1924. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 21677-424).

1925. Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Sept. 13, 2011), D.E. 1092.

1926. Minute Entry, *id.* (Sept. 20, 2011), D.E. 1094.

1927. *See Illinois Report*, Springfield State J.-Reg., Apr. 26, 2016, Ill. News, at 16.

1928. N.D. Ohio Report and Recommendation, *supra* note 1878, at 3 (opinion in a habeas corpus case challenging immigration detention); BOP Locator, *supra* note 1924 (reg. no. 41500-054); *see* Karen DeYoung, *Attempted Deportation of Palestinian Man Reveals a Tangled Legal Odyssey*, Wash. Post, June 16, 2019, at A11; *Va. Man Back in U.S. After Court Questions Deportation*, Winston-Salem J., June 9, 2019, at A17.

1929. N.D. Ohio Report and Recommendation, *supra* note 1878, at 4, 6–7.

1930. *Id.* at 10–11.

1931. *Id.* at 12, 15, *adopted*, Order, *Ashqar v. Adducci*, No. 4:18-cv-1141 (N.D. Ohio Apr. 24, 2019), D.E. 38 (dismissing case).

1932. E.D. Va. Opinion, *supra* note 1878, at 4.

1933. *Id.* at 1, 4–5; Docket Sheet, *Ashqar v. Hott*, No. 1:19-cv-716 (E.D. Va. June 4, 2019) (D.E. 1).

1934. E.D. Va. Opinion, *supra* note 1878, at 5.

1935. *See* DeYoung, *supra* note 1928.

5, Judge Ellis denied the petition.¹⁹³⁶ After further detention, Ashqar was returned to his home in Virginia, where he awaited subsequent deportation with an ankle bracelet.¹⁹³⁷

Challenge: Foreign Evidence

Salah sought to discover Israeli police documents to support his claim that his Israeli confession was obtained by torture and coercion.¹⁹³⁸ Judge St. Eve suggested that he follow letters-rogatory procedures, but Salah ultimately relied on testimony from Israeli police officers.¹⁹³⁹

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).¹⁹⁴⁰ It was unprecedented for such officers to provide testimony outside of Israel.¹⁹⁴¹

1936. Order, *Ashqar*, No. 1:19-cv-716 (E.D. Va. June 5, 2019), D.E. 2019 WL 2719557, *appeal voluntarily dismissed*, Order, *Ashqar v. Hott*, No. 19-6804 (4th Cir. Sept. 9, 2019), D.E. 19; E.D. Va. Opinion, *supra* note 1878.

1937. *See Case Stalled Months After an Aborted Deportation to Israel*, Winston-Salem J., Sept. 26, 2019, at B2.

1938. Salah's Discovery Motion, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005), D.E. 342; *see Higgins, supra* note 1911.

1939. Interview with Judge Amy St. Eve, July 2, 2007; *see* 28 U.S.C. § 1781 (2020); Fed. R. Civ. P. 28(b). *See generally* T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory* (Federal Judicial Center 2014).

1940. *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." *Id.* at 918.

1941. *Abu Marzook*, 412 F. Supp. 2d at 918 ("Israel has never before permitted ISA agents to give live testimony in the United States."); Government's Time Extension Motion at 2, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 16, 2005), D.E. 350 ("The appearance of the ISA operational personnel as witnesses in a proceeding outside the State of Israel is unprecedented."); *see* Michael Higgins, *supra* note 1940 (quoting the government's brief).

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.¹⁹⁴² The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.¹⁹⁴³ All other persons in court during the testimony had security clearances.¹⁹⁴⁴

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.¹⁹⁴⁵ The agents and their Israeli attorneys were identified in court documents by code names.¹⁹⁴⁶ But Judge St. Eve denied a request that they testify in "light disguise," because Salah had already seen them, the public would not see them, and the government had presented no evidence of security concerns respecting the attorneys and court staff who would see them.¹⁹⁴⁷

The hearing was open for the testimony of other witnesses, including Israeli police officers.¹⁹⁴⁸

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.¹⁹⁴⁹ Again Judge St. Eve permitted the witnesses to use private entrances.¹⁹⁵⁰ She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.¹⁹⁵¹ 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 credibil-

1942. *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.

1943. *Abu Marzook*, 412 F. Supp. 2d at 917; see Minute Entry at 4, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 29, 2006), D.E. 652 [hereinafter Aug. 29, 2006, *Abu Marzook* Minute Entry] ("[T]hese ISA agents and their families face a serious, legitimate risk of grave danger if they are publicly identified. . . . Terrorist organizations have targeted ISA agents.").

1944. *Abu Marzook*, 412 F. Supp. 2d at 919.

1945. *Id.* at 928; see Higgins, *supra* note 1942.

1946. See Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

1947. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

1948. *Id.* at 928; see Higgins, *supra* note 1942.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1867.

1949. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, 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 1879.

1950. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, at 6.

1951. *Id.* at 4; see Bush, *Conspiring with Israel*, *supra* note 1949.

ity.¹⁹⁵² But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.¹⁹⁵³ Judge St. Eve decided that the rest of the trial would be public.¹⁹⁵⁴

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.¹⁹⁵⁵ Second, to prevent the jury from knowing 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.¹⁹⁵⁶

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)¹⁹⁵⁷ to a substantial amount of classified evidence.¹⁹⁵⁸ Classified documents were stored in a safe in Judge St. Eve's chambers, to which only the judge and a cleared court reporter had the combination.¹⁹⁵⁹ For hearings concerning classified documents, the court reporter used a laptop provided by the classified information security officer, which also was stored in the safe.¹⁹⁶⁰

1952. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, at 5–6; see Bush, *Conspiring with Israel*, *supra* note 1949.

1953. Interview with Judge Amy St. Eve, July 2, 2007.

1954. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, at 5; see Bush, *Conspiring with Israel*, *supra* note 1949.

1955. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, at 4–5; see Bush, *Conspiring with Israel*, *supra* note 1949; Bush, *Torture Denied*, *supra* note 1949.

1956. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1943, at 5–6.

1957. 18 U.S.C. app. 3 (2020); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

1958. Interview with Judge Amy St. Eve, July 2, 2007; see Robert Timothy Reagan, *Classified Information in Federal Court*, 53 Vill. L. Rev. 889, 889–911 (2008).

1959. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 924 (N.D. Ill. 2006) (describing documents as kept under seal); Interview with Judge Amy St. Eve, July 2, 2007 (noting that there were two cleared court reporters in the Chicago courthouse).

1960. Interview with Judge Amy St. Eve, July 2, 2007; see Reagan, *supra* note 1957, at 21–22 (providing information about classified information security officers).

Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances.¹⁹⁶¹ The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law-clerk assistance.¹⁹⁶²

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.¹⁹⁶³

Deputy marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.¹⁹⁶⁴

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.¹⁹⁶⁵

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.¹⁹⁶⁶ For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.¹⁹⁶⁷ Judge St. Eve approved these evidence substitutions.¹⁹⁶⁸ 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.¹⁹⁶⁹ As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.¹⁹⁷⁰

1961. Interview with Judge Amy St. Eve, July 2, 2007.

1962. *Id.*

1963. *Id.*

1964. *Id.*

1965. *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); *see Higgins*, *supra* note 1942.

1966. *United States v. Salah*, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

1967. *Id.* at 917.

1968. *Id.* at 925.

1969. *Id.* at 919–24.

1970. *Id.* at 925.

To explain to the jury why some topics were being skirted during examination of the witnesses, Judge St. Eve prepared a jury instruction to accompany presentation of the admissions:

This case involves certain classified information. Classified information is information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure. In lieu of disclosing specific classified information, I anticipate that you will hear certain substitutions for the classified information during this trial. These substitutions are admissions of relevant facts by the United States for purposes of this trial. The witnesses in this case as well as attorneys are prohibited from disclosing classified information and, in the case of the attorneys, are prohibited from asking questions to any witness which if answered would disclose classified information. Defendants may not cross examine a particular witness regarding the underlying classified matters set forth in these admissions. You must decide what weight, if any, to give to these admissions.¹⁹⁷¹

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.¹⁹⁷² 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.¹⁹⁷³

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession¹⁹⁷⁴ occupies seventy pages of the *Federal Supplement*.¹⁹⁷⁵ Nineteen portions of the opinion are redacted.¹⁹⁷⁶ The parties received unredacted copies, and the unredacted original was stored in Judge St. Eve's safe.¹⁹⁷⁷

1971. *Id.* at 924.

1972. See Higgins, *supra* note 1942.

1973. Interview with Judge Amy St. Eve, July 2, 2007; see Higgins, *supra* note 1942.

1974. Opinion, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 8, 2006), D.E. 557.

1975. *United States v. Marzook*, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

1976. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51, 758, 767.

1977. Interview with Judge Amy St. Eve, July 2, 2007.

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.¹⁹⁷⁸ Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.¹⁹⁷⁹ 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.¹⁹⁸⁰

1978. Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006), D.E. 571; see Jeff Coen, *Anonymous Jury Urged in Hamas Funds Case*, Chi. Trib., June 28, 2006, Metro, at 4.

1979. Ashqar's Response to Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006), D.E. 597; Salah's Response to Government's Anonymous Jury Motion, *id.* (July 18, 2006), D.E. 591; see Jeff Coen, *Hamas-Case Motion Challenged*, Chi. Trib., June 29, 2006, Metro, at 3.

1980. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006), D.E. 624; Interview with Judge Amy St. Eve, July 2, 2007; see Rudolph Bush, *Hamas-Case Jury to Be Named*, Chi. Trib., Aug. 10, 2006, Metro, at 3.

Chapter 16

Lodi

*United States v. Hayat (Garland E. Burrell, Jr.,
and Deborah Barnes, E.D. Cal.)*

Hamid Hayat was convicted in 2006 of attending a terrorism training camp, a type of material support. In 2019, the trial judge vacated the conviction and twenty-four-year sentence on a finding of ineffective assistance of counsel.¹⁹⁸¹

During the prosecution and the habeas corpus case, the court wrestled with the question of whether Hayat should be represented by an attorney with a security clearance. Judges in both the district court and the court of appeals reviewed classified information. During the habeas corpus case, the court heard testimony from witnesses in Islamabad, Pakistan.

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On June 5, 2005, the government arrested Hamid and his father, Umer Hayat, of Lodi, California, an agricultural town forty miles south of Sacramento.¹⁹⁸² Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.¹⁹⁸³

1981. See generally *The Confession Tapes: Marching Orders* (episode 11, Netflix 2019) [hereinafter *Marching Orders*]; Jason Fagone, *The Man Who Paid for America's Fear*, S.F. Chron., Mar. 2, 2022, at S1, www.sfchronicle.com/projects/2022/hamid-hayat/.

1982. *United States v. Hayat*, 710 F.3d 875, 883 (9th Cir. 2013); see Randal C. Archibold & Jeff Kearns, *In California Terror Case, a Mistrial for a Father, but a Son Is Guilty*, N.Y. Times, Apr. 26, 2006, at A17; Greg Krikorian & Rone Tempest, *2 Men Held in Links to Terror*, L.A. Times, June 8, 2005, at 1; Dean E. Murphy & David Johnston, *California Father and Son Face Charges in Terrorism Case*, N.Y. Times, June 9, 2005, at A18.

1983. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *The Enemy Within*], www.pbs.org/wgbh/pages/frontline/enemywithin/; Krikorian & Tempest, *supra* note 1982; Murphy & Johnston, *supra* note 1982; Rone

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.¹⁹⁸⁴ A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.¹⁹⁸⁵ He was reported to have encouraged support of terrorism as part of his undercover work.¹⁹⁸⁶ The government reportedly paid him approximately \$225,000.¹⁹⁸⁷

Tempest, Greg Krikorian & Lee Romney, *Ties to Terror Camps Probed*, L.A. Times, June 9, 2005, at 1.

The younger Hayat's maternal grandfather was Pakistan's minister of religious affairs in the late 1980s. See Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

1984. *Hayat*, 710 F.3d at 880–81; see Eric Bailey, *Attorney Says Lodi Terror Suspect Told Tall Tales to FBI Mole*, L.A. Times, Mar. 3, 2006, at 6; Rone Tempest, *FBI Informer Begins His Testimony in Terror Trial*, L.A. Times, Feb. 23, 2006, at 1 [hereinafter *FBI Informer*]; Rone Tempest, *Lodi Terror Trial Enters Final Round*, L.A. Times, Apr. 11, 2006, at 3 [hereinafter *Final Round*]; Rone Tempest, *Onetime Clerk Is at Center of Lodi Trial*, L.A. Times, Mar. 21, 2006, at 1 [hereinafter *Onetime Clerk*]; Rone Tempest, *Tape Recording Surfaces in Lodi Terrorism Trial*, L.A. Times, Apr. 5, 2006, at 3 [hereinafter *Tape Recording Surfaces*]; Denny Walsh, *Hayat Released from Custody*, Sacramento Bee, Aug. 26, 2006, at B1; see also *Marching Orders*, *supra* note 1981 (including a brief interview with Khan's mother).

1985. *Hayat*, 710 F.3d at 880–81; see Bailey, *supra* note 1984; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 1984 (“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 1984.

1986. E.g., Redacted Government Protective Order Motion at 4, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 170 (“In a second conversation, the CW [cooperating witness, namely Khan,] congratulated Hamid on what is believed to be Hamid's acceptance into a training camp.”); see Bailey, *Mixed Picture*, *supra* note 1985 (“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.”); *The Enemy Within*, *supra* note 1983 (“Narrator: And then there were the tapes of the informant talking to Hamid in Pakistan in which Naseem Khan was browbeating him about attending a Madrassa and going to a jihadi camp.”); Tempest, *FBI Informer*, *supra* note 1984 (“Some Lodi residents contend that Khan was more than just a passive mole in the mosque. They said he was often an instigator, asking

“[R]ecorded conversations between Khan and [Hamid] Hayat indicated that Hayat’s father was linked to a terrorist organization in Pakistan and that Hayat’s uncle and grandfather were recruiters for ‘jihad.’ . . . In the recorded conversations, Hayat made several anti-American and anti-Semitic remarks.”¹⁹⁸⁸

The Hayats went to Pakistan in April 2003.¹⁹⁸⁹ Hamid married there; when he returned to California, he returned without his wife, who had not yet received the necessary visa.¹⁹⁹⁰ Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.¹⁹⁹¹ Federal agents discovered his trip while he

young men about waging jihad and encouraging travelers to Pakistan to bring back fire-brand speeches and extremist documents.”).

1987. 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 1984 (more than \$200,000); Bailey, *Mixed Picture*, *supra* note 1985 (about \$250,000); *Marching Orders*, *supra* note 1981 (\$235,000); Fagone, *supra* note 1981 (\$225,000 plus an apartment and a car); *The Enemy Within*, *supra* note 1983 (hundreds of thousands of dollars); Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. Times, Apr. 27, 2007, at A1 (about \$225,000); Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. Times, Sept. 11, 2007, at A20 (more than \$200,000); Rone Tempest, *Al Qaeda in Lodi “Unlikely,”* L.A. Times, Mar. 30, 2006, at 9 (nearly \$230,000 in salary and expenses); Tempest, *FBI Informer*, *supra* note 1984 (nearly \$250,000 “for his efforts in Lodi alone”); Tempest, *Terrorist Training*, *supra* note 1985 (more than \$200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 1984 (about \$3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 1985 (\$250,000); Tempest, *Onetime Clerk*, *supra* note 1984 (more than \$200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 1984 (nearly \$230,000); Mihir Zaveri, *2006 Terrorism Conviction Rejected by Federal Judge*, N.Y. Times, Aug. 1, 2019, at A17 (about \$225,000); *see Hayat*, 710 F.3d at 880 n.2 (“The FBI paid Khan between \$3,000 and \$4,500 per month plus expenses.”).

“Mr. Hayat and his father were the only two people charged in connection with that investigation.” Zaveri, *supra*.

1988. Findings and Recommendations at 3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 11, 2019), D.E. 734 [hereinafter *Habeas Findings and Recommendations*], 2019 WL 176342; *see id.* at 2–6 (summarizing the evidence against Hamid Hayat).

1989. *Hayat*, 710 F.3d at 881; *see* Second Superseding Indictment at 2, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 26, 2006), D.E. 162; First Superseding Indictment at 3, *id.* (Sept. 22, 2005), D.E. 50; *see The Enemy Within*, *supra* note 1983; Krikorian & Tempest, *supra* note 1982; Tempest, *FBI Informer*, *supra* note 1984.

1990. *See* Fagone, *supra* note 1981.

1991. *Hayat*, 710 F.3d at 882; *see* Archibold, *Diverging Views*, *supra* note 1987; Krikorian & Tempest, *supra* note 1982; Murphy & Johnston, *supra* note 1982.

was en route, and the plane was diverted to Japan, where agents detained him, interviewed him, and then let him continue on his trip.¹⁹⁹² Passengers on the diverted plane were told that someone on the plane was very dangerous.¹⁹⁹³

Four days after Hamid's return to California, federal agents interviewed him again.¹⁹⁹⁴ They also interviewed his father.¹⁹⁹⁵ Both denied the son's involvement with terrorists.¹⁹⁹⁶ After failing a polygraph examination, however, Hamid confessed to attending an Al-Qaeda training camp in Pakistan for six months in 2003 and 2004.¹⁹⁹⁷

Trials

The father and son were indicted on June 16, 2005, for making false statements to federal officials.¹⁹⁹⁸ More than three months later, on September 22, Hamid's indictment was amended to include a charge of materially

1992. *Hayat*, 710 F.3d at 882; see Second Superseding Indictment, *supra* note 1989, at 3; First Superseding Indictment, *supra* note 1989, at 3; see also Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

1993. Transcript at 149, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 29, 2018, filed Mar. 16, 2018), D.E. 712.

1994. *Hayat*, 710 F.3d at 882; see *The Enemy Within*, *supra* note 1983; Krikorian & Tempest, *supra* note 1982.

1995. Government Trial Brief at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); see *The Enemy Within*, *supra* note 1983; Krikorian & Tempest, *supra* note 1982.

1996. Government Trial Brief, *supra* note 1995, at 4–5, 8–9; see Krikorian & Tempest, *supra* note 1982.

1997. Government Trial Brief, *supra* note 1995, at 8; see Krikorian & Tempest, *supra* note 1982; Tempest, *supra* note 1992; Tempest et al., *supra* note 1983.

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, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 17, 2007), D.E. 482 [hereinafter Order Denying New Trial], 2007 WL 1454280; see Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times, May 28, 2006, West Mag., at 16; Archibold, *Diverging Views*, *supra* note 1987; *The Enemy Within*, *supra* note 1983; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 719 (2010); Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. Pa. J. Const. L. 1475, 1493 (2009).

1998. Indictment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005), D.E. 8; see Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. Times, June 17, 2005, at 1; Chris Heffelfinger, *Radical Islam in America* 130 (2011); Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, *supra* note 1992; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

supporting terrorism by attending the training camp in Pakistan.¹⁹⁹⁹ The government added an additional false-statement charge against each defendant on January 26, 2006.²⁰⁰⁰ The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.²⁰⁰¹

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.²⁰⁰² Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.²⁰⁰³ They agreed to return to Pakistan to avoid terrorism-related charges.²⁰⁰⁴

The two Hayats were tried together, but before separate juries.²⁰⁰⁵ The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.²⁰⁰⁶

1999. First Superseding Indictment, *supra* note 1989; see Tempest, *supra* note 1992; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

2000. Second Superseding Indictment, *supra* note 1989; United States v. Hayat, 710 F.3d 875, 883 (9th Cir. 2013).

2001. Docket Sheet, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005) [hereinafter E.D. Cal. Docket Sheet]; see Tempest & Krikorian, *supra* note 1998.

Tim Reagan interviewed Judge Burrell for this case study in his chambers on February 13, 2007.

2002. See Tempest et al., *supra* note 1983.

2003. See Murphy & Johnston, *supra* note 1982; Tempest, *supra* note 1992; Tempest et al., *supra* note 1983.

2004. See Archibold, *Diverging Views*, *supra* note 1987 (reporting a voluntary return to Pakistan to avoid deportation); *The Enemy Within*, *supra* note 1983 (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 1985 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, *supra* note 1999 (reporting that Khan was deported in August 2005).

2005. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 19, 2006), D.E. 150 (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.

2006. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006), D.E. 331 (finding Hamid Hayat guilty); E.D. Cal. Docket Sheet, *supra* note 2001 (noting a mistrial for Umer Hayat because the jury was not able to reach a verdict, D.E. 325); United States v. Hayat, 710 F.3d 875, 881 n.3, 884 (9th Cir. 2013); see Order Denying New Trial, *supra* note 1997, at 1; see also Archibold & Kearns, *supra* note 1982; *The Enemy Within*, *supra* note 1983; Tempest, *supra* note 1992 ("But what the three federal prosecutors could—and did—show convincingly was that 23-year-old Hamid Hayat of Lodi, Calif., espoused strong

Following the son's conviction, his attorney requested appointment under the Criminal Justice Act (CJA) for her continued representation, an appointment that would result in her being paid by the federal judiciary.²⁰⁰⁷ Judge Burrell referred the request to the Federal Public Defender, who opined that CJA appointment would be proper for the inexperienced attorney so long as an experienced San Francisco attorney was associated pro bono through possible sentencing, with a recommendation that the experienced attorney be appointed for any appeal or habeas motion.²⁰⁰⁸

Hamid Hayat 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.²⁰⁰⁹ After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.²⁰¹⁰ A new trial was denied.²⁰¹¹ Hamid was sentenced on September

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."); Walsh, *supra* note 1984 ("The jury split 7–5 for conviction on one count and 6–6 on a second count . . .").

2007. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 4, 2006), D.E. 345; *see* 18 U.S.C. § 3006A (2020).

2008. Amended Defender Response, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 22, 2006), D.E. 362; *see* Order, *id.* (May 18, 2006), D.E. 356 (CJA appointment); Letter, *id.* (May 30, 2006, filed May 31, 2006), D.E. 376 (CJA appointment confirmation); Appearance of Counsel, *id.* (May 19, 2006), D.E. 350; *see also* Tim Reagan, John Shapard, Christina Studebaker, Naomi Medvin, Jennifer Marsh, Melissa Deckman & Stefanie Lindquist, *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration* 25 (Federal Judicial Center 2001), www.fjc.gov/sites/default/files/2012/cjareport.pdf ("The [Eastern District of California's] federal defender's office is responsible for assigning panel attorneys to cases and for providing panel attorneys with continuing legal education."); Transcript at 372–76, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 30, 2018, filed Mar. 16, 2018), D.E. 713 [hereinafter Jan. 30, 2018, Habeas Transcript] (testimony by the district's former Federal Public Defender).

2009. Order Denying New Trial, *supra* note 1997, at 6, 8–13; *see* Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

2010. Order Denying New Trial, *supra* note 1997, 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.

2011. Order Denying New Trial, *supra* note 1997; *see* Bulwa, *supra* note 2010.

10, 2007, to twenty-four years in prison.²⁰¹² Over a dissent,²⁰¹³ the court of appeals affirmed the conviction on March 13, 2013.²⁰¹⁴

The government initially decided to retry the father,²⁰¹⁵ 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.²⁰¹⁶ 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.²⁰¹⁷

After his release, the father told reporters that his and his son's confessions had resulted from exhaustion and leading questions—they had told the agents what they wanted to hear so that they could go home.²⁰¹⁸

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 not permitted to return.²⁰¹⁹ They were Muhammad Ismail, Hamid Hayat's uncle and Umer Hayat's brother-in-law, and Muhammad's son

2012. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007), D.E. 505; *United States v. Hayat*, 710 F.3d 875, 884 (9th Cir. 2013); see Marshall, *supra* note 1987.

2013. *Hayat*, 710 F.3d at 915 (Judge A. Wallace Tashima, dissenting: "Because the district court plainly erred in preventing Hayat from introducing exculpatory evidence and in allowing inflammatory expert testimony that usurped the jury's role as finder of fact, I would reverse Hayat's conviction and remand to the district court for a new trial. I therefore respectfully dissent.").

2014. *Hayat*, 710 F.3d 875; see Bob Egelko, *Appeals Court Backs Terrorist Conviction*, S.F. Chron., Mar. 14, 2013, at D5; Sam Stanton, Denny Walsh & Stephen Magagnini, *Divided Appellate Panel Upholds Terrorist Conviction of Lodi's Hamid Hayat*, Sacramento Bee, Mar. 14, 2013; see also Fagone, *supra* note 1981 ("The four-year delay was never explained.").

2015. 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.

2016. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006), D.E. 380; Information, *id.* (May 31, 2006), D.E. 379; *Hayat*, 710 F.3d at 881 n.3; see *The Enemy Within*, *supra* note 1983; Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 1984.

2017. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006), D.E. 391; *Hayat*, 710 F.3d at 881 n.3; see Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 1984.

2018. *The Enemy Within*, *supra* note 1983; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 1984.

2019. 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.

Jaber Ismail, Hamid's cousin.²⁰²⁰ 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 could fly home.²⁰²¹ Five months later, Muhammad and Jaber were permitted to return home after intervention of counsel.²⁰²² Jaber Ismail testified at Hamid Hyat's habeas corpus evidentiary hearing.²⁰²³

When Hamid Hayat lost his appeal in 2013, he and his wife, who was still in Pakistan, decided to end their marriage so that she could move on.²⁰²⁴

Habeas Corpus Proceedings

Within a year of the court of appeals' affirmance, on April 30, 2014, the CJA-appointed appellate attorney filed a habeas motion to vacate Hamid's conviction on the grounds of (1) Hamid's attorney's conflict of interest arising from her deference to the codefendant's attorney, (2) her ineffective assistance related to her refusal to seek a security clearance, and (3) the government's *Brady* violation in failing to disclose that "the militant camp near Balakot had already been closed by the Pakistani government at the time Hamid allegedly attended it."²⁰²⁵

Following an August 11 deposition of Hamid's trial attorney, habeas counsel moved on November 13 for summary judgment on some claims.²⁰²⁶ During the deposition, the trial attorney acknowledged that she

2020. See Jan. 30, 2018, Habeas Transcript, *supra* note 2008, at 301, 335–36; see also Archibold, *supra* note 2019; Bulwa, *supra* note 2019.

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 *id.*

2021. See Archibold, *supra* note 2019; Bulwa, *supra* note 2019; see also Sam Stanton, *They "Pointed Guns at Our Entire Family."* *Terror Witness Recalls Airport Stop*, Sacramento Bee, Jan. 30, 2018.

2022. 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.

2023. Jan. 30, 2018, Habeas Transcript, *supra* note 2008, at 300–64; Habeas Findings and Recommendations, *supra* note 1988, at 14–15.

2024. See Fagone, *supra* note 1981.

2025. Habeas Petition at 3–4, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 30, 2014), D.E. 531; see *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure to the defense of exculpatory evidence); see also Tucker Carrington, *Manual on Recurring Problems in Criminal Trials* 26–29 (Federal Judicial Center, 6th ed. 2010).

2026. Summary-Judgment Motion, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Nov. 13, 2014), D.E. 548; Mojaddidi Deposition, *attached as ex. FFF*, Summary-Judgment Motion, *supra*.

had had no previous experience with criminal trials, and she stated that her litigation strategy had been to pursue speedy-trial rights and rely on what she perceived as the government's weak evidence.²⁰²⁷ Judge Burrell denied Hamid summary judgment on November 10, 2016.²⁰²⁸

In August 2016, the court appointed Deborah Barnes as a magistrate judge and assigned her magistrate-judge responsibilities for this case.²⁰²⁹ From January 29 to February 15, 2018, Judge Barnes presided over a seven-day evidentiary habeas corpus hearing.²⁰³⁰

On January 11, 2019, Judge Barnes advised Judge Burrell to grant Hamid Hayat a new trial for ineffective assistance of counsel because (1) the trial attorney failed to investigate alibi witnesses and present their testimony,²⁰³¹ and (2) she failed to present evidence from a false-confessions expert.²⁰³² In addition, Judge Barnes concluded that in the prosecution's thin case there was a reasonable probability that the outcome would have been different had the defense attorney succeeded in excluding the prosecu-

2027. Mojaddidi Deposition, *supra* note 2026.

2028. Opinion, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Nov. 10, 2016), D.E. 600, 2016 WL 6658963, *adopting in part and rejecting in part* Findings and Recommendation, *id.* (Mar. 10, 2016), D.E. 588, 2016 WL 916231 (by Magistrate Judge Craig M. Kellison); see Sam Stanton, *Federal Judge Won't Set Aside Terror Conviction of Lodi-Area Man*, Sacramento Bee, Nov. 10, 2016.

2029. E.D. Cal. Docket Sheet, *supra* note 2001 (Aug. 3, 2016, D.E. 599) Habeas Findings and Recommendations, *supra* note 1988, at 10; E.D. Cal. Judge Profile, www.caed.uscourts.gov/caednew/index.cfm/judges/all-judges/united-states-magistrate-judge-deborah-barnes-db/united-states-magistrate-judge-deborah-barnes-db/.

Tim Reagan interviewed Judge Barnes for this case study in her chambers on May 22, 2018.

Magistrate Judge Craig M. Kellison, previously assigned the case, retired on September 1, 2018. Judicial Milestones, www.uscourts.gov/judicial-milestones/craig-m-kellison.

2030. Transcripts, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 29, 30, and 31, and Feb. 1, 5, 14, and 15, 2018, filed Mar. 16, 2018), D.E. 712 to 718; E.D. Cal. Docket Sheet, *supra* note 2001 (minutes, D.E. 696, 697, 699, 700, 703, 705, 706); see Jan. 29, 2018, Transcript, *supra*, at 3–4 (“We will be dark on Fridays. And the Court has set aside three weeks for this hearing.”); see also Stephen Magagnini & Sam Stanton, “He’s Innocent; He’s Been Innocent.” *Lodi Terror Suspect’s Family Hopes He’ll Be Released*, Sacramento Bee, Feb. 1, 2018; Stephen Magagnini & Sam Stanton, *With His Dad’s Lawyer Controlling the Money, Terror Suspect Couldn’t Get a Fair Trial, Witness Says*, Sacramento Bee, Jan. 31, 2018; Sam Stanton & Stephen Magagnini, “Don’t Talk to the FBI, Never, Ever.” *Lodi Man Seeks to Overturn Terrorism Conviction*, Sacramento Bee, Jan. 29, 2018; Sam Stanton & Stephen Magagnini, “Hamid Didn’t Want to Go.” *Lawyers Say FBI Coerced Terror Defendant to Falsely Confess*, Sacramento Bee, Jan. 29, 2018.

2031. Habeas Findings and Recommendations, *supra* note 1988, at 20–53, 116.

2032. *Id.* at 56–65, 116.

tion's questionable expert testimony that a prayer found in the defendant's wallet would only have been carried by a jihadi.²⁰³³

Judge Barnes also determined that Hamid's inexperienced attorney's working so closely with the father's more experienced attorney created a conflict of interest that caused Hamid's attorney to forego many viable litigation strategies.²⁰³⁴

On July 30, Judge Burrell adopted Judge Barnes's key findings and vacated Hamid Hayat's conviction and sentence.²⁰³⁵ "Hayat's habeas counsel presented six alibi witnesses at the habeas evidentiary hearing. These witnesses could have testified at trial if [the trial attorney] had adequately investigated a potential alibi defense and presented that defense during trial."²⁰³⁶ In addition, the trial attorney's "failure to present an Arabic language expert on the meaning of the supplication during trial contributed to the prejudice Hayat suffered."²⁰³⁷

On August 9, Judge Burrell approved Hamid's stipulated release from prison pending a possible retrial subject to conditions including travel restrictions and a nightly curfew.²⁰³⁸ Hamid was released that day.²⁰³⁹

In light of Judge Burrell's assuming an inactive status in 2020, the case was reassigned to Judge John A. Mendez.²⁰⁴⁰ On February 18, 2020, Judge Mendez granted the government's motion to dismiss Hamid Hayat's indictment and release the defendant from conditions of release.²⁰⁴¹

2033. *Id.* at 70–93.

2034. *Id.* at 98–111, 116.

2035. Opinion, *Hayat*, No. 2:05-cr-240 (E.D. Cal. July 30, 2019), D.E. 752 [hereinafter Vacation Opinion], 2019 WL 3423538; see Bob Egelko, *Terrorist Case Conviction of Lodi Man Tossed*, S.F. Chron., July 31, 2019, at A1; Zaveri, *supra* note 1987.

2036. Vacation Opinion, *supra* note 2035, at 30–31.

2037. *Id.* at 33.

"What the magistrate judge observed during the habeas evidentiary proceeding concerning [the trial attorney's] deficiencies in her representation of Hayat differs from what the district judge observed about [the trial attorney's] representation of Hayat during the trial proceedings." *Id.* at 13–14.

2038. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Aug. 9, 2019), D.E. 757, 2019 WL 3760714; Stipulation, *id.* (Aug. 8, 2019), D.E. 756.

2039. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 15804-097); see Order to Continue Hearing, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 18, 2019), D.E. 759; see also Demian Bulwa, Bob Egelko & Tatiana Sanchez, *After 14 Years in Prison, Lodi Man Released in Terror Case*, S.F. Chron., Aug. 12, 2019, at C1.

2040. E.D. Cal. Docket Sheet, *supra* note 2001 (D.E. 764, 765).

2041. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 18, 2020), D.E. 770; see Bob Egelko, *Feds to Drop Charges Against Lodi Terror Suspect*, S.F. Chron., Feb. 15, 2020, at A1.

After Hamid's release from a medium-security prison in Arizona, where he had been held since 2011, he found work at an Amazon fulfillment center near the Stockton airport.²⁰⁴²

Challenge: Classified Evidence

The Trial

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)²⁰⁴³ may apply to this case.²⁰⁴⁴ 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.²⁰⁴⁵

Six times the government provided notice of material submitted to the court *ex parte*, *in camera*, and under seal,²⁰⁴⁶ and twice the government provided notice of a hearing *ex parte*, *in camera*, and under seal.²⁰⁴⁷

2042. See Fagone, *supra* note 1981.

2043. 18 U.S.C. app. 3 (2020); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

2044. CIPA Notice, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 27, 2005), D.E. 13.

2045. CIPA Motion at 3, *id.* (July 6, 2005), D.E. 19.

2046. Six times the government provided notice of *ex parte*, *in camera*, under seal material submitted to the court:

1. CIPA Notice, *id.* (Oct. 6, 2005), D.E. 69; see Redacted Government CIPA Brief, *id.* (Dec. 16, 2005), D.E. 126 (specifying a hearing date of October 7, 2005).
2. CIPA Notice, *id.* (Nov. 18, 2005), D.E. 105.
3. CIPA Notice, *id.* (Dec. 9, 2005), D.E. 122; see Redacted Government CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005), D.E. 127 (specifying a hearing date of December 9, 2005).
4. CIPA Notice, *id.* (Jan. 28, 2006), D.E. 167; see Redacted Government CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 2, 2006), D.E. 177 (specifying a hearing date of January 27, 2005); Redacted Government CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 170 (specifying a hearing date of

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.²⁰⁴⁸ The evidence resulted in four exhibits—satellite images in the vicinity of Bala-kot, Pakistan—that the parties ultimately stipulated were admissible.²⁰⁴⁹ The defense attorneys 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. . . .

. . .

January 27, 2005); Redacted Government CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006), D.E. 171 (specifying a hearing date of January 27, 2005).

5. CIPA Notice, *id.* (Apr. 3, 2006), D.E. 279; *see* Redacted Government CIPA Motion, *id.* (Apr. 4, 2006), D.E. 284 (specifying a hearing date of April 4, 2006); Redacted Order, *id.* (Apr. 3, 2006), D.E. 281.

6. CIPA Notice, *id.* (Dec. 13, 2006), D.E. 445; *see* Order, *id.* (Dec. 21, 2006), D.E. 446 (granting an in camera ex parte motion for a protective order).

2047. Twice the government provided notice of an ex parte, in camera, under seal hearing:

1. CIPA Hearing Notice, *id.* (Dec. 5, 2005), D.E. 116 (specifying a hearing date of December 9, 2005); *see* Redacted Government CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005), D.E. 127 (specifying a hearing date of December 9, 2005).

2. CIPA Hearing Notice, *id.* (Dec. 9, 2005), D.E. 123 (specifying a hearing date of Dec. 16, 2005); *see* Redacted Government CIPA Brief, *id.* (Dec. 16, 2005), D.E. 128 (specifying a hearing date of December 16, 2005).

There may have been a third sealed hearing. *See* Redacted Government CIPA Motion, *id.* (dated Jan. 6, 2005 [sic], filed Jan. 6, 2006), D.E. 138 (specifying a hearing date of January 6, 2005 [sic]).

2048. *See Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of February 14, 2006); *see also* Order at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 10, 2006), D.E. 140 (announcing a trial date of February 14, 2006, and discussing a government motion that defense counsel obtain a security clearance).

2049. Exhibit 4 Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006), D.E. 183; Exhibit 3 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 182; Exhibit 2 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 181; Exhibit 1 Stipulated Order, *id.* (Feb. 3, 2006), D.E. 180.

... 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.²⁰⁵⁰

Judge Burrell considered whether he should order defense counsel to obtain security clearances or, alternatively, he should appoint already cleared counsel to assist in the defense.²⁰⁵¹ The classified information security officer, who was provided by the Justice Department's Justice Management Division to assist the court with security clearances and the handling of classified information, could not find a local defense attorney with a security clearance, but he was able to identify two in the Northern District of California who were cleared.²⁰⁵² Ultimately, Judge Burrell decided that cleared counsel was not necessary for the defendants' trial.²⁰⁵³

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 seek them.²⁰⁵⁴ Judge Burrell's court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.²⁰⁵⁵

2050. Defendants' Joint CIPA Response at 2–3, *id.* (Jan. 16, 2006), D.E. 148.

2051. Interview with Judge Garland E. Burrell, Jr., Feb. 13, 2007; see Transcript at 6–7, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 27, 2006, filed Sept. 7, 2006), D.E. 398 [hereinafter Jan. 27, 2006, Transcript], also filed as ex. 3, Motion for Reconsideration, *id.* (Oct. 24, 2017), D.E. 665 [hereinafter Oct. 24, 2017, Motion for Reconsideration].

2052. Interview with Judge Garland E. Burrell, Jr., Feb. 13, 2007; Jan. 27, 2006, Transcript, *supra* note 2051, at 7, 15; see Reagan, *supra* note 2043, at 21–22 (“The classified information security officers are not lawyers, and they are organizationally quite separate from the government’s representatives in court. Their obligation is to help the court protect classified information, not to assist the government’s representatives in court.”).

2053. Interview with Judge Garland E. Burrell, Jr., Feb. 13, 2007; see Transcript at 3–32, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006, filed Nov. 7, 2007), D.E. 519, also filed as ex. 2, Oct. 24, 2017, Motion for Reconsideration, *supra* note 2051.

2054. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006), D.E. 179.

2055. Interview with Judge Garland E. Burrell, Jr., Feb. 13, 2007.

Hamid Hayat's motion for a new trial²⁰⁵⁶ 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.²⁰⁵⁷ Judge Burrell filed his ruling on this argument under seal.²⁰⁵⁸

The Appeal

The court of appeals reviewed classified information withheld from the defense in discovery and affirmed its withholding.²⁰⁵⁹

Habeas Corpus Proceedings

Judge Barnes reviewed classified materials in chambers, at a nearby FBI sensitive compartmented information facility (SCIF), and at the classified information security officer's Washington office.²⁰⁶⁰

At a June 30, 2017, status conference, habeas attorneys informed Judge Barnes that they would like to seek security clearances for access to classified information at issue in the case.²⁰⁶¹ Government attorneys informed Judge Barnes that it was the government's position that habeas attorneys would never be given access to classified information because the government would never acknowledge their "need to know" classified information in support of their case.²⁰⁶² The government noted, however, that

2056. New Trial Brief, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006), D.E. 441.

2057. Sealing Order, *id.* (Feb. 5, 2007), D.E. 450; Defendant's Sealing Request, *id.* (Oct. 27, 2006), D.E. 440; *see also* Order, *id.* (Mar. 21, 2007), D.E. 451 (granting the plaintiff's motion to file an argument III reply under seal); Order, *id.* (Feb. 5, 2007), D.E. 450 (granting the government's motion to file a response to argument III under seal).

2058. Order Denying New Trial, *supra* note 1997, at 35; E.D. Cal. Docket Sheet, *supra* note 2001 (noting that "counsel for the parties are authorized to obtain from the clerk's office a copy of the sealed order," D.E. 484).

2059. *United States v. Hayat*, 710 F.3d 875, 900 (9th Cir. 2013).

2060. Interview with Judge Deborah Barnes, May 22, 2018; *see* Reagan, *supra* note 2043, at 22–23 (describing SCIFs, which are facilities for storing classified information granted extra protection because it concerns sources or methods).

2061. Transcript at 15, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 30, 2017, filed July 13, 2017), D.E. 624 [hereinafter June 30, 2017, Transcript].

2062. *Id.* at 15–22; Revised Security Procedures Established Pursuant to Pub. L. No. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 4 (2020) [hereinafter CIPA Security Procedures] ("Justices, judges and cleared court personnel may disclose classified information only to persons who possess both the appropriate security clearance and the requisite need to know the information in the performance of an official function.").

while it would not voluntarily permit security-clearance procedures for habeas counsel it would have to respect a court order on the issue.²⁰⁶³

On August 14, Judge Barnes ordered the government “to establish a process by which petitioner’s counsel may apply for a security clearance.”²⁰⁶⁴ “[T]he court is not convinced by the government’s unsupported contention that it is ‘impossible’ to provide petitioner’s counsel with access to the security clearance application process; history and the law show the opposite.”²⁰⁶⁵ Two days later, Judge Barnes appointed as habeas cocounsel a former assistant United States attorney who had once had a security clearance.²⁰⁶⁶ Twelve days later, the classified information security officer provided the new appointee with forms and instructions for seeking a clearance.²⁰⁶⁷

The government asked Judge Barnes to reconsider her order requiring a security-clearance process for habeas counsel and presented “new facts that are available to the Court for the first time now that the Court has the appropriate security clearances.”²⁰⁶⁸ Although article III judges generally have automatic security clearances for access to classified information necessary for them to adjudicate their cases, magistrate judges have to be granted security clearances.²⁰⁶⁹ Judge Barnes concluded,

The court has learned that an attorney or attorneys in the Office of the Federal Defender in this district have appropriate security clearance. The court is willing to appoint a cleared attorney for the limited purpose of participating in the proceedings to review the documents responsive to the approved discovery.²⁰⁷⁰

Habeas counsel responded by requesting appointment of cleared counsel,²⁰⁷¹ and Judge Barnes appointed the federal defender’s office as cocounsel for matters involving classified information.²⁰⁷²

2063. June 30, 2017, Transcript, *supra* note 2061, at 14.

2064. Opinion at 21, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Aug. 14, 2017), D.E. 630, 2017 WL 3479015.

2065. *Id.* at 16.

2066. Order, *id.* (Aug. 16, 2017), D.E. 631; Motion, *id.* (July 27, 2017), D.E. 627.

2067. Appointment Request at 2, *id.* (Oct. 13, 2017), D.E. 653 [hereinafter Oct. 13, 2017, Appointment Request].

2068. Motion at 1, *id.* (Aug. 29, 2017), D.E. 633; see Notice of In Camera, Ex Parte Filing Under Seal, *id.* (Aug. 29, 2017), D.E. 634.

2069. CIPA Security Procedures, *supra* note 2062 (“A security clearance for justices and other Article III judges is not required.”); see Reagan, *supra* note 2043, at 2.

2070. Opinion at 21, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 10, 2017), D.E. 649, 2017 WL 4517931.

2071. Oct. 13, 2017, Appointment Request, *supra* note 2067.

On November 1, 2017, Judge Burrell stayed discovery in an opinion relying heavily on quoted text from the government's brief: "The Government's arguments show the public's interest in protecting classified information favors granting its stay request."²⁰⁷³ On January 9, 2018, Judge Burrell vacated the stay and narrowed some of Judge Barnes's discovery orders.²⁰⁷⁴

As a result of Judge Burrell's ruling, classified information was no longer at issue in the habeas case, so Judge Barnes granted a request by the federal defender's office to be removed from the case.²⁰⁷⁵

Challenge: Foreign Evidence

For Hamid Hayat's habeas evidentiary hearing, Judge Barnes granted a motion to designate as necessary two Pakistani witnesses, and she ordered the government to facilitate the granting of visas to the witnesses so that they could testify in court as alibi witnesses.²⁰⁷⁶ After the government denied the witnesses visas, habeas counsel sought court authorization for four foreign depositions.²⁰⁷⁷ Because of the government's safety concerns, Judge Barnes ordered the testimony taken by video conference.²⁰⁷⁸

The testimony was incorporated into the evidentiary hearing, which included two in-person alibi witnesses, and the testimony was taken during two nighttime sessions in Sacramento to accommodate the witnesses in Islamabad, which was thirteen hours ahead.²⁰⁷⁹ Two uncles, an aunt, and

2072. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 16, 2017), D.E. 654.

2073. Opinion at 8, *id.* (Nov. 1, 2017), D.E. 668, 2017 WL 4959408.

2074. Opinion, *id.* (Jan. 9, 2018), D.E. 686, 2018 WL 347792.

2075. Order, *id.* (July 13, 2018), D.E. 733.

2076. Order, *id.* (Oct. 2, 2017), D.E. 543.

2077. Motion, *id.* (Nov. 17, 2017), D.E. 672.

2078. Opinion, *id.* (Dec. 20, 2017), D.E. 683, 2017 WL 6539610; *see* Transcript at 43–58, *id.* (Dec. 14, 2017, filed Jan. 17, 2018), D.E. 689.

Here, Hayat proposes to schedule depositions for the week of January 8, 2018. All four proposed deponents (and anyone with whom they or others shared the information) would necessarily know precisely when and where U.S. prosecutors would arrive in and be present in Islamabad, the location of the depositions, and the predictable movements of the U.S. contingent. The risks are apparent and unreasonable. Indeed, only a small handful of more dangerous locations exist in which to take foreign depositions than Islamabad, particularly for U.S. officials.

Government Brief at 21, *id.* (Nov. 30, 2017), D.E. 678.

2079. Transcripts, *id.* (Feb. 14 and 15, 2018, filed Mar. 16, 2018), D.E. 717, 178; Interview with Judge Deborah Barnes, May 22, 2018; *see* Government Brief at 118, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 25, 2018), D.E. 725.

a lifelong friend “testified that Hamid [Hayat] was either at his ancestral village of Behboodi or visiting his grandparents in Rawalpindi, and was never gone long enough to have undergone terrorist training.”²⁰⁸⁰ Technicians established a video link between the courtroom and a lawyer’s office in Islamabad.²⁰⁸¹ A few practice runs with the link resulted in a smooth connection during the hearing.²⁰⁸² Judge Barnes was very grateful that someone in the court thought to make sure that the air was turned on during the after-hours proceedings.²⁰⁸³

The witnesses testified in Urdu, and two interpreters were used.²⁰⁸⁴ One witness knew English, but Urdu was the witness’s primary language and the witness testified in Urdu for consistency.²⁰⁸⁵

2080. Stephen Magagnini, *Witnesses in Sacramento Terror Case Testify from Pakistan in Rare Late-Night Court Session*, Sacramento Bee, Feb. 20, 2018; see Habeas Findings and Recommendations, *supra* note 1988, at 14–15, 34–41.

2081. Interview with Judge Deborah Barnes, May 22, 2018.

2082. *Id.*

2083. *Id.*

2084. *Id.*

2085. *Id.*

Chapter 17

Toledo

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

Federal prosecutions of seven men in Toledo, Ohio, resulted in prison terms ranging from one day to twenty-three years and probation. In addition to the challenges of court security and jury security, the district judge reviewed evidence collected pursuant to the Foreign Intelligence Surveillance Act (FISA).

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Conspiracy to Fight United States Forces in Iraq

On Thursday, February 16, 2006, the government filed a sealed indictment against three Muslim men of Toledo for conspiracy to fight United States forces in Iraq.²⁰⁸⁶ Mohammad Zaki Amawi was a citizen of both the United States and Jordan, Marwan Othman el-Hindi was a naturalized citizen of the United States, and Wassim I. Mazloun was a permanent resident of the United States.²⁰⁸⁷ El-Hindi and Mazloun were arrested in Toledo on

2086. Indictment, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006), D.E. 1 [hereinafter *Amawi* Indictment]; see Dan Eggen, *Ohio Men Accused of Plot to Kill Troops in Iraq*, Wash. Post, Feb. 22, 2006, at A3; Amanda Garrett, Mike Tobin, Christopher Evans & Stephen Koff, 3 *Ohioans Face Terror Charges*, Cleveland Plain Dealer, Feb. 22, 2006, at A1; Neil A. Lewis, 3 *Charged with Conspiring to Kill U.S. Troops in Iraq*, N.Y. Times, Feb. 22, 2006, at A12; Mike Wilkinson & Christina Hall, 3 *Charged in Terror Plot*, Toledo Blade, Feb. 22, 2006, at A1; Andrew Zajac, *Ohio Men Indicted on Terror Charges*, Chi. Trib., Feb. 22, 2006, News, at 3.

2087. See *Amawi* Indictment, *supra* note 2086; Eggen, *supra* note 2086; Lewis, *supra* note 2086; Zajac, *supra* note 2086.

Sunday; Amawi was arrested in Jordan on Sunday and flown to the United States on Monday; the indictment was unsealed on Tuesday.²⁰⁸⁸ The U.S. District Court for the Northern District of Ohio assigned the case to Judge James G. Carr.²⁰⁸⁹

Amawi was born in the United States of Jordanian parents; the family moved back to Jordan when Amawi was two years old.²⁰⁹⁰ After the parents divorced, Amawi's mother moved with him to Toledo, about five years before the indictment.²⁰⁹¹ In 2005, he worked at AZ Travel and Services.²⁰⁹² Later that year, he returned to Jordan.²⁰⁹³ El-Hindi was born in Jordan.²⁰⁹⁴ In the United States, he dropped out of Onondaga Community College.²⁰⁹⁵ He was in his third marriage.²⁰⁹⁶ Mazloum was born in Lebanon and grew up in Venezuela; he moved to the United States in 2000.²⁰⁹⁷ With his brother, he operated City Auto Sales, a used-car business, and he studied computer science and engineering at the University of Toledo.²⁰⁹⁸

2088. Docket Sheet, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Docket Sheet]; see Eggen, *supra* note 2086; Garrett et al., *supra* note 2086; Wilkinson & Hall, *supra* note 2086; Zajac, *supra* note 2086.

2089. *Amawi* Docket Sheet, *supra* note 2088; see Mark Reiter, *Deadline Imposed in Local Terrorism Case*, Toledo Blade, Mar. 8, 2006, at B1.

Tim Reagan interviewed Judge Carr for this case study at a district judges' workshop in San Antonio, Texas, on September 9, 2008.

2090. Interview with Judge James G. Carr, Sept. 9, 2008.

2091. *Id.*; see Erika Ray, *Experts Say Terror Links Are Formed Overseas*, Toledo Blade, Feb. 23, 2006, at A6.

2092. See Ignazio Messina & Christina Hall, *Business Falls at Firms Tied to 3 Suspects*, Toledo Blade, Feb. 23, 2006, at A6.

2093. See Ray, *supra* note 2091.

2094. See *Amawi* Indictment, *supra* note 2086; *Few Clues Available on Accused Toledo Man*, Toledo Blade, Feb. 22, 2006, at A4 [hereinafter *Few Clues*].

2095. See Christopher Evans, Amanda Garrett, Mark Rollenhagen & Mike Tobin, *Nickel-and-Dime Hustler, or Something Worse?*, Cleveland Plain Dealer, May 21, 2006, at A1.

2096. See *id.*; *Few Clues*, *supra* note 2094.

2097. See Erica Blake, *Local Man in Terror Case Is Released on Bail*, Toledo Blade, Sept. 1, 2007, at B1.

2098. See Christina Hall, *Indictment of UT Student Shocks Family, Acquaintances*, Toledo Blade, Feb. 22, 2006, at A4; Messina & Hall, *supra* note 2092; David Yonke & Tom Troy, *Toledo-Area Muslims Ask for Justice, Fear Backlash*, Toledo Blade, Feb. 22, 2006, at A1.

Information about the conspiracy was provided to the government by a man called “the Trainer” in the indictment.²⁰⁹⁹ According to the indictment, the Trainer was a U.S. citizen with a U.S. military background whom el-Hindi had solicited “to assist in providing security and body-guard training.”²¹⁰⁰ The Trainer began passing information about the defendants to the government in 2004.²¹⁰¹

Part of his pitch to the defendants was that Muslims needed to protect themselves. This morphed into suggestions and then offers that he could provide training to the defendants in jihadist methods. This, in turn, he told them, would prepare them either to engage in combat against American forces in Iraq and/or provide training to do so for others.

The defendants fell for his spurious blandishments.²¹⁰²

On March 2, newspapers identified the Trainer as Darren Griffin, also known as Bilal, who had worked at a charity called KindHearts, which the government shut down the same week it indicted Amawi, el-Hindi, and Mazloun.²¹⁰³ Two days after Amawi’s indictment, the government obtained a warrant to search AZ Travel, where he worked.²¹⁰⁴ The supporting affidavit referred to Griffin as a paid cooperating witness who had been reporting to the FBI for four years.²¹⁰⁵ On June 6, 2006, Judge Carr issued an order forbidding public dissemination of Griffin’s image or identity.²¹⁰⁶

2099. *Amawi Indictment*, *supra* note 2086; see Eggen, *supra* note 2086; Garrett et al., *supra* note 2086; Lewis, *supra* note 2086; Wilkinson & Hall, *supra* note 2086; Zajac, *supra* note 2086.

2100. *Amawi Indictment*, *supra* note 2086.

2101. See Joshua Boak, *Detainee Served as Imam at Prison*, Toledo Blade, Feb. 23, 2006, at A1. See generally Al Jazeera Investigates: Informants (Al Jazeera documentary film 2014), www.youtube.com/watch?v=CMRns4ViuEY.

2102. Order, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Oct. 6, 2011), D.E. 1129, 2011 WL 4696477 (denying a motion for a new trial based on new evidence).

2103. Mike Tobin, Mark Rollenhagen & Christopher Evans, *FBI’s Informant Worked at Muslim Charity 3 Years*, Cleveland Plain Dealer, Mar. 2, 2006, at A1; David Yonke, *Insider in Local Terror Arrests ID’d*, Toledo Blade, Mar. 2, 2006, at A1; Christopher D. Kirkpatrick & David Yonke, *Muslims Find Giving to Charity Now Harder*, Toledo Blade, Mar. 6, 2006, at A1.

2104. Search Warrant, United States v. AZ Travel Inc., No. 3:06-mj-7025 (N.D. Ohio Feb. 18, 2006), D.E. 2.

2105. Affidavit, *id.* (filed unsealed Apr. 17, 2006), D.E. 8; see Mark Reiter, *Feds Suspected Plot by Toledo Trio in ’04*, Toledo Blade, Apr. 18, 2006, at A1.

2106. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 6, 2006), D.E. 95.

Related Cases

A year after the original indictment was filed, a superseding indictment added as defendants two Chicago men, cousins Zubair and Khaleel Ahmed.²¹⁰⁷ A separate indictment charged el-Hindi and Ashraf Zaim, the owner of AZ Travel, with grant fraud.²¹⁰⁸ A third indictment charged Mazloum's brother Bilal with making a false statement to federal agents during the investigation of Mazloum.²¹⁰⁹ The court assigned the two new cases to Judge Carr.²¹¹⁰ Judge Carr decided that the Ahmeds and Wassim Mazloum could be released on bond and electronic monitoring.²¹¹¹ In December 2007, so that the trial against the original three defendants could proceed without impairing the Ahmeds' ability to mount defenses, the Ahmeds were dismissed from the superseding indictment, and a separate indictment was filed against them.²¹¹²

Convictions

Jury selection for the trial of the original three defendants began on March 4, 2008.²¹¹³ Judge Carr allowed the attorneys to prepare and use a jury questionnaire.²¹¹⁴ Judge Carr permitted attorneys to question potential ju-

2107. Superseding Indictment, *id.* (Feb. 7, 2007), D.E. 186; see Jeff Coen & Tonya Maxwell, 2 *Arrested in Terror Conspiracy*, Chi. Trib., Feb. 22, 2007, Metro, at 1; Mark Reiter, 2 *Tied to Terror Suspects Indicted*, Toledo Blade, Feb. 22, 2007, at A1; Libby Sander, 2 *Chicago Cousins Are Charged with Plotting Overseas Attacks*, N.Y. Times, Feb. 22, 2007, at A20.

2108. Indictment, *United States v. El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007), D.E. 1; see Reiter, *supra* note 2107; Sander, *supra* note 2107.

2109. Indictment, *United States v. Mazloum*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007), D.E. 1; see Reiter, *supra* note 2107; Sander, *supra* note 2107.

2110. Docket Sheet, *Mazloum*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007) [hereinafter *Mazloum* Docket Sheet]; Docket Sheet, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007) [hereinafter *El-Hindi* Docket Sheet].

2111. See Blake, *supra* note 2097.

2112. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Dec. 27, 2007), D.E. 525; Indictment, *United States v. Ahmed*, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007), D.E. 1.

2113. *Amawi* Docket Sheet, *supra* note 2088; see Erica Blake, *U.S. Jury Pool Draws 450 for Terror Conspiracy Trial*, Toledo Blade, Mar. 5, 2008, at B1; Damian G. Guevara, *Toledo Trio Accused in 2006 Terror Plot Head to Trial*, Cleveland Plain Dealer, Mar. 4, 2008, at B1.

2114. James G. Carr, *United States v. Amawi: Jury Questionnaire* (Mar. 4, 2008), www.fjc.gov/sites/default/files/2014/TROHN007.pdf; Interview with Judge James G. Carr, Sept. 9, 2008; see Transcript, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Jan. 15, 2008, filed Jan. 25, 2010), D.E. 1048; Transcript at 48–64, *id.* (Jan. 10, 2008, filed Jan. 25, 2010), D.E. 1047 [hereinafter Jan. 10, 2008, *Amawi* Transcript].

rors during voir dire,²¹¹⁵ but he threatened to remove the privilege when the attorneys took too much time trying to develop challenges for cause against too many potential jurors.²¹¹⁶ Voir dire proceeded more efficiently after that.²¹¹⁷

Judge Carr gave both sides extra peremptory challenges, but he was not lenient with challenges for cause.²¹¹⁸ After all potential jurors had been questioned, there remained many more than needed for the jury, alternates, and peremptory challenges.²¹¹⁹ So Judge Carr invited the attorneys to file a joint motion to reconsider denials of cause challenges.²¹²⁰ The attorneys accepted the invitation, potentially appealable issues were removed, and a jury satisfactory to both sides and the court heard the case.²¹²¹

On March 24, Judge Carr severed from the trial two counts that were only against Amawi for threats against the President,²¹²² and the government later dismissed those counts.²¹²³ Opening statements began on April 1.²¹²⁴ Griffin testified on the following day.²¹²⁵ He testified that for nearly \$56,000 a year he professed approval of overseas jihad to see who in the Toledo-area Muslim community would respond, and the three defendants took the bait.²¹²⁶ Closing arguments concluded on Tuesday, June 10.²¹²⁷ The jury reached guilty verdicts on Friday.²¹²⁸

Judge Carr wished he had given the questions greater scrutiny, because some proved to be too confusing to the potential jurors. Interview with Judge James G. Carr, Sept. 9, 2008.

2115. Interview with Judge James G. Carr, Sept. 9, 2008; Jan. 10, 2008, *Amawi Transcript*, *supra* note 2114, at 62–63.

2116. Interview with Judge James G. Carr, Sept. 9, 2008.

2117. *Id.*

2118. *Id.*

2119. *Id.*

2120. *Id.*

2121. *Id.*

2122. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 24, 2008), D.E. 690.

2123. Government Motion, *id.* (July 15, 2008), D.E. 840.

2124. *Amawi Docket Sheet*, *supra* note 2088.

Following opening statements, Judge Carr provided the jurors with preliminary instructions. James G. Carr, *United States v. Amawi: Preliminary Jury Instructions* (Apr. 1, 2008), www.fjc.gov/sites/default/files/2014/TROHN003.pdf.

2125. See Erica Blake, “*The Trainer*” *Begins Terror Trial Testimony*, *Toledo Blade*, Apr. 3, 2008, at A1.

2126. See *id.*

Judge Carr deferred sentencing of the three original defendants until after the separate indictment against el-Hindi was resolved.²¹²⁹ After a bench trial of five court days in November 2008,²¹³⁰ Judge Carr convicted el-Hindi on the fraud indictment and sentenced him to one-and-a-half years;²¹³¹ the court of appeals affirmed the conviction.²¹³² Zaim pleaded guilty,²¹³³ and Judge Carr sentenced him to one day of custody.²¹³⁴ In October 2009, Judge Carr sentenced the three original defendants:²¹³⁵ twenty years for Amawi;²¹³⁶ twelve years for el-Hindi,²¹³⁷ to be served in advance of the sentence on the fraud indictment;²¹³⁸ and eight years and four months

2127. *Amawi* Docket Sheet, *supra* note 2088; see Mark Reiter, *Terrorist Plot Case Is Handed to Jurors*, Toledo Blade, June 11, 2008, at B1.

For jury instructions, see James G. Carr, *United States v. Amawi: Final Jury Instructions* (June 10, 2008), www.fjc.gov/sites/default/files/2014/TROHN004.pdf; James G. Carr, *United States v. Amawi: Stipulated Definitions* (June 4, 2008), www.fjc.gov/sites/default/files/2014/TROHN005.pdf; James G. Carr, *United States v. Amawi: Supplemental Jury Instruction* (June 10, 2008), www.fjc.gov/sites/default/files/2014/TROHN006.pdf (concerning examination of original evidence).

2128. Jury Verdicts, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 13, 2008), D.E. 806; see Mark Reiter, *3 Guilty in Plot to Kill Troops*, Toledo Blade, June 14, 2008, at A1.

2129. See Erica Blake, *Millions Spent on Terror Case*, June 22, 2008, at A1.

2130. *El-Hindi* Docket Sheet, *supra* note 2110; see Erica Blake, *Convicted Terrorist to Face Another Trial*, Toledo Blade, Nov. 5, 2008, at B1.

2131. Judgment and Commitment, *United States v. El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009), D.E. 119 [hereinafter *El-Hindi Judgment*]; Transcript at 163, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 21, 2009, filed Jan. 22, 2010), D.E. 1045 [hereinafter *El-Hindi Sentencing Transcript*]; see Erica Blake, *El-Hindi Guilty of Conspiracy, Theft Charges*, Toledo Blade, Nov. 13, 2008, at B1.

2132. *United States v. El-Hindi*, 408 F. App'x 957 (6th Cir. 2011).

2133. *El-Hindi* Docket Sheet, *supra* note 2110.

2134. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Dec. 8, 2008), D.E. 91.

2135. See Erica Blake, *3 in Toledo Terror Plot Will Serve up to 20 Years*, Toledo Blade, Oct. 22, 2009, at A1.

2136. Amended Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009, D.E. 998; see Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting a release date of August 28, 2023, reg. no. 30547-160).

Judge Carr denied a habeas corpus petition on November 6, 2014. Opinion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Nov. 6, 2014), D.E. 1158, 2014 WL 5795551.

2137. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009), D.E. 997; *El-Hindi Sentencing Transcript*, *supra* note 2131, at 163; see BOP Locator, *supra* note 2136 (noting release from prison on May 1, 2018, reg. no. 43530-060).

2138. *El-Hindi Judgment*, *supra* note 2131; *El-Hindi Sentencing Transcript*, *supra* note 2131, at 163.

for Mazloun.²¹³⁹ On August 23, 2012, the court of appeals affirmed “all opinions and judgments of the district court.”²¹⁴⁰

In light of intervening Supreme Court decisions that certain federal statutory references to crimes of violence are unconstitutionally vague, Amawi sought habeas corpus relief from his conviction.²¹⁴¹ Judge Carr transferred the motion to the court of appeals because it was a successive habeas corpus motion.²¹⁴² The court of appeals determined that the Supreme Court precedents did not apply to Amawi’s specific charges.²¹⁴³

Bilal Mazloun was sentenced on August 26, 2008, to one year of probation on a guilty plea.²¹⁴⁴ On January 15, 2009, the Ahmeds both pleaded guilty to a single count of material support to terrorists.²¹⁴⁵ They surrendered to begin serving their sentences before sentencing.²¹⁴⁶ On July 12, 2010, Judge Carr sentenced Zubair Ahmed to ten years and Khaleel Ahmed to eight years and four months.²¹⁴⁷

2139. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 27, 2009), D.E. 1000; Transcript at 65, *id.* (Oct. 21, 2009, filed Jan. 22, 2010), D.E. 1046; *see* BOP Locator, *supra* note 2136 (noting release from prison on April 23, 2014, reg. no. 43528-060).

2140. *United States v. Amawi*, 695 F.3d 457, 465 (6th Cir. 2012), *cert. denied*, 568 U.S. 1209 (2013).

2141. Habeas Corpus Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Sept. 13, 2016), D.E. 1161; *see* *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 576 U.S. 591 (2015).

2142. Opinion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 4, 2018), D.E. 1176, 2018 WL 4823116.

2143. *In re Amawi*, 780 F. App’x 301 (6th Cir. 2019).

2144. *Mazloun* Docket Sheet, *supra* note 2110.

2145. Docket Sheet, *United States v. Ahmed*, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007) [hereinafter *Ahmed* Docket Sheet]; *see 2 Men Plead Guilty in Local Terror Case*, Toledo Blade, Jan. 16, 2009, at B1.

2146. Surrender Order, *Ahmed*, No. 1:07-cr-647 (N.D. Ohio Jan. 8, 2010), D.E. 178; Quarterly Report, *id.* (May 1, 2009), D.E. 155.

2147. Transcript at 44, 66, *id.* (July 12, 2010, filed Dec. 8, 2010), D.E. 202; *Ahmed* Docket Sheet, *supra* note 2145; *see* BOP Locator, *supra* note 2136 (noting releases from prison on May 6, 2016, for Khaleel Ahmed, reg. no. 19304-424, and August 17, 2018, for Zubair Ahmed, reg. no. 19303-424).

In 2019, Northern District of Illinois Judge John Robert Blakey granted a government motion to modify the terms of Zubair Ahmed’s supervised relief to include surveillance of his computer use. Order, *United States v. Ahmed*, No. 1:07-cr-834 (N.D. Ill. May 23, 2019), D.E. 19.

In 2018, the government initiated a suit to revoke Khaleel's U.S. citizenship.²¹⁴⁸ Northern District of Illinois Judge Robert M. Dow, Jr., ruled in the government's favor on some claims on September 22, 2021.²¹⁴⁹ The opinion was sealed, pending redactions, until May 23, 2022, because it quoted from Khaleel's sealed plea agreement in his criminal case.²¹⁵⁰ Following execution of a settlement agreement, Judge Robert M. Dow entered judgment against Khaleel on May 23.²¹⁵¹

Communications Management Units

In 2014, Southern District of Illinois Judge J. Phil Gilbert dismissed a pro se action by Amawi pursuant to the Freedom of Information Act (FOIA) for information about communications management units (CMUs) in prison and the treatment of Muslim prisoners there, because of a combination of partial compliance with the FOIA requests and Amawi's not agreeing to required fees.²¹⁵²

In 2016, Judge Gilbert dismissed a pro se action challenging Amawi's assignment to a CMU, granting the defendants qualified immunity.²¹⁵³ In February 2019, the court of appeals dismissed an appeal for failure to pay \$505 in appellate fees or seek to proceed in forma pauperis.²¹⁵⁴ Amawi

2148. Docket Sheet, *United States v. Ahmed*, No. 1:18-cv-4598 (N.D. Ill. July 3, 2018).

2149. Opinion, *id.* (Sept. 22, 2021), D.E. 133 [hereinafter *Ahmed* Citizenship Revocation Opinion] (redacted); Opinion, *id.* (Sept. 22, 2021), D.E. 97 (sealed).

2150. *Ahmed* Citizenship Revocation Opinion, *supra* note 2149, at 1; Minutes, *Ahmed*, No. 1:18-cv-4598 (N.D. Ill. Sept. 22, 2021), D.E. 96.

2151. Judgment, *Ahmed*, No. 1:18-cv-4598 (N.D. Ill. May 23, 2022), D.E. 134.

Tim Reagan remotely attended status conferences on November 16, 2021, and March 1 and 30, April 18, and May 6, 2022, at which a settlement agreement and resolution of travel documents were discussed.

2152. Opinion, *Amawi v. Fed. Bureau of Prisons*, No. 3:13-cv-536 (S.D. Ill. June 24, 2014), D.E. 32, 2014 WL 2866651 (declining to excuse failure to oppose the summary-judgment motion); Order, *id.* (Apr. 9, 2014), D.E. 29, 2014 WL 1389278 (adopting the magistrate judge's report and recommendation); Report and Recommendation, *id.* (Mar. 3, 2014), D.E. 26 (recommending summary judgment); Opinion, *id.* (July 10, 2013), D.E. 9, 2013 WL 3467074 (magistrate judge's screening of the pro se complaint); Complaint, *id.* (June 10, 2013), D.E. 1.

2153. Order, *Amawi v. Walton*, No. 3:13-cv-866 (S.D. Ill. Dec. 19, 2016), D.E. 200, 2016 WL 7337948 (adopting a report and recommendation); Report and Recommendation, *id.* (Nov. 17, 2016), D.E. 199, 2016 WL 7364768; *see* Opinion, *id.* (Dec. 21, 2017), D.E. 208, 2017 WL 6540913 (denying reconsideration).

2154. Order, *Amawi v. Walton*, No. 19-1014 (7th Cir. Feb. 20, 2019), D.E. 4; *see* Order, *id.* (Apr. 9, 2019), D.E. 6 (denying reconsideration).

paid the fee in partial payments from May 13, 2019, to November 22, 2021.²¹⁵⁵

Challenge: Attorney–Client Contacts

As they began preparing their clients’ defenses, the defendants’ attorneys became concerned that their communications with their clients were being improperly monitored.²¹⁵⁶ One month after the indictment was filed, the assistant federal defender representing Amawi filed a motion “to compel the United States to describe with particularity the extent to which attorney–client communications have been or may be monitored, or in the alternative, for pretrial release on bond.”²¹⁵⁷ Mazloum’s attorney joined the motion on the next court day.²¹⁵⁸ Government attorneys responded that they were not aware of any monitoring other than customary monitoring by the Bureau of Prisons.²¹⁵⁹

Eight months into the case, Judge Carr reluctantly allowed Amawi to fire the federal defender’s office, which was representing him; Amawi was concerned that a government employee would not represent him adequately.²¹⁶⁰ Amawi was no more satisfied with newly appointed counsel and eventually requested to be represented by the federal defender’s office again, a request that Judge Carr granted.²¹⁶¹ Balancing Amawi’s attorney’s desire for more time to prepare for trial and el-Hindi’s desire for a speedy trial, Judge Carr granted Amawi a short continuance to afford his reappointed attorney time to prepare.²¹⁶²

2155. Orders, *id.* (Apr. 9, 2019, to Nov. 22, 2021), D.E. 7, 9 to 16; see Docket Sheet, *Amawi*, No. 3:13-cv-866 (S.D. Ill. Aug. 21, 2013) (D.E. 219 to 227).

2156. Transcript at 37–39, 41–43, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 7, 2006, filed Jan. 22, 2010), D.E. 1038 [hereinafter Mar. 7, 2006, *Amawi* Transcript]; see Christina Hall, *Scrutiny of Terror Suspects Strict*, Toledo Blade, Feb. 25, 2006, at A1.

2157. Amawi Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 17, 2006), D.E. 34; see *Attorney Seeks Data on Inmate Privacy*, Toledo Blade, Mar. 18, 2006, at B1.

2158. Mazloum Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 20, 2006), D.E. 39.

2159. Government Responses, *id.* (Mar. 21, 2006), D.E. 40.

2160. Transcript, *id.* (Oct. 19, 2006, filed Jan. 22, 2010), D.E. 1039; *Amawi* Docket Sheet, *supra* note 2088; see Mark Reiter, *Local Terror Suspect Will Get New Lawyer*, Toledo Blade, Oct. 20, 2006, at B3.

2161. Transcript at 3–7, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Jan. 18, 2008, filed Sept. 27, 2010), D.E. 1068; Jan. 10, 2008, *Amawi* Transcript, *supra* note 2114, at 3; Interview with Judge James G. Carr, Sept. 9, 2008.

2162. Interview with Judge James G. Carr, Sept. 9, 2008.

Challenge: FISA Evidence

At an early status conference—before the Ahmeds had been indicted—Judge Carr, who sat on the court that issued FISA surveillance orders, asked government counsel if the case would include FISA evidence.²¹⁶³ The attorney, who appeared by telephone, responded, “The answer to that question alone, it could be considered classified, and we wouldn’t be authorized to discuss that over this telephone line.”²¹⁶⁴

On the day before the Ahmeds’ April 24, 2007, detention hearing, the government filed notices that it intended to use evidence obtained pursuant to FISA orders at the hearing.²¹⁶⁵ On September 14, the government filed a notice that it intended to use FISA evidence pertaining to each defendant at some point during the case.²¹⁶⁶ Judge Carr determined that it was not necessary to disclose to defense counsel FISA application materials for the FISA evidence for the court to determine the validity of the FISA evidence *ex parte* and *in camera*.²¹⁶⁷

The court of appeals agreed with Judge Carr that no FISA-derived evidence was discoverable.²¹⁶⁸

Challenge: Court Security

Judge Carr was distressed to learn about unnecessarily visible court security.²¹⁶⁹ For example, prospective jurors had to walk by an SUV conspicuously marked as a Department of Homeland Security vehicle.²¹⁷⁰ It did not help that one news station reported on the case with a graphic titled, “Terror in Toledo.”²¹⁷¹ Chief Judge Carr was able to persuade security forces to convey less of a siege image.²¹⁷²

2163. Mar. 7, 2006, *Amawi* Transcript, *supra* note 2156, at 5.

2164. *Id.*

2165. FISA Notices, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Apr. 23, 2007), D.E. 234, 235.

2166. FISA Notice, *id.* (Sept. 14, 2007), D.E. 365.

2167. *United States v. Amawi*, 531 F. Supp. 2d 832 (N.D. Ohio 2008).

2168. *United States v. Amawi*, 695 F.3d 457, 474–75 (6th Cir. 2012).

2169. Interview with Judge James G. Carr, Sept. 9, 2008.

2170. *Id.*

2171. *Id.*

2172. *Id.*

Challenge: Jury Security

Judge Carr used an anonymous jury and had jurors report off-site instead of to the courthouse during the trial.²¹⁷³ To minimize prejudice, Judge Carr told the jurors that it was customary to use an anonymous jury in a criminal trial and that off-site reporting was necessitated by insufficient courthouse parking availability, which actually was true to some extent.²¹⁷⁴

2173. *Id.*

2174. *Id.*

Chapter 18

Atlanta

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

Two convictions for material support of terrorism followed trials in which one defendant represented himself and the other made his own closing argument. Challenges for the judges in this case included reviewing classified evidence.

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On March 23, 2006, the FBI arrested Georgia Tech student Syed Haris Ahmed on a sealed material-support indictment filed in the Northern District of Georgia.²¹⁷⁵ The court initially assigned the case to District Judge Clarence Cooper and Magistrate Judge Joel M. Feldman.²¹⁷⁶ With the defendant's consent, the government obtained permission from Judge Feldman to proceed initially under seal with closed proceedings.²¹⁷⁷ But on the following day, April 20, the day Ahmed pleaded not guilty at a closed hearing,²¹⁷⁸ the *Atlanta Journal-Constitution* reported Ahmed's arrest,²¹⁷⁹ and as a result the government moved to unseal the case.²¹⁸⁰

2175. Indictment, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006), D.E. 1; see Brenda Goodman, *Student Is Held in Terror Case*, N.Y. Times, Apr. 21, 2006, at A18; Bill Torpy, *Terror Charge for Student*, Atlanta J. & Const., Apr. 21, 2006, at A1.

2176. Docket Sheet, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006) [hereinafter N.D. Ga. Docket Sheet].

For this case study, Tim Reagan interviewed Judge Cooper and his law clerk Nicole Jenkins in the judge's chambers on November 18, 2009. Judge Feldman retired on October 22, 2006. *Judicial Milestones*, The Third Branch, Nov. 2006, at 8.

2177. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006), D.E. 16.

2178. See Bill Torpy & Jeremy Redmon, *Path Traced in Suspects' Terror Case*, Atlanta J. & Const., Apr. 22, 2006, at A1.

2179. Bill Torpy & Mike Morris, *FBI Detains Tech Student, but Won't Say Why*, Atlanta J. & Const., Apr. 20, 2006, at A1.

2180. Motion to Unseal, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006), D.E. 21; see Goodman, *supra* note 2175.

Also on April 20, Magistrate Judge Linda T. Walker took over for Judge Feldman,²¹⁸¹ because of Judge Feldman's impending retirement.²¹⁸² Two months later, because of Judge Walker's recusal, Magistrate Judge Gerrilyn G. Brill took over for Judge Walker.²¹⁸³

Ahmed was an American citizen born in Pakistan.²¹⁸⁴ He moved to the United States with his parents and siblings in 1997.²¹⁸⁵ At Georgia Tech, he majored in mechanical engineering.²¹⁸⁶

On July 19, 2006, the indictment against Ahmed was superseded to add Ehsanul Islam Sadequee as a defendant.²¹⁸⁷ Sadequee was arrested while shopping in Dhaka, Bangladesh, on April 17 and turned over to U.S. authorities.²¹⁸⁸ The U.S. District Court for the Eastern District of New York had issued a warrant for Sadequee's arrest on March 28.²¹⁸⁹ U.S. authorities transported him to the District of Alaska;²¹⁹⁰ the court there

2181. N.D. Ga. Docket Sheet, *supra* note 2176.

2182. Reassignment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006), D.E. 23 ("In light of the potential length required to dispose of the above-styled case which may extend beyond the undersigned's scheduled October 22, 2006 retirement, IT IS HEREBY ORDERED that this case be reassigned from the undersigned to the next magistrate scheduled to receive a long case, to wit: the Honorable Linda T. Walker."); *see* Order, *id.* (Apr. 19, 2006), D.E. 18 (declaring the case to be complex under 18 U.S.C. § 3161(h)(8)(A), (B)(ii) (2006), now § 3161(h)(7)(A), (B)(ii) (2020)).

2183. Reassignment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 21, 2006); Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009.

Tim Reagan interviewed Judge Brill for this case study in her chambers. Judge Brill retired on January 17, 2016. Judicial Milestones, www.uscourts.gov/judicial-milestones/gerrilyn-g-brill.

2184. *See* Goodman, *supra* note 2175; Torpy & Morris, *supra* note 2179.

2185. *See* Torpy & Morris, *supra* note 2179.

2186. *See id.*

2187. Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. July 19, 2006), D.E. 39; *see* Jeffry Scott, *Georgia Terror Suspects Accused of Dobbins Plot*, Atlanta J. & Const., July 20, 2006, at D1. *See generally* Homegrown: The Counter-Terror Dilemma (HBO 2016).

2188. *See* William K. Rashbaum & Brenda Goodman, *New Terror Accusations Keep a Georgia Man in Custody*, N.Y. Times, Apr. 29, 2006, at A12; Torpy, *supra* note 2175; Torpy & Redmon, *supra* note 2178.

2189. Arrest Warrant, *United States v. Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006), D.E. 2.

2190. Docket Sheet, *United States v. Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006); *see* Jeremy Redmon & Bill Torpy, *Feds Trace Pair to D.C. in Terror Case*, Atlanta J. & Const., Apr. 29, 2006, at A1.

committed Sadequee to the Eastern District of New York.²¹⁹¹ Sadequee was arraigned in Brooklyn on April 22.²¹⁹² On August 1, the court in the Eastern District of New York committed Sadequee to the Northern District of Georgia.²¹⁹³ Sadequee pleaded not guilty in Atlanta to the superseding indictment on August 9.²¹⁹⁴

Ahmed and Sadequee met at Al-Farooq Masjid, a mosque near Georgia Tech.²¹⁹⁵ They agreed to prepare for violent jihad, including by playing paintball in the north Georgia mountains.²¹⁹⁶

Sadequee was a U.S. citizen born in Fairfax, Virginia; his parents were Bangladeshi.²¹⁹⁷ He moved to the Atlanta area in 1988.²¹⁹⁸ From 1999 to 2001, he studied at an Islamic seminary in Ajax, Ontario.²¹⁹⁹ In August 2005, he traveled to Bangladesh to marry a cousin.²²⁰⁰ While there, he studied business administration at North South University in Dhaka.²²⁰¹

On March 6, 2005, Ahmed and Sadequee traveled together to Toronto, which has a very large Muslim community.²²⁰² Two of the men they met were subsequently prosecuted by Canada after a seventeen-suspect terrorism sweep.²²⁰³

2191. Commitment to Another District, *Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006), D.E. 4.

2192. Docket Sheet, *Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

2193. Docket Sheet, *United States v. Sadequee*, No. 1:06-mj-820 (E.D.N.Y. Aug. 1, 2006).

2194. Minutes, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006), D.E. 52; see Bill Torpy, *Terror Case Suspect Returned to Atlanta*, *Atlanta J. & Const.*, Aug. 10, 2006, at D12.

2195. See Torpy & Redmon, *supra* note 2178.

2196. Specific Findings at 2–4, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 10, 2009), D.E. 510.

2197. See Bill Torpy, *Suspected Terrorists*, *Atlanta J. & Const.*, June 11, 2006, at A1; Redmon & Torpy, *supra* note 2190.

2198. See Torpy, *supra* note 2197.

2199. See *id.*

2200. See Rashbaum & Goodman, *supra* note 2188; Redmon & Torpy, *supra* note 2190.

2201. See Redmon & Torpy, *supra* note 2190.

2202. Specific Findings, *supra* note 2196, at 3; see Brenda Goodman, *U.S. Says 2 Georgia Men Planned a Terror Attack*, *N.Y. Times*, Apr. 22, 2006, at A12; Torpy, *supra* note 2197.

2203. See Ian Austen & David Johnston, *17 Held in Plot to Bomb Sites Across Ontario*, *N.Y. Times*, June 4, 2006, at 11; Bill Torpy, *Ga. Terror Case Tied to Arrests*, *Atlanta J. & Const.*, June 4, 2006, at A1; Torpy, *supra* note 2197.

In April, Ahmed and Sadequee made casing videos of potential terrorism targets: the Capitol, the George Washington Masonic Memorial in Alexandria, the World Bank, and a fuel storage facility in Newington, Virginia.²²⁰⁴ A suspected terrorist in Britain, Younis Tsouli, was discovered to have received the videos over the internet.²²⁰⁵

On July 17, Ahmed traveled to Pakistan.²²⁰⁶ His family claimed the trip was for religious education, but the government claimed the purpose was military training.²²⁰⁷ On August 18, Sadequee traveled to Bangladesh.²²⁰⁸

Ahmed returned to the United States on August 19, and federal agents interviewed him upon his arrival.²²⁰⁹ They interviewed him again the following March.²²¹⁰

In October 2008, because Judge Cooper would be taking senior status four months later, District Judge William S. Duffey, Jr., became the presiding judge.²²¹¹ The government decided to try Ahmed and Sadequee by separate indictments.²²¹²

2204. Specific Findings, *supra* note 2196, at 5–6 (“That the videos were to advance and provide support for terrorism is demonstrated by Sadequee’s narration during the dusk videotaping of the Pentagon, when, referring to the Pentagon, Sadequee stated: ‘this is where our brothers attacked.’”); see Rashbaum & Goodman, *supra* note 2188; Redmon & Torpy, *supra* note 2190; Torpy, *supra* note 2197; Craig Whitlock & Spencer S. Hsu, *Terror Webmaster Sentenced in Britain*, Wash. Post, Jan. 24, 2008, at A10.

2205. Specific Findings, *supra* note 2196, at 13; see Torpy, *supra* note 2197.

On July 5, 2007, Tsouli was sentenced by a British court to ten years in prison. See Whitlock & Hsu, *supra* note 2204.

2206. Specific Findings, *supra* note 2196, at 10; see Torpy, *supra* note 2197.

2207. See Torpy, *supra* note 2197.

2208. Specific Findings, *supra* note 2196, at 10.

2209. *Id.* at 11.

2210. *Id.* at 15.

2211. Order, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 1, 2008), D.E. 344 (exchanging the criminal case for two civil cases); Interview with Judge Clarence Cooper, Nov. 18, 2009; see Transcript at 3, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Jan. 26, 2009, filed Feb. 12, 2009), D.E. 384 [hereinafter First Jan. 26, 2009, Transcript]; Transcript at 2–3, *id.* (Jan. 26, 2009, filed Jan. 30, 2009), D.E. 376 [hereinafter Second Jan. 26, 2009, Transcript]; Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges (noting Judge Cooper’s taking senior status on February 9, 2009).

Tim Reagan interviewed Judge Duffey for this case study in his chambers on June 16, 2009, and by telephone on February 18, 2010. Judge Duffey retired on July 1, 2018. FJC Biographical Directory, *supra*.

2212. Third Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 9, 2008), D.E. 347 (superseding indictment against Sadequee); Second Superseding Indictment, *id.* (Dec. 9, 2008), D.E. 343 (superseding indictment against Ahmed).

As trial approached, each of the defendants expressed a desire to represent himself.²²¹³ Ahmed wanted to address the court during closing arguments.²²¹⁴ Sadequee said that he wanted to question witnesses.²²¹⁵

Judge Duffey agreed to let Ahmed proceed with counsel but make his own closing statement if the trial were to the bench rather than to a jury.²²¹⁶ Ahmed opted for a bench trial,²²¹⁷ which began on June 1, 2009.²²¹⁸ He said that he thought that Judge Duffey would be more objective than the average juror.²²¹⁹ On the fourth day of trial, as the court prepared to hear closing arguments, Judge Duffey clarified that Ahmed elected not to testify and that his closing remarks could not be considered as evidence.²²²⁰

2213. Second Jan. 26, 2009, Transcript, *supra* note 2211, at 21 (“[Sadequee]: I also wanted to ask about I’m considering going *pro se*. And I understand that there is a number of categories, like standby counsel.”); *id.* at 27 (Ahmed “would like to address [the court] again about an issue that he just raised for the first time at counsel table similar to what Mr. Sadequee—the discussion you had with Mr. Sadequee.”); First Jan. 26, 2009, Transcript, *supra* note 2211, at 14 (“[Ahmed]: I wanted to file a motion to terminate counsel.”); see Bill Rankin, *Terror Suspects May Want to Defend Selves*, Atlanta J. & Const., Jan. 28, 2009, at C3.

2214. Interview with Judge William S. Duffey, Jr., June 16, 2009; see Bill Rankin, *No Jury for Terror Suspect*, Atlanta J. & Const., May 20, 2009, at B1.

2215. Transcript at 31, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 3, 2009, filed Mar. 13, 2009), D.E. 401 (“I would definitely intend to interview witnesses. . . . I also perhaps would make some statements in the opening statement or closing statement.”); Second Jan. 26, 2009, Transcript, *supra* note 2211, at 23 (“maybe I would just interview one or two witnesses”); see Rankin, *supra* note 2213.

2216. Transcript at 6–7, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. May 19, 2009, filed Jan. 12, 2010), D.E. 643 [hereinafter May 19, 2009, Transcript]; Transcript, *id.* (May 18, 2009, filed Jan. 12, 2010), D.E. 642.

2217. May 19, 2009, Transcript, *supra* note 2216, at 3–6; Specific Findings, *supra* note 2196, at 2; Interview with Judge William S. Duffey, Jr., June 16, 2009; see Rankin, *supra* note 2214.

2218. Minutes, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 1, 2009), D.E. 496; Transcript, *id.* (June 1, 2009, filed June 19, 2009), D.E. 519; Specific Findings, *supra* note 2196, at 2; see Bill Rankin, *Defendant “Fell Prey” to Extremist, Lawyer Says*, Atlanta J. & Const., June 2, 2009, at A10.

2219. May 19, 2009, Transcript, *supra* note 2216, at 9.

2220. Transcript at 877–78, 910, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 4, 2009, filed June 19, 2009), D.E. 522; see May 19, 2009, Transcript, *supra* note 2216, at 8 (“THE DEFENDANT: . . . Can I explain something? I mean, as long as I can say this statement, I don’t care if it’s considered for my trial or not. For me that’s—to say the statement, deliver it in public is all I care about.”).

On June 9, Judge Duffey announced that Ahmed was guilty.²²²¹

The case received extensive coverage, especially by local news media.²²²² One status conference held in Judge Brill's chambers was attended by reporters from several news media because there had been talk of closing the proceeding.²²²³ Judge Brill observed that sealing documents and closing proceedings often intensifies news media interest.²²²⁴

One local journalist sat through the entire trial.²²²⁵ Judge Duffey reserved a row of seats for the press, and he permitted sketch artists to sit in the jury box.²²²⁶ News media had access to all of the evidence on the day that it was admitted; the U.S. Attorney's office was responsible for providing copies of the evidence to the media.²²²⁷ No one in Judge Duffey's chambers was permitted to convey information to news media, except to read a few answers provided by Judge Duffey to questions about scheduling.²²²⁸

Judge Duffey sealed his special findings supporting Ahmed's guilty verdict until after Sadequee's jury trial.²²²⁹ News media initially objected to the idea, but they came to accept the temporary sealing as proper.²²³⁰ Judge Duffey provided copies of the sealed findings to the parties' attorneys of record, forbidding them from revealing them to anyone else; the defendant was permitted to examine his attorney's copy but not to retain a copy.²²³¹

2221. Verdict, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 10, 2009), D.E. 509; Transcript at 4, *id.* (June 10, 2009, filed June 19, 2009), D.E. 523 [hereinafter June 10, 2009, Transcript]; Specific Findings, *supra* note 2196, at 2; see Robbie Brown, *Georgia Man Is Convicted in Conspiracy*, N.Y. Times, June 11, 2009, at A21; Bill Rankin, *Terror Trial Verdict: Guilty*, Atlanta J. & Const., June 11, 2009, at A1.

2222. Interview with Judge Clarence Cooper, Nov. 18, 2009; Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; Interview with Judge William S. Duffey, Jr., June 16, 2009.

2223. Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009.

2224. *Id.*

2225. Interview with Judge William S. Duffey, Jr., June 16, 2009.

2226. *Id.*

2227. *Id.*

2228. *Id.*

2229. June 10, 2009, Transcript, *supra* note 2221, at 5; Specific Findings, *supra* note 2196; N.D. Ga. Docket Sheet, *supra* note 2176; Interview with Judge William S. Duffey, Jr., June 16, 2009.

2230. Interview with Judge William S. Duffey, Jr., June 16, 2009.

2231. June 10, 2009, Transcript, *supra* note 2221, at 6.

For Sadequee's trial, Judge Duffey used a jury questionnaire.²²³² Prospective jurors filled out the questionnaire a week before voir dire.²²³³ This gave the lawyers and the court ample time to review the questionnaires to focus follow-up voir dire on the most important issues.²²³⁴

Judge Duffey bifurcated the questionnaire so that prospective jurors filled out the first part, which focused on general background issues and matters that might affect a panel member's service, before they filled out the second part, which focused on issues related to the nature of the trial, beliefs about Islam, and other case-specific matters.²²³⁵

Jury selection in Sadequee's trial began on August 3, 2009.²²³⁶ That morning, Sadequee announced that he would represent himself.²²³⁷ Judge Duffey appointed his attorneys as standby counsel.²²³⁸ Sadequee cross-examined the government's witnesses and called only his sister as his own witness.²²³⁹ He did not testify himself,²²⁴⁰ but he did present a closing argument.²²⁴¹ On, August 12, the jury found Sadequee guilty on all four counts presented.²²⁴²

2232. William S. Duffey, Jr., *United States v. Sadequee: Jury Questionnaire* (July 22, 2009) [hereinafter *Jury Questionnaire*], www.fjc.gov/sites/default/files/2014/TRGAN002.pdf; Interview with Judge William S. Duffey, Jr., Feb. 18, 2010.

2233. Interview with Judge William S. Duffey, Jr., Feb. 18, 2010.

2234. *Id.*

Judge Duffey tried to minimize the amount of jurors' idle time at the courthouse. *Id.*

2235. *Jury Questionnaire*, *supra* note 2232; Interview with Judge William S. Duffey, Jr., Feb. 18, 2010.

2236. Minutes, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 3, 2009), D.E. 574.

2237. *Id.*; Transcript at 3, *id.* (Aug. 3 and 4, 2009, filed Aug. 31, 2009), D.E. 592 [hereinafter Aug. 3 and 4, 2009, Transcript]; Interview with Judge William S. Duffey, Jr., Feb. 18, 2010.

2238. Interview with Judge William S. Duffey, Jr., Feb. 18, 2010.

2239. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 10, 2009, filed Sept. 2, 2009), D.E. 596 [hereinafter Aug. 10, 2009, Transcript]; Transcripts, *id.* (Aug. 5–7, 2009, filed Aug. 31 and Sept. 2, 2009), D.E. 593, 594, 595; Aug. 3 and 4, 2009, Transcript, *supra* note 2237.

2240. Aug. 10, 2009, Transcript, *supra* note 2239, at 1241–42.

2241. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 11, 2009, filed Sept. 2, 2009), D.E. 597.

2242. Jury Verdict, *id.* (Aug. 12, 2009), D.E. 588 (guilty of conspiracy to provide material support to terrorists, providing and attempting to provide material support to terrorists, conspiracy to provide material support to a designated foreign terrorist organization, and attempting to provide material support to a designated foreign terrorist organization); Transcript, *id.* (Aug. 12, 2009, filed Sept. 2, 2009), D.E. 598.

The defendants represented themselves at sentencing, although their lawyers were allowed to argue some sentencing guidelines issues.²²⁴³ On December 14, Judge Duffey sentenced Ahmed to thirteen years and sentenced Sadequee to seventeen years, followed by thirty years of supervised release in both cases.²²⁴⁴ Both defendants voluntarily dismissed their appeals.²²⁴⁵

Ahmed was released on August 11, 2017,²²⁴⁶ and Sadequee was released on October 13, 2020.²²⁴⁷ On December 17, 2019, Judge Eleanor L. Ross modified Ahmed's supervised release to permit internet access beginning July 17, 2020.²²⁴⁸

Challenge: Closed Proceeding

When Ahmed entered a plea, Sadequee had not yet been indicted, and the government received permission from the court, with Ahmed's consent, to have the proceeding closed.²²⁴⁹ Deputy marshals taped newspapers to the windows on the courtroom door so that no one could see inside.²²⁵⁰

2243. Transcript, *id.* (Dec. 14, 2009, filed Jan. 12, 2010), D.E. 645 (Ahmed's sentencing); Transcript, *id.* (Dec. 14, 2009, filed Jan. 8, 2010), D.E. 635 (Sadequee's sentencing); N.D. Ga. Docket Sheet, *supra* note 2176; see Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 7, 2009), D.E. 602.

2244. Judgment and Commitment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 15, 2009), D.E. 620 (Ahmed's sentence); Judgment and Commitment, *id.* (Dec. 14, 2009), D.E. 622 (Sadequee's sentence); see Amended Judgment and Commitment, *id.* (May 2, 2011), D.E. 651 (modifying Ahmed's conditions of supervised release respecting access to the internet); see also Bill Rankin, *Two Terrorists Get Prison Sentences*, Atlanta J. & Const., Dec. 15, 2009, at A1.

2245. Docket Sheet, *United States v. Ahmed*, No. 09-16452 (11th Cir. Dec. 29, 2009) (noting a dismissal on May 20, 2011); Docket Sheet, *United States v. Sadequee*, No. 09-16325 (11th Cir. Dec. 21, 2009) (noting a dismissal on April 9, 2010).

2246. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 57987-019).

2247. *Id.* (reg. no. 15240-006).

2248. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 17, 2019), D.E. 667; see Order, *id.* (Oct. 30, 2020), D.E. 670 (denying reconsideration); see also Order, *id.* (June 4, 2021), D.E. 675 (denying Ahmed early termination of supervised release: "While the Defendant has maintained employment, is enrolled in school, has written a children's book, and has completed four years of supervised release, given the nature of the crime(s), it is the Court's inclination the Defendant remain under court supervision and thus, on supervised release at this time."); Order, *id.* (Sept. 3, 2021), D.E. 678 (denying Sadequee modification of supervised release to permit internet access).

2249. Order, *id.* (Apr. 19, 2006), D.E. 16.

2250. See Torpy & Redmon, *supra* note 2178.

Judge Brill granted the news media's motion to intervene for the purpose of possibly challenging sealing and closure orders.²²⁵¹

Challenge: Attorney Appointment

Initially, one of the attorneys appointed to represent Sadequee was an attorney in the Federal Public Defender's office.²²⁵² But Sadequee was assaulted in detention by another inmate who was also represented by that office, so the office could no longer represent Sadequee.²²⁵³ Judge Brill appointed a Muslim attorney with offices in Miami as a replacement.²²⁵⁴

Challenge: Classified Evidence

Early in the case, Judge Feldman issued a protective order requiring the defense to keep discovery confidential that, although not classified, was sensitive.²²⁵⁵ Judge Brill denied as overly broad and excessively burdensome for the court a subsequent government request for a protective order requiring defendants to file under seal, until the court could redact unclassified but sensitive information, all papers based on discovery.²²⁵⁶ News media were vigilant in arguing that the case be prosecuted openly.²²⁵⁷ Judge Brill insisted that specific reasons be articulated for the sealing of any filings.²²⁵⁸ The parties subsequently agreed to a protective order that Judge Brill could sign.²²⁵⁹

On June 16, 2006, before Sadequee was added to the indictment, the government filed a notice that it would use evidence obtained through the Foreign Intelligence Surveillance Act (FISA)²²⁶⁰ and a motion for a protective order, pursuant to the Classified Information Procedures Act, laying

2251. Minutes, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 1, 2006), D.E. 71.

2252. Appointment Order, *id.* (Aug. 9, 2006), D.E. 56.

2253. Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; see Transcript at 5, 7–8, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Jan. 5, 2009, filed Jan. 30, 2009), D.E. 375.

2254. Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; see Transcript at 11–12, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 18, 2008, filed Sept. 23, 2008), D.E. 320 [hereinafter Sept. 18, 2008, Transcript].

2255. Protective Order *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006), D.E. 20.

2256. Order, *id.* (Oct. 26, 2006); see Bill Torpy, *Terror Case Files to Remain Open*, Atlanta J. & Const., Oct. 27, 2006, at D3.

2257. See Moni Basu, *Judge Seeks Balance on Terror Case Evidence*, Atlanta J. & Const., Dec. 16, 2006, at B3.

2258. See *id.*

2259. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 20, 2006), D.E. 142.

2260. Notice, *id.* (June 16, 2006), D.E. 35.

out ground rules for defense access to classified evidence.²²⁶¹ On February 8, 2007, Judge Cooper signed a protective order laying out procedures for handling classified information.²²⁶²

Defense counsel had to obtain security clearances.²²⁶³ So did court staff members.²²⁶⁴ District judges have security clearances by virtue of their office, but magistrate judges must obtain security clearances to see classified information.²²⁶⁵

Before classified evidence is presented at trial, and often before it can be shared with defendants themselves in addition to their cleared counsel, the evidence is either declassified or substituted with court-approved summaries or admissions.²²⁶⁶ At an early proceeding, the U.S. Attorney observed that “the intelligence community always wants the Government to wait as long as it possibly can before it declassifies or gets substitutions because every step in that discretion poses some risk of disclosure of sources, even if we do substitutions.”²²⁶⁷

Much pretrial work in criminal cases in the Northern District of Georgia is done by magistrate judges.²²⁶⁸ Judge Brill reviewed classified foundations for trial evidence at an *in camera* proceeding with counsel for both sides present.²²⁶⁹

Some classified information in this case was designated sensitive compartmented information (SCI), which means that it is protected by special

2261. Motion, *id.* (June 16, 2006), D.E. 33.

2262. Protective Order, *id.* (Feb. 8, 2007), D.E. 160.

2263. See Bill Torpy, *Security Clearance Slows Terror Case*, Atlanta J. & Const., Sept. 2, 2006, at D3.

2264. Interview with Judge Clarence Cooper, Nov. 18, 2009; Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; Interview with Judge William S. Duffey, Jr., June 16, 2009.

2265. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2* (Federal Judicial Center, 2d ed. 2013); see also Torpy, *supra* note 2263.

2266. 18 U.S.C. app. 3 §§ 4, 6(c)(1) (2020); see Reagan, *supra* note 2265, at 16–19; Sept. 18, 2008, Transcript, *supra* note 2254, at 4–5.

2267. Sept. 18, 2008, Transcript, *supra* note 2254, at 16.

2268. Interview with Judge Clarence Cooper, Nov. 18, 2009; Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; see Sept. 18, 2008, Transcript, *supra* note 2254, at 2.

2269. Report and Recommendation, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 2, 2007), D.E. 226, *adopted*, Order, *id.* (Dec. 19, 2008), D.E. 358; see Minutes, *id.* (Sept. 24, 2007), D.E. 222.

procedures compartmenting who has access to it.²²⁷⁰ Judges and cleared court staff members could view this information at a sensitive compartmented information facility (SCIF) at the U.S. Attorney's office in the same building as the courthouse.²²⁷¹ Judges Duffey and Brill were permitted to keep some classified materials in chambers safes.²²⁷² A secure room was set aside for defense counsel to store and review classified information.²²⁷³ Classified information security officers reviewed any documents prepared based on classified information for possible redaction.²²⁷⁴

From 2001 until his becoming a judge in 2004, Judge Duffey was the district's U.S. Attorney.²²⁷⁵ He was, therefore, familiar with the security staff at the U.S. Attorney's office.²²⁷⁶ To view classified materials for the case, Judge Duffey made an appointment with the U.S. Attorney's security staff, and the judge usually complied with their request that he give them at least a day's notice and not stay past 5:00 p.m.²²⁷⁷

Challenge: FISA Evidence

Two months after the government provided notice that it would use FISA evidence in the case, Ahmed filed a motion to suppress FISA evidence.²²⁷⁸ Judge Brill issued a report and recommendation finding no errors in FISA procedures and finding that none of the FISA materials were discoverable.²²⁷⁹ Judge Brill acknowledged that defense counsel are in a difficult position when arguing for suppression of FISA evidence, because they do not have access to the FISA records.²²⁸⁰ On the other hand, a FISA suppression

2270. See Reagan, *supra* note 2265, at 3 (describing sensitive compartmented information).

2271. See Torpy, *supra* note 2256; see also Reagan, *supra* note 2265, at 22–23 (describing SCIFs).

2272. Interview with Judge William S. Duffey, Jr., June 16, 2009; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Oct. 18, 2011.

2273. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Oct. 18, 2011.

2274. Interview with Judge Clarence Cooper, Nov. 18, 2009; Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009; Interview with Judge William S. Duffey, Jr., June 16, 2009; see Torpy, *supra* note 2256; see also Reagan, *supra* note 2265, at 21–22 (providing information about classified information security officers).

2275. FJC Biographical Directory, *supra* note 2211; see Rankin, *supra* note 2214.

2276. Interview with Judge William S. Duffey, Jr., June 16, 2009.

2277. *Id.*

2278. FISA Motion, *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006), D.E. 59.

2279. Report and Recommendation, *id.* (Aug. 22, 2007), D.E. 203.

2280. Interview with Judge Gerrilyn G. Brill, Nov. 18, 2009.

motion is easier for the judge than many other suppression motions, because collection of the FISA evidence has been subjected to prior judicial review.²²⁸¹

Ahmed also filed a motion that the government disclose whether he had been subject to warrantless surveillance by the National Security Agency outside FISA.²²⁸² Judge Cooper denied the motion.²²⁸³

2281. *Id.*

2282. NSA Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006), D.E. 60.

2283. Order, *id.* (Feb. 7, 2007), D.E. 163.

Chapter 19

Sears Tower

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

Presiding over the prosecution of the Liberty City Seven in Miami did not require a review of classified information, but it did require management of jury security, two mistrials, and two juror replacements.

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In an effort to thwart a suspected plot to topple the building formerly known as the Sears Tower in Chicago and attack other targets in Chicago, Washington, New York, Los Angeles, and Miami, the government indicted seven men with ties to the Liberty City neighborhood of Miami on June 22, 2006.²²⁸⁴ Narseal Batiste, Burson Augustin, his brother Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor were American citizens.²²⁸⁵ Phanor was already in jail for a probation violation; the others were arrested in Miami on the day of indictment.²²⁸⁶ Patrick Abraham was

2284. Indictment, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006), D.E. 3; *United States v. Augustin*, 661 F.3d 1105, 1114–15 (11th Cir. 2011); see Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. Times, July 1, 2006, at A1; Chris Heffelfinger, *Radical Islam in America* 132 (2011); David Ovalle, Evan S. Benn, Larry Lebowitz & Luisa Yanez, *Terrorism Raid Targets a Warehouse in Miami*, Miami Herald, June 23, 2006, at 1A; Walter Pincus, *FBI Role in Terror Probe Questioned*, Wash. Post, Sept. 2, 2006, at A1; Scott Shane & Andrea Zarate, *F.B.I. Killed Plot in Talking State, a Top Aide Says*, N.Y. Times, June 24, 2006, at A1; Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts*, Wash. Post, June 24, 2006, at A3.

In 2009, the Sears Tower became known as the Willis Tower. See Mary Ellen Podmolik, *Tower Title Holds Power*, Chi. Trib., Mar. 13, 2009, News, at 5; see also Michael J. de la Merced, *Blackstone Group Purchases Landmark Chicago Tower*, N.Y. Times, Mar. 17, 2015, at B3 (“It is unclear if or when Blackstone will change the name of the building, which was rechristened the Willis Tower after the Willis Group, an insurance brokerage, bought the naming rights in 2009.”).

2285. See Shane & Zarate, *supra* note 2284; Whoriskey & Eggen, *supra* note 2284.

2286. *Augustin*, 661 F.3d at 1114; see Trenton Daniel, Nicole White & Andres Viglucci, *Bible Their Book, Work Their Life, Family Says*, Miami Herald, June 24, 2006, at 1A; Shane & Zarate, *supra* note 2284; Whoriskey & Eggen, *supra* note 2284.

a Haitian arrested in Miami on May 9 for overstaying his tourist visa.²²⁸⁷ Lyglenson Lemorin was a legal Haitian immigrant who had moved to Atlanta approximately two months previously, and he was arrested there on June 22.²²⁸⁸ The defendants became known as the Liberty City Seven.²²⁸⁹

Batiste, married with four children, was born in Chicago and grew up there and in Louisiana, where his father was a Baptist preacher.²²⁹⁰ His mother died in 2000.²²⁹¹ At one time, he worked for FedEx in Chicago.²²⁹² Batiste and his wife operated a stucco and masonry business, and he held Bible readings at his warehouse.²²⁹³ Also known as Prince Manna, Batiste followed the traditions of the Moorish Science Temple of America, founded in 1913 by the Prophet Noble Drew Ali, which blends Judaism, Christianity, and Islam, with an emphasis on self-discipline through martial arts.²²⁹⁴ He called his religious group the Seas of David.²²⁹⁵

Abraham was Batiste's right-hand man.²²⁹⁶ Phanor was born in Miami of Haitian parents.²²⁹⁷ He attended Edison Senior High School and finished

2287. *Augustin*, 661 F.3d at 1114; see Shane & Zarate, *supra* note 2284; Whoriskey & Eggen, *supra* note 2284.

2288. *Augustin*, 661 F.3d at 1114; see Daniel et al., *supra* note 2286; Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. Times, Dec. 14, 2007, at A22; Shane & Zarate, *supra* note 2284; Jay Weaver & Luisa Yanez, *Mistrial Called for 6 of "Liberty City 7"*, Miami Herald, Dec. 14, 2007, at 1A; Peter Whoriskey, *Man Acquitted in Terror Case Faces Deportation*, Wash. Post, Mar. 2, 2008, at A3; Whoriskey & Eggen, *supra* note 2284.

2289. See Abby Goodnough, *Trial Starts for Men in Plot to Destroy Sears Tower*, N.Y. Times, Oct. 3, 2007, at A14. See generally Al Jazeera Investigates: Informants (Al Jazeera documentary film 2014), www.youtube.com/watch?v=CMRns4ViuEY (including an interview with Augustine).

2290. See Daniel et al., *supra* note 2286; Drew & Lichtblau, *supra* note 2284; Charles Rabin & Susannah A. Nesmith, *Family: Suspect Grew Up Deeply Religious*, Miami Herald, June 27, 2006, at 1A.

2291. See Rabin & Nesmith, *supra* note 2290.

2292. See Drew & Lichtblau, *supra* note 2284; Pincus, *supra* note 2284.

2293. See Drew & Lichtblau, *supra* note 2284.

2294. *United States v. Augustin*, 661 F.3d 1105, 1111 (11th Cir. 2011); see Drew & Lichtblau, *supra* note 2284; Charles Rabin & Alexandra Alter, *Group Denies Violent Doctrine*, Miami Herald, June 24, 2006, at 29A; Whoriskey, *supra* note 2288; Peter Whoriskey, *Trial Begins for 7 Accused of Plotting to Destroy Sears Tower*, Wash. Post, Oct. 3, 2007, at A9 [hereinafter *Trial Begins*].

2295. See Drew & Lichtblau, *supra* note 2284; Goodnough, *supra* note 2289; Shane & Zarate, *supra* note 2284.

2296. See Jay Weaver & David Ovalle, *How FBI Moles Snared Terror Suspects*, Miami Herald, July 16, 2006, at 1A.

2297. See *id.*

high school in Tallahassee.²²⁹⁸ At the time of his arrest, he was living in Batiste's warehouse.²²⁹⁹ Herrera's parents were from the Dominican Republic.²³⁰⁰ Lemorin, born in Haiti and married with two children, came to the United States as a child in 1993 and had permanent resident status.²³⁰¹

The case against the men was established by Elie Assad, a veteran government informant who posed as a representative of Al-Qaeda.²³⁰² Assad provided the suspects with military boots and a video camera for casing targets.²³⁰³ The FBI paid him \$17,000 plus \$19,570 in expenses, and the government granted him political asylum.²³⁰⁴ Abbas al-Saidi, another informant, was paid \$10,500 plus \$8,815 in expenses.²³⁰⁵

The court assigned the case to Judge Joan A. Lenard.²³⁰⁶ Jury selection began on September 18, 2007.²³⁰⁷ Judge Lenard did not use a jury questionnaire; in a dozen years on the bench, she had never used one.²³⁰⁸ She preferred face-to-face voir dire in three phases: first were questions directed to the whole panel, second were individual general qualification

2298. *See id.*

2299. *See id.*

2300. *See id.*

2301. *See* Daniel et al., *supra* note 2286; Whoriskey, *supra* note 2288.

2302. *United States v. Augustin*, 661 F.3d 1105, 1112 (11th Cir. 2011); *see* Goodnough, *supra* note 2289; Shane & Zarate, *supra* note 2284; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 725–26 (2010); Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. Pa. J. Const. L. 1475, 1489–93 (2009); Whoriskey, *Trial Begins*, *supra* note 2294; Whoriskey & Eggen, *supra* note 2284.

Assad was born in Lebanon of Syrian descent. *See* Jay Weaver, *Liberty City Seven Defense Faces Setbacks*, Miami Herald, Oct. 23, 2007, at 1B (reporting that Assad was paid \$80,000 and al-Saidi was paid about \$40,000).

2303. *Augustin*, 661 F.3d at 1112; *see* Goodnough, *supra* note 2289; Shane & Zarate, *supra* note 2284; Whoriskey & Eggen, *supra* note 2284.

2304. *See* Pincus, *supra* note 2284; Jay Weaver, *Trial for "Liberty City Seven" to Start March 3*, Miami Herald, July 27, 2006, at 3B.

2305. *See* Pincus, *supra* note 2284; Weaver, *supra* note 2304.

2306. Docket Sheet, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006) [hereinafter S.D. Fla. Docket Sheet]; *see* Weaver, *supra* note 2304.

Tim Reagan interviewed Judge Lenard for this case study in her chambers on October 8, 2009.

2307. *Augustin*, 661 F.3d at 1115; *see* Jay Weaver, *Proving Liberty City 7's Intentions Is Task for Feds*, Miami Herald, Sept. 18, 2007, at 1A.

2308. Interview with Judge Joan A. Lenard, Oct. 8, 2009.

questions, and third were more sensitive case-specific individual questions.²³⁰⁹

Opening statements began on October 2.²³¹⁰ Later that month, a Miami police counterterrorism pamphlet, which was distributed at a Metrorail station, was discovered in the jury room.²³¹¹ Judge Lenard dismissed two jurors and an alternate who said they had read it.²³¹²

Jury deliberations began on December 3.²³¹³ On December 13, the jury acquitted Lemorin.²³¹⁴ But the jury deadlocked on the other defendants, and Judge Lenard declared a mistrial.²³¹⁵ On the following day, the government transferred Lemorin to an immigration detention center and initiated deportation proceedings against him.²³¹⁶ He was deported to Haiti on January 20, 2011; his wife and three children continued to live in Miami Beach.²³¹⁷

During deliberations, the second jury decided to replace the foreperson.²³¹⁸ After thirteen days of deliberation, the jury deadlocked, on April

2309. Joan A. Lenard, *United States v. Batiste: Voir Dire Questions* (Sept. 18, 2007) [hereinafter *Voir Dire Questions*], www.fjc.gov/sites/default/files/2014/TRFLS002.pdf; Interview with Judge Joan A. Lenard, Oct. 8, 2009; see *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (finding Judge Lenard's voir dire procedures in a previous case to be a meticulous model); see also Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. Feb. 3, 2009, filed Jan. 20, 2010), D.E. 1485 (phases one and two questions in the third trial).

2310. See Goodnough, *supra* note 2289; Whoriskey, *supra* note 2294.

2311. See Weaver, *supra* note 2302.

2312. See *id.*

2313. See Kirk Semple, *Defense Ends Its Arguments in Terrorism Trial in Miami*, N.Y. Times, Dec. 1, 2007, at A12.

2314. *United States v. Augustin*, 661 F.3d 1105, 1111, 1115 (11th Cir. 2011); see Semple, *supra* note 2288; Weaver & Yanez, *supra* note 2288; Peter Whoriskey, *Terrorism Case Ends in Mistrial; 1 Acquitted*, Wash. Post, Dec. 14, 2007, at A3.

2315. *Augustin*, 661 F.3d at 1115; see Semple, *supra* note 2288; Weaver & Yanez, *supra* note 2288; Whoriskey, *supra* note 2314.

2316. See *Lemorin v. Attorney Gen.*, 416 F. App'x 35 (11th Cir. 2011); *Ex-Terror Suspect Is Charged Anew*, N.Y. Times, Feb. 7, 2008, at A27; Whoriskey, *supra* note 2288.

2317. Order, *Lemorin v. Holder*, No. 3:10-cv-1037 (M.D. Fla. Jan. 31, 2011) (dismissing as moot because of Lemorin's January 20, 2011, deportation a challenge to detention pending removal); see *Ex-Terror Suspect May Be Deported*, Wash. Post, Dec. 6, 2008, at A2; Andres Viglucci, *Haitian Acquitted in Liberty City 7 Case Is Ordered Deported*, Miami Herald, Dec. 6, 2008, at 5B; Jay Weaver & Trenton Daniel, *Acquitted Haitian Defendant in Liberty City Seven Terror Case Is Deported*, Miami Herald, Jan. 21, 2011, at 1B; see also Opinion, *Lemorin v. U.S. Att'y Gen.*, No. 10-10165 (Feb. 8, 2011) (unsuccessful deportation appeal).

2318. Transcript, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. Apr. 4, 2008, filed Mar. 24, 2010), D.E. 1512.

16, 2008, and Judge Lenard again declared a mistrial.²³¹⁹ Jury selection in the third trial began on January 27, 2009.²³²⁰ Selection proceedings were interrupted by briefing on whether it was improper for the government to use a peremptory challenge against a young Haitian-American man.²³²¹

Opening statements began on February 19.²³²² Jury deliberations began on April 27 and were interrupted when one juror took ill and Judge Lenard replaced him with an alternate, which meant that deliberations had to begin again.²³²³ Then jurors reported that one of their members had refused to participate in deliberations.²³²⁴ After questioning all of the jurors, including the juror in question, and with consent of the parties, Judge Lenard replaced that juror as well.²³²⁵ Ultimately, on May 12, the jury acquitted Herrera and convicted each of the others on at least some of the pending counts.²³²⁶ The court of appeals affirmed the convictions.²³²⁷

From November 18 through 20, 2009, Judge Lenard sentenced Batiste to thirteen-and-a-half years, Abraham to nine years and four-and-a-half months, Phanor to eight years, Rotschild Augustine to seven years, and

2319. *Augustin*, 661 F.3d at 1115; see Damien Cave, *Mistrial for 6 in Sears Tower Terror Case*, N.Y. Times, Apr. 17, 2008, at A21; Julianne Gage, *2nd Mistrial in "Liberty City 7" Case*, Wash. Post, Apr. 17, 2008, at A2.

2320. *Augustin*, 661 F.3d at 1115; see Jay Weaver, *Jurors Vetted in Liberty City 6 Trial*, Miami Herald, Jan. 28, 2009, at 3B.

2321. See Jay Weaver, *Racial Concerns Halt Jury Selection in Third Liberty City Six Terrorism Trial*, Miami Herald, Feb. 12, 2009, at 3B.

2322. See Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. Times, Feb. 19, 2009, at A18.

2323. *Augustin*, 661 F.3d at 1115; Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. May 4, 2009, filed Aug. 24, 2010), D.E. 1515; Interview with Judge Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Jury Deliberations in Terror-Conspiracy Retrial Delayed Again*, Miami Herald, May 2, 2009, at 3B.

2324. *Augustin*, 661 F.3d at 1115, 1129; Interview with Judge Joan A. Lenard, Oct. 8, 2009; see Jay Weaver, *Five Members of Liberty City Six Guilty in Terror Plot*, Miami Herald, May 13, 2009, at 11A [hereinafter *Five Members*]; Weaver, *supra* note 2323; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

2325. *Augustin*, 661 F.3d at 1115, 1129–32; Interview with Judge Joan A. Lenard, Oct. 8, 2009; see Weaver, *supra* note 2324; Weaver, *supra* note 2323; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at 1A.

2326. *Augustin*, 661 F.3d at 1110–11, 1115; see Damien Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. Times, May 13, 2009, at A19; Weaver, *Five Members*, *supra* note 2324.

2327. *Augustin*, 661 F.3d at 1134, *cert. denied*, *Batiste v. United States*, 566 U.S. 1015 (petition by Batiste and Phanor), *Augustine v. United States*, 566 U.S. 1015, and *Abraham v. United States*, 566 U.S. 981 (2012); see Jay Weaver, *Convictions Upheld in "Liberty City 7,"* Miami Herald, Nov. 2, 2011, at 6B.

Burson Augustin to six years; Augustine was released in 2013, Abraham was released in 2014, Phanor was released in 2016, and Batiste was released in 2018.²³²⁸

Augustin was released on September 12, 2012.²³²⁹ On August 21, 2013, he was indicted for selling cocaine to a confidential informant.²³³⁰ Judge John E. Steele accepted Augustin's guilty plea on February 5, 2014.²³³¹ On May 5, Judge Steele sentenced Augustin to one year and four months on the indictment and to an additional two years for violation of supervised release.²³³² The court of appeals affirmed the sentence,²³³³ which Judge Steele later reduced by five months in light of retroactive sentencing guidelines amendments for drug crimes.²³³⁴ Augustin was released in 2016.²³³⁵

2328. S.D. Fla. Docket Sheet, *supra* note 2306; see Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting releases from prison on August 7, 2013, for Rothschild "Augustin," reg. no. 76732-004; August 20, 2014, for Abraham, reg. no. 76737-004; and March 23, 2018, for Batiste, reg. no. 76736-004); see also Opinion, Batiste v. United States, No. 1:13-cv-21905 (S.D. Fla. Dec. 17, 2014), D.E. 57 (denying habeas relief to Batiste), *certificate of appealability denied*, Opinion, No. 15-10696 (11th Cir. July 10, 2015).

Northern District of Texas Judge John McBryde denied Phanor's petition for time-served credit for Phanor's federal pretrial detention while serving a state sentence, because the state had already given him credit for that time. Opinion, Phanor v. Chandler, No. 4:14-cv-1039 (N.D. Tex. Feb. 20, 2015), D.E. 10, 2015 WL 738121 (noting a projected good-conduct discharge date of June 28, 2016), *appeal dismissed*, Order, No. 15-10414 (5th Cir. Apr. 20, 2016) (dismissing the appeal because of a late notice of appeal).

Phanor was detained in the Southern District of Florida in 2022 pending a hearing on revocation of his supervised release for use of cocaine. Order, United States v. Phanor, No. 1:06-cr-20373-3 (S.D. Fla. June 22, 2022), D.E. 1584. Following the hearing, Phanor was sentenced to time served followed by nine years of supervised release. Order, *id.* (Aug. 5, 2022), D.E. 1588. BOP Locator, *supra* (formerly noting release from prison on June 28, 2016, and now noting release from prison on August 5, 2022, reg. no. 64959-004).

2329. Record formerly at BOP Locator, *supra* note 2328 (reg. no. 76734-004).

2330. Indictment, United States v. Augustin, No. 2:13-cr-123 (M.D. Fla. Aug. 21, 2013), D.E. 15; Complaint, *id.* (Aug. 9, 2013), D.E. 3.

2331. Adjudication of Guilt, *id.* (Feb. 5, 2014), D.E. 46; see Transcript, *id.* (Feb. 4, 2014, filed Feb. 5, 2014), D.E. 47 (plea colloquy by Magistrate Judge Douglas N. Frazier).

2332. Transcript, *id.* (May 5, 2014, filed July 17, 2014), D.E. 64; Minutes, United States v. Augustin, No. 2:13-cr-124 (M.D. Fla. May 5, 2014), D.E. 25; Minutes, Augustin, No. 2:13-cr-123 (M.D. Fla. May 5, 2014), D.E. 56.

2333. United States v. Augustin, 613 F. App'x 826 (11th Cir. 2015).

2334. Order, Augustin, No. 2:13-cr-123 (M.D. Fla. June 22, 2015), D.E. 71.

2335. BOP Locator, *supra* note 2328 (noting release from prison on February 16, 2016, reg. no. 76734-004).

Following Abraham's release, he was deported on September 16, 2014, to Haiti, where he was detained pending further review by Haitian authorities.²³³⁶

Challenge: Classified Evidence

No part of this case involved classified information.²³³⁷

Challenge: Jury Security

During the first trial, an attorney working for one of the defendants gave a list of the jurors' names to members of a defendant's family.²³³⁸ Because of this and other inappropriate disclosures, Judge Lenard used an anonymous jury for the next two trials.²³³⁹ For the second trial, she also used partial sequestration, which meant that jurors met at undisclosed locations and were shuttled to the courthouse.²³⁴⁰ The court provided them with lunch.²³⁴¹

For the third trial, Judge Lenard did not implement sequestration procedures, but monitored the situation to see if implementing them would be advisable after all.²³⁴² Even partial sequestration is a burden on the jurors—they have to gather extra early—and the drivers and the vans required to shuttle them are an added expense.²³⁴³

Challenge: Pro Se Defendant

The court of appeals denied Augustin's motion to fire his attorney and proceed pro se on appeal.²³⁴⁴

2336. See Jacqueline Charles, "Liberty City" Terrorist Is Deported, Jailed in Haiti, *Miami Herald*, Sept. 25, 2014, at 8A.

2337. Interview with Judge Joan A. Lenard, Oct. 8, 2009.

2338. *Id.*

2339. Voir Dire Questions, *supra* note 2309; Interview with Judge Joan A. Lenard, Oct. 8, 2009.

2340. Interview with Judge Joan A. Lenard, Oct. 8, 2009.

2341. *Id.*

2342. *Id.*

2343. *Id.*

2344. Docket Sheet, *United States v. Augustin*, No. 09-15985 (11th Cir. Nov. 27, 2009) (noting the denial on August 15, 2011).

Chapter 20

Fort Dix

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

In a high-profile prosecution for a thwarted informant-encouraged attempt to attack a military base, in addition to overseeing court security and jury security, the court was called on to review classified evidence, including evidence collected pursuant to the Foreign Intelligence Surveillance Act (FISA).

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On May 7, 2007, the government filed criminal complaints in the U.S. District Court for the District of New Jersey against six men, alleging a plot to attack U.S. military installations, including Fort Dix.²³⁴⁵ Authorities

2345. Complaint, *United States v. Abdullahu*, No. 1:07-mj-2050 (D.N.J. May 7, 2007), D.E. 1; Complaint, *United States v. Tatar*, No. 1:07-mj-2049 (D.N.J. May 7, 2007), D.E. 1; Complaint, *United States v. Duka*, No. 1:07-mj-2048 (D.N.J. May 7, 2007), D.E. 1 (Shain); Complaint, *United States v. Duka*, No. 1:07-mj-2047 (D.N.J. May 7, 2007), D.E. 1; Complaint, *United States v. Duka*, No. 1:07-mj-2046 (D.N.J. May 7, 2007), D.E. 1 (Dritan); Complaint, *United States v. Shnewer*, No. 1:07-mj-2045 (D.N.J. May 7, 2007), D.E. 1; *see* Docket Sheet, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. June 5, 2007) [hereinafter D.N.J. Docket Sheet]; *United States v. Duka*, 671 F.3d 329, 333–34 (3d Cir. 2011); *see also* George Anastasia, *Fort Dix Targeted in “Jihad,” U.S. Says*, Phila. Inquirer, May 9, 2007, at A1; Chris Heffelfinger, *Radical Islam in America* 129 (2011); David Kocieniewski, *6 Men Arrested in a Terror Plot Against Ft. Dix*, N.Y. Times, May 9, 2007, at A1; Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, Wash. Post, May 9, 2007, at A1; John Shiffman & Jan Heffler, *Ordinary Lives, Radical Words*, Phila. Inquirer, May 9, 2007, at A1; John Shiffman & Jennifer Moroz, *Step by Step, Fort Dix Suspects Snared*, Phila. Inquirer, May 11, 2007, at A1. *See generally* Human Rights Watch, *Illusion of Justice* 25, 41–42, 52–54, 85–87, 105–06, 112, 130, 192–93, 198–200 (2014); Murtaza Hussain & Razan Ghalayini, *The Real Story Behind the Fort Dix Five Terror Plot*, The Intercept, June

arrested them that evening.²³⁴⁶ The grand jury returned an indictment on June 5,²³⁴⁷ and the court assigned the case to Judge Robert B. Kugler.²³⁴⁸

Mohamad Shnewer, a taxi driver and naturalized U.S. citizen born in Jordan, was the alleged coordinator.²³⁴⁹ He was the only defendant fluent in Arabic.²³⁵⁰ Also charged were his brother-in-law Eljvir Duka and Eljvir's brothers Dritan and Shain, roofers who were Albanian and who had been in the United States illegally since they were children.²³⁵¹ The two other defendants were Serdar Tatar, a legal resident born in Turkey who worked as a 7-Eleven clerk, and Agron Abdullahu, a legal resident who was born in Yugoslavia, had Egyptian military training, and baked dough for a supermarket.²³⁵² It was reported that Fort Dix may have been selected as a target because Tatar's family frequently delivered pizza there.²³⁵³

The group came to the government's attention in January 2006, when a video store clerk reported that the men were having a video copied showing them shouting about jihad while training with firearms in the Poconos.²³⁵⁴ The government sent Mahmoud Omar, an informant, to investi-

25, 2015, firstlook.org/theintercept/2015/06/25/fort-dix-five-terror-plot-the-real-story/ (including a twelve-minute documentary, "Entrapped" by Razan Ghalayini).

2346. *Duka*, 671 F.3d at 335; D.N.J. Docket Sheet, *supra* note 2345; see George Anastasia & Troy Graham, *Fort Dix Suspects Indicted*, Phila. Inquirer, June 6, 2007, at B1; Kocieniewski, *supra* note 2345; Russakoff & Eggen, *supra* note 2345.

2347. Indictment, *Shnewer*, No. 1:07-cr-459 (D.N.J. June 5, 2007), D.E. 18; see Kareem Fahim, *Charges Filed Against 6 Men in Plot to Attack Base*, N.Y. Times, June 6, 2007, at B6.

2348. D.N.J. Docket Sheet, *supra* note 2345; see Kareem Fahim, *U.S. Judge Promises Speedy Trial, and Leg Shackles, in Fort Dix Terror Case*, N.Y. Times, June 15, 2007, at A21; Troy Graham, *An Oct. Trial for Ft. Dix Six*, Phila. Inquirer, June 15, 2007, at B1.

Tim Reagan interviewed Judge Kugler for this case study in his chambers on December 15, 2009.

2349. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 2345; see Kocieniewski, *supra* note 2345; Russakoff & Eggen, *supra* note 2345; Shiffman & Hefler, *supra* note 2345.

2350. See Heffelfinger, *supra* note 2345, at 112.

2351. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 2345; see *Duka v. United States*, 27 F.4th 189, 191 (3d Cir. 2022); see also Kocieniewski, *supra* note 2345; Russakoff & Eggen, *supra* note 2345; Shiffman & Hefler, *supra* note 2345.

2352. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 2345.

2353. Edward Colimore, *Dismay at Cookstown Pizzeria*, Phila. Inquirer, May 9, 2007, at A4; Kocieniewski, *supra* note 2345; Russakoff & Eggen, *supra* note 2345; Shiffman & Hefler, *supra* note 2345.

2354. *Duka*, 671 F.3d at 334; see Anastasia, *supra* note 2345; Alan Feuer, *Practice in the Poconos*, N.Y. Times, May 9, 2007, at B6; Troy Graham, *Employee Who Played Key*

gate the group, and by March the informant had befriended Shnewer.²³⁵⁵ Arrests immediately followed a sham sale of guns by Omar to Dritan and Shain Duka.²³⁵⁶ It was reported that the government paid Omar more than \$230,000.²³⁵⁷ Besnik Bakalli, a second informant reportedly paid \$150,000, had encouraged the defendants to avenge Muslims.²³⁵⁸

On October 31, 2007, Abdullahu pleaded guilty to a charge of providing firearms to illegal aliens.²³⁵⁹ Judge Kugler sentenced him to one year and eight months on March 31, 2008.²³⁶⁰

Role in Dix Case Moves On, Phila. Inquirer, Dec. 24, 2008, at A6; Kocieniewski, *supra* note 2345; Russakoff & Eggen, *supra* note 2345.

2355. Duka, 671 F.3d at 334; see Anastasia, *supra* note 2345; Feuer, *supra* note 2354; *Informer Appears at Trial, but His Recordings Talk*, N.Y. Times, Nov. 2, 2008, NJ, at 1 [hereinafter *Informer Appears*]; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 722–24 (2010).

According to a 2010 newspaper article on Omar, “He has an eviction notice for overdue rent, an application for welfare, a foundering export business, and an uncertain immigration status.” George Anastasia, *From Star FBI Witness to Ostracism, Loss*, Phila. Inquirer, June 27, 2010, at A1.

2356. Duka, 671 F.3d at 335; Duka, 27 F.4th at 191; see George Anastasia, *Details Emerge in Terror Sting*, Phila. Inquirer, May 10, 2007, at A1; Fahim, *supra* note 2347; *Informer Appears*, *supra* note 2355; Shiffman & Hefler, *supra* note 2345.

2357. See George Anastasia, *Terror Trial Opens for Ft. Dix 5*, Phila. Inquirer, Oct. 21, 2008, at A1; *Informer Appears*, *supra* note 2355; Wadie E. Said, *Crimes of Terror* 36 (2015); Paul von Zielbauer & Jon Hurdle, *Five Are Convicted of Conspiring to Attack Fort Dix*, N.Y. Times, Dec. 23, 2008, at A18; see also Geoff Mulvihill, *Defense Lawyers Question Informant in Terror Case*, Wash. Post, Nov. 6, 2008, at A10 (“Omar, an Egyptian who entered the U.S. illegally in the 1990s, is getting \$1,500 a week plus free rent for his aid to the government.”).

2358. Duka, 671 F.3d at 334; see Von Zielbauer & Hurdle, *supra* note 2357; see also Said, *supra* note 2357, at 34 (“The government’s other informant, an Albanian Citizen named Besnik Bakalli, agreed to work for the government in exchange for not being deported from the United States.”).

2359. Minutes, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. Oct. 31, 2007), D.E. 86; Plea Agreement, *id.* (Oct. 22, 2007, filed Oct. 31, 2007), D.E. 89; see Superseding Information, *id.* (Oct. 31, 2007), D.E. 85; Waiver of Indictment, *id.* (Oct. 31, 2007), D.E. 87.

2360. Judgment, *id.* (Mar. 31, 2008), D.E. 151; Minutes, *id.* (Mar. 31, 2008), D.E. 150; see Kareem Fahim, *Gun Supplier Is Given 20-Month Sentence in Fort Dix Case*, N.Y. Times, Apr. 1, 2008, at B3; Kareem Fahim, *Tough Talk, and Hedging, in Taped Conversations of a Terrorism Defendant*, N.Y. Times, Mar. 31, 2008, at A21; Troy Graham, *First of Fort Dix Six Pleads Guilty*, Phila. Inquirer, Nov. 1, 2007, at B1; Troy Graham, *Man Who Supplied Guns in Alleged Fort Dix Terror Plot Sentenced to 20 Months*, Phila. Inquirer, Apr. 1, 2008, at B1.

Abdullahu was released from prison on March 24, 2009. Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (reg. no. 61286-066).

On July 11, Tatar initiated a civil action challenging his and his co-defendants' conditions of confinement.²³⁶¹ Because they were detained in the Philadelphia Detention Center,²³⁶² across the Delaware River from the Camden courthouse where they were to be tried, Tatar filed his handwritten complaint in the Eastern District of Pennsylvania.²³⁶³ The district court there transferred the action to Judge Kugler in the District of New Jersey as related to the criminal case.²³⁶⁴ Tatar filed a handwritten amended complaint on April 1, 2009,²³⁶⁵ and a typed amended complaint on January 4, 2011.²³⁶⁶ Judge Kugler granted the defendants summary judgment on June 19, 2012.²³⁶⁷

Because of the news media's attention to this case, Judge Kugler and the court set up a public website where documents in the case file were posted.²³⁶⁸ This allowed access to the documents without going through PACER (Public Access to Court Electronic Records, the federal courts' fee-based online record portal).²³⁶⁹ Evidence was posted the moment it was admitted.²³⁷⁰ Each side loaded digitized exhibits on a secure server in advance of moving for their admissibility.²³⁷¹ Neither side had access to the other side's exhibits on the server until they were admitted.²³⁷²

The court also posted proceeding transcripts on the server in a way that permitted free access to the proceedings while protecting the reporters' proprietary rights.²³⁷³ Transcript text rolled on the public website in

2361. Docket Sheet, *Tatar v. Levi*, No. 2:08-cv-3270 (E.D. Pa. July 11, 2008).

2362. Opinion at 1, *Tatar v. Levi*, No. 1:08-cv-4422 (D.N.J. Sept. 20, 2010), D.E. 49, 2010 WL 3740610.

2363. Motion, *Tatar*, No. 2:08-cv-3270 (E.D. Pa. July 25, 2008), D.E. 4.

2364. Order, *id.* (Sept. 2, 2008), D.E. 7.

2365. First Amended Complaint, *Tatar*, No. 1:08-cv-4422 (D.N.J. Apr. 1, 2009), D.E. 20.

2366. Second Amended Complaint, *id.* (Jan. 4, 2011), D.E. 64; see Danielle Camilli, *Fort Dix Conspirator Sues Prison Officials*, Bucks Cty. Courier Times, Jan. 6, 2011, at 9.

2367. Opinion, *Tatar*, No. 1:08-cv-4422 (D.N.J. June 19, 2012), D.E. 88, 2012 WL 2339814.

2368. Decorum Order, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. July 13, 2007), D.E. 49; Interview with Judge Robert B. Kugler, Dec. 15, 2009; see Graham, *supra* note 2348.

"Judge Kugler managed this extraordinarily complex trial in an exemplary way." *United States v. Duka*, 671 F.3d 329, 333 (3d Cir. 2011).

2369. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2370. *Id.*; see Graham, *supra* note 2348.

2371. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2372. *Id.*

2373. *Id.*

continuous loops so that a viewer would see whatever few lines of text were displayed when the viewer looked at the transcript and whatever lines of text scrolled by while the viewer watched.²³⁷⁴

Jury selection for the trial against the five remaining defendants began on September 29, 2008.²³⁷⁵ Judge Kugler used a jury questionnaire.²³⁷⁶ For five days, approximately 150 prospective jurors reported to the courthouse each day to fill out the questionnaire in the jury room, where Judge Kugler greeted them.²³⁷⁷ In the courtroom, Judge Kugler and the attorneys reviewed answered questionnaires.²³⁷⁸ Approximately two-thirds of the prospective jurors were disqualified on the basis of the questionnaires alone.²³⁷⁹

During the following week, fifteen prospective jurors reported in the morning and fifteen reported in the afternoon for individual voir dire.²³⁸⁰ Judge Kugler observed that once the questionnaires were filled out, there were few questions left to ask.²³⁸¹ Although it was unusual in federal courts for attorneys to ask questions directly during voir dire, Judge Kugler permitted it in this case.²³⁸² Judge Kugler also granted the parties double the number of usual peremptory challenges.²³⁸³

Because of the trial's high profile, the court designated two overflow courtrooms: one for the news media and one for the rest of the public.²³⁸⁴ Because Judge Kugler permitted the media to use laptop computers in the main courtroom and gave them wireless internet access, they did not use their overflow courtroom.²³⁸⁵ Journalists were able to blog in real time

2374. *Id.*

2375. Amended Minutes, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. Sept. 29, 2008), D.E. 242; see George Anastasia, *Trial for Fort Dix Five Begins Tomorrow*, *Phila. Inquirer*, Sept. 28, 2008, at A1.

2376. Robert B. Kugler, *United States v. Shnewer: Jury Questionnaire* (Sept. 29, 2008), www.fjc.gov/sites/default/files/2014/TRNJX002.pdf; see Anastasia, *supra* note 2375.

2377. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2378. *Id.*

2379. *Id.*

2380. *Id.*

2381. *Id.*

2382. *Id.*

2383. *Id.*

2384. Decorum Order, *supra* note 2368; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2385. *Id.*; see Graham, *supra* note 2348.

from the courtroom, but recording devices were not permitted.²³⁸⁶ Nor were published likenesses of the jurors permitted, and the general public was not permitted to bring in electronic equipment.²³⁸⁷ The overflow courtroom was needed for the rest of the public on the first day of the trial and on the day of the verdict.²³⁸⁸

Trial began on October 20, 2008, with opening arguments.²³⁸⁹ On December 22, after six days of deliberation, a jury convicted Shnewer, the Dukas, and Tatar of conspiring to kill American soldiers.²³⁹⁰ On April 28 and 29, 2009, Judge Kugler sentenced Tatar to thirty-three years, and he sentenced the other defendants to life.²³⁹¹

In part because of the cold December weather, Judge Kugler did not want press conferences on the steps of the courthouse following the verdict, so the news media were asked to gather in the jury assembly room.²³⁹² The government addressed the media for the first half hour, and defense counsel and families addressed the media thereafter.²³⁹³ The media could bring in cameras and recording devices for this purpose.²³⁹⁴ Because it worked well, a similar procedure was used after sentencing.²³⁹⁵

2386. Decorum Order, *supra* note 2368; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2387. *Id.*

2388. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2389. *See* Anastasia, *supra* note 2357.

2390. Jury Verdict, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. Dec. 22, 2008), D.E. 371; *see* Duka v. *United States*, 27 F.4th 189, 192 (3d Cir. 2022); *see also* William Branigin, *5 Men Convicted in Plot to Kill Soldiers at Fort Dix*, Wash. Post, Dec. 23, 2008, at A2; Troy Graham, *Fort Dix Five Guilty of Conspiracy*, Phila. Inquirer, Dec. 23, 2008, at A1; Von Zielbauer & Hurdle, *supra* note 2357.

2391. *Duka*, 27 F.4th at 192; *United States v. Duka*, 671 F.3d 329, 335–36 (3d Cir. 2011); Judgments, *Shnewer*, No. 1:07-cr-459 (D.N.J. Apr. 28 and 29, 2009), D.E. 417, 419, 421, 425, 427; Minutes, *id.* (Apr. 28 and 29, 2009), D.E. 416, 418, 420, 424, 426; *see* BOP Locator, *supra* note 2360 (noting life sentences for Dritan Duka, reg. no. 61285-066, Eljvir Duka, reg. no. 61282-066, Shain Duka, reg. no. 61284-066, and Shnewer, reg. no. 61283-066, and noting a release date of August 26, 2035, for Tatar, reg. no. 61287-066); *see also* Troy Graham, *Final 2 Ft. Dix Defendants Sentenced*, Phila. Inquirer, Apr. 30, 2009, at A1; Troy Graham, *Three in Fort Dix Terrorist Plot Sentenced to Life*, Phila. Inquirer, Apr. 29, 2009, at A1; *3 Brothers Sentenced to Life for Holy War Plot at Ft. Dix*, N.Y. Times, Apr. 29, 2009, at A19.

2392. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2393. *Id.*

2394. *Id.*

2395. *Id.*

In June and August of 2010, friends and relatives of the defendants organized rallies in front of the courthouse protesting the convictions.²³⁹⁶

On December 28, 2011, the court of appeals affirmed the convictions and sentences, with the exception of a defective charge against Shnewer.²³⁹⁷ One week before oral argument, the government informed the court that an attempted weapons possession charge was not technically a crime, but it did not affect Shnewer's life sentence.²³⁹⁸

In 2016, Judge Kugler denied habeas relief to Tatar on February 11²³⁹⁹ and to Shnewer on March 7.²⁴⁰⁰

Judge Kugler allowed the Dukas to be present in court and to testify as witnesses in a January 6, 2016, evidentiary hearing on whether their attorneys coerced them to refrain from testifying at their criminal trial.²⁴⁰¹ On May 31, Judge Kugler ruled that the Dukas were not coerced, denying petitions to vacate their convictions.²⁴⁰² Judge Kugler again denied habeas relief to Dritan and Shain Duka on August 6, 2020.²⁴⁰³ The court of appeals agreed on March 8, 2022, that a reconsideration of the Dukas' sentences in

2396. See George Anastasia, *Dix Appeal Spotlights Two Sides of Security*, Phila. Inquirer, Sept. 5, 2010, at B1; Barbara Boyer, *Protesters at City Court Back "Fort Dix Five,"* Phila. Inquirer, June 2, 2010, at B1.

2397. *United States v. Duka*, 671 F.3d 329, 333, 356 (3d Cir. 2011), *cert. denied*, 567 U.S. 906 (2012); *Duka v. United States*, 27 F.4th 189, 192 (3d Cir. 2022); see Geoff Mulvihill, *Court Upholds Fort Dix Attack Plot Conviction*, Trenton Times, Dec. 29, 2011, at A1.

2398. *Duka*, 671 F.3d at 353, 356; see Mulvihill, *supra* note 2397.

2399. Opinion, *Tatar v. United States*, No. 1:13-cv-3317 (D.N.J. Feb. 11, 2016), D.E. 43, 2016 WL 589671, *as amended*, Order, *id.* (Feb. 18, 2016), D.E. 45 (correcting a typographical error), *certificate of appealability denied*, Order, No. 16-1421 (3d Cir. May 24, 2016); see Tim Darragh, *Fort Dix Plotter Denied a Reduced Sentence*, S. Jersey Times, Feb. 14, 201, at B2.

2400. Opinion, *Shnewer v. United States*, No. 1:13-cv-3769 (D.N.J. Mar. 7, 2016), D.E. 35, 2016 WL 867461, *aff'd*, 703 F. App'x 85 (3d Cir. 2017); see Tim Darragh, *Judge Rejects Bias Claim by Ft. Dix Plotter*, Newark Star-Ledger, Mar. 9, 2016, at 23.

2401. Order, *Duka v. United States*, No. 1:13-cv-3664 (Oct. 21, 2015), D.E. 44; Transcript, *id.* (Jan. 6, 2016, filed Feb. 4, 2016), D.E. 53; see Opinion, *id.* (Sept. 30, 2015), D.E. 39, 2015 WL 5768786 (ordering an evidentiary hearing); see also Jim Walsh, *Judge: Dix Terrorists Can Return to Camden*, Vineland Daily J., Oct. 23, 2016, at A3.

2402. Opinion, *Duka*, No. 1:13-cv-3664 (May 31, 2016), D.E. 58, 2016 WL 3063868, *certificate of appealability denied*, Order, No. 16-3239 (3d Cir. Dec. 22, 2016), 2016 WL 9414218, *cert. denied*, 583 U.S. ___, 138 S. Ct. 271 (2017), and *certificate of appealability denied*, Order, No. 16-3246 (3d Cir. Feb. 6, 2017), 2017 WL 3425964, and *certificate of appealability denied*, Order, No. 16-3247 (3d Cir. Feb. 6, 2017), 2017 WL 3392332; see Barbara Boyer, *Brothers in Fort Dix Plot Lose "Sole Remaining Claim" for Freedom*, Phila. Inquirer, June 2, 2016, at B5.

2403. Opinion, *Duka*, No. 1:13-cv-3664 (Aug. 6, 2020), D.E. 102, 2020 WL 4530035.

light of a recent Supreme Court decision holding crime-of-violence sentencing enhancements unconstitutionally vague was unnecessary, because the Dukas were in prison for life on other charges.²⁴⁰⁴

Challenge: Classified Evidence

Attorneys representing the defendants who went to trial needed security clearances, and they were not permitted to share classified information with their clients.²⁴⁰⁵ A secure room was set up in the courthouse for the attorneys to examine and work on classified documents; a separate safe was designated for each defendant.²⁴⁰⁶ Judge Kugler's staff—law clerks, court reporters, courtroom deputies, and his judicial assistant—all received security clearances; Judge Kugler observed that the clearance process went smoothly.²⁴⁰⁷

The Camden courthouse did not have a facility for storing sensitive compartmented information, but the defense attorneys did not have to examine such information and the little that Judge Kugler examined was brought to him by a classified information security officer and taken away the same day.²⁴⁰⁸

Challenge: FISA Evidence

Much of the case against the defendants was based on evidence obtained pursuant to FISA surveillance orders.²⁴⁰⁹ Much of the FISA evidence was declassified, but the affidavits supporting the FISA orders generally were

2404. *Duka v. United States*, 27 F.4th 189 (3d Cir. 2022); see *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019).

2405. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2406. *Id.*

2407. *Id.*

2408. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

2409. FISA Evidence Order at 2, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. Aug. 14, 2008, filed Dec. 29, 2009), D.E. 457 (redacted); Interview with Judge Robert B. Kugler, Dec. 15, 2009; see George Anastasia, *More Ft. Dix Suspects Want to Suppress Evidence*, *Phila. Inquirer*, June 21, 2008, at B4; Mulvihill, *supra* note 2397.

On appeal, the government made a showing that FISA evidence was *de minimis*; although the court was skeptical that the government had identified all FISA-derived evidence, the quantity of FISA-derived evidence did not affect the outcome of the appeal. *United States v. Duka*, 671 F.3d 329, 337 n.4 (3d Cir. 2011).

not.²⁴¹⁰ Judge Kugler reviewed FISA files to determine what was discoverable and to determine that the FISA surveillance was properly supported.²⁴¹¹ FISA discoverability decisions were somewhat hampered by the judge's not knowing, particularly early in the case, what the defenses might be.²⁴¹²

The court of appeals found no constitutional infirmity in the government's use of the FISA evidence.²⁴¹³

Challenge: Classified Opinion

Judge Kugler's August 14, 2008, opinion on the validity of FISA evidence is classified.²⁴¹⁴ A redacted opinion was filed publicly on December 29, 2009, after review by intelligence agencies.²⁴¹⁵ Redactions appear to conceal what agents of Al-Qaeda were the targets of FISA surveillance resulting in evidence against the defendants.²⁴¹⁶

Challenge: Jury Security

Judge Kugler used an anonymous jury.²⁴¹⁷ Each juror met at one of two secret locations; deputy marshals shuttled the jurors to the courthouse.²⁴¹⁸ During deliberations, the jurors were sequestered at a nearby hotel.²⁴¹⁹

After the trial, jurors were given contact information for members of the news media, and they could contact them if they wished, but the media were not permitted to contact the jurors directly.²⁴²⁰

2410. FISA Evidence Order, *supra* note 2409, at 2–9; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2411. FISA Evidence Order, *supra* note 2409, at 13–23; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2412. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2413. *Duka*, 671 F.3d at 336–47; *see* Mulvihill, *supra* note 2397.

2414. Opinion Cover Sheet, *Shnewer*, No. 1:07-cr-459 (D.N.J. filed Aug. 15, 2008), D.E. 216; FISA Evidence Order, *supra* note 2409, at 1; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2415. Opinion, *Shnewer*, No. 1:07-cr-459 (D.N.J. Aug. 14, 2008, filed Dec. 29, 2009), D.E. 457 (redacted); Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2416. *See* FISA Evidence Order, *supra* note 2409.

2417. Decorum Order, *supra* note 2368; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2418. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2419. Decorum Order, *supra* note 2368; Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2420. *Id.*

Challenge: Court Security

Court security was enhanced for the trial.²⁴²¹ Additional precautions were taken during the two days of sentencing.²⁴²² No other judge scheduled proceedings for those days, and court staff were encouraged to work at home.²⁴²³ Because a jury was not present, there was a greater visible presence of security.²⁴²⁴

Challenge: Attorney Appointment

In February and March of 2010, nearly ten months after their appeals were filed, each of the Dukas penned a five- or six-page handwritten pro se motion for new appellate counsel, claiming insufficient contacts with counsel and counsels' failures to keep them informed of their appeals' progress.²⁴²⁵ The court of appeals denied the requests, finding no extraordinary circumstances justifying departure from the usual practice of trial counsel continuing on appeal.²⁴²⁶ The court nevertheless permitted the defendants to file pro se appellate briefs in addition to their attorneys' briefs.²⁴²⁷

Shnewer's attorney filed Shnewer's request for new counsel on Shnewer's behalf, stating that Shnewer wanted to argue on appeal ineffective assistance of trial counsel.²⁴²⁸ The court denied this request as well.²⁴²⁹

Challenge: Physical Health During Detention

On November 2, 2020, Judge Kugler denied Tatar's motion for compassionate release because of the COVID-19 pandemic.²⁴³⁰ Judge Kugler de-

2421. Interview with Judge Robert B. Kugler, Dec. 15, 2009.

2422. *Id.*

2423. *Id.*

2424. *Id.*

2425. New Counsel Motion, *United States v. Duka*, No. 09-2301 (3d Cir. signed Mar. 4, 2010, filed Mar. 15, 2010) (Shain Duka's motion); New Counsel Motion, *United States v. Duka*, No. 09-2300 (3d Cir. signed Feb. 19, 2010, filed Mar. 1, 2010) (Dritan Duka's motion); New Counsel Motion, *United States v. Duka*, No. 09-2292 (3d Cir. signed Feb. 15, 2010, filed Feb. 22, 2010) (Eljvir Duka's motion); *see United States v. Duka*, 671 F.3d 329, 351 (3d Cir. 2011).

2426. Order, *Duka*, No. 09-2301 (3d Cir. Mar. 23, 2010); Order, *Duka*, No. 09-2300 (3d Cir. Mar. 23, 2010); Order, *Duka*, No. 09-2292 (3d Cir. Mar. 23, 2010).

2427. *Duka*, 671 F.3d at 333, 350–51.

2428. New Counsel Motion, *United States v. Shnewer*, No. 09-2299 (3d Cir. Mar. 1, 2010).

2429. Order, *id.* (Mar. 23, 2010).

terminated that neither age nor medical condition put Tatar at an elevated risk.²⁴³¹ Moreover, the seriousness of Tatar's crime weighed against compassionate release.²⁴³²

Because the Federal Public Defender's office determined that Tatar did not appear to qualify for compassionate release, Judge Kugler granted the office's motion to withdraw from the case.²⁴³³ The court of appeals affirmed the denial of compassionate release on July 15, 2022.²⁴³⁴

2430. Opinion, *United States v. Tatar*, No. 1:07-cr-459-5 (D.N.J. Nov. 2, 2020), D.E. 497 [Hereinafter *Tatar* COVID-19 Opinion], 2020 WL 6482706, *appeal pending*, Docket Sheet, No. 20-3432 (3d Cir. Dec. 4, 2020) (noting submission of the case on June 6, 2022); see Jim Walsh, *Fort Dix Five Member Denied Prison Release*, Vineland Daily J., Dec. 10, 2020, at A3.

2431. *Tatar* COVID-19 Opinion, *supra* note 2430, at 6.

2432. *Id.* at 7–8.

2433. *Id.* at 2, 8.

2434. Opinion, *United States v. Tatar*, No. 20-3432 (3d Cir. July 15, 2022), D.E. 75, 2022 WL 2763699.

Chapter 21

Triangle Takedown²⁴³⁵

United States v. Boyd (Louise W. Flanagan, Malcolm J. Howard, William Arthur Webb, and James E. Gates) and United States v. Sherifi (W. Earl Britt) (E.D.N.C.)

A prosecution for conspiracy to commit terrorism included as defendants a North Carolina father and two sons and other apparently more zealous advocates of conflict. Among the challenges for three district judges and two magistrate judges were pro se defendants and classified evidence.

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Indictments

Sabrina Boyd answered her front door on Monday, July 27, 2009, to news that her husband and her three sons had been in a serious automobile ac-

²⁴³⁵. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

cident.²⁴³⁶ Another son had been killed in an automobile accident in 2007.²⁴³⁷ The man at the door offered her, her daughter, and her daughter-in-law a ride to Duke Hospital in a highway patrol car.²⁴³⁸ At the hospital, she was greeted by a man dressed as a doctor, who offered her his hand.²⁴³⁹ She declined to shake his hand, because of her religious beliefs.²⁴⁴⁰ He grabbed her wrists and handcuffed her.²⁴⁴¹

Sabrina was lured away from her home and detained so that her home could be searched.²⁴⁴² Meanwhile, her husband, Daniel Patrick Boyd; two of her sons, Zakariya and Dylan Boyd; and four other men—Hysen Sherifi, Anes Subasic, Mohammad Omar Aly Hassan, and Ziyad Yaghi—were arrested and indicted on material-support and conspiracy terrorism charges.²⁴⁴³ The three Boyds had also been lured away from the family home under false pretenses²⁴⁴⁴ in an operation described as a Triangle Take-down.²⁴⁴⁵ Authorities seized gas masks, 27,000 rounds of ammunition, and twenty-six guns from the Boyds' home and truck.²⁴⁴⁶

2436. See Campbell Robertson, *Wife Disputes Jihad Charge Against Husband and Sons*, N.Y. Times, July 30, 2009, at A20; Yonat Shimron, *Wife Adamantly Denies Suicide Plot*, Raleigh News & Observer, July 29, 2009, at A1.

2437. See Transcript at 19, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011, filed Jan. 9, 2012), D.E. 1618 [hereinafter Dec. 20, 2011, *Boyd* Transcript]; see also Mandy Locke, Yonat Shimron & Josh Shafer, *7 Arrested in Terror Plot*, Raleigh News & Observer, July 28, 2009, at A1; Robertson, *supra* note 2436; Shimron, *supra* note 2436.

2438. See Shimron, *supra* note 2436.

2439. See Robertson, *supra* note 2436; Shimron, *supra* note 2436.

2440. See Shimron, *supra* note 2436.

2441. See Robertson, *supra* note 2436; Shimron, *supra* note 2436.

2442. See Shimron, *supra* note 2436.

2443. Indictment, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. July 22, 2009), D.E. 3 [hereinafter *Boyd* Indictment]; United States v. Hassan, 742 F.3d 104, 110 (4th Cir. 2014); see Carrie Johnson & Spencer S. Hsu, *Seven Face Terrorism Charges in N.C.*, Wash. Post, July 28, 2009, at A3; Locke et al., *supra* note 2437; Sarah Ovaska, *Eighth Terror Suspect Named*, Raleigh News & Observer, Aug. 4, 2009, at A1. See generally Human Rights Watch, *Illusion of Justice* 72–74, 196–98 (2014).

2444. Transcript at 77–78, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 4–5, 2009, filed Aug. 10, 2009), D.E. 111 [hereinafter Aug. 4–5, 2009, *Boyd* Transcript].

2445. See Editorial, *The FBI's Takedown*, Raleigh News & Observer, July 29, 2009 (referring to North Carolina's research triangle: Duke University, University of North Carolina at Chapel Hill, North Carolina State University, and the cities of Raleigh, Durham, and Chapel Hill).

2446. Detention Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 11, 2009), D.E. 112; see Mandy Locke, Josh Shaffer, Sarah Ovaska & Yonat Shimron, *The Bulk of Terror Evidence Concerns Boyd*, Raleigh News & Observer, Aug. 6, 2009, at A1; Sarah Ovaska & Mandy Locke, *FBI Agent: Boyd Spoke of "Jihad Right Here,"* Raleigh News & Observer,

Sherifi was a legal resident from Kosovo, and the other defendants were U.S. citizens.²⁴⁴⁷ An eighth defendant, U.S. citizen Jude Kenan Mohammad, was a fugitive²⁴⁴⁸ until he was killed in a drone strike on November 16, 2011.²⁴⁴⁹

Bajram Asllani, another fugitive conspiracy suspect, was not included in the indictment.²⁴⁵⁰ He was arrested in Kosovo, but the United States and Kosovo did not have an extradition treaty.²⁴⁵¹

The defendants were indicted on Wednesday, July 22, 2009.²⁴⁵² The court randomly assigned the case to Chief Judge Louise W. Flanagan.²⁴⁵³ Originally, the defendants were going to be arrested on Saturday, so Chief Judge Flanagan arranged for some court staff to discreetly come to work on Saturday for initial appearances.²⁴⁵⁴ In the event, the defendants were arrested on a weekday.²⁴⁵⁵

On September 24, the indictment was superseded to include allegations of plans to attack the Marine base in Quantico, Virginia.²⁴⁵⁶

Aug. 5, 2009, at A1; Charlie Savage, *Power Wars* 280–81 (2015) (“The son of a Pakistani father and an American mother, he was a high-school dropout in Raleigh, North Carolina, who fell in with a group of Islamists at the local mosque.”).

2447. See Johnson & Hsu, *supra* note 2443; Locke et al., *supra* note 2437.

2448. Reassignment Order at 2 n.2, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 17, 2011), D.E. 1323; see Anne Blythe, *Sentence Today in NC “Homegrown Terrorism” Ring*, Raleigh News & Observer, Jan. 13, 2012, B.

2449. Dismissal, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 18, 2013), D.E. 2191; see Karen DeYoung & Peter Finn, *4 Americans Killed in Drone Strikes Since ‘09*, Wash. Post, May 23, 2013, at A1; Scott Shane & Eric Schmitt, *One Drone Victim’s Trail from Raleigh to Pakistan*, N.Y. Times, May 23, 2013, at A10; *Wanted International Terrorist Hails from Triangle, Could Be Dead*, WRAL.com, Feb. 16, 2012, www.wral.com/wanted-international-terrorist-hails-from-triangle-could-be-dead/10733078/.

2450. See Complaint, *United States v. Asllani*, No. 5:10-mj-1350 (E.D.N.C. Apr. 19, 2010).

2451. See Anne Blythe, *N.C. Trio Found Guilty in Terror Plot*, Raleigh News & Observer, Oct. 14, 2011, A.

2452. *Boyd* Indictment, *supra* note 2443.

2453. Interview with Judge Louise W. Flanagan, Mar. 5, 2012. Tim Reagan interviewed Judge Flanagan for this case study in her New Bern chambers on March 5, 2012, and in her Raleigh chambers on May 17, 2013.

2454. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2455. *Id.*

2456. Superseding Indictment, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 24, 2009), D.E. 145; *United States v. Hassan*, 742 F.3d 104, 110 (4th Cir. 2014); see Spencer S. Hsu, *2 N.C. Men Now Accused of Targeting U.S. Military*, Wash. Post, Sept. 25, 2009, at A3.

Daniel Boyd grew up near Washington, D.C.²⁴⁵⁷ Raised an Episcopalian, he converted to Islam after his mother married a Muslim.²⁴⁵⁸ He and Sabrina were high-school sweethearts in Alexandria, Virginia; she also converted to Islam.²⁴⁵⁹ In 1989, the Boyds moved to Peshawar, Pakistan.²⁴⁶⁰

In 1991, a Pakistani appellate court overturned a criminal sentence against Daniel Boyd that would have resulted in amputation of his right hand and his left foot.²⁴⁶¹ His brother was also spared a similar sentence, which was for a bank robbery that occurred shortly after a disagreement between the brothers and the bank manager.²⁴⁶² Following the prosecution ordeal, Daniel Boyd moved his family first to Massachusetts and then to North Carolina.²⁴⁶³ At the time of the 2009 arrest, they lived in Willow Spring, a suburb south of Raleigh.²⁴⁶⁴

The Boyd investigation had been underway since approximately 2005.²⁴⁶⁵ An informant facilitated the investigation by befriending Daniel Boyd and recording conversations with him over the course of several years.²⁴⁶⁶

Magistrate Judge William Arthur Webb presided over the defendants' detention hearing, which was conducted on August 4 and 5 in the district's

2457. *Hassan*, 742 F.3d at 115; see Carrie Johnson & Spencer S. Hsu, *From Suburban D.C. Childhood to Indictment on Terror Charges*, Wash. Post, July 29, 2009, at A1.

2458. See Steve Coll, *The Brothers & the Grisly Sentence*, Wash. Post, Oct. 2, 1991, at B1; Johnson & Spencer, *supra* note 2457; Mandy Locke, Josh Shaffer & Yonat Shimron, *Contrasts Veil Daniel Boyd*, Raleigh News & Observer, Aug. 2, 2009, at A1 [hereinafter *Contrasts*]; Locke et al., *supra* note 2437; Ovaska, *supra* note 2443.

2459. See Coll, *supra* note 2458; Johnson & Spencer, *supra* note 2457; Locke et al., *Contrasts*, *supra* note 2458; Shimron, *supra* note 2436.

2460. See Locke et al., *Contrasts*, *supra* note 2458.

2461. See Steve Coll, *Brothers Spared Ghastly Sentence*, Wash. Post, Oct. 15, 1991, at E1.

2462. See Coll, *supra* note 2458; Coll, *supra* note 2461.

2463. See Locke et al., *Contrasts*, *supra* note 2458.

2464. See Johnson & Spencer, *supra* note 2457; Locke et al., *Contrasts*, *supra* note 2458; Ovaska, *supra* note 2443.

2465. *United States v. Hassan*, 742 F.3d 104, 115 (4th Cir. 2014); Aug. 4–5, 2009, *Boyd* Transcript, *supra* note 2444, at 11; see Johnson & Spencer, *supra* note 2457.

2466. Detention Order, *supra* note 2446, at 2–4 (noting that the identity of the witness was not revealed for detention proceedings); see Locke et al., *supra* note 2446; Ovaska & Locke, *supra* note 2446; *Hassan*, 742 F.3d at 115–16 (noting that three informants testified at trial against Sherifi, Hassan, and Yaghi).

Raleigh courthouse.²⁴⁶⁷ The hearing was attended by more than one hundred friends, relatives, and neighbors present to support the defendants.²⁴⁶⁸ Spectators who prayed aloud during proceedings were required to leave the courtroom.²⁴⁶⁹

On August 5, Judge Webb continued Subasic's detention hearing and denied bail for the other defendants, who were then transferred to Virginia for detention.²⁴⁷⁰ On August 10, Judge Webb denied bail for Subasic, who also was transferred to Virginia.²⁴⁷¹

Judge Flanagan, whose chambers are in New Bern, held her first status conference in the case on August 27 at the Raleigh courthouse.²⁴⁷² Early in the case, Judge Flanagan held pretrial proceedings in Raleigh for the convenience of the attorneys and the U.S. Marshals Service, as transportation issues involved in bringing the defendants back from Virginia to that courthouse then were easier to address.²⁴⁷³ As the trial date approached, Judge Flanagan began to hold proceedings in New Bern.²⁴⁷⁴

On November 24, 2010, the government filed a second superseding indictment, which added two counts against Subasic for immigration fraud.²⁴⁷⁵ Judge Flanagan determined, on January 28, 2011, that these

2467. Aug. 4–5, 2009, *Boyd* Transcript, *supra* note 2444; see Ovaska & Locke, *supra* note 2446; Yonat Shimron, *Muslims Turn Out in Court*, Raleigh News & Observer, Aug. 5, 2009, at A8.

Tim Reagan interviewed Judge Webb for this case study in his chambers on March 20, 2012. Judge Webb retired on May 2, 2014. Judicial Milestones, www.uscourts.gov/judicial-milestones/william-webb.

2468. See Ovaska & Locke, *supra* note 2446; Shimron, *supra* note 2467.

2469. Interview with Judge William Arthur Webb, Mar. 20, 2012.

2470. Detention Order, *supra* note 2446; Docket Sheet, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. July 22, 2009) [hereinafter *Boyd* Docket Sheet] (D.E. 102); Interview with Judge Louise W. Flanagan, May 17, 2013; see Sarah Ovaska, *Six Terror Suspects Are Now in a Va. Jail*, Raleigh News & Observer, Aug. 7, 2009, at B2.

2471. Detention Order, *supra* note 2446; Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 10, 2009, filed Aug. 23, 2010), D.E. 559; *Boyd* Docket Sheet, *supra* note 2470 (D.E. 110); Interview with Judge Louise W. Flanagan, May 17, 2013; see Mandy Locke & Sarah Ovaska, *No Bail for Suspect in Terror Plot*, Raleigh News & Observer, Aug. 11, 2009, at B3.

2472. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 130); see Mandy Locke, *Terror Case May Be Long Coming to Trial*, Raleigh News & Observer, Aug. 28, 2009, at B3.

2473. Interview with Judge Louise W. Flanagan, Mar. 5, 2012, and May 17, 2013.

2474. *Id.* Mar. 5, 2012.

2475. Second Superseding Indictment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 24, 2010), D.E. 670; *United States v. Hassan*, 742 F.3d 104, 110–11 (4th Cir. 2014); *United States v. Sherifi*, 793 F. Supp. 2d 751, 752 (E.D.N.C. 2011).

charges were improperly joined, so she severed them.²⁴⁷⁶ Several months later, to promote a speedy trial, the new charges were assigned to Judge Malcolm J. Howard.²⁴⁷⁷

Convictions

On February 9, Daniel Boyd pleaded guilty.²⁴⁷⁸ His son Zakariya pleaded guilty on June 7.²⁴⁷⁹ Dylan pleaded guilty on September 14, five days before trial.²⁴⁸⁰

As trial drew near, Judge Flanagan completely severed the prosecution against Subasic, because he was by that time proceeding pro se and his unconventional representation might have been disruptive or prejudicial to the other defendants.²⁴⁸¹

On Monday, September 19, the trial of Sherifi, Hassan, and Yaghi began before Judge Flanagan in New Bern, and the trial of Subasic for immigration fraud began before Judge Howard in Greenville.²⁴⁸² The Boyds appeared as cooperating witnesses against their codefendants.²⁴⁸³

2476. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 28, 2011), D.E. 750.

2477. Reassignment Order, *supra* note 2448; *Boyd* Docket Sheet, *supra* note 2470 (minutes, Aug. 16, 2011, D.E. 1321); Interview with Judge Louise W. Flanagan, May 17, 2013.

Tim Reagan interviewed Judge Howard for this case study in his Greenville chambers on March 21, 2012.

2478. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 799); *Hassan*, 742 F.3d at 111; *see* Transcript at 36, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012, filed Nov. 24, 2014), D.E. 2204 [hereinafter Aug. 24, 2012, *Boyd* Afternoon Transcript] (statement by Daniel Boyd at sentencing: “I know there’s never a wrong time to do the right thing.”); *see also* Anne Blythe & Yonat Shimron, *N.C. Man Admits Terror Plot*, Raleigh News & Observer, Feb. 10, 2011, A; Campbell Robertson, *North Carolina Man Admits to Aiding a Jihadist Plot*, N.Y. Times, Feb. 10, 2011, at A14; Francine Sawyer, *Boyd Pleads Guilty to Terrorism Charges*, New Bern Sun J., Feb. 9, 2011.

2479. *Hassan*, 742 F.3d at 111; *see* Mandy Locke, *2nd Man Admits Aiding Terrorism*, Raleigh News & Observer, June 8, 2011, B; Campbell Robertson, *Second Guilty Plea in Terror Case*, N.Y. Times, June 8, 2011, at A17; “Homegrown Terrorist” Pleaded Guilty Tuesday in Federal Court in New Bern, New Bern Sun J., June 7, 2011.

2480. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 1432); *Hassan*, 742 F.3d at 111; *see* Anne Blythe, *3rd Man Guilty in Terror Plot*, Raleigh News & Observer, Sept. 15, 2011, A.

2481. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2011), D.E. 1283; *see Hassan*, 742 F.3d at 111.

2482. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 1459, 1463); Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed June 10, 2012), D.E. 2033 (first day of jury selection); *see Hassan*, 742 F.3d at 114–15.

2483. Transcript at 6–154, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 6, 2011, filed Mar. 23, 2012), D.E. 1838 (Dylan Boyd); Transcript at 52–224, *id.* (Oct. 5, 2011, filed Mar. 23,

Subasic's jury found him guilty of immigration fraud on September 23.²⁴⁸⁴ On October 13, the day after receiving its charge, the other jury convicted Sherifi, Hassan, and Yaghi.²⁴⁸⁵

Sherifi testified in his defense; Hassan and Yaghi presented no evidence.²⁴⁸⁶

In December 2011 and January 2012,²⁴⁸⁷ Judge Flanagan sentenced Sherifi to forty-five years,²⁴⁸⁸ Yaghi to thirty-one years and eight months,²⁴⁸⁹ Hassan to fifteen years,²⁴⁹⁰ Zakariya Boyd to nine years,²⁴⁹¹ and Dylan Boyd to eight years.²⁴⁹² On February 4, 2014, the court of appeals

2012), D.E. 1837 (Zakariya Boyd); *id.* at 225–78 (Dylan Boyd); Transcript at 15–57, *id.* (Sept. 29, 2011, filed Mar. 2, 2012), D.E. 1744 (Daniel Boyd); Transcript at 34–279, *id.* (Sept. 28, 2011, filed Feb. 28, 2012), D.E. 1751 (same); *Hassan*, 742 F.3d at 115 (noting that Daniel Boyd was the prosecution's chief trial witness).

2484. Jury Verdict, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 23, 2011), D.E. 1472.

2485. Jury Verdicts, *id.* (Oct. 13, 2011), D.E. 1504, 1506, 1508, 1510; Transcripts, *id.* (Oct. 12–13, 2011, filed June 10, 2012), D.E. 2035, 2036; *Hassan*, 742 F.3d at 124; *see* Blythe, *supra* note 2451.

2486. Transcript at 47–183, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 10, 2011, filed June 11, 2012), D.E. 2043 (Sherifi's testimony); *id.* at 194 (Hassan's attorney: "We see no reason to put on any evidence. We rest."); *id.* at 195 ("Likewise for Mr. Yaghi, your Honor."); *Hassan*, 742 F.3d at 115; *see* Blythe, *supra* note 2451; Francine Sawyer, *Federal Terrorism Trial Goes to Jury*, New Bern Sun J., Oct. 12, 2011.

2487. Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2012, filed June 10, 2012), D.E. 2037 (sentencing of Hassan, Sherifi, and Yaghi); *Hassan*, 742 F.3d at 124–25.

2488. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), D.E. 1653; Judgment, *id.* (Jan. 13, 2012), D.E. 1663; *Hassan*, 742 F.3d at 111.

2489. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), D.E. 1655, 2012 WL 147955; Yaghi Judgment, *id.* (Jan. 13, 2012), D.E. 1666; *Hassan*, 742 F.3d at 111; *see* Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting a release date of November 7, 2036, reg. no. 51771-056).

2490. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), D.E. 1654, 2012 WL 147952; Hassan Judgment, *id.* (Jan. 13, 2012), D.E. 1668; *Hassan*, 742 F.3d at 111.

2491. Zakariya Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011), D.E. 1600; Dec. 20, 2011, *Boyd* Transcript, *supra* note 2437, at 31; *see id.* ("The oppression that you endured during your upbringing really left you quite scarred, it's evident, and it would seem that there was some enabling in your household that took from you any adult to which you could turn for reasoned guidance.").

2492. Dylan Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011), D.E. 1598; Dec. 20, 2011, *Boyd* Transcript, *supra* note 2437, at 31; *see id.* ("you were not as involved as others in the crime").

affirmed Sherifi, Hassan, and Yaghi's convictions and sentences.²⁴⁹³ Hassan was released on July 28, 2022.²⁴⁹⁴

Conspiracy to Kill Witnesses

On January 20, 2012, the government filed criminal complaints alleging that Sherifi conspired with his brother Shkumbin Sherifi²⁴⁹⁵ and another person²⁴⁹⁶ to have three trial witnesses beheaded.²⁴⁹⁷ The complaint also alleged a plot to kill a fellow inmate by whom Sherifi believed he was defrauded.²⁴⁹⁸ Codefendant Nevine Elshiekh was a teacher; Hassan was one of her former students.²⁴⁹⁹ After attending trial proceedings, she began to correspond with Sherifi, and in time their correspondence became romantic.²⁵⁰⁰ Judge Flanagan recused herself from this case,²⁵⁰¹ and the court assigned it to Judge W. Earl Britt.²⁵⁰²

Pro Se Trial

Subasic's pro se trial on the original indictment began on May 8.²⁵⁰³ Judge Flanagan welcomed seventy potential jurors, and the court empaneled sixteen on the following day.²⁵⁰⁴ Subasic's defense was that he was a Christian conducting freelance surveillance on Muslim jihadists for the benefit of a future report.²⁵⁰⁵

2493. *Hassan*, 742 F.3d 104, *cert. denied*, 574 U.S. 861 and *Sherifi v. United States*, 573 U.S. 910 (2014); *see Terrorists' Convictions Upheld*, New Bern Sun J., Feb. 5, 2014.

2494. BOP Locator, *supra* note 2489 (reg. no. 51769-056).

2495. Complaint, *United States v. Sherifi*, No. 7:12-mj-1008 (E.D.N.C. Jan. 20, 2012), D.E. 5.

2496. Complaint, *United States v. Elshiekh*, No. 7:12-mj-1009 (E.D.N.C. Jan. 20, 2012), D.E. 6.

2497. *See* Indictment, *United States v. Sherifi*, No. 7:12-cr-20 (E.D.N.C. Feb. 21, 2012), D.E. 40; *see also* Anne Blythe, *2 More Held in NC Terror Case*, Raleigh News & Observer, Jan. 25, 2012, A.

2498. Interview with Judge Louise W. Flanagan, Mar. 5, 2012; *see* Blythe, *supra* note 2497.

2499. *See* Anne Blythe, *Inmate Convicted in Murder-for-Hire Case*, Raleigh News & Observer, Nov. 9, 2012.

2500. *See id.*

2501. Notice, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Feb. 24, 2012), D.E. 48.

2502. Docket Sheet, *id.* (Feb. 21, 2012) [hereinafter *Sherifi* Docket Sheet].

For this case study, Tim Reagan interviewed Judge Britt and his law clerk Amy Petty in the judge's home chambers in Raleigh on May 16, 2013.

2503. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 1945).

2504. *Id.* (D.E. 1950).

2505. Interview with Judge Louise W. Flanagan, May 17, 2013.

The Boyds testified as government witnesses.²⁵⁰⁶ Subasic called as witnesses Yaghi, Hassan, Hysen Sherifi, and three unindicted members of the Boyd family.²⁵⁰⁷ Subasic's Boyd witnesses invoked their Fifth Amendment rights not to answer Subasic's questions.²⁵⁰⁸ Initially, Yaghi and his attorney agreed that Yaghi would rely on his Fifth Amendment right not to testify.²⁵⁰⁹ After establishing what Subasic's questioning would entail, Judge Flanagan asked Subasic, "Do you want the jury to hear you ask the question and the witness to take the Fifth Amendment?"²⁵¹⁰ Yaghi interrupted and announced that he would like to testify after all.²⁵¹¹ At the end of the trial, Subasic testified for three days on his own behalf.²⁵¹²

Jury deliberations began on June 13;²⁵¹³ on the following day, the jury found Subasic guilty.²⁵¹⁴ On August 24, Judge Flanagan sentenced Subasic to thirty years;²⁵¹⁵ on the next day, she revoked his citizenship.²⁵¹⁶ The

2506. Transcript at 10–105, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. May 31, 2012, filed May 22, 2013), D.E. 2164 (Dylan Boyd); Transcript at 60–222, *id.* (May 30, 2012, filed Apr. 19, 2013), D.E. 2163 (same); *id.* at 6–55 (Zakariya Boyd); Transcript at 113–251, *id.* (May 29, 2012, filed Apr. 19, 2013), D.E. 2162 (same); Transcript at 7–225, *id.* (May 23, 2012, filed Apr. 19, 2013), D.E. 2159 (Daniel Boyd); Transcript at 19–254, *id.* (May 22, 2012, filed Apr. 19, 2013), D.E. 2158 (same); Transcript at 35–195, *id.* (May 21, 2012, filed Apr. 19, 2013), D.E. 2157 (same); Transcript at 159–272, *id.* (May 18, 2012, filed Apr. 19, 2013), D.E. 2156 (same).

2507. Transcript at 47–179, *id.* (June 7, 2012, filed May 22, 2013), D.E. 2172 (Sherifi); Transcript at 147–61, *id.* (June 6, 2012, filed May 22, 2013), D.E. 2170 [hereinafter June 6, 2012, Transcript] (Sabrina Boyd); *id.* at 161, 167–69 (Maryam Boyd); *id.* at 170–72 (Noah Boyd); Transcript at 210–59, *id.* (June 5, 2012, filed May 22, 2013), D.E. 2169 (Hassan); Transcript at 37–62, *id.* (June 4, 2012, filed May 22, 2013), D.E. 2167 [hereinafter June 4, 2012, Transcript] (Yaghi).

2508. June 6, 2012, Transcript, *supra* note 2507, at 148–61, 163–72.

2509. June 4, 2012, Transcript, *supra* note 2507, at 38–45.

2510. *Id.* at 45.

2511. *Id.*

2512. Transcript at 6–172, *Boyd*, No. 5:09-cr-216 (E.D.N.C. June 12, 2012, filed May 22, 2013), D.E. 2176; Transcript at 9–210, *id.* (June 11, 2012, filed May 22, 2013), D.E. 2175; Transcript at 41–171, *id.* (June 8, 2012, filed May 22, 2013), D.E. 2174.

2513. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 2053).

2514. Jury Verdict, *Boyd*, No. 5:09-cr-216 (E.D.N.C. June 14, 2012), D.E. 2060; *United States v. Hassan*, 742 F.3d 104, 111; see *Accused Terrorist Found Guilty in New Bern Court*, New Bern Sun J., June 14, 2012; *Jury Convicts 7th Man in NC Terror Plot*, Raleigh News & Observer, June 14, 2012.

2515. Subasic Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012), D.E. 2117; Transcript at 185–90, *id.* (Aug. 24, 2012, filed May 22, 2013), D.E. 2179 ("THE COURT: Mr. Subasic, you're a bully. And you've demonstrated that from the age of 15 forward, in your school life and in your community life. You took what didn't belong to you through

court of appeals affirmed both of Subasic's convictions and his sentence on April 25, 2014.²⁵¹⁷

Following Subasic's trial, Judge Flanagan sentenced Daniel Boyd to eighteen years,²⁵¹⁸ and she resentenced his sons to seven years for Dylan²⁵¹⁹ and seven years and nine months for Zakariya.²⁵²⁰ Dylan was released on September 1, 2015,²⁵²¹ and Zakariya was released on April 27, 2016.²⁵²²

Witness-Murder Sentences

Sherifi's codefendants pleaded guilty on November 1, and Sherifi's trial, at which he appeared pro se, began on Monday, November 5.²⁵²³ On Thursday, the jury found Sherifi guilty.²⁵²⁴ On May 10, 2013, Judge Britt sentenced Sherifi to life in prison; he sentenced the brother to three years, and he sentenced Elshiekh to three and a half years.²⁵²⁵ The brother, Shkumbin

threat of violence, force and intimidation, and you terrorized those in your community."); *Hassan*, 742 F.3d at 111; see BOP Locator, *supra* note 2489 (noting a release date of June 5, 2035, reg. no. 51766-056).

2516. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 25, 2012), D.E. 2137.

2517. *United States v. Subasic*, 568 F. App'x 234 (4th Cir. 2014), *cert. denied*, 574 U.S. 1174 (2015).

2518. Daniel Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012), D.E. 2115; Aug. 24, 2012, *Boyd* Afternoon Transcript, *supra* note 2478, at 39; see BOP Locator, *supra* note 2489 (noting a release date of December 30, 2024, reg. no. 51765-056).

"It would appear that the need to protect the public from this defendant has been largely mitigated, though it's recognized the defendant needs continued mental health treatment by his own statements here today." Aug. 24, 2012, *Boyd* Afternoon Transcript, *supra* note 2478, at 38.

2519. Dylan Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012), D.E. 2132; *Hassan*, 742 F.3d at 111.

2520. Zakariya Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012), D.E. 2133; *Hassan*, 742 F.3d at 111.

2521. BOP Locator, *supra* note 2489 (reg. no. 51770-056).

2522. *Id.* (reg. no. 51767-056).

2523. *Sherifi* Docket Sheet, *supra* note 2502 (D.E. 313, 315, 321); see Transcript, *United States v. Sherifi*, No. 7:12-cr-20 (E.D.N.C. Nov. 7, 2012, filed Jan. 28, 2013), D.E. 340 (testimony by Sherifi's codefendants); see also Anne Blythe, 2 *Plead Guilty in Beheading Plot*, Raleigh News & Observer, Nov. 2, 2012.

2524. Jury Verdict, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Nov. 8, 2012), D.E. 329; see Blythe, *supra* note 2499.

2525. *Sherifi* Docket Sheet, *supra* note 2502 (D.E. 361 to 363); Judgments, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. May 10, 2013), D.E. 357 to 359; see Anne Blythe, *Primary Suspect in Murder-for-Hire Gets Life in Prison*, Raleigh News & Observer, May 10, 2013.

Sherifi, was released from prison on September 2, 2014,²⁵²⁶ and Elshiekh was released on May 13, 2016.²⁵²⁷

In 2018 and 2019 Judge Flanagan denied habeas relief to Subasic²⁵²⁸ and Yaghi.²⁵²⁹

Habeas Corpus Cases

Judge Britt denied habeas relief to Sherifi in 2019.²⁵³⁰ Judge Flanagan, however, granted Sherifi habeas relief on August 25, 2020, vacating Sherifi's conviction for carrying a firearm during a crime of violence, in light of the Supreme Court's 2019 holding in *United States v. Davis* that the statute proscribing carrying a firearm during a crime of violence was unconstitutionally vague.²⁵³¹ on May 17, 2022, Judge Flanagan took two years off Sherifi's sentence in her case.²⁵³² An appeal is pending,²⁵³³ and Judge Britt's sentence to life in prison remains in effect.²⁵³⁴

Challenge: Attorney Appointment

The court appointed the federal defender to represent David Boyd and experienced Criminal Justice Act (CJA) panel attorneys to represent the other defendants.²⁵³⁵

2526. BOP Locator, *supra* note 2489 (reg. no. 55984-056).

2527. *Id.* (reg. no. 55983-056).

2528. Opinion, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. July 31, 2018), D.E. 2291, 2018 WL 3631884, *certificate of appealability denied*, *United States v. Subasic*, 742 F. App'x 775 (4th Cir. 2018), *cert. denied*, 588 U.S. ___, 139 S. Ct. 2761 (2019).

2529. Opinion *id.* (Mar. 29, 2019, filed Apr. 22, 2019), D.E. 2314 [hereinafter Yaghi Redacted Habeas Corpus Opinion] (redacted), *certificate of appealability denied*, *United States v. Yaghi*, 795 F. App'x 193 (4th Cir.), *cert. denied*, 592 U.S. ___, 141 S. Ct. 838 (2020); *see* Opinion, *id.* (Dec. 1, 2020), D.E. 2350 (denying a successive habeas motion), *aff'd*, Order, No. 20-7880 (4th Cir. May 3, 2021), D.E. 12.

2530. Opinion, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. May 22, 2019), D.E. 396, *certificate of appealability denied*, Order, No. 19-7154 (4th Cir. Feb. 19, 2020), D.E. 9.

2531. Opinion, *United States v. Sherifi*, No. 5:09-cr-216-2 (E.D.N.C. Aug. 25, 2020), D.E. 2339 [hereinafter *Sherifi* Habeas Relief], 2020 WL 5026846; *see* *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019).

2532. Amended Judgment, *Sherifi*, No. 5:09-cr-216-2 (E.D.N.C. May 17, 2022), D.E. 2389 (noting a sentence of forty-three years); *see* *Sherifi* Habeas Relief, *supra* note 2531, at 8–9.

2533. Docket Sheet, *United States v. Sherifi*, No. 22-4317 (4th Cir. May 31, 2022).

2534. BOP Locator, *supra* note 2489 (reg. no. 51768-056).

2535. Interview with Judge Louise W. Flanagan, Mar. 5, 2012; Interview with Judge James E. Gates, Mar. 6, 2012 (noting that the federal defender's office arranged for CJA appointments).

Under the CJA, Judge Flanagan supervised defense expenses as well as presided over the criminal case. She required the panel attorneys to submit time and expense budgets, and she authorized monthly payments for this complex case rather than requiring the attorneys to wait until the case was over to get paid.²⁵³⁶ This was only the second time in recent memory that monthly CJA payments had been authorized in the Eastern District of North Carolina.²⁵³⁷ Judge Flanagan encouraged the defense attorneys to pool resources as much as possible.²⁵³⁸

Defense expenses in this case were high, in part, because of the amount of surveillance evidence that the attorneys had to review.²⁵³⁹ Magistrate Judge James E. Gates presided over discovery matters.²⁵⁴⁰ Judge Gates appointed liaisons among the defense attorneys for various discovery issues, such as paper discovery, electronic files, and transcripts.²⁵⁴¹ Judge Gates and Judge Flanagan kept in especially frequent contact throughout this case, sometimes directly and sometimes through law clerks.²⁵⁴²

Judge Gates held regular status conferences with all sides present, followed by ex parte meetings as desired.²⁵⁴³ The defendants themselves were not routinely present for status conferences, but Judge Gates ensured that each defendant was present at least once and present for anything particularly substantive.²⁵⁴⁴

The biggest discovery problem was approximately 270 hours of surveillance transcripts.²⁵⁴⁵ A careful review turned out to be important because the first transcripts had many errors.²⁵⁴⁶ Many of the recordings from which they were made were poor in quality.²⁵⁴⁷

Tim Reagan interviewed Judge Gates for this case study in his chambers.

2536. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2537. *Id.* and May 17, 2013.

Monthly vouchers had been approved earlier for a death penalty case. *Id.* May 17, 2013.

2538. *Id.* Mar. 5, 2012.

2539. *Id.*

2540. Interview with Judge James E. Gates, Mar. 6, 2012; Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2541. Interview with Judge James E. Gates, Mar. 6, 2012.

2542. *Id.*

2543. *Id.*

2544. *Id.*

2545. *Id.*; Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2546. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2547. Interview with Judge James E. Gates, Mar. 6, 2012.

Affirming convictions for Sherifi, Hassan, and Yaghi, the court of appeals “commend[ed] defense counsel for ably and robustly representing the [defendants].”²⁵⁴⁸

Sherifi’s second prosecution also was based on voluminous surveillance recordings, many in languages other than English, and Judge Gates closely managed discovery issues pertaining to those as well.²⁵⁴⁹

When Sherifi decided to proceed pro se, the court continued assigned counsel as standby counsel.²⁵⁵⁰ As trial approached, however, Judges Britt and Gates decided that the expense of standby counsel was not necessary.²⁵⁵¹

Challenge: Pro Se Defendants

Subasic’s first attorney was appointed two days after Subasic’s arrest.²⁵⁵² A week later, the court appointed substitute counsel, because the first attorney determined that she was not available to take the case.²⁵⁵³ One year after that, the new attorney notified the court that his client had instructed him to resign.²⁵⁵⁴ Subasic filed a handwritten motion for substitute counsel a month later, on September 3, 2010.²⁵⁵⁵ On November 1, Judge Gates granted the motion, permitting the dismissed attorney to remain on the case for an overlap period to assist new counsel.²⁵⁵⁶ Substitute counsel entered his appearance on November 5,²⁵⁵⁷ and the dismissed attorney withdrew from the case on January 3, 2011.²⁵⁵⁸ The public record does not re-

2548. *United States v. Hassan*, 742 F.3d 104, 125 n.15 (4th Cir. 2014).

2549. Interview with Judge W. Earl Britt, May 16, 2013.

2550. *Id.*

2551. *Id.*

2552. Order at 1, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 1, 2010), D.E. 631 [hereinafter Subasic Substitute Counsel Order]; Notice of Appearance, *id.* (July 29, 2009), D.E. 69.

2553. Subasic Substitute Counsel Order, *supra* note 2552, at 1; Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2009), D.E. 104; Motion to Withdraw, *id.* (Aug. 4, 2009), D.E. 101.

2554. Notice of Instruction to Resign, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 13, 2010), D.E. 542; Subasic Substitute Counsel Order, *supra* note 2552, at 1.

2555. Pro Se Motion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 3, 2010), D.E. 568; Subasic Substitute Counsel Order, *supra* note 2552, at 1.

2556. Subasic Substitute Counsel Order, *supra* note 2552.

2557. Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 5, 2010), D.E. 645; see Transcript, *id.* (Nov. 16, 2010, filed Feb. 28, 2011), D.E. 858 (first court appearance of substitute counsel).

2558. Notice of Withdrawal, *id.* (Jan. 3, 2011), D.E. 694.

flect the precise nature of Subasic's difficulties with his attorney,²⁵⁵⁹ but the attorney's notice of his client's instruction that he resign indicates that Subasic was dissatisfied with the attorney's zeal.²⁵⁶⁰

Subasic expressed dissatisfaction with his new counsel and sought other relief in pro se filings.²⁵⁶¹ Four times, Judge Flanagan ordered Subasic to seek relief from the court through counsel.²⁵⁶² On April 28, Subasic moved pro se to dismiss his new attorney.²⁵⁶³ The attorney filed a motion on Subasic's behalf on the following day for Subasic to represent himself from then on.²⁵⁶⁴ Subasic expressed the opinion that it would be suicide for him to be represented by an attorney.²⁵⁶⁵ On May 13, Judge Flanagan granted the motion.²⁵⁶⁶ Judge Flanagan, however, kept the attorney in the case as standby counsel.²⁵⁶⁷

Judge Flanagan agreed that because Subasic was representing himself, and because of the nature of the evidence, he would need a computer where he was detained.²⁵⁶⁸ It was particularly difficult to find a detention facility that would permit an inmate to keep a computer in his cell.²⁵⁶⁹

2559. See Transcript at 10–11, *id.* (Oct. 5, 2010, filed Oct. 27, 2010), D.E. 627 (noting the judge's sealing of the courtroom for a discussion of Subasic's motion for new counsel).

2560. Notice of Instruction to Resign, *supra* note 2554.

2561. Motions, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Apr. 15, 2011), D.E. 932, 933; Motion, *id.* (Feb. 14, 2011), D.E. 811; Motion, *id.* (Feb. 3, 2011), D.E. 798; Motion, *id.* (Feb. 1, 2011), D.E. 791.

2562. Order, *id.* (Feb. 28, 2011), D.E. 854; Order, *id.* (Feb. 24, 2011), D.E. 828; Order, *id.* (Feb. 15, 2011), D.E. 808; Order, *id.* (Feb. 7, 2011), D.E. 796.

2563. Motion, *id.* (Apr. 28, 2011), D.E. 943.

2564. Motion, *id.* (Apr. 29, 2011), D.E. 944.

2565. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2566. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 978); Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 16, 2011), D.E. 980 [hereinafter May 16, 2011, *Boyd* Order]; see Waiver of Counsel, *id.* (May 13, 2011), D.E. 979; see also Anne Blythe, *Five Triangle Terror Suspects Enter Not Guilty Pleas*, Raleigh News & Observer, Aug. 16, 2011, A (reporting on Subasic's self representation).

2567. May 16, 2011, *Boyd* Order, *supra* note 2566, at 10; see Transcript at 5, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed Mar. 4, 2013), D.E. 2144 [hereinafter Immigration Fraud Trial Day One Transcript] (noting standby counsel's participation in the immigration fraud case).

2568. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2569. *Id.*; Interview with Judge Malcolm J. Howard, Mar. 21, 2012; Interview with Judge James E. Gates, Mar. 6, 2012.

There were no federal detention facilities in the district; the Marshals Service contracted with approximately ten state and county facilities. Interview with Judge Malcolm J. Howard, Mar. 21, 2012.

At the immigration fraud trial, Subasic's standby attorney was always near at hand.²⁵⁷⁰ He helped Subasic subpoena witnesses.²⁵⁷¹ At Subasic's terrorism trial, the attorney helped Subasic catalog evidence and locate and subpoena witnesses.²⁵⁷² He also answered Subasic's legal questions.²⁵⁷³

On one occasion, the court and the Marshals Service worked together to allow Subasic to return to his cell to collect materials related to government witnesses who had traveled from Nevada.²⁵⁷⁴ Although the government provided notice of the witnesses on the night before they were to be examined, Subasic did not get the notice until he appeared at court in the morning.²⁵⁷⁵ Judge Flanagan allowed an hour and a quarter during the lunch break for Subasic to retrieve materials from his cell,²⁵⁷⁶ and she admonished the government to provide better notice, including voice notice to standby counsel, of any future last-minute changes.²⁵⁷⁷

The court of appeals did not permit Subasic to proceed pro se until after it affirmed his convictions and sentence.²⁵⁷⁸

For his murder conspiracy trial, Sherifi chose to proceed pro se; the other defendants had assigned counsel.²⁵⁷⁹ Because Sherifi's ankles were shackled out of the jury's sight, he questioned witnesses from a seated position.²⁵⁸⁰ So as to not draw the jury's notice to seated questioning by the defendant, government attorneys also questioned witnesses and addressed the court from a seated position while the jury was present.²⁵⁸¹

2570. Interview with Judge Malcolm J. Howard, Mar. 21, 2012; see Immigration Fraud Trial Day One Transcript, *supra* note 2567, at 23–24.

2571. Immigration Fraud Trial Day One Transcript, *supra* note 2567, at 7.

2572. Interview with Judge Louise W. Flanagan, May 17, 2013; see Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 17, 2012, filed Feb. 5, 2012), D.E. 1701 [hereinafter Jan. 17, 2012, *Boyd* Transcript] (reflecting standby counsel's participation in a discovery proceeding).

2573. Interview with Judge Louise W. Flanagan, May 17, 2013.

2574. Transcript at 7–13, 99–101, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 15, 2012, filed Apr. 19, 2013), D.E. 2153.

2575. *Id.* at 8.

2576. *Id.* at 11–12, 99.

2577. *Id.* at 100–101.

2578. Order, *United States v. Subasic*, No. 12-4683 (4th Cir. Aug. 1, 2014), D.E. 124 (granting the motion to proceed pro se); Order, *id.* (Feb. 11, 2014), D.E. 106 (denying the motion to proceed pro se).

2579. Interview with Judge James E. Gates, Mar. 6, 2012.

2580. Interview with Judge W. Earl Britt, May 16, 2013.

2581. *Id.*

Judge Britt admonished Sherifi that if his conduct ever became disruptive he would have to watch proceedings from the holding cell outside the courtroom.²⁵⁸² Judge Britt arranged for closed-circuit transmission of proceedings to the cell, should they become necessary.²⁵⁸³ On one occasion, Sherifi came close to eliciting an expulsion order, but he did not quite cross Judge Britt's line.²⁵⁸⁴

Sherifi pushed Judge Britt's tolerance during Sherifi's closing, but his straying from propriety did not require more than the occasional caution from Judge Britt, who did not want to exacerbate the event.²⁵⁸⁵

Challenge: Interpreters

Subasic's native language was Bosnian, but he had fairly good command of English, and he often expressed himself in court in English.²⁵⁸⁶ He nevertheless wanted an interpreter with him at court proceedings.²⁵⁸⁷ Frequently, however, he disagreed with the interpreter's translations,²⁵⁸⁸ especially translations of what Subasic said.²⁵⁸⁹ When Subasic realized that one of the interpreters recognized him from Serbia, Subasic threatened her with physical harm.²⁵⁹⁰

At his pro se terrorism trial, the interpreters asked for and received, on the first day of jury selection, permission to have electronic tablets in court so that they could access online dictionaries.²⁵⁹¹

2582. *Id.*

2583. *Id.*

2584. *Id.*

2585. *Id.*

2586. Interview with Judge Louise W. Flanagan, Mar. 5, 2012; Interview with Judge Malcolm J. Howard, Mar. 21, 2012; Interview with Judge James E. Gates, Mar. 6, 2012; e.g., Transcript at 62–63, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 7, 2011, filed Mar. 12, 2012), D.E. 1808; Transcript at 9–16, *id.* (July 29, 2011, filed June 10, 2012), D.E. 2032.

Subasic pronounced the word “exhibit” with an accent on the first syllable, and other trial participants, including Judge Howard, came to adopt that pronunciation as well. Interview with Judge Malcolm J. Howard, Mar. 21, 2012.

2587. E.g., Jan. 17, 2012, *Boyd* Transcript, *supra* note 2572; Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2588. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2589. Interview with Judge James E. Gates, Mar. 6, 2012.

2590. Interview with Judge William Arthur Webb, Mar. 20, 2012.

2591. Transcript at 5–6, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 8, 2012, filed Apr. 19, 2013), D.E. 2147.

Challenge: Court Security

At the August 2009 detention hearing, security officers kept a watchful eye on the large crowd of spectators for sudden movements.²⁵⁹² There were sixteen armed deputy marshals at hand in the jury room.²⁵⁹³ Judge Webb permitted women wearing burkhas to attend the proceedings upon positive identification, and extra female security officers were recruited to help screen the heavily covered female visitors.²⁵⁹⁴

It was convenient for a case requiring special security to be tried in New Bern, because the federal courthouse had recently been given congressionally approved security renovations.²⁵⁹⁵ The U.S. Marshals Service worked with the Methodist church across the street, which operated a day-care center,²⁵⁹⁶ to allay the church's security concerns.²⁵⁹⁷ The church hosted community meetings on the topic.²⁵⁹⁸

For Subasic's pro se immigration fraud trial in Greenville, Judge Howard decided that Subasic would not be shackled, although Subasic had been shackled at preliminary proceedings.²⁵⁹⁹ Four experienced deputy marshals were at hand in the courtroom. Usually, two stood in the corners of the courtroom behind the judge and two stood behind the defendant.²⁶⁰⁰ Judge Howard conducted sidebar conferences at a table next to the bench, and deputy marshals moved to stand near Subasic, so that Subasic would be separated from court staff.²⁶⁰¹

At Subasic's pro se terrorism trial, he was frequently shackled beneath counsel table, but he was not shackled during jury selection and for open-

2592. See Ovaska & Locke, *supra* note 2446.

2593. Interview with Judge William Arthur Webb, Mar. 20, 2012.

2594. *Id.*

2595. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. D, tit. V, 123 Stat. 524, 661 (providing \$10.6 million for the New Bern courthouse and \$153 million for the Chicago courthouse); Interview with Judge Louise W. Flanagan, Mar. 5, 2012; see Nikie Mayo, *Money for Courthouse Renovation Clears Hurdle in Congress*, New Bern Sun J., July 31, 2008.

2596. See Francine Sawyer, *Terror Trial Could Be Held in New Bern*, New Bern Sun J., Aug. 2, 2010.

2597. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2598. *Id.*

2599. Interview with Judge Malcolm J. Howard, Mar. 21, 2012.

2600. *Id.*

2601. *Id.*

ing and closing arguments.²⁶⁰² When he was permitted to move around the courtroom, he was required to wear a stun belt, and two deputy marshals stood near him.²⁶⁰³ Subasic's behavior never created a security concern.²⁶⁰⁴

Sherifi's murder conspiracy trial began with the security precautions recommended by the U.S. Marshal and based on the precautions developed for Subasic's trial, but after one day Judge Britt decided that they were not necessary.²⁶⁰⁵

Challenge: Jury Security

Judge Flanagan used an anonymous jury, and jurors reported to a secret location from which they were bused to court.²⁶⁰⁶

Judge Britt used an anonymous jury for the first time in his nearly thirty-two years on the bench, but the jurors reported directly to the courthouse.²⁶⁰⁷ Judge Britt characterized the jurors' anonymity as routine.²⁶⁰⁸ He reassured the jury that he would not be anonymous and he was not concerned about his safety as a result of the trial.²⁶⁰⁹

Judge Howard did not employ any special security measures with respect to the jury, who knew virtually nothing about Subasic's dangerousness.²⁶¹⁰

Challenge: FISA Evidence

On the day that the indictment was unsealed and the defendants were arrested, the government filed notices that it would rely on evidence against each defendant obtained pursuant to the Foreign Intelligence Surveillance

2602. Transcript at 98–99, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. May 10, 2012, filed Apr. 19, 2013), D.E. 2150; Interview with Judge Louise W. Flanagan, May 17, 2013.

2603. Interview with Judge Louise W. Flanagan, May 17, 2013.

2604. *Id.*

2605. Interview with Judge W. Earl Britt, May 16, 2013.

2606. Transcript at 85, 171–73, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 9, 2012, filed Apr. 19, 2013), D.E. 2148; Transcript at 6, *id.* (May 7, 2012, filed June 13, 2013), D.E. 2181; Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2607. Interview with Judge W. Earl Britt, May 16, 2013.

2608. *Id.*

2609. *Id.*

2610. Interview with Judge Malcolm J. Howard, Mar. 21, 2012.

Act (FISA).²⁶¹¹ In motions filed from December 10, 2010, to February 24, 2011, “defendants contend that aside from providing this notice, the government has not confirmed any details about what evidence derived from FISA searches and surveillance will be used in the prosecution of the case.”²⁶¹²

Judge Flanagan reviewed all FISA surveillance order applications resulting in the government’s evidence and found all of the orders were issued properly.²⁶¹³ The court of appeals reviewed the same materials and came to the same conclusion.²⁶¹⁴

Challenge: Classified Evidence

At the beginning of the case, Judge Flanagan had one law clerk, her judicial assistant, and a court reporter obtain security clearances.²⁶¹⁵ As the case got going, she had additional staff members obtain security clearances, including a member of the court’s information technology staff.²⁶¹⁶ Judge Flanagan used term law clerks; new law clerks started the clearance paperwork before they came aboard.²⁶¹⁷

Magistrate Judges Webb and Gates were cleared to see classified information in this case.²⁶¹⁸ District judges automatically have security clearances, but magistrate judges must obtain them, a process that was greatly facilitated by the background checks they received when they became judges.²⁶¹⁹ Both of Judge Gates’s career law clerks were cleared.²⁶²⁰ Judge Webb also had a career law clerk cleared.²⁶²¹

On August 3, 2009, one week after the defendants were arrested, the government filed a notice that classified information might be at issue in

2611. Notices, *Boyd*, No. 5:09-cr-216 (E.D.N.C. July 27, 2009), D.E. 34 to 40; *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014); *United States v. Sherifi*, 793 F. Supp. 2d 751, 753 (E.D.N.C. 2011).

2612. *Sherifi*, 793 F. Supp. 2d at 753.

2613. *Id.* at 760–61.

2614. *Hassan*, 742 F.3d at 139.

2615. Interview with Judge Louise W. Flanagan, Mar. 5, 2012.

2616. *Id.*

2617. *Id.*

2618. *Id.*; Interview with Judge William Arthur Webb, Mar. 20, 2012; Interview with Judge James E. Gates, Mar. 6, 2012.

2619. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2* (Federal Judicial Center, 2d ed. 2013).

2620. Interview with Judge James E. Gates, Mar. 6, 2012.

2621. Interview with Judge William Arthur Webb, Mar. 20, 2012.

the case and requested a hearing to discuss the matter, pursuant to the Classified Information Procedures Act.²⁶²² At the detention hearing on the following day, the government stated that classified methods were used to obtain evidence against the defendants.²⁶²³ A classified information security officer attended the detention hearing in case her expertise on how courts handle classified information was needed.²⁶²⁴

On January 4, 2010, the government filed a notice that it was submitting to the court an ex parte classified motion.²⁶²⁵ The classified motion was filed with the classified information security officer, upon which it became part of the court record.²⁶²⁶ On January 13, Judge Flanagan filed an ex parte classified order requesting supplementation.²⁶²⁷ The government filed notices of ex parte classified supplementations on January 13²⁶²⁸ and 27.²⁶²⁹ Judge Flanagan resolved the ex parte issues addressed in these classified filings in a classified order issued on February 18 and amended on February 19.²⁶³⁰ On January 28, in another classified order, Judge Flanagan had granted a classified ex parte motion to strike and substitute,²⁶³¹ which was filed on January 27.²⁶³²

On February 18, Judge Flanagan signed a protective order that required defense attorneys who received access to classified materials to keep those materials confidential.²⁶³³

From February through May, the government filed an additional eleven notices of ex parte classified filings.²⁶³⁴ The docket sheet notes seven classified ex parte orders filed by Judge Flanagan in response to these clas-

2622. Government Motion, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 3, 2009), D.E. 91, 92.

2623. Aug. 4–5, 2009, *Boyd* Transcript, *supra* note 2444, at 11.

2624. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 27, 2012; *see Reagan, supra* note 2619, at 21–22 (providing information about classified information security of-ficers).

2625. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 4, 2010), D.E. 205.

2626. *Id.*

2627. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 209, 231).

2628. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2010), D.E. 210.

2629. Notice, *id.* (Jan. 27, 2010), D.E. 220.

2630. *Boyd* Docket Sheet, *supra* note 2470 (D.E. 236, 241).

2631. *Id.* (D.E. 221).

2632. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 27, 2010), D.E. 219.

2633. Classified Information Protective Order, *id.* (Feb. 18, 2010), D.E. 237.

2634. Notices, *id.* (Feb. 25 and 26, Mar. 1, 11, and 18, Apr. 12 and 29, and May 18 and 20, 2010), D.E. 242, 243, 247, 257, 265, 295 to 297, 323, 345, 353.

sified filings.²⁶³⁵ On May 24, Judge Flanagan explained in a public notice that she had, in classified orders, “authorized the government to delete specified items of classified information from discovery and to substitute summaries for certain classified documents.”²⁶³⁶

As discovery proceeded over the next few months, both the defendants²⁶³⁷ and the government²⁶³⁸ filed notices of classified filings.

When Subasic began to represent himself, he sought access to classified evidence and did not want to rely on appointed cleared counsel to assist him with such materials.²⁶³⁹ Judge Flanagan sought additional briefing from the cleared attorney and reasoned that the defendant’s direct access to classified information would arise as an issue only if it were material to his defense, the government declined to declassify it or share it with him, and suitable substitutions could not be provided.²⁶⁴⁰

Classified evidence was stored and reviewed by defense counsel in secure rooms at the Raleigh courthouse next to a secure room originally established for the prosecution of David Passaro.²⁶⁴¹ There was a separate safe for each defendant.²⁶⁴² Judge Flanagan also had a safe for storage of classified materials at the New Bern courthouse.²⁶⁴³

Challenge: Classified Opinion

Judge Flanagan’s March 29, 2019, opinion denying habeas relief to Yaghi contained classified information, so it was filed with a classified information security officer pending a classification review.²⁶⁴⁴ A redacted opin-

2635. *Boyd* Docket Sheet, *supra* note 2470 (Feb. 26, D.E. 244; Mar. 8, D.E. 253; Mar. 12, D.E. 258; Mar. 19, D.E. 267; Apr. 6, D.E. 289; Apr. 30, D.E. 324; May 14, D.E. 338; May 17, 2010, D.E. 339, 340).

2636. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 24, 2010), D.E. 362.

2637. Notices, *id.* (Mar. 29 and May 24 and 26, 2010), D.E. 279, 365, 369.

2638. Notice, *id.* (June 7, 2010), D.E. 407.

2639. Order, *id.* (May 19, 2011), D.E. 989, 2011 WL 1930628.

2640. *Id.*

2641. Interview with Judge James E. Gates, Mar. 6, 2012; Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Apr. 27, 2012; *see* Ovaska, *supra* note 2443; Chapter 26: Interrogation Death in Afghanistan, *infra* page 410.

2642. Interview with Judge James E. Gates, Mar. 6, 2012; Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Apr. 27, 2012.

2643. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Apr. 27, 2012.

2644. *Boyd* Docket Sheet, *supra* note 2470.

ion was put on the public docket on April 22, redacting portions of the section headed, “Alleged *Giglio* Violation.”²⁶⁴⁵

Challenge: Sensitive Unclassified Evidence

Early in the case, on December 10, 2009, Judge Flanagan signed a protective order permitting the government to designate some discovery materials as sensitive, which would prohibit the defendants from sharing the materials with persons outside the litigation and require them to return the materials at the end of the case.²⁶⁴⁶ According to the protective order,

such material may include information relevant to ongoing national security investigations and prosecutions; information provided to the United States by foreign law enforcement, some of which may have led to prosecutions in other countries that are sensitive to pre-trial publicity; and materials implicating the privacy interests of the defendants and third parties.²⁶⁴⁷

A year later, Judge Flanagan noticed that procedures for protecting sensitive information in court filings while preserving as public a record as possible needed some adjustment, so she issued an order that, among other things, made clear that filings could be sealed only with the court’s permission.²⁶⁴⁸

2645. Yaghi Redacted Habeas Corpus Opinion, *supra* note 2529; see *Giglio v. United States*, 405 U.S. 150 (1972) (recognizing a defendant’s right to impeachment evidence).

2646. Sensitive Discovery Protective Order, *United States v. Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 10, 2009), D.E. 188; Protective Order Amendment, *id.* (Dec. 23, 2009), D.E. 202.

2647. Sensitive Discovery Protective Order, *supra* note 2646, at 1.

2648. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 30, 2010), D.E. 693.

Chapter 22

Islamic Jihad Union

United States v. Muhtorov (John L. Kane, D. Colo.)

The prosecution of two defendants for material support of terrorism, one defendant's material support much more serious than the other's, presented the challenge of whether the trials should be severed and how complications in one prosecution, such as delayed discovery, would affect the other. Translation and attorney-appointment challenges accompanied challenges arising from classified evidence, foreign evidence, and witness security.

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The FBI arrested Jamshid Muhtorov, who was on his way to Turkey, at Chicago's O'Hare airport on Saturday, January 21, 2012, on a January 19 criminal complaint alleging association with the Islamic Jihad Union (IJU).²⁶⁴⁹ On Monday, he was presented to the federal court in Chicago and jurisdiction over him was removed to the District of Colorado, his

2649. Complaint, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 19, 2012), D.E. 1; Partially Translated Complaint, *id.* (Feb. 6, 2012), D.E. 22 (Russian translation); *United States v. Muhtorov*, 20 F.4th 558, 581, 635 (10th Cir. 2021); *United States v. Jumaevev*, 20 F.4th 518, 529 (10th Cir. 2021); *United States v. Muhtorov*, 329 F. Supp. 3d 1289, 1291–92, 1296 (D. Colo. 2018); see Bruce Finley & Felisa Cardona, “*I Knew Him as a Good Guy, Praying*,” *Denver Post*, Jan. 31, 2012, at 1A.

home.²⁶⁵⁰ Also on Monday, the government filed an indictment in Colorado.²⁶⁵¹

Muhtorov was born in Jizzakh, Uzbekistan, then part of the Soviet Union, in 1976.²⁶⁵² Apparently arising from his work with the Human Rights Society of Uzbekistan and other organizations, he became a person of concern to the Uzbek government, and he entered the United States as a political refugee in February 2007.²⁶⁵³ He settled in Aurora, Colorado, with his wife and two children.²⁶⁵⁴

Muhtorov was calculated and at times devious. He encouraged others . . . to support the IJU and terrorist ideals generally. He also swore his allegiance to the IJU and told his daughter to pray that he become a martyr. . . . [H]e was a self-described braggart who craved attention and admiration from others, making the resoluteness of his actions and intentions questionable.²⁶⁵⁵

The Colorado court assigned the case to Judge Philip A. Brimmer, who recused himself because he occasionally socialized with the assistant U.S. attorney assigned to the case.²⁶⁵⁶ On March 7, Judge Christine M. Arguello transferred the case to Judge John L. Kane.²⁶⁵⁷

2650. Minutes, *United States v. Muhtorov*, No. 1:12-cr-53 (N.D. Ill. Jan. 23, 2012), D.E. 2.

2651. Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012), D.E. 5; Translated Indictment, *id.* (Feb. 6, 2012), D.E. 21 (Russian translation); *Muhtorov*, 20 F.4th at 635; see *Formal Indictment Unsealed Against Suspect in Terror Support*, Denver Post, Jan. 25, 2012, at 2B.

2652. *Muhtorov*, 329 F. Supp. 3d at 1292; *United States v. Muhtorov*, 187 F. Supp. 3d 1240, 1243 (D. Colo. 2015).

2653. *Muhtorov*, 20 F.4th at 580; *Muhtorov*, 329 F. Supp. 3d at 1293; *Muhtorov*, 187 F. Supp. 3d at 1244; see Bruce Finley & Felisa Cardona, *Aurora Man Arrested in Uzbek Terror Case*, Denver Post, Jan. 24, 2012, at 1A.

2654. *Muhtorov*, 329 F. Supp. 3d at 1293; *Muhtorov*, 187 F. Supp. 3d at 1244; see Finley & Cardona, *supra* note 2653.

2655. *Muhtorov*, 329 F. Supp. 3d at 1292.

2656. Recusal, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 25, 2012), D.E. 6.

2657. Order, *id.* (Mar. 7, 2012), D.E. 38; see Transcript at 12–13, *id.* (June 7, 2016, filed July 13, 2016), D.E. 1068 [hereinafter June 7, 2016, Transcript] (recording Judge Kane's observation that as a senior judge he could have declined assignment of the case).

For this case study, Tim Reagan interviewed Judge Kane and his law clerk Fahren Devine in the judge's chambers on October 19, 2018, and he interviewed Judge Kane by email on March 13, 2019.

Bakhtiyor Jumaev was added as a defendant by superseding indictment on March 20.²⁶⁵⁸ Jumaev became acquainted with Muhtorov through a mutual friend when Muhtorov traveled to Philadelphia for a commercial trucking class taught in Russian.²⁶⁵⁹ Jumaev was arrested in Philadelphia on a March 14 complaint for sending his friend Muhtorov a check for \$300 in 2011, allegedly in support of terrorist activities.²⁶⁶⁰ As Judge Kane concluded six years later,

After his co-defendant Jamshid Muhtorov informed him that the Islamic Jihad Union (IJU) was in need of financial support, Defendant Bakhtiyor Jumaev mailed Mr. Muhtorov \$300. Mr. Jumaev wrote only a single check, and the funds never reached the IJU or any other foreign terrorist organization. Mr. Jumaev had no specific plot or plan and did not intend to further any via his contribution. The idea to aid the terrorist organization was proposed and facilitated entirely by Mr. Muhtorov. Indeed, Mr. Jumaev had no direct contact with the members of any terrorist organization. And, significantly, he never committed any act of violence, nor did he advocate for any particular violent act.²⁶⁶¹

“From the filing of the first superseding indictment onward, Jumaev’s and Muhtorov’s cases proceeded largely in tandem, with the two filing numerous joint motions and objections addressing discovery, scheduling, and other matters.”²⁶⁶²

At a December 2, 2015, proceeding, Judge Kane asked whether the two defendants’ cases could be severed: “I think we could move Mr. Jumaev’s case forward much faster than we could that of Mr. Muhtorov.”²⁶⁶³ Judge

2658. Superseding Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 20, 2012), D.E. 50; Translated Superseding Indictment, *id.* (Mar. 23, 2012), D.E. 57 (Russian translation); United States v. Jumaev, 20 F.4th 518, 529 (10th Cir. 2021); *see Muhtorov*, 20 F.4th at 635; Second Superseding Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 22, 2012), D.E. 59 (removing aliases from the caption); Translated Second Superseding Indictment, *id.* (Mar. 26, 2012), D.E. 61 (Russian translation).

2659. *Jumaev*, 20 F.4th at 528.

2660. Complaint, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 14, 2012); *see* Docket Sheet, United States v. Jumaev, No. 2:12-mj-455 (E.D. Pa. Mar. 15, 2012); *Jumaev*, 20 F.4th at 529 (noting that the check was made out by a third party); *see also* Felisa Cardona, *2nd Man Held in Terrorist Probe*, Denver Post, Mar. 16, 2012, at 1B; Robert Moran, *Philadelphia Man Charged with Aiding Islamic Terrorist Group*, Phila. Inquirer, Mar. 16, 2012, at A1.

2661. Opinion at 1, *Muhtorov*, No. 1:12-cr-33 (D. Colo. July 18, 2018), D.E. 1920 [hereinafter *Jumaev Sentencing Opinion*], 2018 WL 3490886.

2662. *Jumaev*, 20 F.4th at 529.

2663. Transcript, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Dec. 2, 2015, filed Dec. 11, 2015), D.E. 905 [hereinafter Dec. 2, 2015, Transcript].

Kane denied Jumaev's motion for severance on March 3, 2016, "without prejudice to renew in the event a superseding indictment is filed,"²⁶⁶⁴ and then granted Muhtorov's severance motion on November 29,²⁶⁶⁵ following the filing of a third superseding indictment.²⁶⁶⁶

[S]hould Mr. Jumaev assert his right not to testify at the joint trial, Mr. Muhtorov will be denied the opportunity to cross examine him about incriminating out-of-court statements he may have made about Muhtorov that the government might introduce at trial, or to call Mr. Jumaev in his own case to provide exculpatory testimony.

...

I am satisfied that granting a severance works no prejudice on either defendant's right to a fair trial, but denying one would cause, or surely threatens to cause, such prejudice. Under these circumstances, I think the most prudent economy and efficiency can be achieved by avoiding re-trials because of a frugal selection of one trial rather than two that proves to be fundamentally unfair.²⁶⁶⁷

Judge Kane set Jumaev's trial to begin on March 13, 2017, and Muhtorov's trial to begin on July 31.²⁶⁶⁸

Judge Kane decided to use a juror questionnaire.²⁶⁶⁹ Instead of questions that would be used to categorize potential jurors, he preferred questions that would help potential jurors express themselves and help attorneys craft additional voir dire questions.²⁶⁷⁰ A questionnaire was also a

2664. Order, *id.* (Mar. 3, 2016), D.E. 968.

2665. Opinion, *id.* (Nov. 29, 2016), D.E. 1177 [hereinafter Severance Opinion], 2016 WL 11612426; *United States v. Muhtorov*, 20 F.4th 558, 636 (10th Cir. 2021); *Jumaev*, 20 F.4th at 530–31.

2666. Third Superseding Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 18, 2016), D.E. 1014; *Muhtorov*, 20 F.4th at 636; *see* Severance Opinion, *supra* note 2665, at 1 (noting that trial was set to begin on March 13, 2017).

2667. Severance Opinion, *supra* note 2665, at 1, 5; *Muhtorov*, 20 F.4th at 636.

2668. Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Dec. 20, 2016), D.E. 1204; *Muhtorov*, 20 F.4th at 636; *Jumaev*, 20 F.4th at 530.

2669. *E.g.*, Juror Questionnaire, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 8, 2018), D.E. 1831-1 (Muhtorov's trial); *see* Transcript at 3, *id.* (Feb. 15, 2017, filed Apr. 21, 2017), D.E. 1374 [hereinafter Feb. 15, 2017, Transcript]; *see also* Transcript at 3–5, *id.* (Mar. 1, 2017, filed Oct. 15, 2018), D.E. 1977 (discussion of questionnaire logistics: approval, submission to the jury commissioner, duplication for members of the venire).

2670. Interview with Judge John L. Kane, Oct. 19, 2018; *see* Transcript at 2–7, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 6, 2017, filed Oct. 24, 2018), D.E. 1986 [hereinafter Mar. 6, 2018, Transcript].

useful way to obtain personal information from potential jurors that did not have to be revealed in open court.²⁶⁷¹

Judge Kane decided that voir dire would be conducted in groups of sixteen “to avoid having somebody blurt out something that would possibly pollute the entire panel.”²⁶⁷² Judge Kane allowed for both judge voir dire and attorney voir dire.²⁶⁷³

Judge Kane also wanted the jury instructions to be clear and presented early:

I’m sure you’ve all tried cases where the judge waited until everything was done and then instructed the jury. And, that, I think, produces a jury that pays no attention to the instructions.

The other thing is that instructions that are written by lawyers for courts of appeal are very difficult for other people to understand.²⁶⁷⁴

Prospective jurors were instructed to report to the courthouse at 1:00 p.m. on March 13.²⁶⁷⁵ That morning, Judge Kane heard argument on a speedy-trial motion to dismiss Jumaev’s indictment.²⁶⁷⁶ The reply brief had been filed two days before.²⁶⁷⁷ Judge Kane denied the dismissal motion, and after a colloquy with Jumaev himself Judge Kane granted a motion to continue the trial until January 2018 as a remedy for delayed discovery.²⁶⁷⁸

2671. Interview with Judge John L. Kane, Oct. 19, 2018.

2672. Feb. 15, 2017, Transcript, *supra* note 2669, at 3; see Jury Selection Order, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 31, 2018), D.E. 1617.

2673. See Transcript at 10, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 14, 2017, filed Apr. 21, 2017), D.E. 1383 [hereinafter Mar. 14, 2017, Transcript]; Mar. 6, 2018, Transcript, *supra* note 2670, at 3 (“I’m going to conduct somewhat of a brief *voir dire*, and then counsel will do the *voir dire* in this case.”).

2674. Mar. 6, 2018, Transcript, *supra* note 2670, at 8; see, e.g., Transcript at 11–54, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 24, 2018, filed Aug. 1, 2018), D.E. 1933 [hereinafter May 24, 2018, Transcript] (*Muhtorov*’s trial); Transcript at 5–43, *id.* (Mar. 22, 2018, filed Apr. 18, 2018), D.E. 1764 [hereinafter Mar. 22, 2018, Transcript] (*Jumaev*’s trial); Jury Selection Order, *supra* note 2672.

2675. See Transcript at 66, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 13, 2017, filed Apr. 21, 2017), D.E. 1382 [hereinafter Apr. 21, 2017, Transcript].

2676. *Id.* at 36–65.

2677. See Docket Sheet, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012) [hereinafter Trial Docket Sheet] (D.E. 1312).

2678. Apr. 21, 2017, Transcript, *supra* note 2675, at 68–79; Amended Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 13, 2017), D.E. 1320; *United States v. Jumaev*, 20 F.4th 518, 531 (10th Cir. 2021); see Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 13, 2017), D.E. 1316.

The jury panel was dismissed.²⁶⁷⁹ However, Judge Kane allowed the attorneys to examine in his chambers, without copying, the dismissed panel's filled-out jury questionnaires.²⁶⁸⁰

At the next proceeding, Judge Kane explained to all of the parties, which included Muhtorov and his attorneys,

I directed remarks personally to [Mr. Jumaev] to assure myself that this was his desire and that he understood that a continuance of the case would mean that he would remain incarcerated for the additional time requested by defense counsel in order to process the discovery which has been given to them and which they did not at that time have a reasonable amount of time to prepare.²⁶⁸¹

Delaying Jumaev's trial created the issue of whether Muhtorov's trial should also be delayed to preserve the opportunity for Muhtorov to call Jumaev as a witness without a pending prosecution for Jumaev providing Jumaev with a Fifth Amendment privilege.²⁶⁸² Muhtorov sought pretrial release in conjunction with a delay in his trial.²⁶⁸³ Judge Kane granted pretrial release on June 23, 2017, but abated his order "so that the specific combination of conditions can be aired and determined with comment from all sides."²⁶⁸⁴

Three days later, some time before that day's hearing on release conditions, the government filed a notice of appeal respecting the release order.²⁶⁸⁵ Judge Kane observed, "I think it is premature because I abated my order."²⁶⁸⁶ He decided that Muhtorov should receive home incarceration with possible furloughs for religious worship, counsel visits, and medical

2679. Mar. 14, 2017, Transcript, *supra* note 2673, at 5.

2680. *Id.* at 10, 12.

2681. *Id.* at 3.

2682. *Id.* at 4 (remarks by Judge Kane); see *United States v. Muhtorov*, 20 F.4th 558, 636 (10th Cir. 2021).

2683. Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 26, 2017), D.E. 1418; see Transcript, *id.* (June 22, 2017, filed June 27, 2017), D.E. 1456 (motion hearing).

2684. Opinion, *id.* (June 23, 2017), D.E. 1448; see Transcript, *id.* (June 23, 2017, filed June 27, 2017), D.E. 1457 (announcing the decision); see also Kirk Mitchell, *Terror Suspect Ordered Freed*, June 24, 2017, at 1A.

2685. Notice of Appeal, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 26, 2017), D.E. 1452; see Kirk Mitchell, *Feds Appeal Release of Suspect*, Denver Post, June 28, 2017, at 6A; see also Kirk Mitchell, *Ankle Monitors Inadequate*, Denver Post, July 4, 2017, at 2A.

2686. Transcript at 4, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 26, 2017, filed June 27, 2017), D.E. 1458.

care, but Judge Kane stayed the release order until June 29 to permit a home evaluation.²⁶⁸⁷

On June 28, the court of appeals issued a temporary stay of the release order pending additional briefing,²⁶⁸⁸ and on July 7 the court issued a stay pending appeal.²⁶⁸⁹ On July 21, the court of appeals reversed the release order: “Simply put, the evidence does not support the district court’s assessment that Muhtorov no longer poses a danger or presents a flight risk that cannot be minimized by strict release conditions.”²⁶⁹⁰

For health reasons, Judge Kane was not able to begin Jumaev’s trial on January 8, 2018, after all, and neither defendant sought reassignment to another judge.²⁶⁹¹ Judge Kane reset the two trials to begin on March 12 for Jumaev and May 14 for Muhtorov.²⁶⁹²

Trial proceedings were not conducted on Fridays.²⁶⁹³ Judge Kane informed the attorneys that he would conclude each day of jury trial between 4:30 and 5:00 p.m.²⁶⁹⁴ Whichever attorney was at the lectern at 4:30 should decide when to break for the day, but the judge would break at 5:00 if the attorney did not before then.²⁶⁹⁵

Judge Kane permitted the jurors to take notes, and invited them to submit questions at every recess.²⁶⁹⁶ They seldom posed questions, but Judge Kane thought that the opportunity to do so gave them confidence.²⁶⁹⁷

2687. *Id.* at 9–10; Minutes, *id.* (June 26, 2017), D.E. 1455; see Kirk Mitchell, *Release Carries Conditions*, Denver Post, June 27, 2017, at 2A.

2688. Order, *United States v. Muhtorov*, No. 17-1220 (10th Cir. June 28, 2017); see Kirk Mitchell, *Appeals Court Halts Release of Colorado Terror Suspect*, Denver Post, June 30, 2017, at 6A.

2689. Order, *Muhtorov*, No. 17-1220 (10th Cir. July 7, 2017); see Kirk Mitchell, *Uzbek Terror Suspect Must Stay in Aurora Detention*, Denver Post, July 11, 2017, at 8A.

2690. *United States v. Muhtorov*, 702 F. App’x 694, 702 (10th Cir. 2017), *cert. denied*, 583 U.S. ___, 138 S. Ct. 430 (2017).

2691. Order at 1, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Dec. 12, 2017), D.E. 1585.

2692. *Id.* at 2; *United States v. Jumaev*, 20 F.4th 518, 531 (10th Cir. 2021); *United States v. Muhtorov*, 20 F.4th 558, 637 (10th Cir. 2021).

2693. Transcript at 3, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 7, 2018, filed Mar. 9, 2018), D.E. 1693.

2694. *Id.* at 12.

2695. *Id.*

2696. Interview with Judge John L. Kane, Oct. 19, 2018.

2697. *Id.*

Jury selection in Jumaev's trial ran from March 12 to 15,²⁶⁹⁸ and opening statements were presented on March 22.²⁶⁹⁹ Jumaev testified at his trial.²⁷⁰⁰ The jury found him guilty on April 30.²⁷⁰¹

Jury selection in Muhtorov's trial ran from May 14 to 16,²⁷⁰² and opening statements were presented on May 24.²⁷⁰³ Muhtorov also testified at his trial.²⁷⁰⁴ His wife testified next.²⁷⁰⁵ The jury found him guilty on three counts and not guilty on one count on June 21.²⁷⁰⁶

Judge Kane sentenced Jumaev on July 18 to time served plus ten years of supervised release.²⁷⁰⁷

2698. Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 12 through 15, 2018), D.E. 1697, 1700, 1705, 1708; Transcripts, *id.* (Mar. 12 through 15, 2018, filed Oct. 24, 2018), D.E. 1981 to 1984.

2699. Minutes, *id.* (Mar. 22, 2018), D.E. 1721; Mar. 22, 2018, Transcript, *supra* note 2674, at 43–86.

2700. Transcript, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 12, 2018, filed May 22, 2018), D.E. 1843; Transcript, *id.* (Apr. 11, 2018, filed May 22, 2018), D.E. 1842; Transcript, *id.* (Apr. 10, 2018, filed May 22, 2018), D.E. 1841; Transcript at 1079–114, *id.* (Apr. 9, 2018, filed May 15, 2018), D.E. 1832.

2701. Jury Verdict, *id.* (Apr. 30, 2018), D.E. 1805; Transcript, *id.* (Apr. 30, 2018, filed Oct. 24, 2018), D.E. 1987; *United States v. Jumaev*, 20 F.4th 518, 532 (10th Cir. 2021); *see* Jumaev Sentencing Opinion, *supra* note, 2661 at 6 (“The jury deliberated over 15 hours and recessed for a weekend before returning the verdict.”); *see also* *United States v. Muhtorov*, 329 F. Supp. 3d 1289, 1292 (D. Colo. 2018).

2702. Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 14 through 16, 2018), D.E. 1829, 1833 to 1835.

2703. Minutes, *id.* (May 24, 2018), D.E. 1850; May 24, 2018, Transcript, *supra* note 2674, at 55–98.

2704. Transcript at 1158–286, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 7, 2018, filed Aug. 1, 2018), D.E. 1941; Transcript at 1073–142, *id.* (June 6, 2018, filed Aug. 1, 2018), D.E. 1940.

2705. Transcript at 1291–327, *id.* (June 11, 2018, filed Aug. 1, 2018), D.E. 1942; *Muhtorov*, 329 F. Supp. 3d at 1296.

2706. Jury Verdict, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 21, 2018), D.E. 1898; *United States v. Muhtorov*, 20 F.4th 558, 580, 582 (10th Cir. 2021); *Muhtorov*, 329 F. Supp. 3d at 1292; *see* Kirk Mitchell, *Man Guilty of Aiding Terrorists*, *Denver Post*, June 22, 2018, at 2A.

2707. Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. July 18, 2018, filed July 19, 2018), D.E. 1922; Jumaev Sentencing Opinion, *supra* note 2661; Transcript, *Muhtorov*, No. 1:12-cr-33 (D. Colo. July 18, 2018, filed Aug. 1, 2018), D.E. 1945; *United States v. Jumaev*, 20 F.4th 518, 532 (10th Cir. 2021); *see* *Muhtorov*, 329 F. Supp. 3d at 1292; *see also* Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting release from prison on July 19, 2018, reg. no. 68105-066); *see also* Kirk Mitchell, “Fair” Sentence: “Time Served,” *Denver Post*, July 19, 2018, at 2A; Jeremy Roebuck, *Judge Frees Phila. Man in Terrorism Case*, *Phila. Inquirer*, July 20, 2014, at B3.

Although his actions certainly are sufficient for the jury to have found him guilty of . . . very serious [material-support] crimes, . . . his guilt rests on far less culpable conduct than that of all other defendants of which I have been made aware who have been convicted under the same statute.

...

To arrive at the appropriate sentence, I ask: What sentence is necessary to convey that any support for terrorism will not be tolerated? I believe that message has been sent in this case. Mr. Jumaev has already been subjected to significant punishment. He has spent 76 months in pretrial detention in Denver, far from his friends in Pennsylvania and even farther from his family in Uzbekistan and elsewhere.²⁷⁰⁸

On August 30, Judge Kane sentenced Muhtorov to eleven years in prison and fifteen years of supervised release.²⁷⁰⁹ He was released on June 18, 2021.²⁷¹⁰

The court of appeals procedurally consolidated the defendants' appeals,²⁷¹¹ and they were heard on November 19, 2020.²⁷¹²

On May 20, 2021, the court of appeals invited the parties to comment on the classified information security officer's referring court personnel to an internet article, "To Oversee or Overrule: What Is the Role of the Foreign Intelligence Surveillance Court Under FISA Section 702?"²⁷¹³ The government reported that the article generally supported one of its argu-

2708. Jumaev Sentencing Opinion, *supra* note 2661, at 1–2, 27. See generally John L. Kane, *Sentencing, Bureaucracy, and the Paradigm of Disillusion*, The Champion, Nov. 2018, at 18 (reflecting on sentencing challenges in other cases and concluding, "Sentencing law itself is a failed effort to substitute the focus on the complexities of each individual with rigid guidelines.").

2709. Amended Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 24, 2019), D.E. 2020 (clarifying a recommendation for the location of imprisonment near family); Judgment, *id.* (Sept. 4, 2018), D.E. 1966; *Muhtorov*, 20 F.4th at 582; *Muhtorov*, 329 F. Supp. 3d at 1311; see *id.* at 1304 (noting six years, seven months, and nine days of presentence detention); see also Kirk Mitchell, *Uzbek Refugee Receives 11-Year Prison Sentence*, Denver Post, Aug. 31, 2018, at 4A.

2710. BOP Locator, *supra* note 2707 (reg. no. 42383-424); *Muhtorov*, 20 F.4th at 582.

2711. Order, *United States v. Jumaev*, No. 18-1296 (10th Cir. Oct. 1, 2018).

2712. Docket Sheet, *United States v. Muhtorov*, No. 18-1366 (10th Cir. Sept. 7, 2018); Docket Sheet, *Jumaev*, No. 18-1296 (10th Cir. Sept. 7, 2018).

2713. Order, *Jumaev*, No. 18-1296 (10th Cir. May 20, 2021); see George Croner, *To Oversee or to Overrule: What Is the Role of the Foreign Intelligence Surveillance Court Under FISA Section 702?*, Lawfare Blog (May 18, 2021), www.lawfareblog.com/oversee-or-overrule-what-role-foreign-intelligence-surveillance-court-under-fisa-section-702 (referring to section 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a).

ments.²⁷¹⁴ Muhtorov's attorneys, on the other hand, reported that "the post presents an incorrect and slanted view of Section 702 surveillance."²⁷¹⁵

The court of appeals affirmed the convictions on December 8, 2021.²⁷¹⁶ On June 29, 2022, the court of appeals denied Jumaev relief from a deportation order.²⁷¹⁷

Challenge: Attorney Appointment

Twelve days after his arrest, Muhtorov appeared without counsel before Magistrate Judge Kathleen M. Tafoya in Denver on February 2, 2012, and with the assistance of a Russian interpreter, Muhtorov said,

You know what, I spent 10 days in Chicago at MCC. I was arrested. And they did not allow me to make a phone call to make all arrangements to hire an attorney to get prepared for the hearing. And then I was in Oklahoma and they did not allow me to do it either. Yesterday they brought me here to—in Colorado and they did not allow me to do anything for that. So if it's going to continue like that I will never have a chance to talk to anybody, to my wife, or to anybody else.²⁷¹⁸

The government represented that Muhtorov had appointed counsel in Chicago,²⁷¹⁹ and Judge Tafoya decided to appoint the federal defender's office to represent Muhtorov in Denver.²⁷²⁰ Muhtorov appeared with counsel at a February 7 status conference.²⁷²¹

2714. Appellee's Supplemental Brief at 3, *Muhtorov*, No. 18-1366 (10th Cir. June 1, 2021).

2715. Appellant's Supplemental Brief at 1–2, *id.* (June 1, 2021).

2716. *United States v. Muhtorov*, 20 F.4th 558 (10th Cir. 2021), *cert. pending*, Docket Sheet, No. 22-5188 (U.S. July 22, 2021) (noting distribution for the conference of September 28, 2022); *United States v. Jumaev*, 20 F.4th 518 (10th Cir. 2021), *cert. pending*, Docket Sheet, No. 21-5182 (U.S. July 26, 2022) (noting distribution for the conference of September 28, 2022).

2717. Opinion, *Jumaev v. Garlan*, No. 21-9513 (10th Cir. June 29, 2022), 2022 WL 2342994; *see Jumaev*, 20 F.4th at 532 n.4 (noting the deportation order).

2718. Transcript at 5–6, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Feb. 2, 2012, filed Feb. 24, 2012), D.E. 29 [hereinafter Feb. 2, 2012, Transcript]; *see* John Ingold, *Terror Suspect: "I Am Not Guilty,"* *Denver Post*, Feb. 3, 2012, at 2B.

Judge Tafoya retired on January 31, 2022. Judicial Milestones, www.uscourts.gov/judicial-milestones/kathleen-m-tafoya.

2719. Feb. 2, 2012, Transcript, *supra* note 2718, at 8.

2720. *Id.* at 9–11.

2721. Transcript, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Feb. 7, 2012, filed Mar. 23, 2012), D.E. 56.

During the case, two attorneys in the federal defender's office moved to a private law firm, and Judge Kane kept them on the case.²⁷²² No party objected to Judge Kane's continuing to preside, although the new law firm's senior partner had recently provided Judge Kane with representation.²⁷²³

Jumaev was represented by very capable attorneys on the court's Criminal Justice Act panel.²⁷²⁴ During the course of the prosecution, a paralegal working on Jumaev's case completed law school and passed the bar exam; Judge Kane appointed her to act as another attorney for Jumaev to preserve the continuity of her work.²⁷²⁵

One challenge for efficient administration of the case arose from the frequent need for prosecuting attorneys to receive approval to act from the Justice Department in Washington, D.C.²⁷²⁶ There also was a lot of turnover among the prosecuting attorneys.²⁷²⁷

Challenge: Translation and Interpreters

At an October 11, 2012, proceeding, an attorney for the government summarized the challenges of translation in the case:

I will tell the Court that the bottleneck—and certainly it's a bottleneck for the Government and I anticipate you will hear from the defense is a bottleneck for them—is the translation process. And again, even Russian translation is a resource issue, but especially when we're dealing with languages such as Uzbek and now we also have disclosures we've made to the defense of defendant Jumaev's conversations that involve a mix of Uzbek and Tajik, that is, that is an interpreter resource that is incredibly rare. We have one FBI linguist who translates Tajik.²⁷²⁸

2722. Email interview with Judge John L. Kane, Mar. 13, 2019; Trial Docket Sheet, *supra* note 2677 (D.E. 1111); see Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 12, 2016), D.E. 1110.

2723. Email interview with Judge John L. Kane, Mar. 13, 2019.

2724. CJA Appointment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 9, 2014), D.E. 502; CJA Appointment, *id.* (Apr. 3, 2012), D.E. 67; Interview with Judge John L. Kane, Oct. 19, 2018.

2725. Email interview with Judge John L. Kane, Mar. 13, 2019.

2726. Interview with Judge John L. Kane, Oct. 19, 2018 (noting that despite his inquiries, Judge Kane was not told who the decision makers were).

2727. *Id.*

2728. Transcript at 7, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 11, 2012, filed Oct. 28, 2012), D.E. 230.

Other languages that appeared in the case included Arabic, Kurgheese, Urdu, Turkish, and German.²⁷²⁹

The court appointed an Uzbek interpreter with a top-secret security clearance to assist Jumaev.²⁷³⁰ On November 13, 2013, Jumaev's attorney sought an order to show cause why the interpreter had not produced a translated March 15, 2012, postarrest interrogation of Jumaev, despite assurances that the translation had been completed in May 2013.²⁷³¹ Judge Kane issued the requested order.²⁷³² On January 7, 2014, Jumaev's counsel reported that he had still not received the translated transcript, and he was seeking alternative Uzbek translation.²⁷³³

At a June 7, 2016, proceeding, for example, interpreters provided the defendants with both simultaneous Russian interpretation and sequential Uzbek interpretation.²⁷³⁴ In 2017, a challenge arose because of a need for Tajik translation, and the dialect spoken in Samarkand, Uzbekistan, where Jumaev was born and raised, has influences from other languages and not all Tajik translators are familiar with it.²⁷³⁵

Judge Kane recommended that in cases requiring translated discovery, judges assess early what the translation requirements will be.²⁷³⁶

Challenge: FISA Evidence

Fifteen days after filing Muhtorov's indictment, the government filed a notice of intent to use evidence obtained pursuant to the Foreign Intelligence Surveillance Act (FISA).²⁷³⁷

On the following day, Muhtorov moved for suppression of FISA evidence at his detention hearing.²⁷³⁸ At the hearing on February 14, 2012,

2729. Interview with Judge John L. Kane, Oct. 19, 2018.

2730. Transcript at 3, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 23, 2012, filed June 27, 2012), D.E. 150 [hereinafter May 23, 2012, Transcript].

2731. Translation Motion, *id.* (Nov. 13, 2013), D.E. 464.

"Uzbek and Tajik translators with security clearances were scarce." *United States v. Jumaev*, 20 F.4th 518, 530 (10th Cir. 2021).

2732. Order to Show Cause, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Nov. 13, 2013), D.E. 465.

2733. Report, *id.* (Jan. 7, 2014), D.E. 495.

2734. June 7, 2016, Transcript, *supra* note 2657, at 3.

2735. See Transcript at 8–9, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 20, 2017, filed June 22, 2017), D.E. 1445 [hereinafter Apr. 20, 2017, Transcript].

2736. Interview with Judge John L. Kane, Oct. 19, 2018.

2737. FISA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Feb. 7, 2012), D.E. 12.

2738. Motion, *id.* (Feb. 8, 2012), D.E. 14.

Magistrate Judge Michael E. Hegarty ruled that he could consider FISA evidence for purposes of his detention ruling.²⁷³⁹

On April 4, the government filed a notice of intent to use FISA evidence against Jumaev.²⁷⁴⁰

After reviewing materials presented to and issued by the FISA court with respect to the defendants, Judge Kane determined on September 24 that the FISA materials were not discoverable and the FISA evidence should not be suppressed: “the electronic surveillance and physical searches at issue were lawfully authorized and conducted.”²⁷⁴¹

On October 25, 2013, the government filed a second notice of intent to use FISA evidence against Muhtorov—evidence obtained pursuant to 50 U.S.C. § 1881a, which is section 702 of FISA, and which was enacted as part of the FISA Amendments Act of 2008.²⁷⁴²

The court of appeals later concluded,

The Section 702 surveillance did not target Mr. Muhtorov. Rather, the government targeted a non-United States person living abroad, and in the process the government incidentally collected Mr. Muhtorov’s communications with the target. The government then used those communications to support applications to surveil Mr. Muhtorov under the Foreign Intelligence Surveillance Act of 1978 ²⁷⁴³

With respect to the section 702 notice, the *New York Times* reported, “The Justice Department for the first time has notified a criminal defendant that evidence being used against him came from a warrantless wiretap, a move that is expected to set up a Supreme Court test of whether such eavesdropping is constitutional.”²⁷⁴⁴

2739. Transcript at 13–17, *id.* (Feb. 14, 2012, filed Mar. 9, 2012), D.E. 46; *see* United States v. Muhtorov, 20 F.4th 558, 590 (10th Cir. 2021).

2740. FISA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 4, 2012), D.E. 68.

2741. FISA Order at 2, *id.* (Sept. 24, 2012), D.E. 196; *see* *Muhtorov*, 20 F.4th at 590; United States v. Muhtorov, 187 F. Supp. 3d 1240, 1241 (D. Colo. 2015).

2742. FISA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 25, 2013), D.E. 457; *Muhtorov*, 20 F.4th at 590, 636; United States v. Jumaev, 20 F.4th 518, 530 (10th Cir. 2021); *Muhtorov*, 187 F. Supp. 3d at 1241–42, 1244; *see* FISA § 702(a), 50 U.S.C. § 1881a(a) (2020); Pub. L. No. 110-261, § 101, 122 Stat. 2436, 2438.

2743. *Muhtorov*, 20 F.4th at 581.

2744. Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. Times, Oct. 27, 2013, at A21; *see also* Robert Barnes & Ellen Nakashima, *U.S. to Use Warrantless Evidence in Terror Case*, Wash. Post, Oct. 26, 2013, at A1; John Ingold, *Feds Acknowledge Use of Warrantless Wiretaps Against Aurora Terror Suspect*, Denver Post, Nov. 16, 2013, at 4A.

The notice resulted from a change in Justice Department policy to comport with representations that the solicitor general had made to the Supreme Court in a case resolved on February 26, 2013.²⁷⁴⁵ In *Clapper v. Amnesty International USA*, the Supreme Court determined that the plaintiffs did not have standing to challenge the constitutionality of section 702 because they could not show that they had been subjected to section 702 surveillance.²⁷⁴⁶

Three days after Muhtorov's section 702 notice, Jumaev moved for notice of whether section 702 evidence was collected against him.²⁷⁴⁷ The government responded that if Jumaev were entitled to section 702 notice, such notice would have been given.²⁷⁴⁸

On November 19, 2015, following "an exhaustive *in camera* and *ex parte* review of all relevant . . . classified materials provided to me by the government, including supplemental classified materials prepared at my request," Judge Kane denied Muhtorov's motion to suppress evidence derived via section 702.²⁷⁴⁹ "While I am convinced the [FISA Amendments Act] is susceptible to unconstitutional application as an end-run around the Wiretap Act and the Fourth Amendment's prohibition against warrantless or unreasonable searches, I am equally convinced that it was not unconstitutionally applied to Mr. Muhtorov."²⁷⁵⁰

2745. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); Reply Brief at 15, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (U.S. Oct. 17, 2012), www.aclu.org/legal-document/amnesty-et-al-v-clapper-reply-brief-petitioners; see Transcript at 4, *id.* (Oct. 29, 2012), www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-1025.pdf; see also Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance Program*, Wash. Post, Jan. 30, 2014, at A13; Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A13; Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 17, 2013, at A3.

2746. 568 U.S. 398.

2747. Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 28, 2013), D.E. 458.

2748. Response at 4, *id.* (Nov. 19, 2013), D.E. 470; see *United States v. Jumaev*, 20 F.4th 518, 530 (10th Cir. 2021).

2749. *United States v. Muhtorov*, 187 F. Supp. 3d 1240 (D. Colo. 2015); see *United States v. Muhtorov*, 20 F.4th 558, 590, 636 (10th Cir. 2021); *Jumaev*, 20 F.4th at 530; Suppression Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 29, 2014), D.E. 520; see also Kirk Mitchell, *Warrantless Wiretap Law Upheld*, Denver Post, Nov. 21, 2015, at 2A.

2750. *Muhtorov*, 187 F. Supp. 3d at 1243; see Redacted Transcript at 5, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 17, 2015, filed June 25, 2015), D.E. 774 [hereinafter Redacted June 17, 2015, Transcript] (announcing at a status conference the judge's draft ruling).

Judge Kane was also convinced by his “*ex parte* review of all of the classified information in this case” that Jumaev was not entitled to section 702 notice.²⁷⁵¹

After a “careful and independent review of the classified record,” the court of appeals also determined that the FISA surveillance was constitutional.²⁷⁵²

Challenge: Classified Evidence

In this case, Judge Kane tried to strike a balance between the needs of national security and the needs of justice.²⁷⁵³ The Classified Information Procedures Act (CIPA) governed how classified information was used in the case.²⁷⁵⁴

“The government submitted numerous CIPA filings to the district court. The court held 18 *in camera* and *ex parte* classified hearings. It entered seven classified orders. Some were accompanied by an unclassified order describing their general subject matter.”²⁷⁵⁵

Six weeks after it filed Muhtorov’s indictment, the government filed a motion for a pretrial CIPA conference.²⁷⁵⁶ The government filed a similar motion three weeks after a superseding indictment included Jumaev.²⁷⁵⁷

Pursuant to CIPA’s section 2, Judge Kane held a status conference on May 23, 2012, with the defendants and an Uzbek interpreter present.²⁷⁵⁸ On June 20, Judge Kane set for the following day an initial *ex parte* section 4 conference with the government “for the purpose of informing me—in plain language rather than in ‘code’—what it is that is classified in this case

2751. *Muhtorov*, 187 F. Supp. 3d at 1243 n.4; *Jumaev*, 20 F.4th at 530; see Redacted June 17, 2015, Transcript, *supra* note 2750, at 5–6.

2752. *Muhtorov*, 20 F.4th at 592–618.

2753. Transcript at 3, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Feb. 21, 2018, filed Mar. 2, 2018), D.E. 1684 [hereinafter Feb. 21, 2018, Transcript].

2754. 18 U.S.C. app. 3 (2020); see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013)

2755. *Muhtorov*, 20 F.4th at 629.

2756. CIPA Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Mar. 5, 2012), D.E. 36; see *Jumaev*, 20 F.4th at 529–30.

2757. CIPA Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 11, 2012), D.E. 84.

2758. May 23, 2012, Transcript, *supra* note 2730; Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. May 23, 2012), D.E. 124; see 18 U.S.C. app. 3 § 2 (“pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution”).

and how the government views the discovery process in light of it.”²⁷⁵⁹ In an effort to maintain balance, Judge Kane offered the defense an ex parte session following the ex parte proceeding with the government.²⁷⁶⁰ Defense counsel met ex parte with Judge Kane on June 28 to disclose anticipated defenses, which helped Judge Kane make more informed decisions about the government’s disclosure obligations.²⁷⁶¹

On September 26, the government filed a notice that it was submitting to Judge Kane an ex parte discovery motion pertaining to classified information.²⁷⁶²

On the basis of the Court’s independent review of the information and the arguments set forth in the Government’s Motion, the Court finds that the classified information referenced in the government’s motion implicates the government’s national security and classified information privilege because the information is properly classified, and its disclosure could cause serious damage to the national security of the United States. Furthermore, the Court finds that none of the classified information is exculpatory, *see Brady v. Maryland*, 373 U.S. 83 (1963).²⁷⁶³

On April 30, 2013, Judge Kane authorized the government to produce to the defendants an unclassified substitution for some otherwise discoverable classified information.²⁷⁶⁴ A couple of years later, Judge Kane denied defense attorneys’ motion for access to the government’s ex parte classified filings.²⁷⁶⁵

Over the course of the litigation, the government filed eleven notices of ex parte in camera sealed filings.²⁷⁶⁶

2759. Order, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 20, 2012), D.E. 135 [hereinafter Section 4 Order]; *see* Minutes, *id.* (June 21, 2012), D.E. 137; *see also* 18 U.S.C. app. 3 § 4 (upon a sufficient showing, the court may authorize the government to withhold classified information from discovery or approve summaries or admissions as substitutes for classified information).

2760. Section 4 Order, *supra* note 2759.

2761. Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 28, 2012), D.E. 151; Email interview with Judge John L. Kane, Mar. 13, 2019.

2762. CIPA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Sept. 26, 2012), D.E. 198 [hereinafter Sept. 26, 2012, CIPA Notice].

2763. CIPA Order at 2, *id.* (Oct. 3, 2012), D.E. 213.

2764. CIPA Order, *id.* (Apr. 30, 2013), D.E. 339.

2765. Redacted June 17, 2015, Transcript, *supra* note 2750, at 8–9; Minutes, *Muhtorov*, No. 1:12-cr-33 (D. Colo. June 17, 2015), D.E. 770.

2766. CIPA Notices, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 26, 2013; Aug. 24 and Nov. 18, 2016; Nov. 6 and 21 and Dec. 15, 2017; and Feb. 14 and 28, Mar. 1, and Apr. 2,

Although meeting *ex parte* with the government to learn what classified information it had about the defendant and then meeting *ex parte* with defense counsel to learn what defenses they were working on was somewhat successful, it was not ideal.²⁷⁶⁷ Some defenses cannot be formulated without the information that the government is seeking to withhold.²⁷⁶⁸ Judge Kane reflected on the importance of clearances for defense attorneys and a recognition that they “need to know” the classified information that the government has that might be helpful to the defense.²⁷⁶⁹ Access to classified information requires a security clearance and a recognized need to know.²⁷⁷⁰

An apparent cause of delay in the case was the intelligence community’s unfortunate reluctance to disclose or declassify information until persuaded that the prosecution required it.²⁷⁷¹ The possibility of a plea deal, for example, means that sensitive evidence might not be needed for trial.²⁷⁷² Disclosures to defense attorneys often came in piecemeal streams alternating with massive evidence dumps.²⁷⁷³

A law clerk, court reporters, and interpreters needed security clearances.²⁷⁷⁴ Two deputy clerks of court received security clearances so that they could help the court handle classified documents.²⁷⁷⁵

Challenge: Classified Argument

The court of appeals allowed the government to present to the court a classified *ex parte* brief in Muhtorov’s appeal, asking to see the brief before the court ruled on whether it could be presented as argument.²⁷⁷⁶ The court agreed to accept filing of the *ex parte* brief, requiring the government to

2018), D.E. 336, 1092, 1171, 1560, 1567, 1590, 1643, 1679, 1681, 1743; Sept. 26, 2012, CI-PA Notice, *supra* note 2762.

2767. Interview with Judge John L. Kane, Oct. 19, 2018.

2768. *Id.*

2769. *Id.*

2770. Revised Security Procedures Established Pursuant to Pub. L. No. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 4 (2020); *see* Reagan, *supra* note 2754, app. B.

2771. Interview with Judge John L. Kane, Oct. 19, 2018.

2772. *Id.*

2773. *Id.*

2774. *Id.*

2775. *Id.*

2776. Order, *United States v. Muhtorov*, No. 18-1366 (10th Cir. Mar. 23, 2020); *see* Notice, *id.* (Apr. 17, 2020) (noting presentation of the brief to the court by a classified information security officer).

file a redacted version of the brief and its classified exhibits on the public record and requiring the government to “file a document that clearly and specifically identifies where in its unclassified brief it relies on arguments or materials presented in its classified brief.”²⁷⁷⁷

Challenge: Classification Review

Not quite six months before the court of appeals issued its decisions in Muhtorov and Jumaev’s appeals, the court instructed the clerk of court to

work with the Classified Information Security Officer (CISO) to arrange for the appropriate authorities to conduct a pre-publication classification review of the court’s opinions in these matters. . . . The CISO and the individual(s) conducting the classification review are expressly prohibited from disclosing any aspect of the court’s opinions to the lawyers and parties involved in these appeals.²⁷⁷⁸

About two months later, the court informed the parties that it expected to quote from a sealed unclassified order by Judge Kane concerning discovery of classified evidence, and the court gave the parties one week to “file responses stating whether they have any concerns about the court quoting from the aforementioned order in an opinion that will be available to the public.”²⁷⁷⁹

The only concern expressed was the government’s statement that the identities of linguists mentioned in the order should not be disclosed publicly.²⁷⁸⁰ Although the order remains sealed in the district court record,²⁷⁸¹ the court of appeals attached a redacted version of it to its own docket sheet.²⁷⁸²

2777. Order, *id.* (Aug. 24, 2020); see Redacted Brief and Exhibits, *id.* (Nov. 8, 2020); Government Response, *id.* (Sept. 24, 2020) (identifying arguments supported in the government’s classified brief).

2778. Order, *id.* (June 25, 2021).

2779. Order, *id.* (Aug. 10, 2021).

2780. Government Response, *id.* (Aug. 17, 2021); see Muhtorov Response, *id.* (Aug. 17, 2021).

2781. Trial Docket Sheet, *supra* note 2677 (D.E. 1306).

2782. Supplemental Record, *Muhtorov*, No. 18-1366 (Aug. 23, 2021); Order, *id.* (Aug. 23, 2021).

Challenge: Inadvertent Disclosure of Classified Information

At a 2015 proceeding, classified information was inadvertently disclosed and reflected in the proceeding's transcript.²⁷⁸³ At a later proceeding with counsel on both sides of both prosecutions and the classified information security officer present, Judge Kane decided how to handle the inadvertent disclosure. "The defendants' counsel shall return the transcripts which were distributed, all of the copies of them, to the Court. They will be placed under seal and held by the Court for any future reference that might be necessary. The Government shall provide in its place the redacted transcript."²⁷⁸⁴ Judge Kane explained that after his careful review he concluded "that the defendants are not disadvantaged at all by the redaction."²⁷⁸⁵

The classified information security officer explained to Judge Kane that it was important for the attorneys to surrender the classified transcripts before they received the redacted transcripts to make it difficult for them to remember the inadvertently disclosed classified information.²⁷⁸⁶ The defense attorneys noted their difficulty in protecting the classified information disclosed to them without an identification of what disclosed to them was classified.²⁷⁸⁷

Judge Kane decided not to order a scrubbing of the defense attorneys' computers.²⁷⁸⁸ "I rely upon the history of demonstrated competence and integrity of counsel to do that which you have already said you would do, and I accept that."²⁷⁸⁹

Challenge: Witness Security

To protect ongoing investigations and the witness's safety, the government sought permission on November 18, 2016, to keep from the public and the defendants themselves, but not their attorneys, the identity of a "confidential human source."²⁷⁹⁰ Judge Kane granted the request on December 13:

2783. Dec. 2, 2015, Transcript, *supra* note 2663; *see* Redacted June 17, 2015, Transcript, *supra* note 2750.

2784. Dec. 2, 2015, Transcript, *supra* note 2663, at 33 (paragraph break omitted).

2785. *Id.*

2786. *Id.* at 33–34.

2787. *E.g., id.* at 8.

2788. *Id.* at 35.

2789. *Id.*

2790. Motion, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Nov. 18, 2016), D.E. 1170.

the witness could use a pseudonym in court and appear in light disguise; the public could attend the testimony in an overflow space and the transmission of the proceeding would not include the witness's face.²⁷⁹¹

Judge Kane ordered the government to make the witness available for interview by defense counsel.²⁷⁹²

If, for any reason, the [witness] refuses to be interviewed or demonstrates unwillingness to answer questions, I will order his deposition to be taken *in camera* in the presence of the court. Should the [witness] even then fail to cooperate, he will not be permitted to testify in either trial.²⁷⁹³

This court, including the prosecution and defense counsel are constantly confronted with difficulties in piercing the wall of secrecy rightly in place in the interests of national security. Nevertheless, providing these defendants with sufficient discovery to enable them to assert defenses and challenge incriminating testimony is a matter of constitutional necessity.²⁷⁹⁴

The witness testified at a closed pretrial deposition without the defendants present.²⁷⁹⁵

Challenge: Foreign Evidence

Muhtorov sought letters rogatory to obtain a “lengthy document known as the ‘Sauerland Verdict’” from a German court, because the government’s case-in-chief expert was the principal expert in the German case, and the expert testified at a hearing that the document formed the basis of his book chapter on the Islamic Jihad Union.²⁷⁹⁶ After first checking with the government whether it had a copy of the document that it could simply produce to the defendant,²⁷⁹⁷ Judge Kane issued the requested letters.²⁷⁹⁸

2791. Order, *id.* (Dec. 13, 2016), D.E. 1194.

2792. Order, *id.* (Apr. 20, 2017), D.E. 1368.

2793. *Id.* at 2.

2794. *Id.* at 1.

2795. Interview with Judge John L. Kane, Oct. 19, 2018; *see also* Kirk Mitchell, *Trial Requires Unusual Security*, Denver Post, Mar. 13, 2017, at 2A.

2796. Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 3, 2017), D.E. 1329; Minute Order, *id.* (Apr. 3, 2017), D.E. 1331 [hereinafter Letters Rogatory Minute Order].

2797. Letters Rogatory Minute Order, *supra* note 2796.

2798. Letters Rogatory, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 4, 2017), D.E. 1332; *see* Apr. 20, 2017, Transcript, *supra* note 2735, at 36–37 (noting uncertainty about restrictions the German court might place on who could see the document).

Muhtorov also sought the court's assistance with parole so that his mother and a Human Rights Society officer could travel from Uzbekistan to testify at trial.²⁷⁹⁹ Judge Kane granted the request at a June 22, 2017, hearing, advising both sides to prepare for an alternative, such as an ordinary visa process or remote testimony.²⁸⁰⁰

One week later, Jumaez filed a parole motion for his wife, two sons, and a fourth Uzbek witness.²⁸⁰¹ In the event, one son testified at trial remotely with the assistance of Russian interpretation.²⁸⁰²

A defense witness who later became a government informant was interviewed and deposed in Kazakhstan.²⁸⁰³ His deposition was played at Jumaez's trial.²⁸⁰⁴

Challenge: Jury Security

Judge Kane used an anonymous jury.²⁸⁰⁵ He did not have jurors report to an undisclosed location, which could have heightened the jurors' unease.²⁸⁰⁶ Because of reductions in local news media resources, the trials did not receive a lot of public attention.²⁸⁰⁷

An incident arose, but Judge Kane decided that Muhtorov was not entitled to a new trial as a remedy for jurors' thinking that Muhtorov's wife was taking pictures of them.²⁸⁰⁸

As they were leaving the courthouse on June 14, 2018, some jurors in Defendant Jamshid Muhtorov's trial believed that Mr. Muhtorov's wife, who had testified in the trial, was taking pictures of them with her cell phone from across the street. The jurors were on their second full day of deliberations and had decided that afternoon that they would recess until the following Monday. Upon seeing Mrs. Muhtorov, a few jurors re-

2799. Parole Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 6, 2017), D.E. 1334.

2800. Apr. 20, 2017, Transcript, *supra* note 2735, at 17–34; Order, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 21, 2017), D.E. 1389, *modified*, Order, *id.* (June 9, 2017), D.E. 1429.

2801. Motion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 27, 2017), D.E. 1392.

2802. Transcript at 2053–73, *id.* (Apr. 24, 2018, filed May 4, 2018), D.E. 1813.

2803. Feb. 21, 2018, Transcript, *supra* note 2753, at 11–12; Interview with Judge John L. Kane, Oct. 19, 2018.

2804. Transcript at 1765–66, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Apr. 18, 2018, filed May 22, 2018), D.E. 1846; Transcript at 1672, *id.* (Apr. 17, 2018, filed May 22, 2018), D.E. 1845.

2805. Interview with Judge John L. Kane, Oct. 19, 2018.

2806. *Id.*

2807. *Id.*

2808. Opinion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Aug. 10, 2018), D.E. 1953.

turned to the foyer and reported their belief to the Court Security Officers (CSOs). Another group of jurors that had walked a different route was called by the first group of jurors and advised to stay within view of the courthouse. The U.S. Marshals were notified and rushed to investigate the matter. The Marshals determined that neither Mrs. Muhtorov nor [a] family friend who was with her and who had also testified in the trial[] had any photos or videos of the jurors on their cell phones.

...

At the conclusion of [an] evidentiary hearing, I determined it was necessary to interview each juror individually in chambers regarding his or her ability to be fair and impartial and to decide the case on only the evidence presented at trial and the law as it was given to them. All of the jurors unequivocally confirmed that they could do so despite the happenings on June 14, 2018.²⁸⁰⁹

2809. *Id.* at 1–2; *see also* Transcript, *id.* (June 15, 2018, filed Nov. 25, 2018), D.E. 1992 (Judge Kane’s discussion with counsel on how to handle the situation).

II. ESPIONAGE PROSECUTIONS

Espionage cases, as loosely defined here, include prosecutions for leaking or attempting to leak government secrets. Courts presiding over espionage prosecutions typically must handle classified information. A frequent difference between espionage cases and terrorism cases is that the actual defendant frequently must be given access to classified materials in preparation for a defense against espionage charges.

Brian Patrick Regan (“Chapter 23: Would-Be Spy”) was prosecuted at the beginning of the century for trying to sell secrets, and he was ultimately sentenced to life in prison. Shortly after Regan’s case concluded, the government launched a prosecution for giving state secrets to lobbyists (chapter 24), which the government eventually decided not to bring to trial. Senior National Security Agency employee Thomas Drake pleaded guilty to a misdemeanor after three years of investigation and two months of prosecution in another high-profile leak case (“Chaper 25: NSA Expenditures”).

Chapter 23

Would-Be Spy

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

A prosecution for trying to sell classified information to foreign governments required the court to handle classified information and supervise the defendant's access to classified information.

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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.²⁸¹⁰

Regan had been under surveillance for months, after a foreign source passed on a letter from an unidentified US intelligence official offering to sell information. The letter was riddled with misspellings like “enprisoned” and “esponage,” which led the FBI to look for a bad speller within the intelligence community. Regan, who was dyslexic, became the prime suspect. He would later be known as the spy who couldn’t spell.²⁸¹¹

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.²⁸¹² The complaint accused him of attempting to sell to Iraq, Libya, and China top-secret information to which he had access as

2810. *United States v. Regan*, 221 F. Supp. 2d 672, 675 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 666, 669 (E.D. Va. 2002); *United States v. Regan*, 221 F. Supp. 2d 661, 662–63 (E.D. Va. 2002); see Yudhijit Bhattacharjee, *Tale of a Would-Be Spy, Buried Treasure, and Uncrackable Code*, *Wired*, Feb. 2010, at 82 [hereinafter *Would-Be Spy*] (reporting that Regan was arrested aboard a mobile lounge); Rona Kobel, *An Unlikely Setting for Global Intrigue Espionage*, *Balt. Sun*, Feb. 11, 2003, at 1B; *Retired Air Force Sergeant Accused of Spying Is Going to Trial*, *N.Y. Times*, Jan. 13, 2003, at A19 [hereinafter *Going to Trial*]; Susannah Rosenblatt, *Arduous Dig to Find Spy’s Buried Stash*, *L.A. Times*, July 31, 2003, at 24. See generally Yudhijit Bhattacharjee, *The Spy Who Couldn’t Spell: A Dyslexic Traitor, an Unbreakable Code, and the FBI’s Hunt for America’s Stolen Secrets* (2016).

2811. Bhattacharjee, *Would-Be Spy*, *supra* note 2810.

2812. *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).

a contract employee of the National Reconnaissance Office.²⁸¹³ Regan was indicted on October 23, 2001,²⁸¹⁴ and superseding indictments were filed on February 14 and July 24, 2002.²⁸¹⁵ The government filed a notice of intent to seek the death penalty on April 19, 2002.²⁸¹⁶ The court assigned the case to Judge Gerald Bruce Lee.²⁸¹⁷

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.²⁸¹⁸ The jury rejected the death penalty on February 24,²⁸¹⁹ and Regan was sentenced on March 20 to life in prison without the possibility of parole.²⁸²⁰ Regan agreed to accept the life sentence in exchange for the government's

2813. *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 2810.

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 2810. 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.

2814. *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 2812.

2815. *Regan*, 228 F. Supp. 2d at 745–46 (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 2812 (D.E. 101, 157).

2816. *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 2812; see *Going to Trial*, *supra* note 2810.

2817. Docket Sheet, *supra* note 2812; see Lloyd Smith, *An Interview with Judge Gerald Bruce Lee*, *Landslide*, Nov./Dec. 2013, at 7; *U.S. Prosecutors Reconsider, Back Delay in Espionage Suspect's Trial*, L.A. Times, Apr. 25, 2002, at 25 [hereinafter *Prosecutors Reconsider*]; *Would-Be Spy Given Life in Prison*, L.A. Times, Mar. 21, 2003, at 29 [hereinafter *Life in Prison*].

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

2818. Docket Sheet, *supra* note 2812 (D.E. 312); see Josh Meyer, *Would-Be Spy Won't Face Death Penalty*, L.A. Times, Feb. 25, 2003, at 15; *The Week That Was*, Balt. Sun, Feb. 23, 2003, at 2C; *Life in Prison*, *supra* note 2817.

2819. Docket Sheet, *supra* note 2812; see Meyer, *supra* note 2818; Rosenblatt, *supra* note 2810; *The Week That Was*, Balt. Sun, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 2817.

2820. Docket Sheet, *supra* note 2812; see Rosenblatt, *supra* note 2810; *Life in Prison*, *supra* note 2817.

not prosecuting his wife and allowing her to keep part of his military pension.²⁸²¹

THE DEFENDANT: . . . I'm truly sorry for my actions, and I never meant to harm anyone, and I never attempted to harm the United States. I feel a life sentence is excessive in my case. I never harmed anyone. I never killed anyone. I'm going to serve more time than any other spy ever, and my actions come nowhere near any of those. I'm entering into this to protect my wife and children from any more pain and suffering, and I hope one day that the government will reconsider the sentence and show some mercy so that I can spend the last few years of my life with my children. Thank you.²⁸²²

Regan also agreed to disclose what he had done with classified information.²⁸²³ 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.²⁸²⁴ These containers held coded descriptions of the locations of nineteen buried bundles of classified documents—20,000 pages, five compact discs, and five videotapes—hidden in Pocahontas State Park in Virginia and Patapsco Valley State Park in Maryland.²⁸²⁵

Judge Lee retired on September 30, 2017.²⁸²⁶ On February 22, 2021, Judge Liam O'Grady denied Regan's motion for compassionate release during the COVID-19 pandemic, because of the seriousness of his crimes and a failure to show a particularized pandemic risk.²⁸²⁷

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 ac-

2821. Sentencing Transcript, *United States v. Regan*, No. 1:01-cr-405 (E.D. Va. Mar. 20, 2003, filed Apr. 22, 2020), D.E. 359; see Bhattacharjee, *Would-Be Spy*, *supra* note 2810; *Life in Prison*, *supra* note 2817; see also Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 41051-083).

2822. Sentencing Transcript, *supra* note 2821, at 18.

2823. See Bhattacharjee, *Would-Be Spy*, *supra* note 2810; Rosenblatt, *supra* note 2810.

2824. See Rosenblatt, *supra* note 2810.

2825. See Bhattacharjee, *Would-Be Spy*, *supra* note 2810; Rosenblatt, *supra* note 2810.

2826. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges; see Rachel Weinder, "There's Going to Be a Lot Lost When He Retires," *Wash. Post*, May 8, 2017, at B1.

2827. Opinion, *United States v. Regan*, No. 1:01-cr-405 (E.D. Va. Feb. 22, 2021), D.E. 381, *appeal dismissed for want of prosecution*, Order, No. 21-6365 (4th Cir. May 17, 2021), D.E. 7.

cess.²⁸²⁸ 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.²⁸²⁹

The SCIF is a secure facility located in the courthouse where the Defendant and his attorneys may lawfully view classified information. Defense counsel may not remove certain classified information from the SCIF, and the Defendant may not remove classified information from the SCIF. . . . The SCIF has been provided to the espionage defendant and his counsel so that they may have access to classified information to prepare for trial. The Defendant and his counsel must have access to classified information in a “prosecution free zone.” Defense counsel and their client reasonably expect to be free to work in the SCIF to compose work papers, trial memoranda, and trial strategy, free from the roving eye of the prosecutor or the Court. Because the classified information involved in this case relates to national security, the information must be kept secure. The SCIF affords the Government a place to continue to protect classified information.²⁸³⁰

Discovered in Regan’s jail cell were apparently typewritten letters to his wife and children and a page of code.²⁸³¹ These documents appeared to concern the locations of hidden classified information.²⁸³² The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.²⁸³³ Judge Lee al-

2828. *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 required all of his law clerks to have security clearances. Interview with Judge Gerald Bruce Lee, Oct. 2, 2006.

2829. *Regan*, 281 F. Supp. 2d at 800–01; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs); see also Dana Priest & William M. Arkin, *Top Secret America* 50 (2011) (noting that SCIF is pronounced “skiff”).

Defense experts also had to obtain security clearances to examine classified documents. See *Prosecutors Reconsider*, *supra* note 2817.

2830. *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”).

2831. *Regan*, 281 F. Supp. 2d at 800, 807.

2832. *Id.* at 800, 804–05.

2833. *Id.* at 799–800.

lowed a search, but established special procedures to preserve the attorney–client privilege and work-product protection.²⁸³⁴

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

VIII. Post-Verdict Search Procedures

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

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

This Memorandum Opinion and its accompanying Order SHALL be placed UNDER SEAL, to avoid revealing any information that might ad-

2834. *Id.* at 800.

versely affect a potential juror in the trial of Defendant Brian Patrick Reagan.²⁸³⁵

The unit of the Justice Department that provides the courts with classified information security officers—the Litigation Security Group within the Justice Management Division²⁸³⁶—conducted the search.²⁸³⁷

In 2009, a journalist moved the court to unseal a government motion concerning the jail cell documents and Reagan’s response.²⁸³⁸ In 2012, after inviting briefing from both sides, Judge Lee ordered the government to publicly file suitably redacted copies of the documents.²⁸³⁹

2835. *Id.* at 806–07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 2812.

2836. *See* Reagan, *supra* note 2829, at 21–22 (providing information about classified information security officers).

2837. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Feb. 3, 2010.

2838. Docket Sheet, *supra* note 2812 (May 26, 2009, filing by Yudhijit Bhattacharjee, D.E. 341).

2839. *Id.* (Feb. 17, 2012, order, D.E. 345).

Chapter 24

Giving State Secrets to Lobbyists

*United States v. Franklin (T.S. Ellis III, E.D. Va.)*²⁸⁴⁰

A prosecution for improperly passing on classified information was ultimately abandoned, but it required the court to manage classified evidence, classified arguments, and classified orders, among other challenges.

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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).²⁸⁴¹ On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.²⁸⁴²

Other news media reported that for several years the FBI had been investigating not the analyst but two men who worked at AIPAC.²⁸⁴³ The FBI

2840. An appeal was heard by Fourth Circuit Judges Robert B. King, Roger L. Gregory, and Dennis W. Shedd.

For this case study, Tim Reagan interviewed Judge King in the judge's Richmond chambers on March 19, 2008; Judge Shedd by telephone on September 3, 2009; and Judge Gregory in the judge's chambers on September 25, 2009. Judge Shedd retired on May 2, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

2841. *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).

2842. 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).

2843. David Johnston & Eric Schmitt, *F.B.I. Is Said to Brief Pentagon Bosses on Spy Case*, *N.Y. Times*, Aug. 31, 2004, at A14; Walter Pincus, *A Look at the Dropping of Espio-*

interviewed the two men on the day that the story broke on the *CBS Evening News* as well as twice earlier that month.²⁸⁴⁴ On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,²⁸⁴⁵ and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.²⁸⁴⁶

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.²⁸⁴⁷ It was reported that Franklin was seen joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.²⁸⁴⁸ An investigation of Franklin revealed that he had given classified information to Rosen and Weissman and he had improperly stored classified information in his West Virginia home.²⁸⁴⁹ His security clearance was suspended in June 2004.²⁸⁵⁰ In July, Franklin cooperated in a recorded sting meeting with Weissman in which

nage Charges, Wash. Post, May 5, 2009, at A19 (“the [defense] lawyers said that Rosen and Weissman were under government surveillance, including telephone wiretaps, for five years, from 1999 to 2004”); Susan Schmidt & Robin Wright, *Leak Probe More Than 2 Years Old*, Wash. Post, Sept. 2, 2004, at A6; Warren P. Strobel, *Spy Probe Focuses on More Civilians*, Miami Herald, Aug. 29, 2004, at 1A.

2844. *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.

2845. 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).

2846. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 2844.

2847. See David Johnston & Eric Schmitt, *Pentagon Analyst Was Cooperating When Israel Spy Case Became Public*, N.Y. Times, Aug. 30, 2004, at A12; Pincus, *supra* note 2843 (“Franklin, wearing a recording device, met with Weissman and ‘induced him into believing that he had to communicate certain information right away in order to save innocent lives,’ according to the [defense] lawyers.”).

2848. 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.

2849. 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).

2850. See Markon, *Defense Analyst Charged*, *supra* note 2849.

Franklin gave the lobbyist classified information.²⁸⁵¹ Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.²⁸⁵²

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.²⁸⁵³ The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.²⁸⁵⁴ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.²⁸⁵⁵ 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.²⁸⁵⁶ On January 20, 2006, Judge Ellis provisionally sentenced Franklin to twelve years and seven months in prison, leaving room for an adjustment after the completion of Franklin's assistance in a trial against Rosen and Weissman.²⁸⁵⁷ Franklin's sentence ultimately was reduced, and he was ordered released on May 31, 2010.²⁸⁵⁸

2851. *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”).

2852. *Rosen*, 445 F. Supp. 2d at 609–10; see Markon, *supra* note 2851.

2853. Docket Sheet, *United States v. Franklin*, No. 1:05-cr-225 (E.D. Va. May 26, 2005) [hereinafter E.D. Va. Docket Sheet] (D.E. 1); see David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. Times, May 5, 2005, at A1.

2854. E.D. Va. Docket Sheet, *supra* note 2853 (D.E. 8, 25); T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1615 (2013).

2855. E.D. Va. Docket Sheet, *supra* note 2853; Ellis, *supra* note 2854, at 1614.

Tim Reagan interviewed Judge Ellis for this case study in his chambers on September 5, 2007.

2856. *United States v. Rosen*, 599 F. Supp. 2d 690, 693 & n.4 (E.D. Va. 2009); *Rosen*, 445 F. Supp. 2d at 608 n.3; E.D. Va. Docket Sheet, *supra* note 2853; see Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. Times, Oct. 6, 2005, at A21; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, Wash. Post, Oct. 6, 2005, at A2.

2857. E.D. Va. Docket Sheet, *supra* note 2853; see David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

2858. E.D. Va. Docket Sheet, *supra* note 2853 (May 26, 2010, D.E. 906); see Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 70425-083); see also Charlie Savage, *Power Wars* 367 (2015).

AIPAC fired Rosen and Weissman on March 21, 2005.²⁸⁵⁹ The August 4 superseding indictment added Rosen and Weissman as defendants.²⁸⁶⁰ The indictment alleged a conspiracy that began in 1999 when Rosen and Weissman had conversations with an unnamed foreign official (FO-1) about terrorist activities in Asia.²⁸⁶¹ 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.²⁸⁶²

According to the indictment, Rosen met Franklin in 2002.²⁸⁶³ Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."²⁸⁶⁴ Rosen allegedly passed information about the document

2859. *United States v. Rosen*, 487 F. Supp. 2d 721, 725–26 (E.D. Va. 2007); see David Johnston, *Israeli Lobby Reportedly Fires 2 Top Aides in Spying Inquiry*, N.Y. Times, Apr. 21, 2005, at A14.

Rosen and Weissman claimed that the government pressured AIPAC to fire them and stop paying their legal fees or AIPAC itself would face prosecution. *Rosen*, 487 F. Supp. 2d at 724–25. Judge Ellis ruled that this would be a violation of the Sixth Amendment, except that it clearly had no negative effect on the defendants' very able representation by defense counsel. *Id.* at 726–36.

2860. E.D. Va. Docket Sheet, *supra* note 2853 (D.E. 25); see David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

2861. *Rosen*, 599 F. Supp. 2d at 693; *Rosen*, 445 F. Supp. 2d at 608; see Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* 234 (2010) (describing the prosecution as "the most radical antileak prosecution in American history").

2862. *Rosen*, 445 F. Supp. 2d at 608–09; see David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. Times, Aug. 18, 2005, at A22 (identifying USGO-2).

2863. *Rosen*, 445 F. Supp. 2d at 609.

2864. *Id.*

to foreign officials, journalists, and a think-tank fellow.²⁸⁶⁵ Weissman allegedly participated in several of these conversations.²⁸⁶⁶

Judge Ellis ruled that at trial the government would have to prove that the information passed by the defendants qualified as national defense information (NDI).²⁸⁶⁷ “To qualify as NDI, information must be closely held by the government and potentially damaging to national security if disclosed.”²⁸⁶⁸ “It is important to recognize that NDI and classified material may not be coextensive sets.”²⁸⁶⁹ “In short, the government designates what information is labeled and treated as classified, while a court or jury determines what information qualifies as NDI”²⁸⁷⁰

Rosen and Weissman’s trial was originally scheduled to begin in April 2006,²⁸⁷¹ but it was postponed several times as the court dealt with constitutional issues and the handling of classified information.²⁸⁷² Judge Ellis

2865. *Id.*

2866. *Id.*

2867. *United States v. Rosen*, 599 F. Supp. 2d 690, 694–95 (E.D. Va. 2009) (enforcing a subpoena for expert testimony from the government’s former classification czar); *United States v. Rosen*, 471 F. Supp. 2d 651, 652 (E.D. Va. 2007); *see* 18 U.S.C. § 793 (2020).

2868. *United States v. Rosen*, 487 F. Supp. 2d 703, 705 n.1 (E.D. Va. 2007).

2869. *Id.*

2870. *Rosen*, 599 F. Supp. 2d 690; *see* Walter Pincus, *Opinion Could Dampen Zeal to Classify Government Information*, Wash. Post, Feb. 23, 2009, at A17; *see also* *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011), thekojonnamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification (defense expert and former head of the National Archives’ Information Security Oversight Office—sometimes known as the classification czar—opining that “what these individuals were accused of passing along, clearly in my mind, did not meet the qualifications or standards for classification”).

2871. *See* Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

2872. *See* Jerry Markon, *Classified Documents Allowed in Espionage Trial*, Wash. Post, Feb. 25, 2009, at A4 [hereinafter *Classified Documents Allowed*] (reporting a tentative trial date of Apr. 21, 2009); Jerry Markon, *Judge Rejects Dismissal of Pro-Israel Lobbyists Case*, Wash. Post, Aug. 11, 2006, at A5 [hereinafter *Judge Rejects Dismissal*]; Pincus, *supra* note 2843 (“Seven separate trial dates were set and postponed during the past 3½ years before the date of June 2[, 2009,] was established.”); Pincus, *supra* note 2870 (reporting a tentative trial date of Apr. 21, 2009); Richard B. Schmitt, *Lobbyists’ Lawyers Say Rice Leaked Information*, L.A. Times, Apr. 22, 2006, at 24 (reporting that the trial was postponed from May 23, 2006, to Aug. 7, 2006); Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case*, L.A. Times, Aug. 11, 2006, at 13 [hereinafter *Lobbyists to Stand Trial*] (reporting that the trial was postponed indefinitely from Aug. 7, 2006).

ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.²⁸⁷³

In light of Judge Ellis's other pretrial rulings, the government dismissed the indictment against Rosen and Weissman on May 1, 2009, approximately ten years after launching the investigation.²⁸⁷⁴ "The government was neither required to give reasons for dismissing the indictment, nor did it do so."²⁸⁷⁵

Challenge: Classified Evidence

A large amount of classified evidence was at issue in this case.²⁸⁷⁶ Judge Ellis's career law clerk had a top-secret security clearance, and she could help the judge deal with issues concerning classified information.²⁸⁷⁷ One of Judge Ellis's temporary law clerks, however, was a Canadian citizen, so he was not eligible for a security clearance.²⁸⁷⁸

Defense attorneys and witnesses with appropriate security clearances were able to review classified evidence in a sensitive compartmented information facility (SCIF) designated for their use in the courthouse.²⁸⁷⁹

Pursuant to the Classified Information Procedures Act (CIPA),²⁸⁸⁰ the court of appeals heard the government's interlocutory appeal concerning the admissibility of information in two documents, identified as an "FBI

2873. Ellis, *supra* note 2854, at 1624; see Markon, *Judge Rejects Dismissal*, *supra* note 2872; Schmitt, *Lobbyists to Stand Trial*, *supra* note 2872.

2874. E.D. Va. Docket Sheet, *supra* note 2853 (D.E. 890, 891); Ellis, *supra* note 2854, at 1617; see Neil A. Lewis & David Johnston, *U.S. Moves to End Secrets Case Against Israel Lobbyists*, N.Y. Times, May 2, 2009, at A11; Pincus, *supra* note 2843; Schoenfeld, *supra* note 2861, at 246–47 ("as the case subsequently unfolded in a series of motions and countermotions, it became increasingly clear that the government would be unable to prove that the secrets at issue in the case were of the proscribed character"); see also *id.* at 247 ("The only benefit to the public came from T.S. Ellis III, who bequeathed to the nation the most comprehensive and probing explication of the Espionage Act to date.").

2875. Ellis, *supra* note 2854, at 1617.

2876. *United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009); Ellis, *supra* note 2854, at 1614.

2877. Interview with Judge T.S. Ellis III, Sept. 5, 2007.

2878. *Id.*; see 28 C.F.R. § 17.41(b) (2021) ("Eligibility for access to classified information is limited to United States citizens . . .").

2879. E.D. Va. Docket Sheet, *supra* note 2853 (D.E. 632); Ellis, *supra* note 2854, at 1618; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2880. 18 U.S.C. app. 3 (2020); see Reagan, *supra* note 2879 (discussing CIPA).

Report” and an “Israeli Briefing Document.”²⁸⁸¹ In an opinion by Judge Robert B. King, joined by Judges Roger L. Gregory and Dennis W. Shedd, the appellate court affirmed Judge Ellis’s rulings.²⁸⁸²

As required by section 5(a) of CIPA, the defendants gave notice of their intent to introduce classified evidence at trial.²⁸⁸³ Pursuant to section 6 of CIPA, Judge Ellis “determined that a substantial volume of the classified information was indeed relevant and admissible.”²⁸⁸⁴ As permitted by section 6(c)(1), the government proposed substitutions for the classified evidence “by redacting and otherwise summarizing classified information in the original documents.”²⁸⁸⁵ Judge Ellis

ruled that, although some of the government’s proposed redactions were acceptable, other such redactions would not afford the defendants the same opportunity to defend themselves as would the admission of the unredacted documents containing classified information. In some instances, the court concluded that less extensive redactions, or the use of replacements for particular names, places, or terms, would adequately protect the defendants’ rights while simultaneously offering adequate protection for classified information. The court thus directed the parties to fashion substitutions for the classified documents in accordance with the oral rulings it made during the hearing. Thereafter, the court entered an order adopting the parties’ agreed-to substitutions, over the government’s objection.²⁸⁸⁶

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the “silent-witness rule.”²⁸⁸⁷ The silent-witness rule permits some evidence to be presented to the judge, the jury, and the

2881. *Rosen*, 557 F.3d at 196; see Markon, *Classified Documents Allowed*, *supra* note 2872 (“Sources familiar with the documents said the FBI report was on the 1996 Khobar Towers bombing in Saudi Arabia that killed 19 Americans and that the other paper describes a briefing by the Israeli government.”).

2882. *Rosen*, 557 F.3d at 194, 199–200; Ellis, *supra* note 2854, at 1622; see Neil A. Lewis, *Ex-Lobbyists in U.S. Case of Espionage Win a Round*, N.Y. Times, Feb. 25, 2009, at A15; Markon, *Classified Documents Allowed*, *supra* note 2872.

2883. *Rosen*, 557 F.3d at 195 (“a large volume of classified evidence”); see 18 U.S.C. app. 3 § 5(a).

2884. *Rosen*, 557 F.3d at 195; see 18 U.S.C. app. 3 § 6.

2885. *Rosen*, 557 F.3d at 196; see 18 U.S.C. app. 3 § 6(c)(1).

2886. *Rosen*, 557 F.3d at 196.

2887. *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007); Ellis, *supra* note 2854, at 1622–23; see Reggie B. Walton, *Prosecuting International Terrorism Cases in Article III Courts*, 39 Geo. L.J. Ann. Rev. Crim. Proc. iii, xiv (2010) (noting that Judge Ellis’s opinion was “the first published opinion to explicitly approve of the use of the silent witness procedure in the CIPA context”).

parties, but not to the public.²⁸⁸⁸ It is a partial closing of the trial.²⁸⁸⁹ 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.”²⁸⁹⁰

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.²⁸⁹¹

Challenge: Subpoenaing a Cabinet Officer

The defendants requested that subpoenas be issued to twenty current and former high-ranking government officials, including Secretary of State Condoleezza Rice, because of her former position as National Security Advisor, and convicted former Defense Department employee Franklin.²⁸⁹² The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the witnesses objected to would be at best cumulative.²⁸⁹³ Judge Ellis sustained the government’s objection as to five witnesses, but overruled its objection as to Secretary Rice; then National Security Advisor Stephen Hadley, who was her deputy; Paul Wolfowitz and Richard Armitage, each formerly a deputy secretary of state; and seven others.²⁸⁹⁴

[N]othing in the Sixth Amendment right to compulsory process requires, nor should it require, an accused to refrain from calling government offi-

2888. *Rosen* 520 F. Supp. 2d at 793–94.

2889. *Id.* at 794.

The government in *Rosen* proposed widespread use of the Silent Witness Rule to protect classified information and I rejected that effort as it would effectively and impermissibly close the courtroom. Nonetheless, I did approve a far more limited use of the Rule to protect a very small amount of the classified information.

Ellis, *supra* note 2854, at 1623 (footnotes omitted).

2890. *Rosen* 520 F. Supp. 2d at 793–94.

2891. *Id.* at 799.

2892. *United States v. Rosen*, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007); see Pincus, *supra* note 2870.

2893. *Rosen*, 520 F. Supp. 2d at 807 & n.8, 810.

2894. *Id.* at 814–15; see Neil A. Lewis, *Trial to Offer Look at World of Information Trading*, N.Y. Times, Mar. 3, 2008, at A14; Philip Shenon, *Defense May Seek U.S. Testimony in Secrets Case*, N.Y. Times, Nov. 3, 2007, at A14.

cials 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.²⁸⁹⁵

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.²⁸⁹⁶

Because so many issues in this case concerned classified information, Judge Ellis filed separate orders under seal stating (1) how the silent-witness rule would be applied²⁸⁹⁷ and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.²⁸⁹⁸

As the final trial date approached, and shortly before the government dropped the case, Judge Ellis issued a sealed order concerning the defendants' evidence.²⁸⁹⁹

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.²⁹⁰⁰ But the court held several closed hearings, each of which required a court reporter with a security clearance.²⁹⁰¹

2895. *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).

2896. See Jerry Markon, *Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

2897. *United States v. Rosen*, 520 F. Supp. 2d 786, 789, 802 (E.D. Va. 2007).

2898. *Rosen*, 520 F. Supp. 2d at 814; E.D. Va. Docket Sheet, *supra* note 2853 (D.E. 603).

2899. E.D. Va. Docket Sheet, *supra* note 2853 (noting a sealed order filed on April 14, 2009).

2900. *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.

2901. E.D. Va. Docket Sheet, *supra* note 2853 (closed hearings, 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;

The court of appeals granted the government's motion to hear parts of oral arguments under seal in the government's appeal of Judge Ellis's rulings on the admissibility of the "FBI Report" and the "Israeli Briefing Document."²⁹⁰² Eight portions of the court's published opinion resolving the appeal are redacted.²⁹⁰³

Challenge: Classified Arguments

In the interlocutory appeal of Judge Ellis's rulings on the admissibility of classified evidence, the parties filed classified briefs with the classified information security officer and redacted briefs in the public record.²⁹⁰⁴

Appellate judges' options for reviewing classified documents depended on where they had chambers. Judge Gregory's chambers were at the court of appeals in Richmond, where classified materials could be stored in a SCIF. Judge Gregory could retrieve classified materials from the SCIF and bring them back to his chambers for a private review.²⁹⁰⁵

Judge Shedd's chambers in Columbia were not in a courthouse.²⁹⁰⁶ When he needed to review classified materials, he reviewed them at the FBI's SCIF in town.²⁹⁰⁷ Both Judge Shedd and Judge King, who had chambers in Charleston, West Virginia, could also review classified materials in Richmond when they were there to hear cases.²⁹⁰⁸

Jan. 10 and 29, Feb. 7 and 8, May 22, June 24, July 16, Aug. 7, Sept. 25, and Nov. 20, 2008; and Jan. 14 and Apr. 1, 2009); Ellis, *supra* note 2854, at 1622.

2902. Order, *United States v. Rosen*, No. 08-4358 (4th Cir. Oct. 28, 2008) (government's appeal, D.E. 101); *see also* Docket Sheet, *United States v. Rosen*, No. 08-4410 (4th Cir. Apr. 11, 2008) (defendants' cross-appeal, dismissed).

2903. *United States v. Rosen*, 557 F.3d 192, 197, 199–200 (4th Cir. 2009).

2904. Docket Sheet, *Rosen*, No. 08-4358 (4th Cir. Mar. 31, 2008); *see* Reagan, *supra* note 2879, at 21–22 (providing information about classified information security officers).

2905. Interview with Judge Roger L. Gregory, Sept. 25, 2009.

2906. Interview with Judge Dennis W. Shedd, Sept. 3, 2009.

2907. *Id.*

2908. Interview with Judge Roger L. Gregory, Sept. 25, 2009; Interview with Judge Robert B. King, March 19, 2008.

Chapter 25

NSA Expenditures

United States v. Drake (Richard D. Bennett, D. Md.)

An espionage prosecution began with a home search in late 2007 and ended with a misdemeanor information in mid-2011. The case required both the court and the defense to have access to classified information.

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On April 5, 2010, Magistrate Judge James K. Bredar appointed the District of Maryland's federal defender to represent Thomas A. Drake in a criminal case that would begin with an indictment for misusing classified information filed nine days later.²⁹⁰⁹ The court assigned the criminal case to District Judge Richard D. Bennett.²⁹¹⁰

According to the indictment, "between on or about February 27, 2006, and on or about November 28, 2007, Reporter A published a series of newspaper articles about [the National Security Agency (NSA)]" for which Drake was a source.²⁹¹¹ The *New York Times* reported on April 16 that "the description applies to articles written by Siobhan Gorman, then a reporter for the *Baltimore Sun*, that examined in detail the failings of several major N.S.A. programs, costing billions of dollars, using computers to collect and

2909. Order, *In re Drake*, No. 1:10-mj-1257 (D. Md. Apr. 6, 2010), D.E. 2; see Indictment, *United States v. Drake*, No. 1:10-cr-181 (D. Md. Apr. 14, 2010), D.E. 1.

"Thomas Andrews Drake is the son of a World War II veteran and the secretary of famed American novelist Pearl S. Buck." Michael Gurnow, *The Edward Snowden Affair* 25 (2014).

Judge Bredar became a district judge on December 17, 2010. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

2910. Docket Sheet, *Drake*, No. 1:10-cr-181 (D. Md. Apr. 14, 2010).

Tim Reagan interviewed Judge Bennett for this case study in his chambers on September 26, 2013.

2911. Indictment, *supra* note 2909, at 6; see *United States v. Drake*, 818 F. Supp. 2d 909, 912 (D. Md. 2011); see also Robert Little, *Md. Man Charged with Leaking NSA Documents*, *Balt. Sun*, Apr. 16, 2010, at 1A; Jane Mayer, *The Secret Sharer*, *New Yorker*, May 23, 2011, at 47, 47, 56–57.

sort electronic intelligence. The efforts were plagued with technical flaws and cost overruns.”²⁹¹²

“Drake’s history of whistle-blowing stretches back to high school, in Manchester, Vermont, where his father, a retired Air Force officer, taught. When drugs infested the school, Drake became a police informant.”²⁹¹³ He enlisted in the air force in 1979; he served in the air force and navy reserve for fifteen years.²⁹¹⁴

Drake’s first day of work as a civilian employee at the NSA was September 11, 2001.²⁹¹⁵ Twelve years before that, he worked as an NSA contractor, testing and improving the agency’s computer software.²⁹¹⁶

As part of an investigation of leaks that led to a December 16, 2005, *New York Times* report that the NSA had conducted warrantless wiretaps

2912. Scott Shane, *A Former N.S.A. Official Is Charged with Leaking Classified Information*, N.Y. Times, Apr. 16, 2010, at A16; see also Mayer, *supra* note 2911, at 47; Greg Miller, Spencer S. Hsu & Ellen Nakashima, *Ex-NSA Official Accused of Leaks*, Wash. Post, Apr. 16, 2010, at A1.

The National Security Agency developed a pilot program in the late 1990s that would have enabled it to gather and analyze huge amounts of communications data without running afoul of privacy laws. But after the Sept. 11 attacks, it shelved the project—not because it failed to work but because of bureaucratic infighting and a sudden White House expansion of the agency’s surveillance powers, according to several intelligence officials.

Siobhan Gorman, *NSA Rejected System That Sifted Phone Data Legally*, Balt. Sun, May 18, 2006, at 1A; see also Siobhan Gorman, *System Error*, Balt. Sun, Jan. 29, 2006, at 1A (“A program that was supposed to help the National Security Agency pluck out electronic data crucial to the nation’s safety is not up and running more than six years and \$1.2 billion after it was launched, according to current and former government officials.”). “[T]he agency was rejecting a \$3 million in-house program called ThinThread in favor of a \$1-billion-plus contractor-run program called Trailblazer.” Schott Shane, *Ex-N.S.A. Official Gets Plea Deal; Setback for U.S.*, N.Y. Times, June 10, 2011, at A1. See generally Michael V. Hayden, *Playing to the Edge* 19–26 (2016).

2913. Mayer, *supra* note 2911, at 51.

2914. See Tricia Bishop, *No Jail Time for Ex-NSA Official*, Balt. Sun, July 16, 2011, at 1A; Schott Shane, *No Jail Time in Trial Over N.S.A. Leak*, N.Y. Times, July 16, 2011, at A13.

2915. See *60 Minutes: U.S. v. Whistleblower Tom Drake* (CBS television broadcast May 22, 2011) [hereinafter *Whistleblower*], www.cbsnews.com/video/60-minutes-archive-u-s-v-whistleblower-tom-drake/; Gurnow, *supra* note 2909, at 25; Mayer, *supra* note 2911, at 47–49; *Silenced* (Morninglight Films 2014); Emily Wax, *Life After the Whistle*, Wash. Post, July 29, 2013, at C1.

2916. See Mayer, *supra* note 2911, at 49.

of international communications with people in the United States,²⁹¹⁷ the government searched Drake's home on November 28, 2007.²⁹¹⁸ After spending \$82,000 on legal fees and taking out a second mortgage on his house, he qualified for indigent representation.²⁹¹⁹

News media observed that the prosecution of Drake was one of the Obama administration's small number of prosecutions for leaking government secrets, a small number that was nevertheless more than the number for all previous administrations combined.²⁹²⁰ Drake was charged with taking classified information home, not with leaking it to the news media.²⁹²¹

After Judge Bennett and the parties determined what evidence based on classified and otherwise protected information would be presented at trial, the parties agreed to a plea bargain.²⁹²² Drake pleaded guilty to a mis-

2917. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1; see Chapter 35: Warrantless Wiretaps, *infra* page 748.

2918. See *Frontline: United States of Secrets (Part One)* (PBS television broadcast May 13, 2014), www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/; Mayer, *supra* note 2911, at 56; see also Jesselyn Radack, Traitor: The Whistleblower and the "American Taliban" 152 (2012) ("Drake was *not* one of the *Times's* sources and was never charged with being one of the *Times's* sources.").

2919. See Shane, *supra* note 2914.

2920. Bishop, *supra* note 2914; Mayer, *supra* note 2911, at 47 ("The Drake case is one of two that Obama's Justice Department has carried over from the Bush years."); Greg Miller, *Former CIA Officer Accused of Leaking Information About Iran*, Wash. Post, Jan. 7, 2011, at A3; Shane, *supra* note 2912 ("three or four in history, depending on how they are counted, and never more than one under any other president"); see Charlie Savage, *Power Wars* 358 (2015) ("By Obama's seventh year in power, he had overseen nine criminal cases involving unauthorized disclosures of government secrets for public consumption. By contrast, under all previous presidents combined, there had been just three such cases."); *id.* at 370 (identifying the case against Drake as "the second Obama-era leak-related case"); see also Chapter 24: Giving State Secrets to Lobbyists, *supra* page 392 (discussing the third case in history).

2921. Indictment, *supra* note 2909; see *Whistleblower*, *supra* note 2915.

2922. Plea Agreement, *United States v. Drake*, No. 1:10-cr-181 (D. Md. June 10, 2011), D.E. 158; see Tricia Bishop, *Charges Dropped in NSA Leak Case*, Balt. Sun, June 10, 2011, at 1A ("Prosecutors apparently sought to reword classified documents that were deemed too sensitive to be introduced as evidence."); Ellen Nakashima & Jerry Markon, *NSA Leak Trial Exposes Dilemma for Prosecutors*, Wash. Post, June 11, 2011, at A4 ("a federal judge ruled that the prosecution could not shield from public disclosure classified information it wanted to present as evidence"); Dana Priest & William M. Arkin, *Top Secret America* xxi (2011) ("the government was forced to offer Drake a deal because its lawyers said they did not want to reveal classified information related to the case in court"); Shane, *supra*

demeanor information charging him with intentionally exceeding the authorized use of NSA computers.²⁹²³

Judge Bennett sentenced Drake on July 15 to one year of probation and 240 hours of community service.²⁹²⁴ At the sentencing hearing, Judge Bennett expressed his disapproval of the government's bringing the case:

What kind of message is sent by the government when the government dismisses a ten count indictment a year after indictment, on the eve of trial, after days and days of hearings under the Classified Information Procedures Act, and in what I find to be an extraordinary position taken by the government, probably unprecedented in this courthouse, for a case of this profile, literally on a Thursday afternoon before a Monday trial, subject to the government to be prepared as you will in a moment to dismiss the entire ten count indictment and allow the defendant to plead guilty to a misdemeanor?²⁹²⁵

note 2912 ("Judge Bennett ruled last week that the government would have to show some of the allegedly classified material to the jury").

Another possible factor in the parties' calculation was the extent to which the defendant could show that alleged leaks had otherwise been publicly disclosed. Interview with Judge Richard D. Bennett, Sept. 26, 2013.

2923. Information, *Drake*, No. 1:10-cr-181 (D. Md. June 10, 2011), D.E. 157; Sentencing Transcript at 2, *id.* (July 15, 2011, filed July 28, 2011), D.E. 173; see Tricia Bishop, *NSA Espionage Case Closes Quietly*, Balt. Sun, June 11, 2011, at 2A; *Ex-Official for N.S.A. Accepts Deal in Leak Case*, N.Y. Times, June 11, 2011, at A14.

"Top officials had already decided that if Drake rejected [the plea] offer, they would instruct [the prosecutor] to go into court the next morning and ask the judge simply to dismiss the charges." Savage, *supra* note 2920, at 383.

2924. Judgment, *Drake*, No. 1:10-cr-181 (D. Md. July 15, 2011), D.E. 169; see Bishop, *supra* note 2914; Shane, *supra* note 2914.

2925. Sentencing Transcript, *supra* note 2923, at 18; see Ellen Nakashima, *Judge Slams Prosecutors' Handling of Leak Suspect*, Wash. Post, July 30, 2011, at A2; see also Hayden, *supra* note 2912, at 26 ("Drake was . . . indicted under the Espionage Act, a heavy and blunt instrument, and not surprisingly, the case ultimately collapsed of its own weight. . . . This was a matter better handled administratively, like revoking clearances, for example.").

On June 3, 2015, the *Miami Herald* reported that Judge Bennett was looking into whether the government had improperly destroyed documents during the prosecution. Marisa Taylor, *Judge Probes Destruction of Evidence in NSA Leak Prosecution*, Miami Herald, June 3, 2015, at 3A.

Challenge: Classified Evidence

For this case, Judge Bennett's two law clerks and his court reporter obtained security clearances.²⁹²⁶ The court established in the courthouse two sensitive compartmented information facilities (SCIFs) where classified information was stored: one was for the court's use, and the other was for the defense.²⁹²⁷ The defense worked with classified materials in its SCIF.²⁹²⁸ Very early in the case, on June 29, 2010, Judge Bennett issued a protective order specifying how classified discovery would be handled.²⁹²⁹

From July 2010 through May 2011, there was at least one status conference or status report docketed each month, except for the month of January 2011.²⁹³⁰ During the last three months, there were three status conferences each month.²⁹³¹ Most of the status conferences were conducted over the telephone.²⁹³² Judge Bennett generally held status conferences frequently in order to keep his thumb on the pulse of a case.²⁹³³

On April 13, 2011, Judge Bennett held constitutional a requirement by the Classified Information Procedures Act (CIPA) that a defendant give the government and the court advance notice of any intent to use classified information at trial.²⁹³⁴

On April 8, 2011, Mr. Drake filed his Section 5 notice of the classified information he expected to rely upon at trial. On April 25, 2011, the Government provided Defendant with a binder containing both classified and unclassified exhibits that it intended to introduce at trial. The Government's exhibits contained numerous handwritten annotations by

2926. Interview with Judge Richard D. Bennett, Sept. 26, 2013.

2927. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 6, 2013; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2928. Interview with Judge Richard D. Bennett, Sept. 26, 2013; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 6, 2013.

2929. Protective Order, *Drake*, No. 1:10-cr-181 (D. Md. June 29, 2010), D.E. 18.

2930. Docket Sheet, *supra* note 2910.

2931. *Id.*

2932. *Id.*

2933. Interview with Judge Richard D. Bennett, Sept. 26, 2013.

For example, one of Judge Bennett's rules of case management was that parties should not file discovery motions without letting him know in advance in case the matter could be resolved more efficiently than through formal motions. *Id.*

2934. *United States v. Drake*, 818 F. Supp. 2d 909, 912–15 (D. Md. 2011); see CIPA, 18 U.S.C. app. 3 § 5 (2020); see also Reagan, *supra* note 2927, at 11.

its classification expert . . . indicating which portions of the proposed exhibits were classified and which were unclassified.²⁹³⁵

On June 1, Judge Bennett ruled various pieces of classified defense evidence admissible, noting that the government could produce suitable “substitutions where appropriate.”²⁹³⁶ Judge Bennett determined that the government could propose substitutions for both classified evidence and unclassified evidence that nonetheless included privileged secrets.²⁹³⁷ A June 7 “Order Regarding Admissibility of Substitutions for Classified Information” was filed with the classified information security officer, and its cover sheet, including only the filing’s header and title, was filed on the public record.²⁹³⁸

After the case was over, the room that was established as a defense SCIF no longer needed to remain a SCIF, but the court SCIF was kept in operation, and it could be used by circuit judges whose chambers were in Baltimore.²⁹³⁹

Litigation over the return of property seized from Drake and others in the leak investigation extended from November 14, 2011, to October 16, 2014.²⁹⁴⁰ The material seized included both classified information and personal property.²⁹⁴¹ Judge Bennett adopted Magistrate Judge Stephanie A. Gallagher’s recommendation that the plaintiffs were entitled to return of property not classified, so nonclassified material was returned to the plaintiffs following a classification review.²⁹⁴²

Challenge: Closed Proceedings

Pursuant to section 6 of CIPA, Judge Bennett held closed hearings with the parties to determine how classified information would be presented at

2935. Opinion at 3, *United States v. Drake*, No. 1:10-cr-181 (D. Md. June 2, 2011), D.E. 129 [hereinafter CIPA Opinion], 2011 WL 2175007.

2936. Order, *id.* (June 1, 2011), D.E. 128.

2937. CIPA Opinion, *supra* note 2935.

2938. Order, *Drake*, No. 1:10-cr-181 (D. Md. June 7, 2011), D.E. 140; *see Reagan, supra* note 2927, at 21–22 (providing information about classified information security of-ficers).

2939. Interview with Judge Richard D. Bennett, Sept. 26, 2013; Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Nov. 6, 2013.

2940. Docket Sheet, *Wiebe v. NSA*, No. 1:11-cv-3245 (D. Md. Nov. 14, 2011).

2941. Report and Recommendation, *id.* (Sept. 14, 2012), D.E. 67, 2012 WL 4069746, *adopted*, Order, *id.* (Mar. 27, 2013), D.E. 78.

2942. Settlement Order, *id.* (Oct. 16, 2014), D.E. 102.

Judge Gallagher became a district judge on September 13, 2019. FJC Biographical Directory, *supra* note 2909.

trial.²⁹⁴³ The essential task was to determine what substitutions for classified information would “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”²⁹⁴⁴

Classified materials were brought from the SCIF to the closed courtroom.²⁹⁴⁵ Only persons with security clearances were present.²⁹⁴⁶ The proceedings were recorded by the cleared court reporter, but a transcript was never prepared; the case was never appealed.²⁹⁴⁷ For each of many pieces of information over which there was a disagreement about what could be presented at trial, Judge Bennett presided over arguments about what would suffice as a substitution.²⁹⁴⁸ To mitigate fatigue, two attorneys on each side took turns, but Judge Bennett presided over each individual dispute and issued rulings from the bench.²⁹⁴⁹

2943. Settlement Order, *supra* note 2942; see 18 U.S.C. app. 3 § 6 (2020); see also Reagan, *supra* note 2927, at 12–19.

2944. § 6(c)(1).

2945. Interview with Judge Richard D. Bennett, Sept. 26, 2013.

2946. *Id.*

2947. *Id.*

2948. *Id.*

2949. *Id.*

III. OTHER CRIMINAL CASES

The Classified Information Procedures Act was enacted in response to what was sometimes called graymail efforts by defendants in criminal cases during the Cold War who claimed governmental authorization for their crimes and threatened to reveal state secrets as part of a defense.

Those types of cases are not as common now, but two case studies follow that bear some similarity to the Cold War prosecutions.

“Chapter 26: Interrogation Death in Afghanistan” describes the prosecution of a CIA contractor who was prosecuted for interrogating a suspect to death. Among the challenges that the case presented to the court were handling classified information and protecting a witness’s identity.

“Chapter 27: Castro Foe” describes the perjury prosecution of a man who once worked for the CIA and became wanted in Cuba and Venezuela for violent crimes. This case also required the court to meet the challenges of classified information and witness security against the backdrop of some accusations that the United States was harboring a terrorist.

Chapter 26

Interrogation Death in Afghanistan²⁹⁵⁰

United States v. Passaro (Terrence W. Boyle, E.D.N.C.)

The prosecution of a paramilitary CIA contractor for the death of a suspect required both the court and the defendant himself to have access to classified materials. In addition, the trial required protection of a witness's identity.

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On June 21, 2003, Abdul Wali was found dead in his cell at the American-controlled Asadabad Firebase in the Kunar province of Afghanistan.²⁹⁵¹ On August 17, 2006, an Eastern District of North Carolina jury found David Passaro guilty of assault in connection with Wali's death.²⁹⁵²

Passaro was born in South Carolina; while he was very young, the family moved to Connecticut.²⁹⁵³ In 1991, he was convicted of misdemeanor assault in a bar fight; the Hartford, Connecticut, police department fired

2950. Margaret S. Williams collaborated on the research for this case study.

2951. *United States v. Passaro*, 577 F.3d 207, 210–12 (4th Cir. 2009); Jurisdictional Order at 3, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 12, 2005), D.E. 129; see Said Hyder Akbar, *Come Back to Afghanistan* 194 (2005); John Hendren & Mark Mazzetti, *U.S. Charges Contractor Over Beating of Afghan Detainee*, L.A. Times, June 18, 2004, at 6; Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, Wash. Post, June 18, 2004, at A1; *This American Life: Come Back to Afghanistan* (PRI radio broadcast Jan. 31, 2003), www.thisamericanlife.org/radio-archives/episode/230/come-back-to-afghanistan; *This American Life: Teenage Embed, Part Two* (PRI radio broadcast Dec. 12, 2003), www.thisamericanlife.org/radio-archives/episode/254/teenage-embed-part-two.

2952. *Passaro*, 577 F.3d at 212; see Julian E. Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. Times, Aug. 18, 2006, at 18; Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. Times, Aug. 18, 2006, at 8; Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, Raleigh News & Observer, Aug. 18, 2006, at A1.

2953. See Jennifer Brevorka, *CIA Contractor Had Other Faults*, Raleigh News & Observer, June 20, 2004, at A1.

him for the assault shortly after his graduation from the police academy.²⁹⁵⁴

Later, Passaro worked as a medic for the U.S. Army's special forces at Fort Bragg in Fayetteville, North Carolina.²⁹⁵⁵ From December 2002, he was on leave as a paramilitary contractor for the CIA.²⁹⁵⁶ In May 2003, he arrived in Asadabad.²⁹⁵⁷ On June 19, he was assigned the task of interrogating Wali.²⁹⁵⁸ The interrogation was brutal, and it lasted for two days, the remainder of Wali's life.²⁹⁵⁹

Wali was being detained as a suspected orchestrator of rocket attacks on the base.²⁹⁶⁰ He was a well-known commander in fighting against the Soviet army.²⁹⁶¹ On June 18, he voluntarily presented himself for questioning.²⁹⁶² Said Fazel Akbar, governor of the province, arranged the visit, and Said Hyder Akbar, the governor's son, who had grown up in northern California, accompanied Wali as an interpreter.²⁹⁶³

2954. See *id.*; James Dao, *A Man of Violence, or Just "110 Percent" Gung-Ho?*, N.Y. Times, June 19, 2004, at 6; Craig Jarvis & Kristin Collins, *N.C. Man Charged in Afghan Case*, Raleigh News & Observer, June 18, 2004, at A1; Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, N.Y. Times, June 18, 2004, at 1.

2955. *Passaro*, 577 F.3d at 211; see Akbar, *supra* note 2951, at 261 ("a former Army Ranger"); Jarvis & Collins, *supra* note 2954; Oppel & Hart, *supra* note 2954.

2956. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Nov. 12, 2004), D.E. 50; see Oppel & Hart, *supra* note 2954; Estes Thompson, *Former CIA Contractor to Be Jailed Until Trial in Afghan Prisoner Assault*, Wash. Post, June 26, 2004, at A17.

2957. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *supra* note 2956.

2958. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2951, at 2–3.

2959. *Passaro*, 577 F.3d at 211–12; Jurisdictional Order, *supra* note 2951, at 2–3; see Hendren & Mazzetti, *supra* note 2951.

2960. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2951, at 2–3; see Akbar, *supra* note 2951, at 185.

2961. See Dao, *supra* note 2954.

2962. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2951, at 2; see Akbar, *supra* note 2951, at 186–93, 328 (reporting that "Abdul Wali had come to clear his name, not to admit to any wrongdoing"); Hendren & Mazzetti, *supra* note 2951; Oppel & Hart, *supra* note 2954.

2963. See Akbar, *supra* note 2951, at 186–93; Dao, *supra* note 2954; Matthew Eisley, *Young Afghan Adds Chapter to Striking Story*, Raleigh News & Observer, Aug. 10, 2006, at A1 ("Hyder Akbar was born in Afghanistan, but his ruling-class family fled to California when he was too young to remember. He grew up the youngest of four children in Oakland, where his father, Said Fazel Akbar, owned a hip-hop clothing store."); Schmidt & Priest, *supra* note 2951 (reporting that the governor "had returned to his native Kunar province to become the governor there after the fall of the Taliban"); *Come Back to Afghanistan*, *supra* note 2951; *Teenage Embed, Part Two*, *supra* note 2951.

Passaro returned to North Carolina in July.²⁹⁶⁴ Nearly a year later, on June 17, 2004, the government indicted him for assault.²⁹⁶⁵ Attorney General John D. Ashcroft announced the indictment at a news conference in Washington.²⁹⁶⁶

Passaro was not charged with homicide, because Wali's family refused to allow an autopsy, so the precise cause of Wali's death could not be proved.²⁹⁶⁷ Passaro was arrested at Fort Bragg and detained upon his indictment.²⁹⁶⁸

This was the first exercise of the government's extraterritorial jurisdiction under the USA PATRIOT Act.²⁹⁶⁹ The Asadabad Firebase was a mud

On June 18, 2003, Abdul Wali visited my father's office. He knew that the Americans wanted to question him about some recent rocket attacks. He told us he was innocent, and he said he was terrified of going to the U.S. base, because there were pervasive rumors that prisoners were tortured there. My father told him that he needed to go, and he sent me along to reassure him.

Hyder Akbar, *Interrogation Unbound*, N.Y. Times, July 11, 2004, at 17 (reflections by the governor's son).

2964. *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2951, at 3.

2965. Docket Sheet, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. June 17, 2004); *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2951, at 3; *see* Brevorka, *supra* note 2953; Hendren & Mazzetti, *supra* note 2951; Jarvis & Collins, *supra* note 2954; Oppel & Hart, *supra* note 2954; Schmidt & Priest, *supra* note 2951.

2966. *See* Hendren & Mazzetti, *supra* note 2951; Oppel & Hart, *supra* note 2954; Schmidt & Priest, *supra* note 2951.

2967. *Passaro*, 577 F.3d at 212 n.1; Interview with Judge Terrence W. Boyle, Mar. 6, 2012 (noting the cultural norm of rapid internment); *see* Akbar, *supra* note 2951, at 197, 258, 261 (Wali's father "would not permit an autopsy. To do so would break Islamic law."); Schmidt & Priest, *supra* note 2951; Shane, *supra* note 2952.

Tim Reagan interviewed Judge Boyle for this case study in his Raleigh chambers.

2968. Docket Sheet, *supra* note 2965; *see* Akbar, *supra* note 2951, at 260; Brevorka, *supra* note 2953; Hendren & Mazzetti, *supra* note 2951; Jarvis & Collins, *supra* note 2954; Oppel & Hart, *supra* note 2954; Schmidt & Priest, *supra* note 2951.

2969. Interview with Judge Terrence W. Boyle, Mar. 6, 2012; *see* 18 U.S.C. § 7(9) (2020) (extending U.S. criminal jurisdiction to acts by or against U.S. citizens in places controlled by the U.S. government), *enacted by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377; *see also* Gregory P. Bailey, Note, *United States v. Passaro: Exercising Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States*, 58 Cath. U. L. Rev. 1143 (2009); Craig Jarvis, *Secrecy Act Might Affect Passaro Case*, Raleigh News & Observer, July 10, 2004, at A1; Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and*

compound constructed by the Soviet Union,²⁹⁷⁰ but it was U.S. soil for jurisdictional purposes.²⁹⁷¹

The court assigned the case to Judge Terrence W. Boyle.²⁹⁷² On June 25, after a detention hearing, Magistrate Judge William Arthur Webb ordered that Passaro remain detained.²⁹⁷³ In August, Judge Boyle released Passaro with electronic monitoring and a curfew.²⁹⁷⁴ Detention resumed in June 2005 after Passaro was arrested for assaulting his girlfriend.²⁹⁷⁵ Judge Boyle released him again in March 2006, so that he could more effectively assist his attorneys with his defense.²⁹⁷⁶ After he was involved in a traffic

Afghanistan, 2 Stan. J. C.R. & C.L. 365, 375 (2006); Andrea Weigl, *Patriot Act's Reach Questioned*, Raleigh News & Observer, July 21, 2005, at B1.

2970. Jurisdictional Order, *supra* note 2951, at 2 & n.1 (“Asadabad is a small agricultural town in the eastern mountains of Afghanistan which is probably most famous for being the birthplace of jihad against the Soviets in the late 1970’s.”)

2971. *Passaro*, 577 F.3d at 212–19; Jurisdictional Order, *supra* note 2951, at 5–8; see Andrea Weigl, *Passaro's Dismissal Try Rejected*, Raleigh News & Observer, Aug. 13, 2005, at B5.

2972. Docket Sheet, *supra* note 2965.

2973. *Id.*; Detention Order, *United States v. Passaro*, No. 5:04-cr-211 (E.D.N.C. Mar. 14, 2006), D.E. 199; see *C.I.A. Contractor to Be Held Til Trial*, N.Y. Times, June 26, 2004, at 11; Craig Jarvis, *Passaro Will Await Trial in Jail*, Raleigh News & Observer, June 26, 2004, at A1; Thompson, *supra* note 2956.

Judge Webb retired on May 2, 2014. Judicial Milestones, www.uscourts.gov/judicial-milestones/william-webb.

2974. Docket Sheet, *supra* note 2965; Detention Order, *supra* note 2973; see Barbara Barrett, *Passaro Released from Jail*, Raleigh News & Observer, Aug. 28, 2004, at B1; *Fatal Beating Case*, N.Y. Times, Aug. 28, 2004, at 9.

2975. Docket Sheet, *supra* note 2965; Detention Order, *supra* note 2973; see Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. June 2, 2005), D.E. 112 (citing a sheriff's report alleging that Passaro grabbed his girlfriend “by the shoulder, pushed and grabbed her again, forcing her into a door and out the front door, leaving scratches and marks on her left knee,” damaged her cell phone, and stole her ruby ring); see also *Case of Ex-C.I.A. Contractor*, N.Y. Times, June 9, 2005, at 20; Sarah Ovaska, *Abuse Suspect Back in Custody*, Raleigh News & Observer, June 3, 2005, at A1.

Before Passaro was detained again, he also was reported to have acted as a good Samaritan by rescuing the driver of a dump truck that overturned on the shoulder of highway 421. See *Suspect in Beating Helps Rescue Driver*, Raleigh News & Observer, Mar. 31, 2005.

2976. Detention Order, *supra* note 2973; see Andrea Weigl, *Passaro Gets Release to Prepare for Trial*, Raleigh News & Observer, Mar. 16, 2006, at B5.

accident later that month without permission to be away from home, he was detained again.²⁹⁷⁷

On November 12, 2004, Passaro filed a notice that he would rely on a “public authority defense.”²⁹⁷⁸ On January 31, 2006, Judge Boyle denied the government’s motion to exclude the defense.²⁹⁷⁹

Jury selection began on Monday, August 7, 2006.²⁹⁸⁰ Evidence concluded on Wednesday of the following week, and the jury reached its guilty verdict on Thursday.²⁹⁸¹ On February 13, 2007, Judge Boyle sentenced Passaro to eight years and four months in prison.²⁹⁸²

On August 10, 2009, the court of appeals affirmed the conviction, but remanded for resentencing because of an error in applying sentencing guidelines.²⁹⁸³ Judge Boyle sentenced Passaro to six years and eight months on April 6, 2010.²⁹⁸⁴ He was released on January 26, 2011.²⁹⁸⁵

Challenge: Classified Evidence

A large amount of classified information was at issue in this case.²⁹⁸⁶ There were ninety-five classified docket entries,²⁹⁸⁷ out of approximately three

2977. Docket Sheet, *supra* note 2965; see Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 5, 2006), D.E. 207; see also Andrea Weigl, *Judge Sends Passaro Back to Jail*, Raleigh News & Observer, Apr. 12, 2006, at B1; Andrea Weigl, *Passaro Returns to Wake Jail*, Raleigh News & Observer, Apr. 6, 2006, at B5.

2978. Public Authority Defense Notice, *supra* note 2956; see *United States v. Passaro*, 577 F.3d 207, 220–21 (4th Cir. 2009); see Shane, *supra* note 2952.

2979. Order, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Feb. 1, 2006), D.E. 184; see Andrea Weigl, *Passaro Can Claim He Was Doing His Job*, Raleigh, News & Observer, Feb. 3, 2006, at B5.

2980. Docket Sheet, *supra* note 2965.

2981. Jury Verdict, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 17, 2006), D.E. 259.

2982. Judgment, *id.* (Feb. 13, 2007), D.E. 268; *Passaro*, 577 F.3d at 212; see *C.I.A. Contractor Is Sentenced*, N.Y. Times, Feb. 14, 2007, at 20; Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, Raleigh News & Observer, Feb. 14, 2007, at B1.

2983. *Passaro*, 577 F.3d at 211, 223.

2984. Amended Judgment, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 6, 2010), D.E. 308; see Mandy Locke, *Passaro’s Sentence Is Cut*, Raleigh News & Observer, Apr. 7, 2010, at B; *Term Is Cut in Detainee Abuse Case*, L.A. Times, Apr. 7, 2010, at 17; see also Spencer Ackerman, *CIA Apologises After Admitting It Spied on Senate*, Guardian (London), August 1, 2014, at 27 (“Only one man, a former CIA Contractor named David Passaro, has gone to jail in connection to the CIA’s post-9/11 torture.”).

2985. Federal Bureau of Prisons Inmate Locator, www.bop.gov (reg. no. 24708-056).

2986. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

2987. *Id.*

hundred total.²⁹⁸⁸ Before this case, the federal court in the Eastern District of North Carolina had little to no experience handling classified information.²⁹⁸⁹ Judge Boyle's courtroom deputy and one of his law clerks obtained security clearances.²⁹⁹⁰ The defense team also received security clearances.²⁹⁹¹ Two sensitive compartmented information facilities (SCIFs) were constructed in the Raleigh federal building—one for the court and one for the U.S. Attorney.²⁹⁹²

The defendant himself had access to most classified evidence, which he reviewed in the court's SCIF.²⁹⁹³ After his arrest for assaulting his girlfriend, he was on twenty-four-hour video monitoring, even when in the SCIF.²⁹⁹⁴

On one occasion, the government presented classified information ex parte to Judge Boyle for in camera review, and Judge Boyle determined that the information was not material to Passaro's defense.²⁹⁹⁵ Judge Boyle granted the government a protective order in July 2005.²⁹⁹⁶ The order was not filed, but it was delivered to the classified information security officer for service on the defendant.²⁹⁹⁷ Judge Boyle denied Passaro's request for additional information about the information that Judge Boyle determined was not discoverable.²⁹⁹⁸ He granted, however, Passaro's request that the

2988. Docket Sheet, *supra* note 2965.

2989. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011; *see* Jarvis, *supra* note 2969.

2990. Interview with Judge Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

2991. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

2992. Interview with Judge Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011; *see* Craig Jarvis, *Judge Shields Records*, Raleigh News & Observer, July 22, 2004, at B4; Andrea Weigl, *Room Designed to Keep Secrets*, Raleigh News & Observer, Mar. 29, 2005, at B1; *see also* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2993. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

2994. *Id.*

2995. Order, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. Sept. 14, 2005), D.E. 134 [hereinafter Denial of Protective Order Reconsideration]; Government Response, *id.* (Sept. 2, 2005), D.E. 132.

2996. Denial of Protective Order Reconsideration, *supra* note 2995.

2997. Motion, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 18, 2005), D.E. 130 (noting service on August 5, 2005); *see* Reagan, *supra* note 2992, at 21–22 (providing information about classified information security officers).

2998. Denial of Protective Order Reconsideration, *supra* note 2995.

order be included in the public record,²⁹⁹⁹ but it still does not appear to be available on Pacer.³⁰⁰⁰

Challenge: Classified Arguments

Passaro's public-authority-defense notice was initially filed under seal,³⁰⁰¹ but a redacted copy was later filed unsealed.³⁰⁰² On April 12, 2005, Judge Boyle ordered that this and several other documents be redacted of their classified contents and unsealed.³⁰⁰³

The appellate briefs included some classified matters, and the court of appeals was experienced in handling classified briefs.³⁰⁰⁴

Challenge: Subpoenaing Senior Government Officials

Passaro sought testimony from a large number of senior government officials: Attorney General Alberto Gonzales; former CIA Director George J. Tenet; David Addington, counsel to the Vice President; and former attorneys from President Bush's Office of Legal Counsel, Judge Jay Bybee and Professor John Yoo.³⁰⁰⁵ Judge Boyle quashed the subpoenas.³⁰⁰⁶ Judge Boyle, however, permitted Passaro to depose six witnesses whose identities were classified.³⁰⁰⁷

Challenge: Witness Security

Hyder Akbar, the Kunar governor's son who interpreted Wali's interrogation, testified openly at trial.³⁰⁰⁸ Another interpreter, however, testified from behind a curtain.³⁰⁰⁹ His identity was kept secret because no one in

2999. *Id.* at 2 n.1.

3000. Docket Sheet, *supra* note 2965 (D.E. 138); see Public Access to Court Electronic Records, pacer.uscourts.gov.

3001. Docket Sheet, *supra* note 2965 (D.E. 50).

3002. Authority Defense Notice, *supra* note 2956.

3003. Docket Sheet, *supra* note 2965; see Andrea Weigl, *Court Unseals Passaro Papers*, Raleigh News & Observer, Apr. 13, 2005, at B1.

3004. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

3005. See Weigl, *supra* note 3003.

3006. See Andrea Weigl, *Afghan's Deadly Beating Detailed*, Raleigh News & Observer, Aug. 8, 2006, at A1.

3007. See *C.I.A. Contractor Goes to Trial in Abuse Case*, N.Y. Times, Aug. 8, 2006, at A14.

3008. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

3009. *Id.*

Afghanistan knew that he worked for the United States.³⁰¹⁰ He was screened from the public, but not from the defendant or the jury.³⁰¹¹ At first, the curtain was positioned so that nothing was in view of the public—not the witness, not the jury, not even the judge.³⁰¹² Judge Boyle had the curtain adjusted so that only the witness was screened.³⁰¹³

Ten CIA trial witnesses were protected by light disguise.³⁰¹⁴ They all sported the same look—wig, glasses, and moustache—and testified under pseudonyms.³⁰¹⁵

Challenge: Closed Proceeding

For oral arguments on Passaro's appeal, the court prepared for a bifurcated proceeding in which closed arguments concerning classified information would follow open arguments.³⁰¹⁶ It turned out that a closed session was not needed.³⁰¹⁷

3010. Interview with Judge Terrence W. Boyle, Mar. 6, 2012.

3011. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

3012. Interview with Judge Terrence W. Boyle, Mar. 6, 2012.

3013. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

3014. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011; *see* Shane, *supra* note 2952.

3015. Interview with Judge Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011, and May 8, 2012; *see* Andrea Weigl & Matthew Eisley, *Agents Give Trial Air of Mystery*, Raleigh News & Observer, Aug. 9, 2006, at B1.

3016. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Mar. 29, 2011.

3017. *Id.*, May 8, 2012.

Chapter 27

Castro Foe³⁰¹⁸

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

The prosecution of a man with a long history both of working with the CIA and of being prosecuted in other countries for violent crimes required the trial judge's extensive review of classified information. Security for the courthouse, the jury, and a witness also were challenges in this case.

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From the Bay of Pigs in the 1960s to Illegal Entry in the 2000s

Luis Posada Carriles left Cuba for the United States in 1960,³⁰¹⁹ and he was reportedly trained by the CIA to participate in the 1961 Bay of Pigs invasion.³⁰²⁰ He was convicted in Panama in a prosecution related to a 2000

3018. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

3019. *United States v. Posada Carriles*, 541 F.3d 344, 347 (5th Cir. 2008); *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007).

3020. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation at 3, *Posada Carriles v. Campos*, No. 3:06-cv-130 (W.D. Tex. Sept. 11, 2006), D.E. 26; see *Cuban Exile Linked to Contras*, N.Y. Times, Oct. 22, 1986, at A14[hereinafter *Cuban Exile Linked*]; *Jury Clears Cuban Exile of Charges That He Lied to U.S.*, N.Y. Times, Apr. 9, 2011, at A16 [hereinafter *Jury Clears Cuban Exile*]; James C. McKinley, Jr., *Terror Accusations, but Perjury Charges*, N.Y. Times, Jan. 10, 2011, at A9; Joseph B. Treaster, *Accused Terrorist*

attempt to assassinate Fidel Castro.³⁰²¹ In 2004, he was pardoned by Panama's outgoing President Mireya Moscoso.³⁰²² Her successor criticized the pardon: "For me, there are not two classes of terrorism, one that is condemned and another that is pardoned."³⁰²³ In March 2005, he sneaked into the United States, seeking asylum.³⁰²⁴ On May 17, he was scheduled to have a naturalization interview, but he withdrew his asylum application and held a press conference at a secret location in Miami instead.³⁰²⁵ Later that afternoon, the Department of Homeland Security's Immigration and Cus-

Helping to Supply the Contras, N.Y. Times, Dec. 10, 1986, at A21; Tim Weiner, *Case of Cuban Exile Could Test the U.S. Definition of Terrorist*, N.Y. Times, May 9, 2005, at A1; Tim Weiner & Maria Herrera, *Cuban Exile Is Charged with Illegal Entry*, N.Y. Times, May 20, 2005, at A14. See generally Nora Gámez Torres, *Drugs, Spying and Terrorism: CIA Files Offer Insight on Life of Luis Posada Carriles*, Miami Herald, Nov. 19, 2017, at 27A (reporting on Posada Carriles's "secret CIA dossier declassified earlier this month as part of a massive release of documents related to John F. Kennedy's assassination").

3021. *United States v. Carriles*, 486 F. Supp. 2d 599, 601, 602, 604, 614, 619 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344; Report and Recommendation, *supra* note 3020, at 5; see Oscar Corral & Alfonso Chardy, *3 Lawmakers Sought Freedom for Posada and Then Fell Silent*, Miami Herald, July 3, 2005, at 6A (reporting that Posada Carriles was convicted on lesser charges on April 20, 2004); Elaine de Valle, *Panama Sentences Dismay Miami Exiles*, Apr. 22, 2004, at 14A; Abby Goodnough, Tim Weiner & Terry Aguayo, *U.S. Arrests Cuban Exile Accused in Deadly '76 Airline Bombing*, N.Y. Times, May 18, 2005, at A1; *Jury Clears Cuban Exile*, *supra* note 3020; McKinley, *supra* note 3020; *Panama Detains 4 After Castro Charges Plot to Kill Him*, N.Y. Times, Nov. 19, 2000, at 113; Frances Robles & Glenn Carvin, *4 Held in Plot Against Castro*, Miami Herald, Nov. 19, 2000, at 1A (reporting that Posada Carriles and three others were detained at Castro's request); Glenn Garvin, *Exile Says Aim Was Castro Hit*, Miami Herald, Jan. 13, 2001, at 1A (reporting that Posada Carriles called off the assassination attempt); Weiner, *supra* note 3020.

Castro died on November 25, 2016. See Anthony DePalma, *Fidel Castro Dies at 90*, N.Y. Times, Nov. 27, 2016, at A1.

3022. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 3020, at 5; see *4 Anti-Castro Cubans Pardoned*, N.Y. Times, Aug. 27, 2004, at A6; Goodnough et al., *supra* note 3021; *Jury Clears Cuban Exile*, *supra* note 3020; Marc Lacey, *Castro Foe with C.I.A. Ties Puts U.S. in an Awkward Spot*, N.Y. Times, Oct. 8, 2006, at 114; McKinley, *supra* note 3020; Weiner, *supra* note 3020; Weiner & Herrera, *supra* note 3020; see also Corral & Chardy, *supra* note 3021 (reporting that three Cuban-American members of Congress lobbied the Panamanian government to pardon Posada Carriles).

3023. See Weiner, *supra* note 3020.

3024. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Corral & Chardy, *supra* note 3021; *Jury Clears Cuban Exile*, *supra* note 3020; Weiner, *supra* note 3020; Weiner & Herrera, *supra* note 3020.

3025. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Goodnough et al., *supra* note 3021.

toms Enforcement agency took him into custody.³⁰²⁶ He was transported from Miami to El Paso.³⁰²⁷ On May 19, he was charged with illegal entry.³⁰²⁸ On January 11, 2007, the government filed in the Western District of Texas an indictment for illegal immigration.³⁰²⁹ The court assigned the case to Judge Kathleen Cardone.³⁰³⁰

Posada Carriles's Biography

Posada Carriles was born on February 15, 1928, in Cienfuegos, Cuba.³⁰³¹ When he was seventeen, his family moved to Havana, and he enrolled in the University of Havana.³⁰³² Fidel Castro, who took control of Cuba on January 1, 1959, was a law student at the University, three years ahead of Posada Carriles.³⁰³³

In the 1960s, Posada Carriles served in the U.S. Army; he was honorably discharged in March 1964.³⁰³⁴ Unclassified records showed that he had a working relationship with the CIA from 1965 until 1974, but he claimed that he worked with the CIA into the 1980s.³⁰³⁵

In 1967, the CIA helped Posada Carriles get a job with Venezuela's intelligence service, and he came to direct counter-insurgency operations.³⁰³⁶ When Carlos Andres Perez was elected president of Venezuela in 1974,

3026. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; Report and Recommendation, *supra* note 3020, at 1, 5; see Goodnough et al., *supra* note 3021.

3027. See Weiner & Herrera, *supra* note 3020.

3028. See *id.*

3029. Indictment, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007), D.E. 1; *Posada Carriles*, 541 F.3d at 350; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; see Alfonso Chardy, Jay Weaver & Oscar Corral, *Cuban Exile Militant, 2 Allies Indicted*, Miami Herald, Jan. 12, 2007, at 1A.

3030. Docket Sheet, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007) [hereinafter Criminal Docket Sheet].

Tim Reagan interviewed Judge Cardone for this case study in her chambers on April 2, 2012.

3031. Report and Recommendation, *supra* note 3020, at 3; see Ann Louise Bardach & Larry Rohter, *Decades of Intrigue*, N.Y. Times, July 13, 1998, at A1.

3032. See Bardach & Rohter, *supra* note 3031.

3033. See *id.*

3034. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 3020, at 3.

3035. *Posada Carriles*, 541 F.3d at 347.

3036. *Id.*; see McKinley, *supra* note 3020; Weiner, *supra* note 3020.

Posada Carriles left the intelligence service to start his own private security agency.³⁰³⁷

On October 6, 1976, a Cubana Aerolineas airplane was bombed, killing all seventy-three persons on board.³⁰³⁸ The flight originated in Georgetown, Guyana; two men who boarded the plane in Port of Spain, Trinidad, got off in Barbados before the plane continued to Havana, leaving explosives on board in a tube of toothpaste and a camera bag.³⁰³⁹ Posada Carriles was arrested in Venezuela for suspected involvement with the bombing.³⁰⁴⁰ In Cuba, he was tried in absentia and sentenced to death.³⁰⁴¹ In August 1985, he escaped from detention in Venezuela by bribing a guard and walking out disguised as a priest.³⁰⁴² He remained wanted for trial there.³⁰⁴³

3037. See McKinley, *supra* note 3020; Weiner, *supra* note 3020.

3038. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 3020, at 3; see Merrill Collett, *Bosch Ruled Not Guilty in Bombing*, Miami Herald, July 22, 1986, at 1A; Lacey, *supra* note 3022; McKinley, *supra* note 3020; Simon Romero, '76 Bomb Resonates with Diplomats, Not with the Bomber, N.Y. Times, Feb. 3, 2007, at A4.

3039. See Collett, *supra* note 3038; Lacey, *supra* note 3022; Romero, *supra* note 3038.

3040. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 3020, at 3–4; see Collett, *supra* note 3038; Lacey, *supra* note 3022 (“By the time the Cubana Airlines plane exploded, Mr. Posada was no longer in the employ of the C.I.A. But records show that he may have notified his former bosses that a bomb was going to be set off on a plane shortly before it happened.”); McKinley, *supra* note 3020.

In 2015, the *Miami Herald* reported that newly declassified records tended to confirm Posada Carriles’s culpability. Nora Gámez Torres & Alfronson Chardy, *Declassified Memo Indicates Posada Likely Planned Attack*, Miami Herald, June 5, 2015, at 7B.

3041. See Glenn Garvin, *Cuba Seeks Custody of Anti-Castro Plotter*, Miami Herald, Nov. 20, 2000, at 1A.

3042. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 3020, at 4; see Lacey, *supra* note 3022; McKinley, *supra* note 3020; Ana Puga, *Bosch Bombing Case May Be Nearing End After 10-Year Delay*, Miami Herald, June 5, 1986, at 14A (“Squeezed between Cuba’s pressure for a harsh sentence and Cuban exile pressure for a quick release, ‘nobody wants to decide anything,’ said a member of the Venezuelan Congress’ foreign policy commission who declined to be named. ‘This case is what you call a hot potato.’”); Treaster, *supra* note 3020.

Posada Carriles previously escaped on August 8, 1982, and sought asylum at the Chilean embassy in Caracas, but the embassy turned him over to the Venezuelan government. See *Chile Denies Asylum to Caracas Escapees*, Miami Herald, Aug. 12, 1982, at 28A.

3043. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 3020, at 4; see James C. McKinley, Jr., *At Trial of Cuban Exile, a Rebuffed Venezuela Sits Quietly on the Sidelines*, N.Y. Times, Jan. 30, 2011, at A21; William Neuman & Randal C. Archibald, *U.S. Is Pressing Latin Americans to Reject Leaker*, N.Y. Times, July 12, 2013, at A1.

In El Salvador, Posada Carriles provided support to the Contras, who were opposing the government of Nicaragua.³⁰⁴⁴ In 1989, he moved to Guatemala, where he was seriously injured by an apparent attempt to assassinate him in 1990.³⁰⁴⁵ He lived in other Central American countries throughout the 1990s.³⁰⁴⁶

In the spring and summer of 1997, bombs damaged several tourist facilities in Havana, killing an Italian tourist and injuring three others.³⁰⁴⁷ From a secret location in the Caribbean, Posada Carriles consented to a three-day interview with Ann Louise Bardach, who published a series of three articles in the *New York Times* in July 1998.³⁰⁴⁸ According to the arti-

3044. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 3020, at 4; see *Cuban Exile Linked*, *supra* note 3020; Tim Golden, *Sandinistas Say Escapee Ran Supplies*, Miami Herald, Oct. 16, 1986, at 1A (reporting that Posada Carriles was the number two figure in the contra supply operation); McKinley, *supra* note 3020; Weiner, *supra* note 3020.

3045. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 3020, at 4; see Christopher Marquis, *Shooting Deepens Mystery of Itinerant Spy*, Miami Herald, May 13, 1990, at 1A (reporting that Posada Carriles was shot in his jaw, his chest, and his hip in forty rounds fired from two cars while he was driving to work on February 26, 1990); see also Lacey, *supra* note 3022; McKinley, *supra* note 3020; Weiner, *supra* note 3020.

At first, news media reported that Posada Carriles was killed. E.g., *Anti-Castro Agent Reported Killed*, Miami Herald, Apr. 10, 1990, at 7A.

3046. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 3020, at 4 (reporting that Posada Carriles's countries of residence included Honduras and the Dominican Republic).

3047. Report and Recommendation, *supra* note 3020, at 5; see Ann Louise Bardach & Larry Rohter, *A Cuban Exile Details the "Horrendous Matter" of a Bombing Campaign*, N.Y. Times, July 12, 1998, at 110; Juan O. Tamayo, *Cuba Bombs Stir a Wild Guessing Game*, Miami Herald, Aug. 14, 1997, at 1A; Juan O. Tamayo, *Cuban Hotels Were Bombed by Miami-Paid Salvadorans*, Miami Herald, Nov. 16, 1997, at 1A.

3048. Bardach & Rohter, *supra* note 3047; Bardach & Rohter, *supra* note 3031; Ann Louise Bardach & Larry Rohter, *Taking Aim at Castro*, N.Y. Times, July 12, 1998, at 11 [hereinafter *Taking Aim*]; see Dan Frosch, *Castro Enemy Said to Have Recounted Role in Attacks*, N.Y. Times, Mar. 17, 2011, at A21; *Jury Clears Cuban Exile*, *supra* note 3020; Andres Viglucci & Christopher Marquis, *Exile Denies CANF Leaders Financed Attacks in Cuba*, Miami Herald, July 14, 1998, at 1A.

At trial, Bardach disclosed that the interview was conducted in Posada Carriles's house in Aruba. Transcript at 91–92, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Mar. 16, 2011, filed Apr. 8, 2011), D.E. 714.

cles, Posada Carriles admitted to organizing the bombings.³⁰⁴⁹ Later, he claimed that he was misunderstood.³⁰⁵⁰

Immigration Detention

News of Posada Carriles's presence in the United States in 2005 resulted in pressure from Cuba and Venezuela to extradite him and in accusations that the U.S. government was harboring a terrorist.³⁰⁵¹ The Venezuelan government threatened to sever diplomatic ties if Posada Carriles was not arrested.³⁰⁵² At his May 2005 news conference, he said that he was withdrawing his asylum application to relieve international pressure on the United States.³⁰⁵³

After his transfer to El Paso, Posada Carriles renewed his petition for asylum.³⁰⁵⁴ He received an immigration interview on May 21³⁰⁵⁵ and dropped the asylum request on August 31.³⁰⁵⁶ On September 27, he was ordered deported to a country willing to accept him other than Cuba or Venezuela, where he might be tortured.³⁰⁵⁷ No other country was willing to

3049. Bardach & Rohter, *Taking Aim*, *supra* note 3048; Report and Recommendation, *supra* note 3020, at 5; see Goodnough et al., *supra* note 3021; Weiner, *supra* note 3020; Weiner & Herrera, *supra* note 3020.

3050. See Frosch, *supra* note 3048; Dan Frosch, *Motives of Journalist Questioned in Exile's Trial*, N.Y. Times, Mar. 19, 2011, at A16 [hereinafter *Motives*]; James C. McKinley, Jr., *Cuban Exile Lied to U.S., Prosecutor Tells Texas Jury*, N.Y. Times, Jan. 13, 2011, at A17; James C. McKinley, Jr., *Lawyer in Perjury Case Tries to Discredit Reporter*, N.Y. Times, Mar. 22, 2011, at A18 [hereinafter *Tries to Discredit Reporter*]; Juan O. Tamayo & Jay Weaver, *Hero to Some, Terrorist to Others, Posada Gets Day in Court*, Miami Herald, Jan. 9, 2011, at 1A.

3051. See Goodnough et al., *supra* note 3021.

3052. See Steven R. Weisman & Juan Forero, *U.S. Rejects Venezuelan Move on Extradition of Bombing Suspect*, N.Y. Times, May 28, 2005, at A2.

3053. See Goodnough et al., *supra* note 3021.

3054. See Alfonso Chardy & Oscar Corral, *Posada Asylum Trial to Open*, Miami Herald, Aug. 29, 2005, at 1B; Weiner & Herrera, *supra* note 3020.

3055. United States v. Posada Carriles, 541 F.3d 344, 348 (5th Cir. 2008).

3056. See *Foe of Castro Withdraws U.S. Asylum Request*, N.Y. Times, Sept. 1, 2005, at A24.

3057. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 3020, at 2 (noting a finding of likelihood that Cuban agents would torture Posada Carriles if he were deported to either Cuba or Venezuela); see Oscar Corral, *Judge: Posada to Stay in U.S. for Now*, Miami Herald, Sept. 28, 2005, at 1A; McKinley, *supra* note 3020; *Texas Judge Bars Deportation of Exile*, N.Y. Times, Sept. 28, 2005, at A22; Sunjay Trehan, *The Politicization of the Convention Against Torture: The Immigration Hearing of Luis Posada-Carriles and Its Inconsistency with the "War on Terror,"* 37 U. Miami Inter-Am. L. Rev. 567 (2006).

accept him.³⁰⁵⁸ He filed an application for naturalization on October 12 on the basis of his U.S. military service.³⁰⁵⁹

On April 6, 2006, Posada Carriles sought habeas corpus relief from his immigration detention.³⁰⁶⁰ Magistrate Judge Norbert J. Garney recommended that the petition be granted.³⁰⁶¹ The government objected.³⁰⁶² District Judge Philip R. Martinez issued an order to show cause by February 1, 2007, why the petition should not be granted.³⁰⁶³ Because Posada Carriles was indicted before that deadline, he was transferred from immigration detention to criminal pretrial detention.³⁰⁶⁴

On April 26 and 27, 2006, while his habeas petition was pending, Posada Carriles had a naturalization interview.³⁰⁶⁵ His interviewer specialized in national security and fraud cases.³⁰⁶⁶ Also present were government attorneys from the Department of Homeland Security and the Department

3058. *Posada Carriles*, 541 F.3d at 348; see Alfonso Chardy, *6 Nations Refused to Take Posada*, Miami Herald, Aug. 15, 2006, at 3B (reporting that Mexico, Canada, Honduras, Costa Rica, Guatemala, and El Salvador refused to take Posada Carriles); McKinley, *supra* note 3020.

3059. *Posada Carriles*, 541 F.3d at 348–49; see *Cuban Militant Wants to Be U.S. Citizen*, N.Y. Times, Apr. 27, 2006, at A23.

3060. *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007); Report and Recommendation, *supra* note 3020, at 2; Habeas Corpus Petition, *Posada-Carriles v. Campos*, No. 3:06-cv-130 (W.D. Tex. Apr. 6, 2006), D.E. 2; see Alfonso Chardy, *Posada Seeks Release from Federal Detention*, Miami Herald, Apr. 7, 2006, at 3B.

3061. Report and Recommendation, *supra* note 3020, at 22; see Alfonso Chardy, *Posada Should Be Released, Magistrate Tells Judge*, Miami Herald, Sept. 12, 2006, at 1B.

Judge Garney retired on November 30, 2015. Judicial Milestones, www.uscourts.gov/judicial-milestones/norbert-j-garney.

3062. *Posada Carriles*, 481 F. Supp. 2d at 793; Objection, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Oct. 5, 2006), D.E. 30.

3063. *Posada Carriles*, 481 F. Supp. 2d at 793; Order Denying Reconsideration, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Dec. 28, 2006), D.E. 45; Order to Show Cause, *id.* (Nov. 2, 2006), D.E. 42; see Alfonso Chardy, *Judge: Posada Carriles' Time in Detention "Well Beyond" Limit*, Miami Herald, Nov. 4, 2006, at 5B.

Judge Martinez died on February 26, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

3064. *Posada Carriles*, 481 F. Supp. 2d at 794; Arrest Warrant, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007, filed Aug. 16, 2007), D.E. 119; Order, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Feb. 21, 2007), D.E. 47 (dismissing the habeas corpus petition because of a transfer to pretrial detention); see Denial of Reconsideration, *id.* (Mar. 15, 2007), D.E. 56.

3065. *United States v. Posada Carriles*, 541 F.3d 344, 350 (5th Cir. 2008).

3066. *Id.*; see Juan O. Tamayo, *Immigration Papers Raised Red Flags, Official Says*, Miami Herald, Jan. 20, 2011, at 12A.

of Justice's Office of Immigration Litigation.³⁰⁶⁷ Posada Carriles had present two attorneys, who were instructed not to interrupt the interview, and an interpreter provided by the government.³⁰⁶⁸ On August 24, the government denied Posada Carriles naturalization.³⁰⁶⁹

Judge Cardone's Dismissal of the Indictment

The seven-count indictment filed on January 11, 2007, charged Posada Carriles with false statements about the particulars of his 2005 travel to the United States for immigration.³⁰⁷⁰ He claimed that he entered the United States by land from Mexico to Texas, but there was evidence that he entered the United States by sea in Miami.³⁰⁷¹

The parties agreed to defer a pretrial detention hearing, but later they disagreed on precisely what they had agreed to.³⁰⁷² On February 28, 2007, Posada Carriles sought to reopen his pretrial detention hearing, but Judge Garney denied the motion as failing to meet a statutory standard for detention reconsideration.³⁰⁷³ Judge Cardone conducted a hearing on the matter on Tuesday, April 3, and determined on Thursday that the "Defendant does not pose a flight risk at this time, nor does he present a danger to the community," so she ordered him released on bond.³⁰⁷⁴

On the following Tuesday, Judge Cardone denied the government's motion for reconsideration of her release order,³⁰⁷⁵ and the government filed a notice of appeal two days later.³⁰⁷⁶ The court of appeals immediately

3067. *Posada Carriles*, 541 F.3d at 350.

3068. *Id.*

3069. *Id.*

3070. Indictment, *supra* note 3029; see Chardy et al., *supra* note 3029.

Indicted separately were two men who refused to testify before the grand jury empaneled to indict Posada Carriles. See Chardy et al., *supra* note 3029.

3071. *Posada Carriles*, 541 F.3d at 348–49; Report and Recommendation, *supra* note 3020, at 5; see Habeas Corpus Petition, *supra* note 3060, at 6 (claiming entrance from Mexico on March 26, 2005); see also Chardy et al., *supra* note 3029; Goodnough et al., *supra* note 3021.

3072. *United States v. Posada Carriles*, 481 F. Supp. 2d 792, 794 (W.D. Tex. 2007).

3073. *Id.*

3074. *Id.* at 796–97; see Jay Weaver, *Bond Ruling Could Be a Victory for Posada*, Miami Herald, Apr. 11, 2007, at 3B.

3075. Order, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 10, 2007), D.E. 50; see Jay Weaver, *Posada Is a Step Closer to Release*, Miami Herald, Apr. 12, 2007, at 1B.

3076. Notice of Appeal, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 12, 2007), D.E. 51.

stayed the release order,³⁰⁷⁷ but on April 17, over a dissent, it lifted the stay.³⁰⁷⁸ Posada Carriles returned to Miami to live with his family pending trial.³⁰⁷⁹ Venezuela's ambassador to the United States opposed Posada Carriles's release in a *New York Times* opinion essay.³⁰⁸⁰

On May 8, Judge Cardone dismissed the indictment.³⁰⁸¹ First, Judge Cardone found that the indictment was based on statements Posada Carriles made during an immigration interview at which interpretation was incompetent.³⁰⁸² Second, Judge Cardone found that the purpose of the immigration interview was not to assess Posada Carriles's fitness for citizenship but rather to create a criminal case against him:³⁰⁸³ "the Government's tactics in this case are so grossly shocking and so outrageous as to violate the universal sense of justice."³⁰⁸⁴

Posada Carriles returned to Miami to live in a secret location.³⁰⁸⁵ In July 2008, Panama's supreme court overturned his pardon.³⁰⁸⁶

Judge Cardone's Trial

The court of appeals reversed Judge Cardone's dismissal, finding that "nothing in the record suggests that the naturalization interview was anything other than a bona fide examination conducted in accordance with

3077. Order, *United States v. Posada Carriles*, No. 07-50456 (5th Cir. Apr. 12, 2007).

3078. Order, *id.* (Apr. 17, 2007) (order by Judges W. Eugene Davis and Jacques L. Wiener, Jr., with Judge Rhesa H. Barksdale dissenting); see Jay Weaver, *Posada Closer to Moving to Miami*, *Miami Herald*, Apr. 18, 2007, at 3B.

3079. See Oscar Corral & Alfonso Chardy, *Posada Is with Family but Unable to Comment*, *Miami Herald*, Apr. 21, 2007, at 3B; Anthony DePalma & Terry Aguayo, *U.S. Releases Cuban Bombing Suspect, Angering Havana*, *N.Y. Times*, Apr. 20, 2007, at A8; McKinley, *supra* note 3020.

3080. Bernardo Alvarez Herrera, Opinion Essay, *A Terrorist Goes Free*, *N.Y. Times*, Apr. 21, 2007, at A15.

3081. *United States v. Carriles*, 486 F. Supp. 2d 599, 601, 607, 621 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344 (5th Cir. 2008); see Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile Brings Both Glee and Rage*, *N.Y. Times*, May 10, 2007, at A20; Jay Weaver & Alfonso Chardy, *Judge Frees Posada, Rips Feds' Tactics*, *Miami Herald*, May 9, 2007, at 1A.

3082. *Carriles*, 486 F. Supp. 2d at 607–14; see Weaver & Chardy, *supra* note 3081.

3083. *Carriles*, 486 F. Supp. 2d at 614–20; see Weaver & Chardy, *supra* note 3081.

3084. *Carriles*, 486 F. Supp. 2d at 620.

3085. See Tania Valdemoro, *Posada Comes Back to Dade, but He's Under Wraps*, *Miami Herald*, May 14, 2007, at 3B.

3086. See Frances Robles & Alfonso Chardy, *Posada's Pardon Illegal, Panama's Top Court Rules*, *Miami Herald*, July 2, 2008, at 16A.

the applicable regulations.”³⁰⁸⁷ As for incompetent interpretation, the court of appeals held that that was a question for the jury and that Posada Carriles’s indictable answers were not tainted by incompetent interpretation.³⁰⁸⁸ The court of appeals remanded the case back to Judge Cardone on August 14, 2008.³⁰⁸⁹

Meanwhile, the government and Cuba cooperated on an investigation of the 1997 bombings in Cuba.³⁰⁹⁰ On April 8, 2009, the government filed an eleven-count superseding indictment that added charges for perjury pertaining to Posada Carriles’s involvement in the bombings.³⁰⁹¹

Jury selection began on January 10, 2011.³⁰⁹² To empanel sixteen jurors for this case, Judge Cardone called 130 potential jurors, many more than the usual forty-two.³⁰⁹³ She decided not to use a jury questionnaire.³⁰⁹⁴ Most people in El Paso did not know about the defendant or his case.³⁰⁹⁵ The judge thought that a questionnaire would only increase potential jurors’ curiosity about the case.³⁰⁹⁶

Since the development of the internet, Judge Cardone found it considerably more important to provide jurors with clear instructions not to do independent research during the trial; people tend to feel entitled to immediate information now.³⁰⁹⁷ Judge Cardone found her instructions to ju-

3087. *United States v. Posada Carriles*, 541 F.3d 344, 358 (5th Cir. 2008); see Alfonso Chardy, *Cuba Critical of Posada Ruling*, Miami Herald, Aug. 16, 2008, at 3B (“The Cuban government on Friday called the reinstatement of a criminal indictment against Cuban exile militant Luis Posada Carriles a ‘maneuver’ to delay and prevent his extradition.”).

3088. *Posada Carriles*, 541 F.3d at 361–66.

3089. *Id.* at 366; see *Militant Ordered to Stand Trial*, N.Y. Times, Aug. 15, 2008, at A12.

3090. See Alfonso Chardy, Oscar Corral & Jay Weaver, *FBI, Cuba Cooperating on Posada*, Miami Herald, May 3, 2007, at 1A.

3091. Superseding Indictment, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. April 8, 2009), D.E. 133; see Alfonso Chardy, *U.S. Indicts Cuban Exile Militant Luis Posada Carriles, Links Him to Tourist Bombings*, Miami Herald, Apr. 9, 2009, at 1A; *New Charges for Cuban Militant*, N.Y. Times, Apr. 9, 2009, at A19.

3092. Criminal Docket Sheet, *supra* note 3030.

3093. See Juan O. Tamayo, *Luis Posada Carriles Trial: Defense Dealt a Blow*, Miami Herald, Jan. 11, 2011, at 4A.

3094. Transcript at 4, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Feb. 5, 2010, filed Mar. 12, 2010), D.E. 434; Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3095. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3096. *Id.*

3097. *Id.*

rors to be effective because she provided them with reasons for the instructions.³⁰⁹⁸ There was no indication of outside research in this case.³⁰⁹⁹

The case was prosecuted by the Justice Department's counterterrorism section rather than the local U.S. Attorney's office.³¹⁰⁰ The trial lasted nearly three months, because to prove that Posada Carriles lied about his involvement in the Havana bombings, the government had to prove his involvement in the bombings.³¹⁰¹

On April 8, the jury found Posada Carriles not guilty.³¹⁰²

He died at age ninety on May 23, 2018.³¹⁰³

Challenge: Classified Evidence

On May 3, 2007, not quite four months after Posada Carriles's indictment, the government sought a protective order from Judge Cardone shielding from discovery classified information pertaining to the defendant.³¹⁰⁴ Judge Cardone determined that the government's classified information was not discoverable, and she granted the protective order.³¹⁰⁵

As the trial on the superseding indictment commenced, Judge Cardone reviewed government information that would have been discoverable but for its classified status.³¹⁰⁶ This review kept Judge Cardone's chambers busy for two weeks, sometimes until 1:00 a.m.³¹⁰⁷

On January 27, 2011, Judge Cardone issued a protective order approving the production in discovery of substitutions for classified infor-

3098. *Id.*

3099. *Id.*

3100. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012.

3101. Interview with Judge Kathleen Cardone, Apr. 2, 2012; *see* Tamayo & Weaver, *supra* note 3050.

3102. Jury Verdict, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 8, 2011), D.E. 710; *see* Alfonso Chardy, *After Being Acquitted, Cuban Ex-CIA Agent Plans to Return to Miami*, *Miami Herald*, Apr. 8, 2011.

3103. *See* Nora Gámez Torres & Glenn Garvin, *Anti-Castro Militant Posada Carriles Dies*, *Miami Herald*, May 24, 2018, at 1A; Frances Robles, *Luis Posada Carriles, 90, Anti-Castro Warrior, Dies*, *N.Y. Times*, May 24, 2018, at B13; Ellie Silverman, *Militant Opponent of Castro's Regime*, *Wash. Post*, May 25, 2018, at B6.

3104. Criminal Docket Sheet, *supra* note 3030.

3105. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. May 7, 2007), D.E. 103.

3106. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3107. *Id.*

mation.³¹⁰⁸ Obtaining substitutions from the government that she could approve required a substantial amount of back and forth.³¹⁰⁹ Because classified information was held by different parts of the intelligence community, it was sometimes difficult to determine precisely what information the government had.³¹¹⁰ Judge Cardone was especially careful to review representations by the government that information was already known to the defendant or was duplicative.³¹¹¹ The protective order was prepared on a special laptop computer provided by a classified information security officer.³¹¹²

The classified information security officer supervised security precautions for the ex parte discovery proceedings involving classified information.³¹¹³

It turned out that it was not necessary to give defense counsel access to classified information in this case.³¹¹⁴ Two of Posada Carriles's attorneys already had clearances,³¹¹⁵ but the government never determined that they had a need to know classified information for the case.³¹¹⁶ Judge Cardone thought that it was a good idea for defense attorneys to have security clearances in cases such as this in case access to classified information became necessary.³¹¹⁷

To help Judge Cardone handle classified information, her career law clerk, her courtroom deputy, and a court reporter obtained security clearances.³¹¹⁸ Filings pertaining to classified information were handled by the cleared courtroom deputy rather than the regular docket clerk.³¹¹⁹

3108. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 27, 2011), D.E. 605; see Transcript at 3–6, *id.* (Mar. 4, 2011, filed Apr. 8, 2011), D.E. 712.

3109. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3110. *Id.*

3111. *Id.*

3112. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

3113. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012.

3114. Interview with Judge Kathleen Cardone, Apr. 2, 2012; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012.

3115. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3116. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012.

3117. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3118. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 23, 2013.

3119. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

Classified materials were stored at the local FBI's sensitive compartmented information facility (SCIF) and couriered to and from the courthouse by FBI staff.³¹²⁰ The materials, as well as special laptops for the court and the court reporter to use when writing about classified information, were stored in locked bags to which only the court had a key.³¹²¹

On one occasion, the defense thought that it had classified information to present to the court.³¹²² The classified information security officer submitted the information to the intelligence community for a walled-off classification review.³¹²³ The review was walled-off from the attorneys representing the government.³¹²⁴ It turned out that the information was not classified.³¹²⁵

Challenge: Classified Orders

Judge Cardone was called upon to issue discovery orders concerning classified information.³¹²⁶ Such orders were difficult to craft because other judges' orders in similar cases tended to be unavailable.³¹²⁷ The classified information security officer was sometimes able to be helpful in advising the judge to whom in the intelligence community she should direct discovery orders.³¹²⁸

Challenge: Sensitive Unclassified Evidence

For Posada Carriles's trial on the superseding indictment, the government sought a confidential-discovery protective order forbidding the defense from disclosing some discovery to others: "This discovery does not contain any classified information; however, the information potentially implicates the privacy, proprietary, law enforcement and other interests of third parties and foreign governments."³¹²⁹ Protected material included un-

3120. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012; *see* Reagan, *supra* note 3112, at 22–23 (describing SCIFs).

3121. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 26, 2012.

3122. *Id.*

3123. *Id.*

3124. *Id.*

3125. *Id.*

3126. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3127. *Id.*

3128. *Id.*

3129. Motion at 3, *United States v. Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. June 5, 2009), D.E. 145.

published portions of Bardach's 1998 interview with Posada Carriles.³¹³⁰ News media opposed the motion.³¹³¹

Judge Cardone examined in camera the discovery that the government deemed sensitive,³¹³² and she agreed to issue a protective order.³¹³³ The defendant himself had access to the sensitive information, and his obligation to keep the information confidential was governed by the protective order.³¹³⁴

Challenge: Court Security

Located less than a mile from Juárez, Mexico, considered then to be one of the most dangerous cities in the world, the El Paso courthouse was accustomed to proceedings requiring enhanced snipers-on-the-roof security, and enhanced security was used in this case.³¹³⁵

Security was provided for Posada Carriles's transportation to and from the court while he was in detention.³¹³⁶ After he was released, his attorneys took more responsibility for his security.³¹³⁷ Because of his status on release, he was on a no-fly list, so he had to travel to the court from Miami by car.³¹³⁸

3130. *Id.* at 3 n.1.

Bardach appeared as a witness at the trial. See Frosch, *supra* note 3048; Frosch, *Motives*, *supra* note 3050; McKinley, *Tries to Discredit Reporter*, *supra* note 3050.

3131. Motion, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. June 30, 2009), D.E. 153.

3132. Order at 3–4, *id.* (Aug. 25, 2009), D.E. 172.

3133. Protective Order, *id.* (Aug. 25, 2009), D.E. 173.

3134. *Id.*; Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3135. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

In 2014, National Public Radio reported that Juárez had recently become considerably less dangerous. Steve Inskeep, *On the Mend, But Wounds of Violence Still Scar Juarez*, Morning Edition (NPR radio broadcast Mar. 24, 2014), www.npr.org/blogs/parallels/2014/03/24/292394476/on-the-mend-but-wounds-of-violence-still-scar-juarez. But by one report, it was the sixth most dangerous city in the world in 2021. See Daniel Borunda, *Juárez Ranks 6th*, Las Cruces Sun-News, Mar. 22, 2022, at A1 ("Juárez has crept up in the rankings of the world's deadliest cities over the years after having fallen off the 2015 annual rankings . . .").

3136. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3137. *Id.*

3138. *Id.*; see Valdemoro, *supra* note 3085.

Challenge: Jury Security

Judge Cardone used an anonymous jury, and jurors met at an off-site location, from which they were driven to the courthouse by deputy marshals.³¹³⁹

Challenge: Witness Security

One witness required special security precautions.³¹⁴⁰ The courtroom was closed during the witness's testimony, and the jury was admonished not to disclose some of the witness's evidence even after the trial was over.³¹⁴¹ Because the courtroom was closed to the public, the witness did not testify in disguise or from behind a screen.³¹⁴²

3139. Interview with Judge Kathleen Cardone, Apr. 2, 2012.

3140. *Id.*

3141. *Id.*

3142. *Id.*

IV. HABEAS CORPUS

The very complex collection of a few hundred petitions for habeas corpus relief from detention at the U.S. naval base at Guantánamo Bay, Cuba, is surely a unique case-management challenge for a single district court and its court of appeals, but just as surely these national security actions offer lessons that may be applicable to other cases, now and in the future (“Chapter 28: Guantánamo Bay”).

Although the Classified Information Procedures Act technically applies only to criminal cases, its procedures were used as guidance for these habeas corpus cases. Security clearances for court staff and attorneys and the inclusion in the record of classified filings, under seal of course, were coordinated by the Litigation Security Group’s classified information security officers.³¹⁴³

A very significant challenge in these cases was the judges’ presiding over proceedings in which one party was in court and the other party appeared by secure video link. The frequent requirement of interpreters added to the challenge.

A common challenge in national security cases involving pretrial detention, which bears some similarity to Guantánamo Bay detention, is the health, especially the mental health, of detainees who are confined in highly secure conditions. Judges have only limited control over conditions of confinement, but judges are called upon to exert their authority when conditions of confinement affect the detainees’ ability to present their cases.

3143. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

Chapter 28

Guantánamo Bay

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

Although habeas corpus cases technically are civil cases, and the Classified Information Procedures Act (CIPA) applies by its terms to criminal cases, lessons learned from applications of CIPA to criminal cases helped the U.S. District Court for the District of Columbia handle classified information in habeas corpus cases brought by detainees transferred to Guantánamo Bay after the September 11, 2001, terrorist attacks. Other challenges met by the court included challenges that often arise with detention, such as attorney–client contacts, physical health, mental health, and religious accommodation.

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Habeas Corpus Rights

Jurisdiction Over Guantánamo Bay Detainees

On September 25, 2001, Australian David Hicks called his parents in Salisbury, Australia, a suburb of Adelaide, and told them that he had joined the Taliban.³¹⁴⁴ Hicks, a high-school dropout described as a drifter, had con-

3144. See Douglas Frantz, *Alliance Captures Australian Man Fighting for the Taliban*, N.Y. Times, Dec. 13, 2001, at B3; Richard Leiby, *Taliban from Down Under*, Wash. Post, Mar. 10, 2002, at F1.

verted to Islam and adopted the name Mohammed Dawood.³¹⁴⁵ Apparently he had joined the Taliban in 1999.³¹⁴⁶ The Northern Alliance captured him near Kabul, Afghanistan, on December 9, 2001, and turned him over to the United States on December 17.³¹⁴⁷ He was transferred to the USS *Peleliu*, the same ship that held John Walker Lindh at the time,³¹⁴⁸ and then to the naval base at Guantánamo Bay in January 2002.³¹⁴⁹

Shafiq Rasul and Asif Iqbal grew up together in Tipton, England, a town near Birmingham.³¹⁵⁰ They also were described as drifters who converted to Islam.³¹⁵¹ And they also were captured in Afghanistan and transferred to Guantánamo Bay.³¹⁵²

On January 11, 2002, a cargo plane holding 20 detainees from Afghanistan landed at the U.S. naval base in Guantánamo Bay, Cuba, the first of many detainee transfers that eventually swelled the camp population at its height to over 600. Hooded and wearing earmuffs, detainees felt a blast of hot, humid air as they were escorted off the plane by U.S. soldiers, hustled onto a bus, and transported across the water by a ferry to a large building, part of the detention center located on the southeast corner of the 45-square-mile base. Once inside, detainees encountered a beehive of activity similar to their processing at Kandahar and Bagram.

3145. See Frantz, *supra* note 3144; Leiby, *supra* note 3144; see also Jess Bravin, *The Terror Courts* 193 (2013) (noting that Dawood is Arabic for David).

3146. See John Shaw, *Australians Debate Fate of Fighter Held by U.S.*, N.Y. Times, Dec. 30, 2001, at 8.

3147. *Al Odah v. United States*, 321 F.3d 1134, 1137 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 60 (D.D.C. 2002); see Frantz, *supra* note 3144; Shaw, *supra* note 3146.

3148. See Steve Vogel, *5 Detainees Held on U.S. Ship*, Wash. Post, Dec. 18, 2001, at A15; Steve Vogel & Molly Moore, *U.S. Warns Against Helping Bin Laden*, Wash. Post, Dec. 19, 2001, at A1; see also Chapter 7: American Taliban, *supra* page 146.

3149. See Mark Landler & Katharine Q. Seelye, *U.N. Pleads for Afghan Aid While U.S. Jets Raid Compound*, N.Y. Times, Jan. 15, 2002, at A12; Leiby, *supra* note 3144; Carol Rosenberg, *Guantánamo Prisoners a Curious, Varied Group*, Miami Herald, June 20, 2002, at 1A; see also Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 63 (2006) (“On January 6, [2002,] Brigadier General Michael Lehnert received an urgent order from his boss, Defense Secretary Donald Rumsfeld. He was told to build a prison. He had ninety-six hours. . . . Lehnert finished the job with nine hours to spare.”).

3150. See Warren Hoge, *Hometown of British Prisoners Known for Tranquil Diversity*, N.Y. Times, Jan. 29, 2002, at A14.

3151. See Amy Waldman, *How in a Little English Town Jihad Found Young Converts*, N.Y. Times, Apr. 24, 2001, at A1.

3152. *Rasul*, 215 F. Supp. 2d at 60; see Waldman, *supra* note 3151.

Camp personnel removed their outer clothing and earmuffs, lowered their goggles, and cut off their clothes.³¹⁵³

On February 19, 2002, parents of Hicks, Rasul, and Iqbal filed a habeas corpus petition on their behalf in the U.S. District Court for the District of Columbia, and the court assigned the case to Judge Colleen Kollar-Kotelly.³¹⁵⁴ This was the first habeas action filed on behalf of named Guantánamo Bay detainees, and it was filed at a time when there were approximately three hundred.³¹⁵⁵ Six days later, Judge Kotelly ordered the government to file a return.³¹⁵⁶

On May 1, fathers and brothers of eleven Kuwaitis held at Guantánamo Bay filed a complaint against the government seeking the detainees' access to family, counsel, and the courts.³¹⁵⁷ An amended complaint on

3153. Laurel E. Fletcher & Eric Stover, *The Guantánamo Effect* 41 (2009); see Barry Kamins, Opening Remarks, *Guantanamo Bay: The Global Effects of Wrongful Detention, Torture & Unchecked Executive Power: Transcripts*, 10 N.Y. City L. Rev. 313, 313 (2007) ("The detention facility at Guantánamo was built in just ninety hours in January of 2002 on the long-term naval base the United States maintains on the tip of Cuba.").

3154. Docket Sheet, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Feb. 19, 2002); *Rasul v. Bush*, 542 U.S. 466, 472 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1136–37 (D.C. Cir. 2003); *Rasul*, 215 F. Supp. 2d at 57; see *Boumediene v. Bush*, 553 U.S. 723, 734 (2008); see also David Cole, *Engines of Liberty* 158–59 (2016); John Mintz, *Detention of 3 Men in Cuba Disputed*, Wash. Post, Feb. 20, 2002, at A10; Michael Ratner, *The First Habeas Cases: Rasul v. Bush*, in *The Guantánamo Lawyers* 32, 32 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009); Michael Ratner & Ellen Ray, *Guantánamo: What the World Should Know* 7–8, 80 (2004); Philip Shenon, *Suit to Be Filed on Behalf of Three Detainees in Cuba*, N.Y. Times, Feb. 19, 2002, at A11; Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 25 (2008); Clive Stafford Smith, *Eight O'Clock Ferry to the Windward Side* 23 (2007).

3155. See Shenon, *supra* note 3154; see also Michael Ratner, *Guantánamo: The Ninth Circle of Hell*, in *The Guantánamo Lawyers*, *supra* note 3154, at 15 (describing the decision by the Center for Constitutional Rights to participate in the case).

3156. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Feb. 25, 2002), D.E. 7.

3157. *Rasul*, 542 U.S. at 472; *Al Odah*, 321 F.3d at 1136; *Rasul*, 215 F. Supp. 2d at 58 & n.3; Docket Sheet, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. May 1, 2002) [hereinafter *Al-Odah* Docket Sheet]; see Neil MacFarquhar, *Kuwaitis Press U.S. Over 12 Held at Guantánamo*, N.Y. Times, June 26, 2002, at A18; John Mintz, *Detainees Say They Were Charity Workers*, Wash. Post, May 26, 2002, at A12 (reporting that legal expenses would be paid by the Kuwaiti government and donated by the law firm to charity); Ratner & Ray, *supra* note 3154, at 8; Wax, *supra* note 3154, at 25–26 (reporting that the lawyers in this case were retained, unlike the vast majority of Guantánamo Bay habeas attorneys, who worked pro bono).

After receiving a letter from his son via the International Committee of the Red Cross, [Fawzi] al Odah's father, an American-trained pilot who had fought with the

July 8 added a twelfth plaintiff.³¹⁵⁸ The court assigned the case to Judge Kotelly on the plaintiffs' representation that it was related to the habeas petition by Hicks, Rasul, and Iqbal.³¹⁵⁹ The plaintiffs claimed that they were in Afghanistan for charitable purposes and they were captured by bounty hunters.³¹⁶⁰ Judge Kotelly regarded the complaint as a habeas petition.³¹⁶¹

The rights of persons detained at Guantánamo Bay had been litigated when the camp was used to house Haitians captured in international waters so as to prevent their arrival within the United States.³¹⁶² The U.S. Court of Appeals for the Eleventh Circuit concluded in 1991 that the detained Haitians had not reached United States territory.³¹⁶³ In a 1995 case involving Cuban and Haitian refugees, the court decided that "any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of [U.S. law]."³¹⁶⁴

Judge Kotelly determined, on July 30, 2002, that United States courts did not have jurisdiction over the Guantánamo Bay habeas petitions, because the petitioners were aliens held outside sovereign territory.³¹⁶⁵ During the following week, Judge Kotelly also dismissed a habeas petition filed on June 10 by the wife of Mamdouh Habib, another Australian held at Guantánamo Bay, which was assigned to her as related to the other two

Kuwaiti Air Force in the First Gulf War, tracked down the families of eleven other Kuwaiti prisoners and hired a white-shoe American law firm to represent them.

Jonathan Mahler, *The Challenge* 66 (2008).

The law firm styled the filing as a complaint instead of a habeas corpus petition "[i]n an attempt to appear to the court more modest and less like [they] were demanding release." Kristine A. Huskey, *The First Habeas Cases: Al Odah v. United States*, in *The Guantánamo Lawyers*, *supra* note 3154, at 29, 30. The firm named the United States as the lead defendant so as not to offend partners who did not want the firm to sue the President. *Id.*

3158. *Rasul*, 215 F. Supp. 2d at 58 n.3; *Al-Odah* Docket Sheet, *supra* note 3157; *see* Cole, *supra* note 3154, at 159.

3159. *Rasul*, 215 F. Supp. 2d at 58; *Al-Odah* Docket Sheet, *supra* note 3157; *see* Cole, *supra* note 3154, at 159; Huskey, *supra* note 3157, at 30.

3160. *Rasul*, 215 F. Supp. 2d at 60–61; *see* Mintz, *supra* note 3157.

3161. *Rasul*, 215 F. Supp. 2d at 64; *see* Huskey, *supra* note 3157, at 30–31.

3162. *See* Cole, *supra* note 3154, at 155–57.

3163. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991).

3164. *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995).

3165. *Rasul*, 215 F. Supp. 2d 55, *rev'd*, 542 U.S. 466 (2004); *see* Boumediene v. Bush, 553 U.S. 723, 734 (2008); *see also* Bravin, *supra* note 3145, at 80; Mahler, *supra* note 3157, at 66–67; Ratner & Ray, *supra* note 3154, at 80–81; Neely Tucker, *Judge Denies Detainees in Cuba Access to U.S. Courts*, Wash. Post, Aug. 1, 2002, at A10.

cases.³¹⁶⁶ The court of appeals agreed that the court lacked jurisdiction over these three cases.³¹⁶⁷

On June 28, 2004, the Supreme Court held in *Rasul v. Bush* that federal courts did have jurisdiction over habeas petitions by Guantánamo Bay detainees, because a 1903 lease and a 1934 treaty gave the United States indefinite “complete jurisdiction and control” over its naval base in Cuba and the courts unquestionably had jurisdiction over the petitioners’ custodians.³¹⁶⁸

While the Supreme Court case was pending, Rasul and Iqbal were returned to freedom in the United Kingdom.³¹⁶⁹ A subsequent suit for dam-

3166. Opinion, *Habib v. Bush*, No. 1:02-cv-1130 (Aug. 8, 2002), D.E. 5; see *Al Odah v. United States*, 321 F.3d 1134, 1137 (D.C. Cir. 2003); see also Dana Priest, *Detainee Sent Home to Australia*, Wash. Post, Jan. 29, 2005, at A21 (reporting that Habib was born in Egypt and moved to Australia when he was eighteen).

Visiting New York, where his sisters lived, Habib reconnected with school chums from Egypt who had relocated to the city. He visited the Statue of Liberty but spent more time attending the trial of El Sayyid Nosair, accused of assassinating Rabbi Meir Kahane, a right-wing Israeli politician. After returning to Australia, Habib’s Egyptian friends in New York asked him to raise funds for Omar Abdel Rahman, the terrorist leader known as the Blind Sheikh, who ultimately received life imprisonment for conspiring to blow up the United Nations headquarters, the Lincoln Tunnel, and other landmarks. Habib enthusiastically agreed, even organizing rallies for the cause.

Bravin, *supra* note 3145, at 226–27 (providing a summary biography of Habib). See generally Chapter 1: First World Trade Center Bombing, *supra* page 5 (reporting on the prosecution of Nosair for Kahane’s murder).

3167. *Al Odah*, 321 F.3d at 1141 (opinion by Judge A. Raymond Randolph, joined by Judges Merrick B. Garland and Stephen F. Williams), *rev’d*, 542 U.S. 466; *Boumediene*, 553 U.S. at 734; see Huskey, *supra* note 3157, at 31; Mahler, *supra* note 3157, at 67; Ratner & Ray, *supra* note 3154, at 81.

3168. *Rasul*, 542 U.S. at 471, 473, 480, 483–84, 485 (opinion by Justice Stevens, joined by Justices O’Connor, Souter, Ginsburg, and Breyer; Justice Kennedy concurred in the judgment; Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented); see *Boumediene*, 553 U.S. at 734; *In re Guantánamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47 (D.D.C. 2013); see also Huskey, *supra* note 3157, at 32; Mahler, *supra* note 3157, at 122–23; Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1, 5–6; Kara Simard, *Innocent at Guantánamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 Suffolk Transnat’l L. Rev. 365, 371 (2007) (“The United States obtained the lease from an American citizen, Tomas Estrada Palma, who later became the first President of Cuba.”).

3169. *Rasul*, 542 U.S. at 471 n.1; see Order, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007), D.E. 230 (dismissing the habeas petition); see also *British Frees 5 Citizens Sent Home from U.S. Jail*, N.Y. Times, Mar. 11, 2004, at A3; Cole, *supra* note 3154, at 179–80; Margulies, *supra* note 3149, at 145; John Mintz, *U.S. Faces Quandary in Freeing De-*

ages against the United States was unsuccessful,³¹⁷⁰ but the British government agreed to settle a damages suit against it.³¹⁷¹ On June 10, Hicks was formally charged in a military tribunal with joining the Taliban.³¹⁷² The government of Australia had agreed the previous November to such a proceeding for its citizen.³¹⁷³

Hicks pleaded guilty; pursuant to a plea agreement, he was sentenced on March 30, 2007, to seven years of postdetention imprisonment, with all but nine months suspended, and returned to Australia in May to serve out the remaining months of his sentence.³¹⁷⁴ Hicks was released from prison

tainees, Wash. Post, Mar. 22, 2004, at A1; Albert Ruben, *The People's Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantánamo* 15 (2011).

3170. *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (finding, among other things, qualified immunity for the defendants because, “No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights.”); see Docket Sheet, *Rasul v. Rumsfeld*, No. 1:04-cv-1864 (D.D.C. Oct. 27, 2004); see also *Ex-Guantánamo Inmates File Suit*, N.Y. Times, Oct. 28, 2004, at A10.

A former Guantánamo Bay prison guard found Rasul on Facebook, and the BBC filmed a reunion of the two in December 2009. *Our World: Guantanamo Reunited* (BBC television broadcast Jan. 20, 2010); see Brian Stelter, *Guantánamo Reunion, by Way of BBC*, N.Y. Times, Jan. 11, 2010, at B9.

3171. See Rebecca Omonira-Oyekanmi & Peter Finn, *Britain Settles with Detainees*, Wash. Post, Nov. 17, 2010, at A10 (listing fifteen of sixteen detainees to receive compensation).

3172. See Bradley Graham, *3 Charges Placed Against Detainee*, Wash. Post, June 11, 2004, at A3; Mahler, *supra* note 3157, at 66–67; Eric Schmitt & Kate Zernike, *U.S. Charges an Australian with Fighting for Taliban*, N.Y. Times, June 11, 2004, at A12; see also Joshua L. Dratel, *Navigating the New Military Commissions: The Case of David Hicks*, 10 N.Y. City L. Rev. 385, 385–86 (2007) (“David Hicks has been the only one thus far referred to a military commission”).

3173. See Neil A. Lewis, *U.S. Adds to Detained Australians' Rights*, N.Y. Times, Nov. 26, 2003, at A22; see also Bravin, *supra* note 3145, at 171 (reporting that Australia objected to indefinite detention for its citizen).

As a result of the Australian government's negotiations, Hicks was able to meet with his father and stepmother at Guantánamo Bay. See Neil A. Lewis, *Australian Pleads Not Guilty to Terrorism Conspiracy*, N.Y. Times, Aug. 26, 2004, at A14.

3174. Transcript at 81, 157, 243–45, *United States v. Hicks* (Mil. Comm'n Mar. 30, 2007), [www.mc.mil/Portals/0/pdfs/Hicks/Hicks%20\(Trial%20Transcript,%20Guilty%20Plea%20Inquiry%20and%20Findings\).pdf](http://www.mc.mil/Portals/0/pdfs/Hicks/Hicks%20(Trial%20Transcript,%20Guilty%20Plea%20Inquiry%20and%20Findings).pdf) (pp.79–158), [www.mc.mil/Portals/0/pdfs/Hicks/Hicks%20\(Trial%20Transcript,%20Sentencing\).pdf](http://www.mc.mil/Portals/0/pdfs/Hicks/Hicks%20(Trial%20Transcript,%20Sentencing).pdf) (pp.159–249); see Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Aug. 23, 2007), D.E. 228; Bravin, *supra* note 3145, at 312–14; Gordon Cucul-lu, *Inside Gitmo* 224 (2009); William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. Times, Mar. 31, 2007, at A10; Karen Greenberg, *The Least Worst Place: Guantanamo's First 100 Days* 220 (2009); Spencer S. Hsu, *Guantanamo Detainee Returns*

on December 29³¹⁷⁵ and released from supervision on December 21, 2008.³¹⁷⁶ His conviction was vacated in 2015 by the Court of Military Commission Review in light of intervening determinations by the U.S. Court of Appeals for the District of Columbia Circuit that *ex post facto* material-support charges cannot be tried by a military commission.³¹⁷⁷

Habib had been returned to freedom in Australia, without charges, in January 2005.³¹⁷⁸

to Australia, Wash. Post, May 21, 2007, at A10; Michael D. Mori, *Escape from Guantánamo*, in The Guantánamo Lawyers, *supra* note 3154, at 190, 192; Josh White, *Australian to Return Home to Serve Shortened Term*, Wash. Post, Mar. 31, 2007, at A12; *see also* Jonathan Hafetz, *Habeas Corpus After 9/11* 212 (2011) (“The deal not only was negotiated without the prosecutors’ knowledge, but was the result of a request to Vice President Cheney from Australia’s prime minister John Howard, who was facing increasing demands at home to oppose Hicks’s prosecution by a military commission.”). *See generally* Michael Mori, *In the Company of Cowards* (2014) (reflections by Hicks’s military commission defense attorney).

3175. *See* Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, N.Y. Times, Dec. 29, 2007, at A7; Rohan Sullivan, *Ex-Guantanamo Inmate Released*, Wash. Post, Dec. 29, 2007, at A14.

3176. *See* Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. Times, Dec. 21, 2008, at A12.

3177. *Hicks v. United States*, 94 F. Supp. 3d 1241 (Ct. Mil. Comm’n Rev. 2015); *see* Matt Apuzzo, *Guantánamo Conviction of Australian Is Overturned*, N.Y. Times, Feb. 19, 2015, at A14; *Court Annuls Guilty Plea of Ex-Guantánamo Detainee*, Miami Herald, Feb. 19, 2015, at 3A; Greenberg, *supra* note 3174, at 153.

In 2014, journalist Carol Rosenberg reported that Hicks “has written a book, married, [and] works as an auto-body repairman.” Carol Rosenberg, *11 Original Gitmo Captives Remain*, Miami Herald, Jan. 13, 2014, at 1A. In 2021, Rosenberg reported that Hicks has “intentionally dropped out of sight.” Carol Rosenberg, *20 Lives Weigh on Plan to Shut Guantánamo*, N.Y. Times, Mar. 28, 2021, at A1 [hereinafter *20 Lives*].

3178. *See* Raymond Bonner, *Australian’s Long Path in the U.S. Antiterrorism Maze*, N.Y. Times, Jan. 29, 2005, at A4; Priest, *supra* note 3166; *see also* Margulies, *supra* note 3149, at 2 (according to Habib’s attorney, “I had flown with [Habib] from Guantánamo in a plane chartered by the Australian government, west from Cuba and across the Pacific Ocean, careful not to cross over into U.S. airspace. I am the only lawyer allowed by the U.S. government to accompany a prisoner home from the base, a courtesy I cannot explain.”).

It was reported that no charges were filed against Habib so that his torture while detained in Egypt would not become a matter of court review. *See* Raymond Bonner, *Ex-Captive in Guantánamo Makes Run for Office in Australia*, N.Y. Times, Mar. 21, 2007, at A12; *see also* Mori, *supra* note 3174. The Australian government insisted that Habib either be tried or released. *See* Bravin, *supra* note 3145, at 225–38.

Coordination Before Judge Green

During the three weeks following the Supreme Court's *Rasul* decision, eight cases on behalf of thirty-two detainees were filed.³¹⁷⁹ The government moved to consolidate these petitions with the ones already pending before Judge Kotelly, but she ruled that the diversity of factual situations among the cases did not make them suitable for consolidation.³¹⁸⁰

By early September, another three cases had been filed on behalf of another twenty-one detainees.³¹⁸¹ On September 14, the district court's Executive Session decided that Senior Judge Joyce Hens Green³¹⁸² would preside over preliminary coordination and management of all Guantánamo Bay habeas cases both already and subsequently filed, but assigned judges would retain their cases for merits purposes.³¹⁸³

3179. Docket Sheet, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. July 15, 2004) [hereinafter *Anam* Docket Sheet] (fifteen detainees); Docket Sheet, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. July 12, 2004) [hereinafter *Boumediene* Docket Sheet] (six detainees); Docket Sheet, *Gherebi v. Bush*, No. 1:04-cv-1164 (D.D.C. July 12, 2004) [hereinafter D.D.C. *Gherebi* Docket Sheet] (one detainee); Docket Sheet, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, *Benchellali v. Bush*, No. 1:04-cv-1142 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, *Begg v. Bush*, No. 1:04-cv-1137 (D.D.C. July 2, 2004) (two detainees); Docket Sheet, *Khadr v. Bush*, No. 1:04-cv-1136 (July 2, 2004) [hereinafter *Khadr* Docket Sheet] (one detainee); Docket Sheet, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. July 2, 2004) (one detainee); see Margulies, *supra* note 3149, at 158 ("While we were waiting for the Supreme Court in *Rasul*, . . . Clive Stafford Smith had quietly been gathering authorizations to proceed on behalf of several dozen other prisoners at the base, and the Center for Constitutional Rights had recruited a score of prominent law firms to handle these new cases free of charge.").

While argument in the Supreme Court case was pending, an attorney filed a habeas petition on behalf of three of these detainees, Docket Sheet, *Sassi v. Bush*, No. 1:04-cv-547 (D.D.C. Apr. 5, 2004) (habeas petition by next friends of Nizar Sassi, Ridouane Khalid, and Omar Khadr), which the court dismissed on the parties' motion, Order, *id.* (Apr. 15, 2004), D.E. 7.

3180. Opinion, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. July 26, 2004), D.E. 50.

3181. Docket Sheet, *Hamdan v. Rumsfeld*, No. 1:04-cv-1519 (D.D.C. Sept. 2, 2004) [hereinafter *Hamdan* Docket Sheet] (one detainee); Docket Sheet, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. July 27, 2004) (fourteen detainees); Docket Sheet, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 22, 2004) (six detainees).

3182. For this case study, Tim Reagan interviewed Judge Green; Frank Kulbaski, her former law clerk who served as her attorney advisor; and Marcia Davidson, who served as her judicial assistant, at the Federal Judicial Center on September 21, 2011.

3183. *E.g.*, Coordination Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 20, 2004), D.E. 72; see *Gherebi v. Bush*, 338 F. Supp. 2d 91, 94 (D.D.C. 2004); Order, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 5, 2004), D.E. 23 (transfer by Judge Kennedy); Order, *Anam*, No. 1:04-cv-1194 (D.D.C. Oct. 5, 2004), D.E. 26 (same); Order, *Boumediene*, No. 1:04-cv-1166

Judge Green assembled an informal meeting with petitioners' attorneys and representatives of the government, which included military personnel.³¹⁸⁴ At the meeting, Judge Green said that she expected written justifications of detention for each petitioner, which the government asked to think about.³¹⁸⁵ At a second informal meeting three days later, the government agreed to submit returns on a rolling basis.³¹⁸⁶

It proved important to make sure that attorneys understood before whom motions and the like should be filed so that they did not think they could choose strategically between Judge Green and the merits judge.³¹⁸⁷

Ninth Circuit Cases

Two of the eleven new cases were not filed originally in the District of Columbia; they were transferred from the Ninth Circuit.³¹⁸⁸ Before these two

(D.D.C. Sept. 30, 2004), D.E. 23 (transfer by Judge Leon); Order *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 29, 2004), D.E. 37 (transfer by Judge Roberts); Order, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004), D.E. 21 (transfer by Judge Leon); Order, *Khadr*, No. 1:04-cv-1136 (D.D.C. Sept. 21, 2004), D.E. 27 (transfer by Judge Bates); Order, *Begg*, No. 1:04-cv-1137 (D.D.C. Sept. 20, 2004), D.E. 14 (transfer by Judge Collyer); Order, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Sept. 20, 2004), D.E. 12 (transfer by Judge Huvelle); Order, *Almurbati*, No. 1:04-cv-1227 (D.D.C. Sept. 17, 2004), D.E. 14 (transfer by Judge Walton); Order, *Gherebi*, No. 1:04-cv-1164 (D.D.C. Sept. 17, 2004), D.E. 20 (same); Order, *Habib v. Bush*, No. 1:02-cv-1130 (D.D.C. Sept. 17, 2004), D.E. 22 (transfer by Judge Kotelly); Order, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 17, 2004), D.E. 83 (same); Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 17, 2004), D.E. 71 (same); *Hamdan* Docket Sheet, *supra* note 3181 (noting a transfer by Judge Robertson on September 14, 2004); *see also In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47–48 (D.D.C. 2013); *Al Odah v. United States*, 346 F. Supp. 2d 1, 4–5 n.5 (D.D.C. 2004); Daniel Freeman, *One Case, Two Decisions: Khalid v. Bush*, *In re Guantanamo Detainee Cases, and the Neutral Decisionmaker*, 24 Yale L. & Pol'y Rev. 241, 243 (2006); Mahler, *supra* note 3157, at 146–47; Margulies, *supra* note 3149, at 205.

The court commonly referred complex matters of general application to senior judges, who have more control over their dockets and time. Interview with Judge Royce C. Lamberth, May 13, 2011; *see Wax*, *supra* note 3154, at 168.

Tim Reagan interviewed Judge Lamberth for this case study in his chambers.

3184. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

3185. *Id.*

3186. *Id.*

3187. *Id.*

3188. *Hamdan* Docket Sheet, *supra* note 3181; D.D.C. *Gherebi* Docket Sheet, *supra* note 3179; *see* Docket Sheet, *Swift v. Rumsfeld*, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004) (petition on behalf of Salim Ahmed Hamdan); Docket Sheet, *Gheredi v. Bush*, No. 2:03-cv-1267 (C.D. Cal. Feb. 24, 2003) (petition on behalf of Faleh Gherebi, spelling his last name “Gheredi”).

cases were filed in Ninth Circuit districts, and before the parents of Hicks, Rasul, and Iqbal filed a petition in the District of Columbia, concerned citizens filed a habeas petition on behalf of Guantánamo Bay detainees, on January 20, 2002, under the name “Coalition of Clergy, Lawyers, and Professors,” in the Central District of California.³¹⁸⁹ On February 21, Judge A. Howard Matz dismissed the petition, finding that the plaintiffs lacked standing and no federal court would have jurisdiction over the petition anyway.³¹⁹⁰ On November 18, the court of appeals affirmed the standing ruling and vacated the district court’s holding on jurisdiction, reasoning that if the plaintiffs lacked standing then the court lacked jurisdiction over the jurisdiction issue.³¹⁹¹

On February 1, 2003, the brother of detainee Salim Gherebi presented a habeas petition to the Ninth Circuit’s court of appeals;³¹⁹² the court transferred it to the district court for the Central District of California, and the district court assigned the petition to Judge Matz.³¹⁹³ Finding that this petitioner had standing, Judge Matz again ruled, on May 13, that no federal court had jurisdiction over Guantánamo Bay habeas petitions.³¹⁹⁴ On De-

3189. Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 2:02-cv-570 (C.D. Cal. Jan 20, 2002); see *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002); see also *Gherebi v. Bush*, 338 F. Supp. 2d 91, 92 (D.D.C. 2004); Bravin, *supra* note 3145, at 80.

3190. *Coalition of Clergy*, 189 F. Supp. 2d 1036, *aff’d in part and rev’d in part*, 310 F.3d 1153 (9th Cir. 2002); see *Gherebi*, 338 F. Supp. 2d at 92.

Judge Matz retired on April 1, 2013. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

3191. *Coalition of Clergy*, 310 F.3d 1153; see *Gherebi*, 338 F. Supp. 2d at 92.

On August 26, 2003, the coalition attempted to cure standing deficiencies, which Judge Matz observed would be relatively easy to do, *Gherebi v. Bush*, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003), and filed a new complaint, Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 2:02-cv-9516 (C.D. Cal. Dec. 16, 2002). Judge Matz dismissed the new complaint on August 5, 2003. Order, *Coalition of Clergy, Lawyers & Professors*, No. 2:02-cv-9516 (C.D. Cal. Aug. 5, 2003), D.E. 13. An appeal was dismissed on April 7, 2004, for lack of prosecution. Docket Sheet, *Coalition of Clergy, Lawyers & Professors v. Bush*, No. 03-56484 (9th Cir. Aug. 26, 2003).

3192. Docket Sheet, *Gheredi v. Bush*, No. 03-80012 (9th Cir. Feb. 5, 2003); *Gherebi*, 338 F. Supp. 2d at 92.

3193. Order, *Gheredi*, No. 2:03-cv-1267 (C.D. Cal. Mar. 27, 2003), D.E. 17.

3194. *Gherebi*, 262 F. Supp. 2d 1064, *rev’d*, 374 F.3d 727 (9th Cir. 2004); see *Gherebi*, 338 F. Supp. 2d at 92–93; see also Mahler, *supra* note 3157, at 98.

cember 18, the court of appeals disagreed.³¹⁹⁵ On June 30, 2004, the Supreme Court vacated the court of appeals' decision and remanded the case for reconsideration in light of the holding in *Rumsfeld v. Padilla*³¹⁹⁶ that José Padilla's habeas petition filed in the Southern District of New York, where he had been in detention as a material witness, could not be heard in that district because he had been transferred to a naval brig in the District of South Carolina.³¹⁹⁷ On July 8, the court of appeals transferred Gherebi's petition to the district court for the District of Columbia.³¹⁹⁸

The second transferred action was filed by Salim Ahmed Hamdan's military lawyer, who was assigned to represent Hamdan before a military commission.³¹⁹⁹ Hamdan, who was a driver for Osama Bin Laden, was captured in Afghanistan in November 2001 and transferred to Guantánamo Bay in mid-2002.³²⁰⁰ In 2003, he was one of the first six detainees that Pres-

3195. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *modified*, 374 F.3d 727; *see Gherebi*, 338 F. Supp. 2d at 93; *see also* Mahler, *supra* note 3157, at 98; John Mintz, *Hearing Ordered for Terrorism Detainee*, Wash. Post, Dec. 19, 2003, at A19.

3196. 542 U.S. 426, 451 (2004).

3197. *Bush v. Gherebi*, 542 U.S. 952 (2004); *see Gherebi*, 338 F. Supp. 2d at 93; *see also* Chapter 8: Dirty Bomber, *supra* page 156.

3198. *Gherebi*, 374 F.3d at 739; *Gherebi*, 338 F. Supp. 2d at 93–94; *see* Appendix Table 3. 224 Petitioners Transferred After the 2008 Boumediene Decision, *infra* page 632 (noting Gherebi's transfer to Senegal on April 3, 2016, transfers noted by news media n.2).

3199. Petition, *Swift v. Rumsfeld*, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004), D.E. 1 [hereinafter *Swift* Petition]; *see* Neil A. Lewis, *Suit Contests Military Trials of Detainees at Cuba Base*, N.Y. Times, Apr. 8, 2004, at A25.

3200. *Hamdan v. United States*, 696 F.3d 1238, 1240, 1242–43 (D.C. Cir. 2012); *Hamdan v. Rumsfeld*, 565 F. Supp. 2d 130, 131 (D.D.C. 2008); *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 10 (D.D.C. 2006); *see* Neil A. Lewis, *Judge Sets Back Guantánamo Detainees*, N.Y. Times, Dec. 14, 2006, at A32; Mahler, *supra* note 3157, at 10–11; Joseph McMillan, *Hamdan: The Legal Challenge to Military Commissions*, in *Obama's Guantánamo* 154, 154–55, 165 (Jonathan Hafetz ed., 2016); Ali H. Soufan, *The Black Banners* 449 (2011), *reprinted as* *The Black Banners (Declassified)* (2020) (restoring redactions); *see also* Bravin, *supra* note 3145, at 4–6 (reporting, “Bin Laden’s family also came from Hadramout[where Hamdan was born]—his father Mohammed was born there—which perhaps explains the austere ideologue’s affinity toward his barely literate driver.”).

In 2012, the government released a video showing an episode of Hamdan's interrogation, and MSNBC posted the video on the internet. Jim Miklaszewski, *Pentagon Releases Video of US Troops Interrogating Bin Laden's Driver*, MSNBC.com Open Channel, May 4, 2012, www.nbcnews.com/news/world/pentagon-releases-video-us-troops-interrogating-bin-ladens-driver-flna754187.

ident Bush referred to a military commission for trial.³²⁰¹ On April 6, 2004, Lieutenant Commander Charles Swift filed a habeas corpus action on behalf of Hamdan in Swift's home district, the Ninth Circuit's Western District of Washington.³²⁰² On August 9, Judge Robert S. Lasnik transferred the petition, which challenged the validity of the military commission, to the District of Columbia.³²⁰³

Establishing Military Commissions

The District of Columbia district court assigned Hamdan's action to Judge James Robertson.³²⁰⁴ Although Hamdan's petition was included in the court's coordination of preliminary matters before Judge Green, Judge Robertson was able to resolve substantial issues in the case in an opinion issued on November 8, 2004.³²⁰⁵ Judge Robertson granted Hamdan's peti-

3201. *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; see Lewis, *supra* note 3199; Soufan, *supra* note 3200, at 454–58 (describing how Hamdan's referral for prosecution interrupted acquisition of intelligence from him).

3202. *Swift* Petition, *supra* note 3199; see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; see also Bravin, *supra* note 3145, at 213–14; Lewis, *supra* note 3199; Mahler, *supra* note 3157, at 99 (“American service members are considered legal residents of wherever they last lived before joining up. So even though Swift had lived in Puerto Rico, Florida, and now Virginia, his official place of residence hadn't changed since he attended law school in Seattle.”); McMillan, *supra* note 3200, at 155, 159 (reporting that the case was filed in the Ninth Circuit because the court of appeals there had already ruled in *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *modified*, 374 F.3d 727, that federal courts had habeas jurisdiction over Guantánamo Bay detainees).

Swift's instructions from superior officers were to negotiate a deal, not to advocate zealously for his client, as JAG lawyers were bound and trained to do. The Bush administration had deliberately chosen for prosecution detainees who, it believed, would plead guilty and thereby give some legitimacy to the military commission process and the Guantánamo detention system generally.

Hafetz, *supra* note 3174, at 138; see McMillan, *supra*, at 156 (reporting that Hamdan's initial access to a defense attorney was contingent on the attorney's facilitating a plea agreement).

3203. Order, *Swift*, No. 2:04-cv-777 (W.D. Wash. Aug. 9, 2004), D.E. 51; see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; see also Mahler, *supra* note 3157, at 141.

3204. *Hamdan* Docket Sheet, *supra* note 3181; see Mahler, *supra* note 3157, at 146.

Judge Robertson retired on June 1, 2010, and died on September 7, 2019. FJC Biographical Directory, *supra* note 3190; see Sam Roberts, *Judge James Robertson, 81, Who Took a Stand Against Excessive Wiretapping*, N.Y. Times, Sept. 19, 2019, at A23.

3205. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005); see also Mahler, *supra* note 3157, at 148 (reporting

tion in part, holding that the military commission that was to try Hamdan could not do so lawfully, because its procedures allowed for conviction on secret evidence.³²⁰⁶ The ruling reached Cuba that day, which resulted in the indefinite recess of a pretrial proceeding.³²⁰⁷ The court of appeals reversed Judge Robertson's decision, holding that "Congress authorized the military commission that will try Hamdan."³²⁰⁸ The Supreme Court decided *Hamdan v. Rumsfeld* on June 29, 2006, reversing the holding by the court of appeals because the procedures specified for the military commission violated the Uniform Code of Military Justice.³²⁰⁹

On remand, Judge Robertson decided that the Military Commissions Act, signed by President Bush on October 17, deprived Guantánamo Bay detainees of statutory habeas corpus³²¹⁰ and that Hamdan's "connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."³²¹¹ On July 18, 2008, Judge Robertson determined that the Military Commissions Act of 2006 established procedures much improved over those created earlier by executive order, and the provision for appeal to the U.S. Court of Appeals for the District of Columbia Circuit created an opportunity for adequate judi-

that Judge Robertson decided to keep Hamdan's case on a letter request from Hamdan's attorneys).

3206. *Hamdan*, 344 F. Supp. 2d at 166–72, *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); see Hafetz, *supra* note 3174, at 139; Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. Times, Nov. 9, 2004, at A1.

3207. See Bravin, *supra* note 3145, at 219–20; Lewis, *supra* note 3206; Mahler, *supra* note 3157, at 164–65.

3208. *Hamdan*, 415 F.3d 33, *rev'd*, 548 U.S. 557; see Hafetz, *supra* note 3174, at 139; Neil A. Lewis, *Ruling Lets U.S. Restart Trials at Guantánamo*, N.Y. Times, July 16, 2005, at A1; Mahler, *supra* note 3157, at 191–92.

3209. 548 U.S. at 613; see *Hamdan v. United States*, 696 F.3d 1238, 1243 (D.C. Cir. 2012); see also Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees*, N.Y. Times, June 30, 2006, at A1; Hafetz, *supra* note 3174, at 147–48; Mahler, *supra* note 3157, at 283–85; see also McMillan, *supra* note 3200, at 155–63.

It was reported that following the Supreme Court's *Hamdan* decision, Hamdan's military attorney Swift was forced out of the navy. Mahler, *supra* note 3157, at 296–98; see also McMillan, *supra* note 3200, at 164.

3210. *Hamdan*, 464 F. Supp. 2d at 11–12; see Robert Barnes, *Judge Rejects Detention Challenge of Bin Laden's Driver*, Wash. Post, Dec. 14, 2006, at A9; Lewis, *supra* note 3200; Mahler, *supra* note 3157, at 300–01.

3211. *Hamdan*, 464 F. Supp. 2d at 18; see Lewis, *supra* note 3200.

cial review.³²¹² On August 6, a military tribunal convicted Hamdan of providing material support for terrorism but not of terrorism conspiracy.³²¹³ The jury recommended a sentence of five years and six months, and the tribunal judge gave Hamdan credit for time served of five years and one month.³²¹⁴ The government released Hamdan to Yemen on November 25, 2008, to serve the last month of his sentence.³²¹⁵ On January 8, 2009, Yemen released Hamdan to live with his family in Sana'a.³²¹⁶

On June 24, 2011, the Court of Military Commission Review affirmed Hamdan's conviction and sentence.³²¹⁷ The court of appeals for the District of Columbia Circuit, however, held on October 16, 2012, that because material support for terrorism was not at the time of Hamdan's actions (nor

3212. *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008); see MicMillan, *supra* note 3200, at 168; Scott Shane & William Glaberson, *Rulings Clear Military Trial of a Detainee*, N.Y. Times, July 18, 2008, at A1.

3213. *Hamdan*, 696 F.3d at 1240, 1244; Transfer Notice, *Hamdan v. Gates*, No. 1:04-cv-1519 (D.D.C. Jan. 30, 2009), D.E. 110 [hereinafter *Hamdan* Transfer Notice]; Transcript at 3939–42, *United States v. Hamdan* (Mil. Comm'n Aug. 6, 2008, filed Aug. 7, 2008), www.mc.mil/Portals/0/pdfs/Hamdan/Hamdan%20Transcript%20pages%203891-4014.pdf; see Charges, *id.* (May 10, 2007); see also Bravin, *supra* note 3145, at 327–34; William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008, at A1; Jerry Markon, *Hamdan Guilty of Terror Support*, Wash. Post, Aug. 7, 2008, at A1. See generally MicMillan, *supra* note 3200, at 169–74; *The Oath* (Praxis Films 2010).

3214. *Hamdan*, 696 F.3d at 1240–41, 1244; Transcript at 4173–74, *United States v. Hamdan* (Mil. Comm'n Aug. 7, 2008, filed Aug. 7, 2008), www.mc.mil/Portals/0/pdfs/Hamdan/Hamdan%20Transcript%20pages%204113-4182.pdf; see Bravin, *supra* note 3145, at 334–43 (noting that Hamdan received credit for detention following the filing of charges, but not for his previous indefinite detention as an enemy combatant); William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. Times, Aug. 8, 2008, at A1 (reporting on a credit of sixty-one months since Hamdan had been charged out of more than six years in all); Greenberg, *supra* note 3174, at 220 (“there was such scant evidence that his sentence was only five and a half years”); MicMillan, *supra* note 3200, at 174–75 (reporting that the jury was informed of the time-served credit before it returned its sentence verdict); see also Jerry Markon & Josh White, *Bin Laden Driver Gets 5½ Years*; *U.S. Sought 30*, Wash. Post, Aug. 8, 2008, at A1; Soufan, *supra* note 3200, at 457.

3215. *Hamdan* Transfer Notice, *supra* note 3213; *Hamdan*, 696 F.3d at 1241, 1244; see MicMillan, *supra* note 3200, at 175–76; Joe MicMillan, *The United States on Trial*, in *The Guantánamo Lawyers*, *supra* note 3154, at 178, 183; Carol Rosenberg, *Bin Laden's Driver Will Finish Jail Time in Yemen*, Miami Herald, Nov. 26, 2008, at 5A.

3216. *Hamdan*, 696 F.3d at 1241, 1244; see MicMillan, *supra* note 3200, at 176; MicMillan, *The United States on Trial*, *supra* note 3215, at 183; Soufan, *supra* note 3200, at 457; *Yemen Releases Former Bin Laden Driver from Jail*, N.Y. Times, Jan. 12, 2009, at A9.

3217. *United States v. Hamdan*, 801 F. Supp. 2d 1247 (Ct. Mil. Comm'n Rev. 2011); *Hamdan*, 696 F.3d at 1244; see MicMillan, *supra* note 3200, at 182–83.

had it since become) a war crime according to the international law of war, Hamdan's conviction had to be reversed.³²¹⁸

Decisions by Judges Leon and Green

On November 15, 2004, Judge Richard J. Leon took back assignment for all purposes the two cases originally assigned to him.³²¹⁹ The court made sure that attorneys were promptly notified of the reassignment.³²²⁰ By this time, two of the nine detainees in those two cases were no longer at Guantánamo Bay.³²²¹ On January 19, 2005, Judge Leon dismissed the petitions, holding that there was nothing unlawful about "the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict."³²²²

3218. *Hamdan*, 696 F.3d at 1241, 1248–53; see *id.* at 1241, 1246–48 (concluding, to avoid a possible conflict with the Constitution's Ex Post Facto Clause, that the Military Commissions Act of 2006 does not "authorize *retroactive* prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred"); see also Bravin, *supra* note 3145, at 377–80; Karen J. Greenberg, Rogue Justice 248–49 (2016); Charlie Savage, *In Setback for Military Tribunals, Bin Laden Driver's Conviction Is Reversed*, N.Y. Times, Oct. 17, 2012, at A20; Del Quentin Wilber & Ernesto Londoño, *Court Overturns Conviction of Bin Laden's Driver*, Wash. Post, Oct. 17, 2012, at A2; Lindsay Wise & Carol Rosenberg, *Bin Laden Driver's Conviction Tossed*, Miami Herald, Oct. 17, 2012, at 1A. See generally McMillan, *supra* note 3200, at 176–85.

"[State Department lawyer Harold] Koh expressed fury that uniformed military prosecutors were filing a brief arguing that material support *was* a traditional war crime that *could* legitimately be brought before a commission, something the administration had just told Congress it did not believe was true." Charlie Savage, *Power Wars* 497 (2015).

On July 14, 2014, the court of appeals overruled en banc the legal reasoning in Hamdan's case without disturbing the reversal of Hamdan's conviction or the legal conclusion that material support is not triable by a Guantánamo Bay military commission. *Al-Bahlul v. United States*, 767 F.3d 1, 11–17 (D.C. Cir. 2014); *id.* at 63 n.1 (Judge Brett M. Kavanaugh, concurring and dissenting).

3219. Order, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Nov. 15, 2004), D.E. 61; Order, *Benchellali v. Bush*, No. 1:04-cv-1142 (D.D.C. Nov. 15, 2004), D.E. 56; see *O.K. v. Bush*, 377 F. Supp. 2d 102, 104 (D.D.C. 2005) ("Judge Richard Leon elected to retain the motions to dismiss in his two cases."); see also Freeman, *supra* note 3183, at 243; Joe Palazzolo, *Judges Vow to Move Fast on Gitmo Cases*, Legal Times, July 14, 2008, at 6; Wax, *supra* note 3154, at 169.

3220. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

3221. *Khalid v. Bush*, 355 F. Supp. 2d 311, 316 n.3 (D.D.C. 2005); Consent Motion, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 21, 2004), D.E. 19 (noting the transfers of Nizar Sassi and Mourad Benchellali); see Wax, *supra* note 3154, at 169.

3222. *Khalid*, 355 F. Supp. 2d at 314; see *Boumediene v. Bush*, 553 U.S. 723, 734–35 (2008); see also Freeman, *supra* note 3183, at 241; Hafetz, *supra* note 3174, at 135.

Eleven cases remained before Judge Green, who held on January 31 that the habeas petitions stated valid due-process claims.³²²³ Nine days after the Supreme Court's *Rasul* decision, the Defense Department created a Combatant Status Review Tribunal (CSRT) to establish whether each detainee was an enemy combatant.³²²⁴ The government used the results of CSRT proceedings as habeas returns.³²²⁵ Judge Green held that CSRT procedures did not meet constitutional standards for due process.³²²⁶ In addition, some petitioners stated valid claims under the Geneva Conventions.³²²⁷ While Judge Green's decision was pending, the court received an additional eight cases on behalf of eleven additional detainees.³²²⁸

3223. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005); see Freeman, *supra* note 3183, at 241; Hafetz, *supra* note 3174, at 136–37; Wax, *supra* note 3154, at 169–70.

3224. *Boumediene*, 553 U.S. at 733; *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009); *Bismullah v. Gates*, 501 F.3d 178, 181 (D.C. Cir. 2007); *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450; see Margulies, *supra* note 3149, at 159 (“Each tribunal would consist of three commissioned officers who would base their decision on information presented by the military and the prisoner.”); Meltzer, *supra* note 3168, at 6; Simard, *supra* note 3168, at 378; Thomas P. Sullivan, “Due Process” at *Guantánamo*, in *The Guantánamo Lawyers*, *supra* note 3154, at 148. See generally Greenberg, *supra* note 3174, at 154–59; *Taxi to the Dark Side* (Discovery Channel 2007).

CSRT records were posted at www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/index.html, archived at web.archive.org/web/20150125164021/http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/csrt_arb/index.html, and previously posted at www.defense.gov/news/Combatant_Tribunals.html, archived at web.archive.org/web/20141013061622/www.defense.gov/news/Combatant_Tribunals.html.

3225. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

3226. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481; see *Boumediene*, 553 U.S. at 734–35; see also Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. City L. Rev. 393, 402 (2007); Hafetz, *supra* note 3174, at 136–37.

3227. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481.

3228. Docket Sheet, *Abdullah v. Bush*, No. 1:05-cv-23 (D.D.C. Jan. 7, 2005) [hereinafter *Abdullah* Docket Sheet] (two detainees); Docket Sheet, *Ben Mustapha v. Bush*, No. 1:05-cv-22 (D.D.C. Jan. 7, 2005) (one detainee); Docket Sheet, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004) (three detainees); Docket Sheet, *Zemiri v. Bush*, No. 1:04-cv-2046 (D.D.C. Nov. 19, 2004) (one detainee); Docket Sheet, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, *Paracha v. Bush*, No. 1:04-cv-2022 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, *Al-Qosi v. Bush*, No. 1:04-cv-1937 (D.D.C. Nov. 8, 2004) (one detainee); Docket Sheet, *Belmar v. Bush*, No. 1:04-cv-1897 (D.D.C. Nov. 1, 2004) [hereinafter *Belmar* Docket Sheet] (one detainee); see *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 452 & n.15; see also Charles H. Carpenter, *Playing Politics*, in *The Guantánamo Lawyers*, *supra* note 3154, at 301, 301 (reporting on the filing of the petition in No. 1:05-cv-23).

Ill-Fated Transfer Injunctions

On Tuesday, March 1, 2005, attorneys for several Yemeni detainees sought from Judge Henry H. Kennedy, Jr., to whom their case had been assigned, an order requiring the government to give the attorneys thirty days' notice before transferring their clients from Guantánamo Bay, in light of concerns that the government would deprive the court of jurisdiction over the detainees by transferring them to prisons in other countries.³²²⁹ On Friday of the following week, the *New York Times* reported on "a plan to cut by more than half the population at [the] detention facility in Guantánamo Bay, Cuba, in part by transferring hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen."³²³⁰ At 10:30 p.m. that night, the Yemenis' attorneys submitted to the court an emergency motion for a temporary restraining order preventing transfer until Judge Kennedy could rule on the injunction motion.³²³¹

3229. Motion, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. Mar. 3, 2005), D.E. 115; see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 665–66 (2006) ("Since the spring of 2005, the docket of the district court in the District of Columbia has been flooded with motions by GTMO detainees seeking preliminary relief associated with the possibility of a transfer."); Falkoff, *supra* note 3226, at 395–96 ("The prospect of an unnoticed, dead-of-night transfer for indefinite detention in another country, coupled with the very real prospect that our clients might just as easily be rendered to another country to be tortured, led us to file [the motion].") (footnote omitted)); see also Chesney, *supra*, at 658 (noting that the purpose of the notice motions was to preserve an opportunity to challenge transfers that would result in a risk of torture); Allison M. Lefrak, *You're Going Home*, in *The Guantánamo Lawyers*, *supra* note 3154, at 341, 342 ("When a detainee is released, if [a thirty-day notice] order has been entered in his case, the government must give thirty days' notice of the release, in order to allow attorneys to object if the detainee is being sent to a country where he is likely to be tortured or persecuted.").

The petition was filed on behalf of fourteen detainees, but the government could not locate Aref Abd il-Rheem. Preliminary Injunction, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 29, 2005), D.E. 146 [hereinafter *Abdah* Preliminary Injunction], 2005 WL 711814; Status Report, *id.* (Oct. 22, 2004).

Judge Kennedy assumed senior status because of certified disability on November 11, 2011. FJC Biographical Directory, *supra* note 3190.

3230. Douglas Jehl, Neil A. Lewis & Tim Golden, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. Times, Mar. 11, 2005, at A1; see *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion at 1–2, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 12, 2005), D.E. 118 [hereinafter *Abdah* Temporary Restraining Order], 2005 WL 589812.

3231. *Abdah* Temporary Restraining Order, *supra* note 3230, at 1 n.1.

Judge Rosemary M. Collyer was on duty as the emergency motion judge that weekend.³²³² On Saturday, Judge Collyer granted the temporary restraining order.³²³³ On Sunday, several attorneys sought temporary restraining orders on behalf of their clients, but Judge Collyer declined to issue such orders en masse.³²³⁴ On Monday, attorneys began to file thirty-day-notice motions in other cases.³²³⁵

Judge Kennedy granted the Yemenis' motion³²³⁶ and issued similar orders in other cases.³²³⁷ Judges Ricardo M. Urbina,³²³⁸ Paul L. Friedman,³²³⁹

3232. *Id.*

Tim Reagan interviewed Judge Collyer for this case study in her chambers on September 20, 2011.

3233. *Abdah* Temporary Restraining Order, *supra* note 3230.

3234. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

3235. *O.K. v. Bush*, 377 F. Supp. 2d 102, 105 (D.D.C. 2005); Motion, *Abdullah v. Bush*, No. 1:05-cv-23 (D.D.C. Mar. 14, 2005), D.E. 15.

3236. *Abdah* Preliminary Injunction, *supra* note 3229; see Marc D. Falkoff, *Without Law or Justice, in The Guantánamo Lawyers*, *supra* note 3154, at 155, 164 (“[W]e proved to the judge’s satisfaction that we had legitimate and well-founded fears that the United States might render our clients to other countries to be tortured. Our notice order would provide [the detainee] protection and enough time for us to get to the court in case the government tried anything like that.”).

3237. Order, *Al-Shubati v. Bush*, No. 1:07-cv-2338 (D.D.C. Jan. 11, 2008), D.E. 9; Order, *Al-Yazidi v. Bush*, No. 1:07-cv-2337 (D.D.C. Jan. 11, 2008), D.E. 9; Order, *Hentif v. Bush*, No. 1:06-cv-1766 (D.D.C. July 28, 2007), D.E. 29; Order, *Saleh v. Bush*, No. 1:06-cv-1765 (D.D.C. July 28, 2007), D.E. 32; Order, *Al-Harbi v. Bush*, No. 1:05-cv-2479 (D.D.C. Aug. 18, 2006), D.E. 30; Order, *Al-Asadi v. Bush*, No. 1:05-cv-2197 (D.D.C. Nov. 29, 2005), D.E. 5; Order, *Zakirjan v. Bush*, No. 1:05-cv-2053 (D.D.C. Nov. 21, 2005), D.E. 18; Order, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. May 9, 2005), D.E. 119; Order, *Al-Mohammed v. Bush*, No. 1:05-cv-247 (D.D.C. Mar. 30, 2005), D.E. 17.

3238. Order, *Al-Zarnouqi v. Bush*, No. 1:06-cv-1767 (D.D.C. Dec. 4, 2006), D.E. 15; Order, *Rabbani v. Bush*, No. 1:05-cv-1607 (D.D.C. June 16, 2006), D.E. 19; Order, *Alkhemisi v. Bush*, No. 1:05-cv-1983 (D.D.C. Nov. 21, 2005), D.E. 5; Order, *Al-Subaiy v. Bush*, No. 1:05-cv-1453 (D.D.C. Sept. 19, 2005), D.E. 14; Order, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. Sept. 13, 2005), D.E. 8; Order, *Sohail v. Bush*, No. 1:05-cv-993 (D.D.C. Sept. 13, 2005), D.E. 3; Order, *Faizullah v. Bush*, No. 1:05-cv-1489 (D.D.C. Aug. 22, 2005), D.E. 3; Order, *Hatim v. Bush*, No. 1:05-cv-1429 (D.D.C. Aug. 22, 2005), D.E. 16; Order, *El-Marqodi v. Bush*, No. 1:05-cv-1649 (D.D.C. Aug. 19, 2005), D.E. 5; Order, *Al-Karim v. Bush*, No. 1:05-cv-998 (D.D.C. Aug. 8, 2005), D.E. 3; Order, *Zalita v. Bush*, No. 1:05-cv-1220 (D.D.C. July 25, 2005), D.E. 3; Order, *Al-Hela v. Bush*, No. 1:05-cv-1048 (D.D.C. June 3, 2005), D.E. 12; Order, *Tumani v. Bush*, No. 1:05-cv-526 (D.D.C. Apr. 6, 2005), D.E. 5; Order, *Qayed v. Bush*, No. 1:05-cv-454 (D.D.C. Apr. 6, 2005), D.E. 4; Order, *Al-Oshan v. Bush*, No. 1:05-cv-520 (D.D.C. Mar. 31, 2005), D.E. 12.

Gladys Kessler,³²⁴⁰ Richard W. Roberts,³²⁴¹ Kotelly,³²⁴² Emmet G. Sullivan,³²⁴³ and Thomas F. Hogan³²⁴⁴ also issued similar orders. Judge Ellen

Tim Reagan interviewed Judge Urbina for this case study in his chambers on August 15, 2011. Judge Urbina retired on May 31, 2012. FJC Biographical Directory, *supra* note 3190.

3239. *Paracha v. Bush*, 374 F. Supp. 2d 118 (D.D.C. 2005); *Mokit v. Bush*, 374 F. Supp. 2d 106 (D.D.C. 2005); Minute Order, *Al-Salami v. Bush*, No. 1:05-cv-2452 (D.D.C. May 31, 2006); Order, *Akhtiar v. Bush*, No. 1:05-cv-1635 (D.D.C. Sept. 26, 2005), D.E. 10 [hereinafter Sept. 26, 2005, *Akhtiar* Order]; Order, *Almerfed v. Bush*, No. 1:05-cv-1645 (D.D.C. Sept. 23, 2005), D.E. 9; Order, *Al-Shihry v. Bush*, No. 1:05-cv-490 (D.D.C. Apr. 1, 2005), D.E. 17, 2005 WL 1384680; Order, *Al-Wazan v. Bush*, No. 1:05-cv-329 (D.D.C. Apr. 1, 2005), D.E. 19.

For this case study, Tim Reagan interviewed Judge Friedman and his law clerk Albinas Prizgintas in the judge's chambers on October 12, 2011.

3240. Order, *Mohammad v. Bush*, No. 1:05-cv-885 (D.D.C. July 31, 2006), D.E. 29; Order, *Rahman v. Bush*, No. 1:05-cv-882 (D.D.C. July 31, 2006), D.E. 27; Order, *Al-Aweda v. Bush*, No. 1:05-cv-1668 (D.D.C. Dec. 28, 2005), D.E. 22; Order, *Alhami v. Bush*, No. 1:05-cv-359 (D.D.C. June 9, 2005), D.E. 19; Order, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Apr. 28, 2005), D.E. 34; Opinion, *Al-Joudi v. Bush*, No. 1:05-cv-301 (D.D.C. Apr. 4, 2005), D.E. 20, 2005 WL 774847; Opinion, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. Apr. 4, 2005), D.E. 34, 2005 WL 774843.

Tim Reagan interviewed Judge Kessler for this case study in her chambers on May 31, 2011.

3241. Order, *Al-Shareef v. Bush*, No. 1:05-cv-2458 (D.D.C. Dec. 8, 2006), D.E. 28, 2006 WL 3544736; Order, *Feghoul v. Bush*, No. 1:06-cv-618 (D.D.C. Oct. 31, 2006), D.E. 24, 2006 WL 3096856; Order, *Alsaai v. Bush*, No. 1:05-cv-2369 (D.D.C. Aug. 14, 2006), D.E. 22, 2006 WL 2367270; Order, *Said v. Bush*, No. 1:05-cv-2384 (D.D.C. July 25, 2006), D.E. 41; Order, *Zadran v. Bush*, No. 1:05-cv-2367 (D.D.C. July 19, 2006), D.E. 36; Order, *Hamoud v. Bush*, No. 1:05-cv-1894 (D.D.C. July 5, 2006), D.E. 23, 2006 WL 1876947; Opinion, *Al-Rubaish v. Bush*, No. 1:05-cv-1714 (D.D.C. Dec. 14, 2005), D.E. 16; Order, *Mohammadi v. Bush*, No. 1:05-cv-1246 (D.D.C. Sept. 22, 2005), D.E. 7; Order, *Abdulzاهر v. Bush*, No. 1:05-cv-1236 (D.D.C. Sept. 22, 2005), D.E. 12; Order, *Ahmed v. Bush*, No. 1:05-cv-665 (D.D.C. July 8, 2005), D.E. 16, 2005 WL 1606912; Order, *Chaman v. Bush*, No. 1:05-cv-887 (D.D.C. June 16, 2005), D.E. 7; Order, *Slahi v. Bush*, No. 1:05-cv-881 (D.D.C. June 16, 2005), D.E. 5; Order, *Adem v. Bush*, No. 1:05-cv-723 (D.D.C. June 6, 2005), D.E. 13; Order, *Al-Daini v. Bush*, No. 1:05-cv-634 (D.D.C. June 6, 2005), D.E. 10; Order, *Al-Shamri v. Bush*, No. 1:05-cv-551 (D.D.C. May 11, 2005), D.E. 10; Order, *Al-Rashaidan v. Bush*, No. 1:05-cv-586 (D.D.C. Apr. 8, 2005), D.E. 10; Order, *Abdullah v. Bush*, No. 1:05-cv-23 (D.D.C. Apr. 8, 2005), D.E. 24; Order, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Apr. 8, 2005), D.E. 141; *see* Marjorie M. Smith, *The Other Man*, in *The Guantánamo Lawyers*, *supra* note 3154, at 147.

Judge Roberts assumed senior status because of certified disability on March 16, 2016. FJC Biographical Directory, *supra* note 3190.

3242. Order, *Abu Ghanem v. Bush*, No. 1:05-cv-1638 (D.D.C. July 10, 2007), D.E. 53; Order, *Rahmattullah v. Bush*, No. 1:05-cv-878 (D.D.C. Jan. 23, 2007), D.E. 24; Order,

Segal Huvelle ordered thirty-days' notice, unless the detainee was to be released to freedom.³²⁴⁵ Judge Robertson granted the government's motions to stay proceedings pending resolution of jurisdictional questions in higher courts and interpreted the stay to prohibit transfer of the detainees without notice.³²⁴⁶ Judges Reggie B. Walton,³²⁴⁷ John D. Bates,³²⁴⁸ Leon,³²⁴⁹ and Collyer³²⁵⁰ declined to order thirty-days' notice of detainee transfer.

Alsawam v. Bush, No. 1:05-cv-1244 (D.D.C. Oct. 4, 2006), D.E. 21; Order, Al-Baidany v. Bush, No. 1:05-cv-2380 (D.D.C. Oct. 4, 2006), D.E. 27; Order, Ghalib v. Bush, No. 1:05-cv-1238 (D.D.C. May 1, 2006), D.E. 22; Order, Shaaban v. Bush, No. 1:05-cv-892 (D.D.C. May 1, 2006), D.E. 33; Order, Gul v. Bush, No. 1:05-cv-888 (D.D.C. May 1, 2006), D.E. 26; Order, Al-Mithali v. Bush, No. 1:05-cv-2186 (D.D.C. Dec. 20, 2005), D.E. 22; Order, Al-Harbi v. Bush, No. 1:05-cv-1857 (D.D.C. Nov. 17, 2005), D.E. 12; Order, Sameur v. Bush, No. 1:05-cv-1806 (D.D.C. Nov. 17, 2005), D.E. 8; Order, Al-Badah v. Bush, No. 1:05-cv-1641 (D.D.C. Nov. 17, 2005), D.E. 17.

3243. Order, Zuhair v. Bush, No. 1:08-cv-864 (D.D.C. July 31, 2008), D.E. 27; Order, Al-Shibh v. Bush, No. 1:06-cv-1725 (D.D.C. July 31, 2008), D.E. 33; Order, Al-Habashi v. Bush, No. 1:05-cv-745 (D.D.C. July 31, 2008), D.E. 56; Order, Al-Sharbi v. Bush, No. 1:05-cv-2348 (D.D.C. July 31, 2008), D.E. 45; Order, Batarfi v. Bush, No. 1:05-cv-409 (D.D.C. July 31, 2008), D.E. 92; Order, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Aug. 17, 2006), D.E. 36; Order, Ahmed v. Bush, No. 1:05-cv-1234 (D.D.C. Aug. 17, 2006), D.E. 23; Order, Wahab v. Bush, No. 1:05-cv-886 (D.D.C. Aug. 17, 2006), D.E. 26.

3244. Order, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 10, 2008), D.E. 52.

Tim Reagan interviewed Judge Hogan for this case study in his chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the U.S. Courts from October 2011 through June 2013. FJC Biographical Directory, *supra* note 3190; *New Administrative Office Director Named*, Third Branch, June 11, 2013, news.uscourts.gov/new-administrative-office-director-named (announcing the appointment of Judge John D. Bates as Judge Hogan's successor); *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary.

3245. Order, Basardh v. Bush, No. 1:05-cv-889 (D.D.C. Sept. 25, 2006), D.E. 25; Order, Al-Khatemi v. Bush, No. 1:05-cv-2248 (D.D.C. Dec. 20, 2005), D.E. 7; Order, Al-Bahooth v. Bush, No. 1:05-cv-1666 (D.D.C. Dec. 20, 2005), D.E. 20; Order, Kahn v. Bush, No. 1:05-cv-1001 (D.D.C. Dec. 20, 2005), D.E. 12; Order, Mamet v. Bush, No. 1:05-cv-1602 (D.D.C. Sept. 30, 2005), D.E. 9; Order, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. Apr. 12, 2005), D.E. 96, 2005 WL 839542 (also applying to Ameziane v. Bush, No. 1:05-cv-392).

Tim Reagan interviewed Judge Huvelle for this case study in her chambers on June 13, 2011.

3246. Order, Awad v. Bush, No. 1:05-cv-2379 (D.D.C. Jan. 11, 2006), D.E. 9 ("the stay will apply to all proceedings applicable to the petitioners, including without limitation their release, repatriation, or rendition, and it will remain in effect until further order of the Court"); Order, Khan v. Bush, No. 1:05-cv-1491 (D.D.C. Dec. 6, 2005), D.E. 8; Order,

Pursuant to the notice orders in some cases, the government filed sealed stipulated notices that petitioners' attorneys consented to their clients' impending transfers without thirty days' notice, and the notices were unsealed after the detainees were transferred.³²⁵¹ In other cases, the public record included notices of sealed submissions in advance of detainee

Khiali-Gul v. Bush, No. 1:05-cv-877 (D.D.C. Dec. 6, 2005), D.E. 9; Order, Al-Mudafari v. Bush, No. 1:05-cv-2185 (D.D.C. Dec. 2, 2005), D.E. 16; Order, Idris v. Bush, No. 1:05-cv-1555 (D.D.C. Dec. 2, 2005), D.E. 27; Order, Khalifh v. Bush, No. 1:05-cv-1189 (D.D.C. Oct. 24, 2005), D.E. 9; Order, Aziz v. Bush, No. 1:05-cv-492 (D.D.C. Apr. 20, 2005), D.E. 16; Order, Salahi v. Bush, No. 1:05-cv-569 (D.D.C. Apr. 15, 2005), D.E. 8; Order, Qassim v. Bush, No. 1:05-cv-497 (D.D.C. Apr. 13, 2005), D.E. 14; Order, El-Mashad v. Bush, No. 1:05-cv-270 (D.D.C. Apr. 7, 2005), D.E. 29; *see* Qassim v. Bush, 382 F. Supp. 2d 126, 127 (D.D.C. 2005); *see also* Order, Alladeen v. Bush, No. 1:05-cv-833 (D.D.C. Oct. 27, 2005), D.E. 18 (temporary restraining order against removal from Guantánamo Bay).

In one of the cases before Judge Robertson, the petitioners filed a motion for an injunction against rendition on February 4, 2005, a month ahead of the motion presented to Judge Kennedy. Motion, *El-Mashad*, No. 1:05-cv-270 (D.D.C. Feb. 4, 2005), D.E. 3.

3247. *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005).

Tim Reagan interviewed Judge Walton for this case study in his chambers on May 23, 2011.

3248. *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005); *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion, *Al-Shabany v. Bush*, No. 1:05-cv-2029 (D.D.C. Nov. 17, 2005), D.E. 12, 2005 WL 3211407; Opinion, *Zaid v. Bush*, No. 1:05-cv-1646 (D.D.C. Oct. 25, 2005), D.E. 12.

Tim Reagan interviewed Judge Bates for this case study in his chambers on October 15, 2009. Judge Bates served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015. FJC Biographical Directory, *supra* note 3190; *James C. Duff to Return as AO Director in January 2015*, Third Branch, Nov. 4, 2014, news.uscourts.gov/james-c-duff-return-ao-director-january-2015; *New Administrative Office Director Named*, *supra* note 3248.

3249. *Mammar v. Bush*, 407 F. Supp. 2d 77 (D.D.C. 2005); Minute Order, *Al-Ginco v. Bush*, No. 1:05-cv-1310 (D.D.C. May 30, 2006).

3250. Order, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. June 14, 2005), D.E. 18 (ordering, however, thirty-days' notice before transferring one detainee to Libya, where the detainee's father was allegedly assassinated by the Libyan government).

3251. Stipulation and Order, *Al-Habashi v. Bush*, No. 1:05-cv-765 (D.D.C. Jan. 27, 2009), D.E. 127, *filed as ex. 1*, Notice, *id.* (Mar. 5, 2009), D.E. 136; Stipulation and Order, *Al-Joudi v. Bush*, No. 1:05-cv-301 (D.D.C. Feb. 20, 2007), D.E. 89; Stipulation and Order, *Mohammad v. Bush*, No. 1:05-cv-885 (D.D.C. Dec. 14, 2006), D.E. 38; Stipulation and Order, *Al-Badah v. Bush*, No. 1:05-cv-1641 (D.D.C. Dec. 4, 2006), D.E. 44; Stipulation and Order, *Alladeen*, No. 1:05-cv-833 (D.D.C. Nov. 15, 2006), D.E. 32; Stipulation and Order, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 14, 2006), D.E. 52.

transfers,³²⁵² but the submissions remained sealed despite government notices that they could be unsealed.³²⁵³ In a few additional cases, transfer no-

3252. Filing Notice, Ahmed v. Bush, No. 1:05-cv-1234 (D.D.C. Oct. 9, 2008), D.E. 77 (notice thirty-two days before transfer); Filing Notice, Al-Karim v. Bush, No. 1:05-cv-998 (D.D.C. Aug. 29, 2008), D.E. 55 (141 days); Filing Notice, Wahab v. Bush, No. 1:05-cv-886 (D.D.C. Aug. 21, 2008), D.E. 62 (eighteen days); Filing Notice, Al-Qadir v. Bush, No. 1:08-cv-1185 (D.D.C. July 23, 2008), D.E. 7 (thirty-three days); Filing Notice, Feghoul v. Bush, No. 1:06-cv-618 (D.D.C. July 23, 2008), D.E. 59 (thirty-three days); Filing Notice, Al-Harbi v. Bush, No. 1:05-cv-2479 (D.D.C. July 23, 2008), D.E. 101 (100 days); Filing Notice, Al-Marri v. Bush, No. 1:04-cv-2035 (D.D.C. June 6, 2008), D.E. 84 (fifty days); Filing Notice, Rahmattullah v. Bush, No. 1:05-cv-878 (D.D.C. Apr. 8, 2008), D.E. 36 (twenty-seven days); Filing Notice, Kahn v. Bush, No. 1:05-cv-1001 (D.D.C. Apr. 3, 2008), D.E. 33 (twenty-seven days); Filing Notice, Al-Bahooth v. Bush, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007), D.E. 49 (seven days); Filing Notice, Al-Oshan v. Bush, No. 1:05-cv-520 (D.D.C. Dec. 21, 2007), D.E. 110 (ten days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Dec. 21, 2007), D.E. 108 (seven days); Filing Notice, Sameur v. Bush, No. 1:05-cv-1806 (D.D.C. Dec. 12, 2007), D.E. 51 (seven days); Filing Notice, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Dec. 12, 2007), D.E. 204 (seven days); Filing Notice, Zadrán v. Bush, No. 1:05-cv-2367 (D.D.C. Dec. 5, 2007), D.E. 81 (seven days); Filing Notice, Cham-an v. Bush, No. 1:05-cv-887 (D.D.C. Dec. 5, 2007), D.E. 78 (seven days); Filing Notice, Adem v. Bush, No. 1:05-cv-723 (D.D.C. Nov. 23, 2007), D.E. 66 (twenty-one days); Filing Notice, Rahman v. Bush, No. 1:05-cv-882 (D.D.C. Oct. 26, 2007), D.E. 37 (seven days); Filing Notice, Al-Shareef v. Bush, No. 1:05-cv-2458 (D.D.C. Oct. 19, 2007), D.E. 46 (twenty-one days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Aug. 28, 2007), D.E. 95 (eight days); Filing Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 11, 2007), D.E. 73 (four days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 11, 2007), D.E. 89 (four days); Filing Notice, Hamoud v. Bush, No. 1:05-cv-1894 (D.D.C. June 5, 2007), D.E. 35 (thirteen days); Filing Notice, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. June 5, 2007), D.E. 208 (thirteen days); Filing Notice, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Mar. 27, 2007), D.E. 190 (three days); Filing Notice, Gul v. Bush, No. 1:05-cv-888 (D.D.C. Feb. 16, 2007), D.E. 63 (twelve days); Filing Notice, Mokit v. Bush, No. 1:05-cv-621 (D.D.C. Jan. 29, 2007), D.E. 27 (thirty days); Filing Notice, Al-Subaiy v. Bush, No. 1:05-cv-1453 (D.D.C. Jan. 19, 2007), D.E. 47 (thirty-two days); Filing Notice, Anam v. Bush, No. 1:04-cv-1194 (D.D.C. Dec. 8, 2006), D.E. 167 (seven days); Filing Notice, Ghalib v. Bush, No. 1:05-cv-1238 (D.D.C. Dec. 5, 2006), D.E. 35 (eighty-five days); Filing Notice, Said v. Bush, No. 1:05-cv-2384 (D.D.C. Nov. 27, 2006), D.E. 59 (sixteen days); Filing Notice, Alsaaei v. Bush, No. 1:05-cv-2369 (D.D.C. Nov. 27, 2006), D.E. 30 (fourteen days); Filing Notice, Al-Rubaish v. Bush, No. 1:05-cv-1714 (D.D.C. Nov. 27, 2006), D.E. 33 (sixteen days); Filing Notice, Akhtiar v. Bush, No. 1:05-cv-1635 (D.D.C. Nov. 15, 2006), D.E. 25 (thirty days); Filing Notice, Zakirjan v. Bush, No. 1:05-cv-2053 (D.D.C. Nov. 7, 2006), D.E. 73 (ten days); Filing Notice, Khan v. Bush, No. 1:05-cv-1491 (D.D.C. Oct. 2, 2006), D.E. 19 (nine days); Filing Notice, Faizullah v. Bush, No. 1:05-cv-1489 (D.D.C. Sept. 14, 2006), D.E. 27 (twenty-seven days); Filing Notice, Mohammadi v. Bush, No. 1:05-cv-1246 (D.D.C. Aug. 31, 2006), D.E. 22 (forty-one days); Filing Notice, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. Aug. 17, 2006), D.E. 110 (seven days); Filing Notice, Kiyemba v. Bush,

No. 1:05-cv-1509 (D.D.C. June 15, 2006), D.E. 55 (nine days); Filing Notice, *Al-Aweda v. Bush*, No. 1:05-cv-1668 (D.D.C. Apr. 26, 2006), D.E. 34 (twenty-two days); Filing Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. Apr. 26, 2006), D.E. 22 (fifty-nine days); Filing Notice, *Al-Rashaidan v. Bush*, No. 1:05-cv-586 (D.D.C. Apr. 26, 2006), D.E. 22 (twenty-two days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Apr. 26, 2006), D.E. 63 (fifty-nine days); Filing Notice, *Al-Shihry v. Bush*, No. 1:05-cv-490 (D.D.C. Apr. 26, 2006), D.E. 24 (fifty-nine days); Filing Notice, *Qayed v. Bush*, No. 1:05-cv-454 (D.D.C. Apr. 26, 2006), D.E. 11 (fifty-nine days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Apr. 26, 2006), D.E. 63 (fifty-nine days); Filing Notice, *Al-Khatemi v. Bush*, No. 1:05-cv-2248 (D.D.C. Apr. 26, 2006), D.E. 20 (fifty-nine days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. June 17, 2005), D.E. 28 (thirty-two days).

3253. Transfer Notice, *Al-Karim*, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009), D.E. 100; Transfer Notice, *Ahmed*, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008), D.E. 84; Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008), D.E. 131; Transfer Notice, *Wahab*, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008), D.E. 67; Transfer Notice, *Al-Qadir*, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008), D.E. 23; Transfer Notice, *Feghouli*, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008), D.E. 69; Transfer Notice, *Al-Marri*, No. 1:04-cv-2035 (D.D.C. July 29, 2008), D.E. 102; Transfer Notice, *Kahn*, No. 1:05-cv-1001 (D.D.C. May 5, 2008), D.E. 36; Transfer Notice, *Rahmattullah*, No. 1:05-cv-878 (D.D.C. May 5, 2008), D.E. 38; Transfer Notice, *Sameur*, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007), D.E. 53; Transfer Notice, *Al-Bahooth*, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007), D.E. 49; Transfer Notices, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. June 27, 2006, and Dec. 31, 2007), D.E. 67, 108; Transfer Notices, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007), D.E. 47, 113; Transfer Notices, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007), D.E. 192, 206; Transfer Notice, *Zadran*, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007), D.E. 84; Transfer Notice, *Chaman*, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007), D.E. 81; Transfer Notice, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69; Transfer Notice, *Al-Shareef*, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007), D.E. 49; Transfer Notice, *Rahman*, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007), D.E. 40; Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 17, 2007), D.E. 76; Transfer Notice, *Hamoudh*, No. 1:05-cv-1894 (D.D.C. June 22, 2007), D.E. 37; Transfer Notice, *Abdah*, No. 1:04-cv-1254 (D.D.C. June 22, 2007), D.E. 212; Transfer Notice, *Ghalib*, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007), D.E. 42; Transfer Notice, *Gul*, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007), D.E. 65; Transfer Notice, *Mokit*, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007), D.E. 29; Transfer Notice, *Al-Subaiy*, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007), D.E. 51; Transfer Notice, *Said*, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006), D.E. 61; Transfer Notice, *Alsaaei*, No. 1:05-cv-2369 (D.D.C. Dec. 20, 2006), D.E. 32; Transfer Notice, *Al-Rubaish*, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006), D.E. 35; Transfer Notice, *Akhthar*, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006), D.E. 28; Transfer Notice, *Anam*, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006), D.E. 170; Transfer Notice, *Zakirjan*, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006), D.E. 76; Transfer Notice, *Khan*, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006), D.E. 22; Transfer Notice, *Faizullah*, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006), D.E. 33; Transfer Notice, *Mohammadi*, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006), D.E. 29; Transfer Notice, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006), D.E. 112; Transfer Notice, *Al-Khatemi*, No. 1:05-cv-2248 (D.D.C. June 27, 2006), D.E. 25; Transfer Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 27, 2006), D.E. 29; Transfer

tices referred to sealed submissions that were not otherwise reflected on the public record.³²⁵⁴

In 2009, the court of appeals vacated the thirty-day notice orders as beyond the courts' power.³²⁵⁵

On October 2, 2007, Judge Kessler enjoined the transfer of Mohammed Abdul Rahman to Tunisia, where he had been tried in absentia and sentenced to twenty years in prison, on representations of fragile health and the possibility of torture in Tunisia.³²⁵⁶ On December 17, 2010, the court of appeals vacated the injunction on the authority of an intervening case holding that the court may not enjoin a transfer if the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country.³²⁵⁷

On August 19, 2011, Judge Walton denied a motion for an order requiring thirty days' notice before a transfer affecting a habeas petition that would leave the detainee in United States custody.³²⁵⁸

Protective Order Coordination

On November 2, 2005, the district court's Calendar and Case Management Committee decided that all matters pertaining to interpretation of applicable protective orders or logistical issues, such as attorney communica-

Notice, *Kiyemba*, No. 1:05-cv-1509 (D.D.C. June 27, 2006), D.E. 59; Transfer Notice, *Qayed*, No. 1:05-cv-454 (D.D.C. June 27, 2006), D.E. 17; Transfer Notice, *Al-Shihry*, No. 1:05-cv-490 (D.D.C. June 27, 2006), D.E. 25; Transfer Notice, *Al-Aweda*, No. 1:05-cv-1668 (D.D.C. May 23, 2006), D.E. 37; Transfer Notice, *Al-Rashaidan*, No. 1:05-cv-586 (D.D.C. May 23, 2006), D.E. 25.

3254. Transfer Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Nov. 13, 2007), D.E. 106.

3255. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010); Order, *Khadr v. Obama*, No. 08-5233 (D.C. Cir. Sept. 3, 2010) (applying the holding in *Kiyemba* to other appeals), *cert. denied*, 563 U.S. 1016 (2011) (noting that Justices Breyer and Sotomayor would have granted certiorari and that Justice Kagan did not participate in the consideration of the certiorari petition).

3256. Order, *Alhami v. Bush*, No. 1:05-cv-359 (D.D.C. Oct. 2, 2007), D.E. 58; see William Glaberson, *Judge Halts Plan to Transfer Guantánamo Detainee*, N.Y. Times, Oct. 10, 2007, at A16.

3257. Order, *Alhami v. Obama*, No. 07-5400 (D.C. Cir. Dec. 17, 2010) (citing Order, *Bin Mohammed v. Obama*, No. 10-5218 (D.C. Cir. July 8, 2010) (citing *Kiyemba*, 561 F.3d at 516)), *cert. dismissed*, 563 U.S. 931 (2011).

3258. Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Aug. 19, 2011), D.E. 1889; see Motion, *id.* (May 13, 2011), D.E. 1841.

tions and visits with detainees, would be referred to Magistrate Judge Alan Kay.³²⁵⁹

Although Judge Kay occasionally issued rulings resolving disputes, his primary role was to act as a mediator.³²⁶⁰ Judge Kay, an experienced mediator, considered mediation to be the legal equivalent of holistic medicine.³²⁶¹ Assignment of blame and the adversarial process were not essential components of mediation.³²⁶² Judge Kay assisted with such matters as last-minute refusals to let attorneys land, the amount of physical restraints during attorney–client meetings, and finding an interpreter to replace one whose security clearance had been suddenly revoked.³²⁶³

The Justice Department provided the government with attorney representation in the habeas cases, but it was the Defense Department that controlled Guantánamo Bay.³²⁶⁴ Careful negotiation and mediation were crucial in working out matters with one party so complex and powerful.³²⁶⁵

Unconstitutional Stripping of Habeas Jurisdiction

Reviewing in consolidated appeals both Judge Leon’s decision that the detainees did not have habeas rights and Judge Green’s decision that they did, the court of appeals, on February 20, 2007, determined that the October 17, 2006, Military Commissions Act stripped the federal courts of jurisdiction over Guantánamo Bay habeas petitions.³²⁶⁶ In *Boumediene v. Bush*, however, the Supreme Court held, on June 12, 2008, that the Mili-

3259. Order, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Nov. 2, 2005), D.E. 193; see Murray Fogler, *The Next Friend Catch-22*, in *The Guantánamo Lawyers*, *supra* note 3154, at 115, 116; Wax, *supra* note 3154, at 178.

Tim Reagan interviewed Judge Kay for this case study in his chambers on June 21, 2011. Judge Kay retired on January 2, 2017. Judicial Milestones, www.uscourts.gov/judicial-milestones/alan-kay.

3260. Interview with Judge Alan Kay, June 21, 2011; see Fogler, *supra* note 3259, at 116; Wax, *supra* note 3154, at 178–79.

3261. Interview with Judge Alan Kay, June 21, 2011 (noting that successful mediation usually requires teaching, psychology, and humor).

3262. *Id.*

3263. *Id.*

3264. *Id.*

3265. *Id.*

3266. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev’d*, 553 U.S. 723 (2008); see Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635; see also Falkoff, *supra* note 3226, at 402; Hafetz, *supra* note 3174, at 156–57; Meltzer, *supra* note 3168, at 7.

tary Commissions Act was an unconstitutional suspension of habeas corpus.³²⁶⁷

Boumediene was a Bosnian citizen who had been working for the Red Crescent in Sarajevo when, in late 2001, US intelligence caught wind of a plot to blow up the embassy there. He was rounded up along with five other Algerians and, at the request of the United States, taken into Bosnian custody. In January 2002 the Bosnian Supreme Court determined there was no reason to hold the men and ordered their release. When they left prison, they were immediately captured by US forces and sent to Guantánamo.³²⁶⁸

Establishing Procedures for Resolving Several Hundred Petitions

226 Petitions

The last detainee to arrive at Guantánamo Bay was Mohammed Rahim al-Afghani on March 14, 2008.³²⁶⁹

Between Judge Green's January 31, 2005, decision that the CSRT was constitutionally infirm and the Supreme Court's *Boumediene* decision, 226 habeas petitions were filed in the District of Columbia's district court on behalf of 561 detainees,³²⁷⁰ of which at least eighty-one were duplicates.³²⁷¹

3267. *Boumediene*, 553 U.S. at 733, 792; see *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 47 (D.D.C. 2013); see also Robert Barnes, *Justices Say Detainees Can Seek Release*, Wash. Post, June 13, 2008, at A1; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008, at A1; Hafetz, *supra* note 3174, at 158-65; Meltzer, *supra* note 3168, at 9.

3268. Greenberg, *supra* note 3174, at 154. See generally Lakhdar Boumediene & Mustafa Ait Idir, *Witnesses of the Unseen: Seven Years in Guantanamo* (2017) (including reflections of Boumedienne's capture, detention, and release).

3269. See Petition at 2, *Rahim v. Obama*, No. 1:09-cv-1385 (D.D.C. July 27, 2009), D.E. 1; see also Ben Fox, *Detainee Shows a Taste for Pop Culture*, Miami Herald, Jan. 1, 2013, at 4A.

Al-Afghani remains detained. Appendix Table 4. Thirty-Four Habeas Petitioners Remain Detained as of August 28, 2022, *infra* page 641 (n.17).

3270. The cases were assigned the following docket numbers: 1:05-cv-247, 1:05-cv-270, 1:05-cv-280, 1:05-cv-301, 1:05-cv-329, 1:05-cv-345, 1:05-cv-359, 1:05-cv-392, 1:05-cv-409, 1:05-cv-429 through 1:05-cv-431, 1:05-cv-454, 1:05-cv-490, 1:05-cv-492, 1:05-cv-497, 1:05-cv-520, 1:05-cv-526, 1:05-cv-533, 1:05-cv-551, 1:05-cv-569, 1:05-cv-573, 1:05-cv-583, 1:05-cv-584, 1:05-cv-586, 1:05-cv-621, 1:05-cv-634, 1:05-cv-640, 1:05-cv-660, 1:05-cv-665, 1:05-cv-714, 1:05-cv-723, 1:05-cv-748, 1:05-cv-763 through 1:05-cv-766, 1:05-cv-795, 1:05-cv-833, 1:05-cv-877 through 1:05-cv-892, 1:05-cv-993 through 1:05-cv-1002, 1:05-cv-1008 through 1:05-cv-1013, 1:05-cv-1048, 1:05-cv-1124, 1:05-cv-1189, 1:05-cv-1220, 1:05-cv-1233 through 1:05-cv-1244, 1:05-cv-1246, 1:05-cv-1310 through 1:05-cv-1312, 1:05-cv-1347, 1:05-cv-1353, 1:05-cv-1429, 1:05-cv-1453, 1:05-cv-1457, 1:05-cv-1458,

Sixty of the petitions were filed pro se. Most of the other petitions were filed by next friends, of which 26% were brothers, 9% were fathers, 4% were wives, 4% were cousins, 6% were other specified family members (seven uncles, three nephews, two brothers-in-law, one son, and one mother), 7% were family members of unspecified relationship, 34% were other detainees, and 11% were other friends.

Next-Friend Validity

On April 1, 2005, the Center for Constitutional Rights filed a habeas petition for Hazi Ahmed, listing fellow detainee Mohammed Mohammed Hassen as his next friend.³²⁷² The Center had included Hassen as one of

1:05-cv-1487, 1:05-cv-1489 through 1:05-cv-1493, 1:05-cv-1497, 1:05-cv-1504 through 1:05-cv-1506, 1:05-cv-1509, 1:05-cv-1555, 1:05-cv-1590, 1:05-cv-1592, 1:05-cv-1601, 1:05-cv-1602, 1:05-cv-1607, 1:05-cv-1623, 1:05-cv-1635, 1:05-cv-1638, 1:05-cv-1639, 1:05-cv-1641, 1:05-cv-1645, 1:05-cv-1646, 1:05-cv-1649, 1:05-cv-1666 through 1:05-cv-1669, 1:05-cv-1678, 1:05-cv-1679, 1:05-cv-1697, 1:05-cv-1704, 1:05-cv-1714, 1:05-cv-1724, 1:05-cv-1725, 1:05-cv-1779, 1:05-cv-1806, 1:05-cv-1857, 1:05-cv-1864, 1:05-cv-1886, 1:05-cv-1894, 1:05-cv-1971, 1:05-cv-1983, 1:05-cv-2010, 1:05-cv-2029, 1:05-cv-2053, 1:05-cv-2083, 1:05-cv-2087, 1:05-cv-2088, 1:05-cv-2104, 1:05-cv-2112, 1:05-cv-2185, 1:05-cv-2186, 1:05-cv-2197, 1:05-cv-2199, 1:05-cv-2200, 1:05-cv-2201, 1:05-cv-2216, 1:05-cv-2223, 1:05-cv-2248, 1:05-cv-2249, 1:05-cv-2265, 1:05-cv-2336, 1:05-cv-2348, 1:05-cv-2349, 1:05-cv-2367, 1:05-cv-2369 through 1:05-cv-2371, 1:05-cv-2376, 1:05-cv-2378 through 1:05-cv-2381, 1:05-cv-2384 through 1:05-cv-2387, 1:05-cv-2398, 1:05-cv-2399, 1:05-cv-2427, 1:05-cv-2444, 1:05-cv-2452, 1:05-cv-2458, 1:05-cv-2466, 1:05-cv-2467, 1:05-cv-2477, 1:05-cv-2479, 1:06-cv-618, 1:06-cv-619, 1:06-cv-1668, 1:06-cv-1674, 1:06-cv-1675 through 1:06-cv-1679, 1:06-cv-1681 through 1:06-cv-1691, 1:06-cv-1725, 1:06-cv-1752 through 1:06-cv-1754, 1:06-cv-1757 through 1:06-cv-1761, 1:06-cv-1763, 1:06-cv-1765 through 1:06-cv-1769, 1:07-cv-1710, 1:07-cv-2337, 1:07-cv-2338, 1:08-cv-864, and 1:08-cv-987.

An additional petition on behalf of Does 1 through 570 filed by the Center for Constitutional Rights was dismissed for lack of standing. Opinion, *Does v. Bush*, No. 1:05-cv-313 (D.D.C. Oct. 31, 2006), D.E. 31, 2006 WL 3096685.

3271. Appendix Table 1. Eighty-One Duplicate Habeas Petitions Filed Between Judge Green's January 31, 2005, Decision and the Supreme Court's 2008 *Boumediene* Decision, *infra* page 620.

3272. Petition, *Ahmed v. Bush*, No. 1:05-cv-665 (D.D.C. Apr. 1, 2005), D.E. 1; *see* Appendix Table 2. 198 Petitioners Transferred by the Time of the 2008 *Boumediene* Decision, *infra* page 623 (noting Ahmed's transfer to France on March 7, 2005, July 14, 2008, status report n.8).

The Center for Constitutional Rights "is the umbrella organization coordinating the Guantánamo pro bono project." Candace Gorman, *My Experiences Representing a Guantánamo Detainee*, Litig., Spring 2009, at 10, 10 (reflections by a pro bono attorney who represented two Guantánamo Bay detainees). Originally called the Civil Rights Legal Defense Fund and then the Law Center for Constitutional Rights, the Center was first incorporated in 1966. *See* Ruben, *supra* note 3169, at 26–27.

fourteen petitioners in a July 27, 2004, petition.³²⁷³ On May 24, 2005, Judge Roberts ordered briefing on whether the court should recognize Hassen as Ahmed's next friend—specifically, whether Ahmed otherwise was without access to the court, noting that several detainees had filed pro se petitions, and whether Hassen was sufficiently dedicated to Ahmed's interests.³²⁷⁴ The government took no position on the issue, but noted, "The Protective Order typically made applicable in the Guantanamo Bay habeas cases permits counsel two visits with a detainee before an authorization of representation by the detainee must be provided to respondents."³²⁷⁵ On the day after the government's response, Judge Roberts signed a protective order, unopposed approval of which had been pending since a week after the case was filed, and the protective order's incorporated procedures for counsel access to detainees provided, "Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee."³²⁷⁶ On August 8, the government filed a return³²⁷⁷ pursuant to an order issued by Judge Roberts on July 8.³²⁷⁸

On August 31, the government filed a consolidated motion challenging the validity of fellow-detainee next friends in eight cases on behalf of nine detainees.³²⁷⁹ Judge Friedman denied the motion in the case before him.³²⁸⁰ Judges Huvelle,³²⁸¹ Collyer,³²⁸² and Robertson³²⁸³ referred the matter, by

3273. Petition, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. July 27, 2004), D.E. 1 (identifying Hassen as Mohamed Mohamed Hassan Odaini and his brother Bashir Mohamed Hassan Odaini as Hassen's next friend).

Hassen was transferred to Yemen on July 13, 2010. Transfer Notice, *id.* (July 13, 2010), D.E. 888.

3274. Order, *Ahmed*, No. 1:05-cv-665 (D.D.C. May 24, 2005), D.E. 12, 2005 WL 6066070; *see Adem v. Bush*, 425 F. Supp. 2d 7, 13 n.13 (D.D.C. 2006) (noting the order).

3275. Government Response, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 23, 2005), D.E. 14; *see Adem*, 425 F. Supp. 2d at 13.

3276. Ex. A at ¶ III.C.2, Protective Order, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 24, 2005), D.E. 15.

3277. Return, *id.* (Aug. 8, 2005), D.E. 17.

3278. Order, *id.* (July 8, 2005), D.E. 16.

3279. Motion, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Aug. 31, 2005), D.E. 2 (also filed in Nos. 1:05-cv-1497, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1635, and 1:05-cv-1704).

3280. Sept. 26, 2005, *Akhtiar* Order, *supra* note 3239.

3281. Order, *Ahmed*, No. 1:05-cv-1458 (D.D.C. Oct. 13, 2005), D.E. 8.

3282. Order, *Shafiq v. Bush*, No. 1:05-cv-1506 (D.D.C. Oct. 25, 2005), D.E. 10; Order, *Al-Hawary v. Bush*, No. 1:05-cv-1505 (D.D.C. Oct. 25, 2005), D.E. 10; Order, *Nabil v. Bush*, No. 1:05-cv-1504 (D.D.C. Oct. 25, 2005), D.E. 8.

agreement, to Senior Judge Louis F. Oberdorfer.³²⁸⁴ The motion in another case was mooted by an amended petition naming the detainee's mother as his next friend.³²⁸⁵

On September 23, the government filed a motion with Judge Bates challenging the validity of a fellow-detainee next friend in a case filed earlier that month.³²⁸⁶ Approximately one week later, Judge Bates issued sua sponte an order in another fellow-detainee next-friend case to show cause why that case should not be dismissed for lack of next-friend standing.³²⁸⁷ One week after that, the petitioner's attorneys submitted evidence of a meeting between counsel and the detainee petitioner, which was held after the petition was filed, so the action could become a direct petition without the need for a next friend.³²⁸⁸ Judge Bates referred the September 23 motion to Judge Oberdorfer.³²⁸⁹

Judge Oberdorfer issued the requested order to show cause on November 4.³²⁹⁰ Judge Kessler issued a similar order to show cause on Octo-

3283. Order, *Abu Kabir v. Bush*, No. 1:05-cv-1704 (D.D.C. Nov. 1, 2005), D.E. 18 (two detainees).

3284. Judge Oberdorfer died on February 21, 2013. FJC Biographical Directory, *supra* note 3190.

3285. Notice, *Al-Wirghi v. Bush*, No. 1:05-cv-1497 (D.D.C. Jan. 11, 2006), D.E. 12; Amended Petition, *id.* (Dec. 1, 2005), D.E. 10.

3286. Government Motion, *Qasim v. Bush*, No. 1:05-cv-1779 (D.D.C. Sept. 23, 2005), D.E. 2 (petition by detainee Isa Ali al-Murbati as next friend of detainee Muhammed Qasim); see Petition, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 22, 2004), D.E. 1 (petition on behalf of six detainees, including Isa Ali Abdulla Almurbati, represented by his brother Mohamad Ali Abdulla Almurbati as next friend).

3287. Order, *Hamlily v. Bush*, No. 1:05-cv-763 (D.D.C. Oct. 3, 2005), D.E. 16; see *Adem v. Bush*, 425 F. Supp. 2d 7, 13 (D.D.C. 2006) (discussing the order); Petition, *Hamlily*, No. 1:05-cv-763 (D.D.C. Apr. 15, 2005), D.E. 1 (petition by detainee Shaker Aamer as next friend of detainee Adel Hamlily); see also Petition, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004), D.E. 1 (petition on behalf of three detainees, including Shaker Abduraheem Aamer, by his father-in-law Saeed Ahmed Siddique as next friend).

3288. Response, *Hamlily*, No. 1:05-cv-763 (D.D.C. Oct. 11, 2005, filed Oct. 31, 2005), D.E. 20 (redacted); see *Adem*, 425 F. Supp. 2d at 13.

3289. Order, *Qasim*, No. 1:05-cv-1779 (D.D.C. Oct. 31, 2005), D.E. 4.

3290. Order, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Nov. 4, 2005), D.E. 10 [hereinafter Nov. 4, 2005, Oberdorfer Order] (also filed in Nos. 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1704, and 1:05-cv-1779).

ber 11,³²⁹¹ and the court granted the government's motion to consolidate her order with Judge Oberdorfer's.³²⁹²

Judge Oberdorfer's order to show cause included an order that Petitioners and Respondents consult with Magistrate Judge Kay as soon as is practicable (but in any event before the [December 5, 2005,] hearing) to discuss how counsel for Petitioners may obtain access to the detainees who allegedly seek to be represented by next friends to determine if the detainees will authorize counsel to represent them directly.³²⁹³

Judge Kay ordered the government to comply with applicable protective orders and permit attorneys to meet with petitioners so that they could pursue petitions directly without next friends, and this process began to moot the fellow-detainee-as-next-friend issue for these cases.³²⁹⁴

On March 10, 2009, Judge Sullivan dismissed a petition upon determining that the detainee did not want to pursue his case because of his "lack of confidence in the United States judicial process."³²⁹⁵ Ghassan Abdullah al-Sharbi has been at Guantánamo Bay since March 2002.³²⁹⁶ The government announced military-commission conspiracy charges against him on November 8, 2005.³²⁹⁷ On December 8, Abdullah al-Sharbi filed a habeas petition on behalf of his son.³²⁹⁸ The detainee refused to meet with the attorney that his father found for him, but the attorney endeavored to discover whether the refusal resulted from government interference, coercion, or mental illness.³²⁹⁹ On August 8, 2008, the detainee wrote a letter to the court explaining in clear English that he did not want to pursue a habeas action,³³⁰⁰ and the court received the letter on January 7, 2009.³³⁰¹ The

3291. Order, *Al-Razak v. Bush*, No. 1:05-cv-1601 (D.D.C. Oct. 11, 2005), D.E. 11.

3292. Order, *id.* (Nov. 22, 2005), D.E. 19.

3293. Nov. 4, 2005, Oberdorfer Order, *supra* note 3290.

3294. See Report and Recommendation, *Ahmed v. Bush*, No. 1:05-cv-1458 (D.D.C. Oct. 6, 2006), D.E. 26 [hereinafter Oct. 6, 2006, *Ahmed* Report and Recommendation] (also filed in Nos. 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1704, and 1:05-cv-1779).

3295. *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 319 (D.D.C. 2009).

3296. *Id.* at 318.

Al-Sharbi remains detained. Appendix Table 4, *infra* page 641 (n.27).

3297. See Neil A. Lewis, *Pentagon Charges 5 More in Guantánamo Bay Camp*, N.Y. Times, Nov. 8, 2005, at A22.

3298. Petition, *Al-Sharbi v. Bush*, No. 1:05-cv-2348 (D.D.C. Dec. 8, 2005), D.E. 1; *Al Sharbi*, 601 F. Supp. 2d at 318.

3299. *Al Sharbi*, 601 F. Supp. 2d at 318.

3300. Letter, *Al-Sharbi*, No. 1:05-cv-2348 (D.D.C. Jan. 7, 2009), D.E. 88.

3301. Docket Sheet, *id.* (Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

dismissal followed a closed ninety-minute hearing that Judge Sullivan held on March 6, at which al-Sharbi participated by video conference from Guantánamo Bay.³³⁰² Al-Sharbi has admitted to being a combatant against the United States.³³⁰³

Judges Bates,³³⁰⁴ Leon,³³⁰⁵ and Walton³³⁰⁶ dismissed petitions because they were not authorized by the detainees.

Coordination Before Judge Hogan

By the time of the 2008 *Boumediene* decision, at least 198 petitioners had been transferred to other countries, sometimes for release and sometimes for detention and possible prosecution there.³³⁰⁷ Three petitioners were voluntarily dismissed without prejudice because they did not appear to be actual detainees.³³⁰⁸ Another two petitioners apparently committed suicide.³³⁰⁹

3302. *Al Sharbi*, 601 F. Supp. 2d at 318–19.

3303. See Tim Golden, *The Battle for Guantánamo*, N.Y. Times, Sept. 17, 2006, at 660.

3304. *Kuman v. Obama*, 725 F. Supp. 2d 72 (D.D.C. 2010) (dismissing Ahmed Yaslam Said Kuman’s petition).

3305. Order, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Aug. 25, 2010), D.E. 289, 2010 WL 3339182 (dismissing Adel al-Hakeemy’s petition).

3306. Docket Sheet, *Al-Jayfi v. Bush*, No. 1:05-cv-2104 (D.D.C. Oct. 27, 2005) [herein-after *Al-Jayfi* Docket Sheet] (noting the dismissal of Khalid Mohammed al-Thabbi’s petition on February 29, 2012).

3307. Appendix Table 2, *infra* page 623.

“Some have been released outright; more have been turned over to the custody of their home governments.” Cucullu, *supra* note 3174, at 53; see Inside Guantanamo (National Geographic DVD 2009); see also Fletcher & Stover, *supra* note 3153, at 93–115 (describing detainees’ experiences following their transfers). Compare Murat Kurnaz, *Five Years of My Life* 218–19 (2008) (report by a detainee that he was told that his release was contingent upon his signing an admission that he belonged to a terrorist organization, but that he was released to freedom despite his not signing the admission) with Fletcher & Stover, *supra* note 3153, at 89–90 (reporting that detainees were falsely told that their releases were contingent on signing a document, but the document was a promise not to join Al-Qaeda or the Taliban rather than an admission).

3308. Notice, *Almjrd v. Bush*, No. 1:05-cv-2444 (D.D.C. Sept. 20, 2006), D.E. 12 (Talal Ahmed Mohammed Ali Almjrd; voluntary dismissal on the government’s representation that the person on whose behalf the petition was filed was not a detainee at Guantánamo Bay); Stipulation, *Mousovi v. Bush*, No. 1:05-cv-1124 (D.D.C. Oct. 26, 2005), D.E. 20 (Abd al-Rahman and Abdul Rahman Aziz Khan).

3309. Notice, *Al-Harbi v. Bush*, No. 1:05-cv-1857 (D.D.C. June 12, 2006), D.E. 21 (Mani Shaman Turki al-Habardi al-Utaybi); Notice, *Al-Salami v. Bush*, No. 1:05-cv-2452 (D.D.C. June 12, 2006), D.E. 16 (Saleh Ali Abdullah al-Salami); see George Daly, *Don’t Take It Personally*, in *The Guantánamo Lawyers*, *supra* note 3154, at 282 (reflections by

(Since then, Ahmed Khalfan Ghailani was transferred to the Southern District of New York for prosecution,³³¹⁰ and at least 224 additional petitioners were transferred from Guantánamo Bay.³³¹¹ Four died.³³¹² Another 140 named petitioners may not have been at Guantánamo Bay, also turned out to be duplicates, or otherwise were not part of actively pursued petitions.³³¹³ Two current detainees never filed habeas petitions.³³¹⁴)

Approximately three weeks after the Supreme Court's *Boumediene* decision, by which time another four new petitions on behalf of four detainees had been filed,³³¹⁵ the district court decided, in executive session, that Judge Hogan, who had recently assumed senior status, would handle "co-

his habeas attorney on al-Utaybe's suicide); Jeffrey Davis, *Pending Release*, *id.* at 283 (same); see Mahvish Rukhsana Khan, *My Guantánamo Diary* 153–65 (2008) (reflections by his legal interpreter on al-Salami's suicide).

3310. Voluntary Dismissal, Ghailani v. Gates, No. 1:08-cv-1190 (D.D.C. May 21, 2009), D.E. 21; United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013); Judgment, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Jan. 25, 2011), D.E. 1090.

3311. Appendix Table 3, *infra* page 632.

3312. Notice, Latif v. Obama, No. 1:11-cv-2294 (D.D.C. Mar. 10, 2014) (Adnan Farhan Abdul Latif), D.E. 18; Notice, Nassim v. Obama, No. 1:09-cv-1332 (D.D.C. May 23, 2011), D.E. 49 [hereinafter *Nassim* Death Notice] (Hajji Nassim by apparent suicide); Notice, Gul v. Obama, No. 1:08-cv-1224 (D.D.C. Feb. 3, 2011), D.E. 136 (Awal Gul of natural causes); Death Notice, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. June 3, 2009), D.E. 265 [hereinafter *Al-Hanashi* Death Notice] (Mohammad Ahmed Abdullah Saleh al-Hanashi by apparent suicide); see Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. Times, Sept. 12, 2012, at A22 (reporting that Latif died by apparent suicide on September 9, 2012).

3313. Ahmed al-Delebany in No. 1:05-cv-2477; eighty named petitioners in No. 1:05-cv-2386; forty-nine named petitioners in No. 1:05-cv-2385; Ismail Ali al-Rammi in No. 1:05-cv-2381; Fadi Ahmad Alimaqaleh in No. 1:05-cv-2223; Hasan Balgaid in No. 1:05-cv-1983; Ameen Mohammad Albkri in No. 1:05-cv-1639; Ahmed in No. 1:05-cv-1458; Chaman Gul Khialigol in No. 1:05-cv-1124; Mohammed al-Nadour and Mohammed Fahreco in No. 1:05-cv-764; Aref Abd il-Rheem in No. 1:04-cv-1254; Fahmi Abdullah Ubad al-Tawlaqi in No. 1:04-cv-1194.

3314. See *Who's Still Held at Guantánamo*, Miami Herald, www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html, archived at web.archive.org/web/20210912172407/www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html (Walid Bin Attash and Khalid Sheik Mohammad).

3315. The cases were assigned the following docket numbers: 1:08-cv-1085, 1:08-cv-1101, 1:08-cv-1104, and 1:08-cv-1153; see Josh White & Del Quentin Wilber, *Guantánamo Detainee to File Habeas Petition*, Wash. Post, June 26, 2008, at A14.

A duplicate petition on behalf of Ahmed Mohammed Abdullah al-Hakimi, identified as Ahmed Omar in No. 1:05-cv-2386, was assigned the docket number 1:08-cv-1111.

ordination and management” of all Guantánamo Bay habeas petitions,³³¹⁶ with the exception of Hamdan’s petition and nine cases assigned to Judge Leon, who opted out of the coordination plan.³³¹⁷ The court designated one miscellaneous case for coordination of 121 cases pertaining to detainees, *In re Guantanamo Bay Detainee Litigation*,³³¹⁸ and another miscellaneous case for coordination of 136 cases pertaining to previous detainees, *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*.³³¹⁹ Later, Judge Sullivan also opted out of the coordination plan.³³²⁰

On April 1, 2010, Judge Hogan determined that the court no longer had jurisdiction over previous detainees’ cases.³³²¹ By this time, another forty petitions on behalf of forty-two detainees had been filed,³³²² of which at least four were duplicates,³³²³ and another three turned out to have already been transferred to Afghanistan.³³²⁴

3316. The court gave Judge Hogan an extra law clerk for one year to help him with these cases. Interview with Judge Royce C. Lamberth, May 13, 2011; Interview with Judge Thomas F. Hogan, Jan. 12, 2010.

3317. *In re Petitioners Seeking Habeas Corpus Relief*, 567 F. Supp. 2d 83 (D.D.C. 2008); Order, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 2, 2008), D.E. 1; see *Al-Adahi v. Obama*, 613 F.3d 1102, 1104 (D.C. Cir. 2010); *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 48 & n.2 (D.D.C. 2013); see also Palazzolo, *supra* note 3219.

Judge Royce C. Lamberth had been chief judge for one month when the Supreme Court issued its *Boumediene* decision; he presided over regular meetings of judges hearing the habeas cases, including Judge Leon, who otherwise opted out of the coordination plan. Interview with Judge Royce C. Lamberth, May 13, 2011.

3318. Docket Sheet, *Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 2, 2008).

3319. Docket Sheet, *In re Petitioners Seeking Habeas Corpus Relief*, No. 1:08-mc-444 (D.D.C. July 3, 2008) [hereinafter *Former Guantánamo Detainees Docket Sheet*].

3320. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 n.1 (D.D.C. 2008); see Palazzolo, *supra* note 3219.

3321. *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D.D.C. 2010).

3322. The cases were assigned the following docket numbers: 1:08-cv-1173, 1:08-cv-1185, 1:08-cv-1190, 1:08-cv-1207, 1:08-cv-1221 through 1:08-cv-1224, 1:08-cv-1227 through 1:08-cv-1238, 1:08-cv-1310, 1:08-cv-1360, 1:08-cv-1440, 1:08-cv-1628, 1:08-cv-1733, 1:08-cv-1789, 1:08-cv-1805, 1:08-cv-1828, 1:08-cv-1923, 1:08-cv-2019, 1:08-cv-2083, 1:09-cv-31, 1:09-cv-873, 1:09-cv-904, 1:09-cv-1332, 1:09-cv-1385, 1:09-cv-1460 through 1:09-cv-1462, and 1:10-cv-407.

3323. There were at least three detainees named in two cases each:

1. Houmad Warzly in No. 1:05-cv-2385 was identified as Hamoud Abdullah Hamoud Hassan al-Wady in No. 1:08-cv-1237.

The court of appeals, considering the petitions of two detainees who had been transferred without rescission of their designation as enemy combatants, agreed with Judge Hogan, on July 22, 2011, that their petitions were without an article III remedy.³³²⁵ The court of appeals expressly and summarily affirmed Judge Hogan's April 1, 2010, ruling on August 10, 2012.³³²⁶

Merits Rulings

Judge Leon

Proceeding with his retained cases, Judge Leon held a status conference on July 24, 2008, for a petition by six Algerians apprehended in Bosnia, where they held either dual citizenship or legal residence.³³²⁷ Judge Leon determined that to justify detention the government had to show by a preponderance of the evidence that the detainee was an enemy combatant,

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.³³²⁸

2. Abdurahman in No. 1:05-cv-2386 was identified as Abdul Ghaffar in No. 1:08-cv-1310.

3. Abdul Rahim Hussein Muhamed Ali Nashir in No. 1:08-cv-1085 was identified as Abd al-Rahim Hussain Mohammed al-Nashiri in No. 1:08-cv-1207.

At least one detainee was named in three cases: Adel in Nos. 1:05-cv-2385 and 1:05-cv-2386 was identified as Adel Noori in No. 1:08-cv-1310.

3324. Notice, *Hafiz v. Obama*, No. 1:09-cv-1461 (D.D.C. Dec. 22, 2009), D.E. 16 (noting the transfer of Abdul Hafiz to Afghanistan); Notice, *Hashim v. Obama*, No. 1:09-cv-1460 (D.D.C. Dec. 22, 2009), D.E. 7 (noting the transfer of Mohammed Hashim to Afghanistan); Notice, *Hafizullah v. Bush*, No. 1:08-cv-1227 (D.D.C. Nov. 10, 2008), D.E. 35 (noting that the detainee had been transferred a year and a half before the petition was filed).

3325. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 940 (2012).

3326. Opinion, *Chaman v. Obama*, No. 10-5130 (D.C. Cir. Aug. 10, 2012), 2012 WL 3797596.

3327. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193–95 (D.D.C. 2008); *see 6 Tied to Terror Are Given to U.S. by Bosnia, Despite Court Ruling*, N.Y. Times, Jan. 19, 2002, at A8. *See generally* Mark Fleming, *The Boumediene Case After the Supreme Court*, in *Obama's Guantánamo*, *supra* note 3200, at 61.

3328. *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008); *see Bensayah v. Obama*, 610 F.3d 718, 721 (D.C. Cir. 2010).

From November 2008 through June 2009, Judge Leon granted seven habeas petitions—the petitioners were then transferred out of Guantánamo Bay—and he denied five petitions; three of the denied petitioners were transferred anyway, and two denials were affirmed by the court of appeals.

On November 20, 2008, Judge Leon ruled that classified evidence presented to the court established that Belkacem Bensayah was an Al-Qaeda facilitator.³³²⁹ Judge Leon ruled against the government with respect to the other five detainees taken from Bosnia and ordered them released.³³³⁰ As Judge Leon urged in court, the government did not appeal the release orders,³³³¹ but Bensayah appealed the decision against him.³³³² On appeal, the government changed its contention from Bensayah’s providing support to Al-Qaeda to Bensayah’s being part of Al-Qaeda, and the court of appeals determined that the change necessitated a remand to the district court.³³³³ The parties, however, consented to an extension of time to request a rehearing of the appeal.³³³⁴ The last of the successful Bosnian petitioners was released on November 30, 2009.³³³⁵ Bensayah was transferred to Algeria on

3329. *Bensayah*, 610 F.3d at 721–22; *Boumediene*, 579 F. Supp. 2d at 198, *vacated*, 610 F.3d 718; see William Glaberson & Bernie Becker, *Judge Declares Five Detainees Held Illegally*, N.Y. Times, Nov. 21, 2008, at A1 (“It was the first hearing on the government’s evidence for holding detainees at Guantánamo.”); Del Quentin Wilber, *5 at Guantánamo Ordered Released*, Wash. Post, Nov. 21, 2008, at A2.

3330. *Bensayah*, 610 F.3d at 721; *Boumediene*, 579 F. Supp. 2d at 196–99; see Glaberson & Becker, *supra* note 3329; Fleming, *supra* note 3327, at 65; Hafetz, *supra* note 3174, at 244; Chisun Lee, *Their Own Private Guantánamo*, N.Y. Times, July 23, 2009, at A31; Wilber, *supra* note 3329; Paul M. Winke, *A Day in Court, in The Guantánamo Lawyers*, *supra* note 3154, at 350, 357.

3331. *Boumediene* Docket Sheet, *supra* note 3179; see Fleming, *supra* note 3327, at 65–66; Glaberson & Becker, *supra* note 3329; Hafetz, *supra* note 3174, at 244; Winke, *supra* note 3330, at 357.

3332. Docket Sheet, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Dec. 31, 2008); see Winke, *supra* note 3330, at 357.

3333. *Bensayah*, 610 F.3d at 720, 725–27; see Fleming, *supra* note 3327, at 67–68; Charlie Savage, *Appeals Court Sides with Guantánamo Detainee*, N.Y. Times, July 4, 2010, at A15; Savage, *supra* note 3218, *Power Wars*, at 148–52.

3334. Order, *Bensayah*, No. 08-5537 (D.C. Cir. May 6, 2013) (setting the deadline for a petition for rehearing as August 19, 2013).

3335. Notice, *Boumediene v. Obama*, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009), D.E. 306 (noting the release of Saber Lahmar to France); see Steven Erlanger, *Ex-Detainee Describes His 7 Years at U.S. Site*, N.Y. Times, May 27, 2009, at A10 (reporting on Lakhdar Boumediene’s release to France on May 15, 2009); Steven Erlanger, *France: Algerian Freed From Guantánamo Prison*, N.Y. Times, Dec. 2, 2009, at A10 (reporting on Lahmar’s release); Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, Wash. Post, Dec. 16, 2008, at A2 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mus-

December 5, 2013.³³³⁶ The court of appeals agreed to vacate as moot Judge Leon's denial of the writ to Bensayah.³³³⁷

On December 30, 2008, Judge Leon denied another two habeas petitions.³³³⁸

Hisham Sliti, a native of Tunisia, was detained by Pakistani authorities in October 2000 while attempting to fly from Afghanistan to Europe on a false passport.³³³⁹ He escaped but was again apprehended by Pakistani authorities while attempting to flee from Afghanistan in late 2001.³³⁴⁰ Pakistan transferred him to U.S. custody, and the United States transferred him to Guantánamo Bay.³³⁴¹ On March 2, 2005, attorneys filed a habeas petition on behalf of Sliti and fifteen other detainees.³³⁴² Treatment of Sliti at Guantánamo Bay, and mistreatment of his Quran, were reportedly related to a widespread hunger strike later that year.³³⁴³ By the time of Sliti's December 2008 habeas hearing, eleven of Sliti's copetitioners had been transferred to Albania, Egypt, Jordan, Maldives, Mauritania, Somaliland,

tafa Ait Idir to Bosnia and Herzegovina); Peter Finn & Julie Tate, *4 From Guantanamo Are Sent to Europe*, Wash. Post, Dec. 1, 2009, at A6 (reporting on Lahmar's release); Peter Finn & Julie Tate, *Freed Algerian Detainee Flown to France*, Wash. Post, May 16, 2009, at A1 (reporting on Lakhdar Boumediene's transfer to France); William Glaberson, *U.S. Is Set to Release 3 Detainees From Base*, N.Y. Times, Dec. 16, 2008, at A28 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir to Bosnia and Herzegovina); see also *Ex-Guantánamo Inmate is Among 6 Detained from Alleged French Jihad Network*, Miami Herald, May 31, 2017, at 10A (reporting on Lahmar's detention in France in 2017). See generally Boumediene & Idir, *supra* note 3268 (reflections by Boumediene and Idir following their release).

3336. Transfer Notice, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Dec. 5, 2013), D.E. 321 [hereafter Bensayah Transfer Notice]; see Fleming, *supra* note 3327, at 68; Carol Rosenberg, *U.S. Sends 2 Guantánamo Detainees to Algeria*, Miami Herald, Dec. 6, 2013, at 3A; Charlie Savage, *Two Detainees at Guantánamo Are Involuntarily Repatriated to Algeria*, N.Y. Times, Dec. 6, 2013, at A20.

3337. Order, *Bensayah*, No. 08-5537 (D.C. Cir. Jan. 9, 2014); see Petitioner's Unopposed Motion for Vacatur, *id.* (Dec. 20, 2013); Order, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Feb. 3, 2014), D.E. 323 (dismissing Bensayah's writ petition as moot).

3338. *Al-Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008); see William Glaberson, *Judge Agrees with Bush in Ruling on 2 Detainees' Status*, N.Y. Times, Dec. 31, 2008, at A15.

3339. *Sliti*, 592 F. Supp. 2d at 48.

3340. *Id.*

3341. *Id.*

3342. Docket Sheet, *Sliti v. Bush*, No. 1:05-cv-429 (D.D.C. Mar. 2, 2005); *Sliti*, 592 F. Supp. 2d at 48.

3343. See Neil A. Lewis, *Widespread Hunger Strike at Guantánamo*, N.Y. Times, Sept. 18, 2005, at 124.

Spain, Sudan, and Tunisia.³³⁴⁴ Judge Leon found that the evidence that Sliti's travels were financed by extremists with ties to Al-Qaeda implied that Sliti was an Al-Qaeda recruit.³³⁴⁵ While an appeal was pending,³³⁴⁶ Sliti was transferred on November 20, 2014, to Slovakia.³³⁴⁷

Judge Leon also found adequate proof that Moath Hamza Ahmed al-Alwi, a Yemeni apprehended in Pakistan in late 2001, stayed at a guest-house and received military training at a camp, both of which were associated with the Taliban or Al-Qaeda.³³⁴⁸ The court of appeals affirmed the denial of relief on July 22, 2011.³³⁴⁹

On January 14, 2009, Judge Leon granted Mohammed el-Gharani's habeas petition.³³⁵⁰ El-Gharani was a native of Saudi Arabia and a citizen of Chad; he was apprehended in 2001 at the age of fourteen.³³⁵¹

Unlike most of the other cases reviewed to date by this Court, the Government's evidence against el Gharani consists principally of the statements made by two other detainees while incarcerated at Guantánamo Bay. . . . [T]he credibility and reliability of the detainees being relied upon by the Government has either been directly called into ques-

3344. Appendix Tables 2, *infra* page 623, and 3, *infra* page 632.

3345. *Sliti*, 592 F. Supp. 2d at 50.

3346. Docket Sheet, *Sliti v. Obama*, No. 09-5104 (D.C. Cir. Mar. 31, 2009); see Status Report, *id.* (Nov. 11, 2014) (unopposed request to continue abeyance); see also Transfer Approval List, *In re Guantánamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Sept. 21, 2012), D.E. 1991 [hereinafter Sept. 21, 2012, Transfer Approval List] (noting approval for transfer once a transfer country could be identified).

3347. See Adam Goldman & Julie Tate, *Five Guantánamo Detainees Released, Resettled in Europe*, Wash. Post, Nov. 21, 2014, at A15; Carol Rosenberg, *5 Detainees Released to European Nations*, Miami Herald, Nov. 21, 2014, at 3A; Charlie Savage, *5 Guantánamo Inmates Are Sent to Eastern Europe*, N.Y. Times, Nov. 21, 2014, at A19; see also Abigail Hauslohner, *The "Dark Path" out of Guantánamo*, Wash. Post, Jan. 9, 2022, at A1.

3348. *Al-Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008).

3349. *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 907 (2012).

Al-Alwi remains detained. Appendix Table 4, *infra* page 641 (n.26).

3350. *El Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009); see William Glaberson, *Rulings of Improper Detentions in Cuba as the Bush Era Closes*, N.Y. Times, Jan. 19, 2009, at A1; Del Quentin Wilber, *Citing Weak Evidence, Judge Orders Guantánamo Detainee Freed*, Wash. Post, Jan. 15, 2009, at A11.

3351. *El Gharani*, 593 F. Supp. 2d at 145, 147; see Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; Glaberson, *supra* note 3350; Stafford Smith, *supra* note 3154, at 146–50; see also *id.* at 147 (“People born in Saudi Arabia of foreign parents are not considered as Saudis.”).

tion by Government personnel or has been characterized by Government personnel as undetermined.³³⁵²

The government released el-Gharani to Chad on June 11.³³⁵³

On January 28, Judge Leon denied the petition of Ghaleb Nassar al-Bihani on evidence that he served with the 55th Arab Brigade in support of the Taliban against the Northern Alliance.³³⁵⁴ The court of appeals affirmed the denial,³³⁵⁵ but Al-Bihani was transferred to Oman on January 16, 2017.³³⁵⁶

Judge Leon denied Hedi Hammamy's petition on April 2.³³⁵⁷ Hammamy was a Tunisian arrested in Pakistan in April 2002, and Judge Leon found adequate proof that he fought in the battle of Tora Bora.³³⁵⁸ Hammamy had been charged with terrorism activity in Italy, and his identification papers were found at Tora Bora.³³⁵⁹ He was transferred to Georgia on March 23, 2010.³³⁶⁰

Judge Leon granted another petition on June 22, 2009.³³⁶¹ Abdul Rahim Abdul Razak al-Janko, a Syrian citizen, admitted to staying at a Taliban guesthouse and attending the al-Farouq training camp, but he claimed that

3352. *El Gharani*, 593 F. Supp. 2d at 147.

3353. Transfer Notice, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. June 11, 2009), D.E. 301 [hereinafter *El-Gharani Transfer Notice*]; see Finn & Somashekhar, *supra* note 3351.

3354. *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); see Pardiss Kebriaei, "Too Dangerous to Release": *Debunking the Claim*, in *Obama's Guantánamo*, *supra* note 3200, at 69, 70–71 (reporting also by the detainee's attorney that "the public allegations against Ghaleb mainly concern his role as a cook in a group allied with the Taliban in its fight against the Northern Alliance in Afghanistan in 2001"); Lee, *supra* note 3330.

3355. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 929 (2011); see *Justices Reject Appeals of Detainees at Guantánamo*, Wash. Post, Apr. 5, 2011, at A6 [hereinafter *Justices Reject Appeals*].

3356. See Carol Rosenberg, *U.S. Sends 10 Guantánamo Captives to Oman*, Miami Herald, Jan. 17, 2017, at 10A; Charlie Savage, *10 More Prisoners Are Transferred from Guantánamo*, N.Y. Times, Jan. 17, 2017, at A11.

3357. *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009).

3358. *Id.*

3359. *Id.* at 243–44.

3360. See The Guantánamo Docket, www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html; see also Carlotta Gall, *After Years in Guantánamo, He Yearns to Return*, N.Y. Times, Feb. 18, 2017, at A8 (describing the difficulties of life as a former Guantánamo Bay detainee in Tunisia, to which Hammamy returned).

3361. *Al Gincio v. Obama*, 634 F. Supp. 2d 109 (D.D.C. 2009); *Al-Gincio v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); see Del Quentin Wilber, *Judge Orders Guantánamo Detainee's Release*, Wash. Post, June 23, 2009, at A12.

he did this involuntarily.³³⁶² The government conceded that he was subsequently imprisoned by Al-Qaeda and tortured into a false confession that he was a U.S. spy,³³⁶³ and Judge Leon concluded that after such treatment he could not have been part of Al-Qaeda or the Taliban when he was apprehended by the United States.³³⁶⁴ Al-Janko was released from Guantánamo Bay,³³⁶⁵ and, on October 5, 2010, he filed a civil action against the government alleging torture.³³⁶⁶ On December 22, 2011, Judge Leon determined that because al-Janko was no longer a detainee, the court did not have jurisdiction over his complaint.³³⁶⁷ The court of appeals agreed on January 17, 2014.³³⁶⁸

Uighurs

Twenty-two of the Guantánamo Bay detainees were ethnic Uighurs, and there were reports that the Chinese government used the international effort to combat terror as an opportunity to squelch Uighur separatism in China.³³⁶⁹

On March 10, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of two Uighurs: Abu Bakker Qassim and A'del Abdu al-Hakim.³³⁷⁰ The court assigned the petition to Judge Robertson.³³⁷¹ On July

3362. *Al-Ginco*, 626 F. Supp. 2d at 128.

3363. *Id.* at 127; see Hafetz, *supra* note 3174, at 246; see *Al-Janko v. Gates*, 831 F. Supp. 2d 272, 275 (D.D.C. 2011).

3364. *Al-Ginco*, 626 F. Supp. 2d at 129–30; see Hafetz, *supra* note 3174, at 246.

3365. “The United States did not appeal the ruling, and the plaintiff was finally released from Guantanamo on October 7, 2009.” *Al-Janko*, 831 F. Supp. 2d at 276.

3366. Docket Sheet, *Al-Janko v. Gates*, No. 1:10-cv-1702 (D.D.C. Oct. 5, 2010); see *Al-Janko*, 831 F. Supp. 2d at 274; see also Spencer S. Hsu, *Ex-Detainee Sues the U.S., Saying Captors Tortured Him*, Wash. Post, Oct. 7, 2010, at A4 (“Janko says that he was urinated on by his American captors, slapped, threatened with loss of fingernails, and exposed to sleep deprivation, extreme cold and stress positions.”).

3367. *Al-Janko*, 831 F. Supp. 2d 272; see *Judge Dismisses Former Gitmo Detainee’s Lawsuit*, Nat’l L.J., Jan. 2, 2012, at 8.

3368. *Al Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), *cert. denied*, 575 U.S. 902 (2015).

3369. *Qassim v. Bush*, 382 F. Supp. 2d 126, 128 n.4 (D.D.C. 2005); see Cucullu, *supra* note 3174, at 139–40; Charlie Savage, *Two Guantánamo Detainees Freed, the First in 15 Months*, N.Y. Times, Apr. 20, 2012, at A8; Simard, *supra* note 3168, at 369, 379.

3370. Petition, *Qassim v. Bush*, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005), D.E. 1; *Qassim v. Bush*, 407 F. Supp. 2d 198, 199 (D.D.C. 2005); see Simard, *supra* note 3168, at 382. See generally Sabin Willett, *Twelve Years After, in Obama’s Guantánamo*, *supra* note 3200, at 11.

3371. Docket Sheet, *Qassim*, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005).

13 and 15, counsel met the petitioners for the first time and learned that at least two months previously the CSRT had determined that Qassim and al-Hakim were not enemy combatants.³³⁷² The government provided neither the attorneys nor Judge Robertson with notice of the CSRT ruling.³³⁷³ On July 22, the attorneys filed a motion for their clients' immediate release.³³⁷⁴ Recognizing that returning the Uighurs to China could subject them to persecution and releasing them within the United States could have national security implications, Judge Robertson concluded, on December 22, that although the continued detention of the petitioners was unlawful the court could not provide a remedy.³³⁷⁵ On May 5, 2006, three days before oral argument on the petitioners' appeal, the government released Qassim, al-Hakim, and three other Uighurs to a United Nations refugee camp in Albania.³³⁷⁶

From July 29 through December 14, 2005, six habeas petitions were filed on behalf of the other seventeen Uighur detainees.³³⁷⁷ The Center for

3372. *Qassim*, 407 F. Supp. 2d at 199; *Qassim*, 382 F. Supp. 2d at 127; Release Motion, *Qassim*, No. 1:05-cv-497 (D.D.C. July 20, 2005), D.E. 24 [hereinafter *Qassim Release Motion*].

3373. *Qassim*, 407 F. Supp. 2d at 199; *Qassim*, 382 F. Supp. 2d at 127.

3374. *Qassim Release Motion*, *supra* note 3372.

3375. *Qassim*, 407 F. Supp. 2d 198; see Neil A. Lewis, *Freed from Guantánamo but Stranded Far from Home*, N.Y. Times, Aug. 15, 2006, at A15; Simard, *supra* note 3168, at 382–84.

3376. *Qassim v. Bush*, 466 F.3d 1073, 1074 (D.C. Cir. 2006); Notice, *Mamet v. Bush*, No. 1:05-cv-1886 (D.D.C. May 5, 2006), D.E. 30 (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe); see Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. Times, June 10, 2007, at 11; Lewis, *supra* note 3375; Abu Bakker Qassim, *The View from Guantánamo*, N.Y. Times, Sept. 17, 2006, at 415; Savage, *supra* note 3369; Simard, *supra* note 3168, at 384–85; Stafford Smith, *supra* note 3154, at 264–65; P. Sabin Willett, *Exile, in The Guantánamo Lawyers*, *supra* note 3154, at 329.

These Uighurs now live in a refugee camp, monitored by armed guards, and surrounded by razor wire. Integration has been hard for them because there is no Uighur community in Albania, and they do not speak the language. Albania is not a highly sought country for asylum because of its economic situation and poverty.

Simard, *supra* note 3168, at 386.

It was reported that Albania refused to accept additional Uighurs because of pressure from China. Cucullu, *supra* note 3174, at 227. In 2016, it was reported that four of the Uighurs lived in Tirana, Albania, and a fifth was granted asylum in Sweden, where his sister was also a refugee. Willett, *supra* note 3370, at 19.

3377. Petition, *Thabid v. Bush*, No. 1:05-cv-2398 (D.D.C. Dec. 14, 2005), D.E. 1 (two Uighur detainees); Petition, *Razakah v. Bush*, No. 1:05-cv-2370 (D.D.C. Dec. 12, 2005), D.E. 1 (two Uighur detainees); Petition, *Mamet*, No. 1:05-cv-1886 (D.D.C. Sept. 23, 2005), D.E. 1 (two Uighur detainees); Petition, *Abu Kabir v. Bush*, No. 1:05-cv-1704 (D.D.C.

Constitutional Rights filed a petition on behalf of 158 detainees in December 2005,³³⁷⁸ and two of these detainees were Uighurs; they were given a new case number so that their case could be consolidated before Judge Urbina with other Uighur cases.³³⁷⁹

One of the detained Uighurs was Huzaifa Parhat, who, on December 4, 2006, filed one of the first appeals from the CSRT.³³⁸⁰ On June 20, 2008, the court of appeals, in the only CSRT appeal to reach the merits, determined that the evidence presented to the CSRT was insufficient to support Parhat's designation as an enemy combatant.³³⁸¹ "The government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the petitioners should be detained as enemy combatants."³³⁸²

Habeas proceedings concerning the Uighurs received considerable public attention and were attended by Uighurs from the extensive local Uighur community and by Uighurs from elsewhere in the United States and from other countries.³³⁸³ On October 9, Judge Urbina ruled that the government had to release the seventeen Uighurs within the United States,

Aug. 25, 2005), D.E. 1 (two Uighur detainees); Petition, *Mamet v. Bush*, No. 1:05-cv-1602 (D.D.C. Aug. 11, 2005), D.E. 1 (one Uighur detainee); Petition, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. July 29, 2005), D.E. 1 (eight Uighur detainees and one Saudi detainee).

3378. Petition, *Mohammon v. Bush*, No. 1:05-cv-2386 (D.D.C. Dec. 21, 2005), D.E. 1.

The petition appeared to be on behalf of 167 detainees, but some detainees were listed more than once. On July 29, 2008, Judge Hogan dismissed without prejudice all but twenty-nine of the petitioners from this case. Order, *id.* (July 29, 2008).

3379. Docket Sheet, *Ghaffar v. Bush*, No. 1:08-cv-1310 (D.D.C. July 30, 2008); see Order, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 30, 2008), filed as Order, *Ghaffar*, No. 1:08-cv-1310 (D.D.C. July 30, 2008), D.E. 1 (ordering a new case number).

3380. Docket Sheet, *Parhat v. Rumsfeld*, No. 06-1397 (D.C. Cir. Dec. 4, 2006) [hereinafter D.C. Cir. *Parhat* Docket Sheet].

The Detainee Treatment Act of 2005 gave the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over CSRT appeals. Pub. L. No. 109-163, § 1405(e), 119 Stat. 3364, 3477 (2006), 10 U.S.C. § 801 note (2020).

3381. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008); see William Glaberson, *U.S. Court, in a First, Voids Finding by Tribunal*, N.Y. Times, June 24, 2008, at A15; Hafetz, *supra* note 3174, at 249; Josh White & Del Quentin Wilber, *Appeals Court Invalidates Detainee's "Enemy" Status*, Wash. Post, June 24, 2008, at A14.

3382. *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

3383. Interview with Judge Ricardo M. Urbina, Aug. 15, 2011.

because the government had taken too long to find somewhere else to send them.³³⁸⁴

On February 18, 2009, the court of appeals vacated Judge Urbina's order.³³⁸⁵ Judges A. Raymond Randolph and Karen LeCraft Henderson held that the judicial branch did not have the authority to order admission of aliens.³³⁸⁶ Judge Judith W. Rogers would have remanded for consideration of whether immigration detention would be proper.³³⁸⁷ On June 11, the government released Parhat and three other Uighurs to Bermuda.³³⁸⁸

The Supreme Court granted a writ of certiorari on October 20.³³⁸⁹ The government transferred six Uighurs to Palau in November.³³⁹⁰ Palau of-

3384. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008); see Kent Spriggs, *The Tallahassee Uighur Settlement Project*, in *The Guantánamo Lawyers*, *supra* note 3154, at 314, 315 ("The Lutheran refugee agency for the greater Washington, D.C., area was to take fourteen of the Uighurs, and Tallahassee was to take three. The plans of both groups were proffered to Judge Urbina and became part of the record."); see also Cucullu, *supra* note 3174, at 227; William Glaberson, *In Blow to President, Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. Times, Oct. 8, 2008, at A15; Hafetz, *supra* note 3174, at 249; Gary A. Isaac, *The Wrong Person*, in *Obama's Guantánamo*, *supra* note 3200, at 27, 32–33; Savage, *supra* note 3369; Del Quentin Wilber, *Chinese Muslims Ordered Released from Guantanamo*, Wash. Post, Oct. 8, 2008, at A1.

3385. *Kiyemba*, 555 F.3d 1022; see William Glaberson, *Appeals Court Stops Release of 17 Detainees in U.S.*, N.Y. Times, Feb. 19, 2009, at A18; Hafetz, *supra* note 3174, at 249–50; Del Quentin Wilber & Carrie Johnson, *Court Blocks Release of 17 Uighurs Into U.S.*, Wash. Post, Feb. 19, 2009, at A4.

3386. *Kiyemba*, 555 F.3d at 1023–32.

3387. *Id.* at 1032–39 (Judge Judith W. Rogers, concurring in the judgment).

3388. Transfer Notice, *Kiyemba v. Obama*, No. 1:05-cv-1509 (D.D.C. June 11, 2009), D.E. 232 (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat); see Erik Eckholm, *Freed from Guantánamo, Uighur Muslims Bask in Bermuda*, N.Y. Times, June 15, 2009, at A4; Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; William Glaberson, *6 Guantánamo Detainees Are Released to Other Countries as Questions Linger*, N.Y. Times, June 12, 2009, at A6; Hafetz, *supra* note 3174, at 250; Savage, *supra* note 3369; Willett, *supra* note 3370, at 22–25.

"The Uighurs [who went to Bermuda] found jobs[] and got married; while they lacked passports and could not travel, they lived quietly thereafter." Savage, *Power Wars*, *supra* note 3218, at 127; see Willett, *supra* note 3370, at 22–23 ("they . . . have married, have children, hold jobs, and pay rent").

3389. *Kiyemba v. Obama*, 558 U.S. 969 (2009); see Robert Barnes, *Supreme Court to Hear Uighurs' Case*, Wash. Post, Oct. 21, 2009, at A1; Hafetz, *supra* note 3174, at 250; Adam Liptak, *Justices to Hear Appeal from Uighurs Held at Guantánamo*, N.Y. Times, Oct. 21, 2009, at A14.

3390. Transfer Notice, *Ghaffar v. Obama*, No. 1:08-cv-1310 (D.D.C. Nov. 2, 2009), D.E. 107 (Abdul Ghappar Abdul Rahman and Adel Noori); Transfer Notice, *Thabid v. Obama*, No. 1:05-cv-2398 (D.D.C. Nov. 2, 2009), D.E. 123 (Anwar Hassan and Dawut

ferred to accept six of the remaining seven Uighurs, but they declined the offer.³³⁹¹ One of the Uighurs who declined, Bahtiyar Mahnut, did so because the offer was not extended to his brother, Arkin Mahmud, who suffered from mental illness.³³⁹² Switzerland agreed to take the brothers.³³⁹³ On May 1, 2010, the Supreme Court decided not to review the case after all, because all of the Uighurs had been offered places of resettlement outside China and the United States, and most of them had accepted the offers.³³⁹⁴ The judges on the court of appeals reinstated their original opinions on August 9.³³⁹⁵ On April 18, 2011, the Supreme Court denied certiorari. Justice Kagan recused herself, and four justices observed that offers of resettlement from two countries “and the Government’s uncontested commitment to continue to work to resettle petitioners” made the case one that did not present “the important question whether a district court may order the release of an unlawfully held prisoner into the United States *where no other remedy is available*.”³³⁹⁶

Abdurehim); Transfer Notice, Razakah v. Obama, No. 1:05-cv-2370 (D.D.C. Nov. 2, 2009), D.E. 153 (Ahmad Tourson); Transfer Notice, Mamet v. Obama, No. 1:05-cv-1602 (D.D.C. Nov. 2, 2009), D.E. 134 (Edham Mamet); see Hafetz, *supra* note 3174, at 250; Isaac, *supra* note 3384, at 34; David Johnston, 6 Uighurs Leave Guantánamo for Palau, N.Y. Times, Nov. 1, 2009, at 14; Savage, *supra* note 3369.

3391. See Del Quentin Wilber & Peter Finn, *Uighur Brothers to Resettle in Switzerland*, Wash. Post, Feb. 4, 2010, at A10.

3392. See Carol Rosenberg, *Swiss Resettle 2 Uighurs from Guantánamo, Georgia Takes Libyans*, Miami Herald, Mar. 24, 2010; Wilber & Finn, *supra* note 3391.

3393. See Rosenberg, *supra* note 3392; Savage, *supra* note 3369; Wilber & Finn, *supra* note 3391.

3394. Kiyemba v. Obama, 559 U.S. 131 (2010); see Robert Barnes, *Court Declines to Rule on Resettlement of Guantanamo Detainees*, Wash. Post, Mar. 2, 2010, at A5; Hafetz, *supra* note 3174, at 250; Adam Liptak, *Supreme Court Refuses Ruling on Chinese Uighurs Held at Guantánamo*, N.Y. Times, Mar. 2, 2010, at A16.

3395. Kiyemba v. Obama, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (“we reinstate our original opinion, as modified here to take account of new developments”); *id.* at 1048 (Judge Judith W. Rogers, concurring in the judgment) (“my separate concurrence . . . must . . . also be reinstated, acknowledging certain new developments”).

3396. Kiyemba v. Obama, 563 U.S. 954 (2011) (statement of Justice Breyer, joined by Justices Kennedy, Ginsburg, and Sotomayor); see Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. Times, Apr. 19, 2011, at A18.

It was reported that the five remaining Uighurs were offered transfer to Maldives or Palau. Savage, *supra* note 3369.

El Salvador offered to accept the five remaining Uighurs; in 2012, Ahmed Mohamed and Abdul Razak accepted the offer.³³⁹⁷ In 2013, however, they left El Salvador,³³⁹⁸ possibly for Turkey.³³⁹⁹ The Uighurs sent to Palau also resettled in Turkey.³⁴⁰⁰ The last three Uighur detainees were transferred to Slovakia on December 30, 2013.³⁴⁰¹

Returns

For the cases assigned to him for coordination, Judge Hogan ordered the government to begin filing or amending factual returns at the rate of fifty per month, beginning August 29, 2008.³⁴⁰² Just before midnight on August 29, after having filed ten returns, the government moved for a thirty-day extension of all return deadlines, arguing that accommodating the classified information associated with the returns had been unexpectedly time-consuming.³⁴⁰³ Judge Hogan reluctantly granted the motion.³⁴⁰⁴ In November, Judge Hogan ordered that the public files include unclassified versions of the returns.³⁴⁰⁵

Conditions of Confinement

On September 22, in response to motions for access to medical records and other relief, Judge Hogan ruled that although the Supreme Court had

3397. See Carol Rosenberg, *U.S. Sends Captives to El Salvador*, Miami Herald, Apr. 20, 2012, at 3A; Savage, *supra* note 3369.

3398. See Tim Johnson, *Notable & Quotable*, Wall St. J., Sept. 28, 2013, at A11 (“Uighurs familiar with the case said it is likely the two men headed to Turkey.”); Carol Rosenberg, *Six U.S. Detainees Sent to New Lives in Uruguay*, Miami Herald, Dec. 8, 2014, at 1A (“The two men sent to Salvador left, probably to Turkey.”).

3399. See Carol Rosenberg, *U.S. Has Lost Track of Some Inmates from Guantanamo Who Were Released*, Miami Herald, Nov. 13, 2018, at 1A.

3400. See *id.*

3401. Transfer Notice, *Kiyemba v. Obama*, No. 1:05-cv-1509 (D.D.C. Dec. 31, 2013), D.E. 264 [hereinafter Dec. 31, 2013, *Kiyemba* Transfer Notice] (Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper); see Adam Goldman, *Last 3 Uighurs at Guantanamo Are Freed*, Wash. Post, Jan. 1, 2014, at A4; Carol Rosenberg, *Last 3 Uighurs Leave Guantánamo*, Miami Herald, Jan. 1, 2014, at 1A; Charlie Savage, *U.S. Frees Last of the Chinese Uighur Detainees from Guantánamo Bay*, N.Y. Times, Jan. 1, 2014, at A13.

3402. *In re Guantanamo Bay Detainee Litig.*, 564 F. Supp. 2d 14, 16 (D.D.C. 2008).

3403. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 (D.D.C. 2008).

The Justice Department did not begin organizing evidence against the detainees until the Supreme Court’s *Boumediene* decision. Interview with Judge Royce C. Lamberth, May 13, 2011.

3404. *Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 310.

3405. Case-Management Order, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Nov. 6, 2008), D.E. 940, 2008 WL 4858241.

declared unconstitutional the Military Commissions Act of 2006's stripping of jurisdiction over core habeas corpus claims, the precedent did not apply to the act's stripping of jurisdiction over claims concerning conditions of confinement, so Judge Hogan denied the motions.³⁴⁰⁶ Judge Roberts, the merits judge for one of the cases, decided on reconsideration that the motion concerned the detainee's ability to pursue his core habeas claims and granted relief on November 28.³⁴⁰⁷

Judges Urbina,³⁴⁰⁸ Bates,³⁴⁰⁹ and Kessler³⁴¹⁰ agreed with Judge Hogan that the court had no jurisdiction over conditions of confinement.

Zayn al-Abidin Muhammad Husayn,³⁴¹¹ also known as Abu Zubaydah, was identified in early 2000 as a suspected key lieutenant of Osama Bin Laden's.³⁴¹² In March 2002, he was captured in Faisalabad, Pakistan.³⁴¹³ He

3406. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 314 (D.D.C. 2008); *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 312 (D.D.C. 2008).

As Congress considered stripping Guantánamo Bay detainees of habeas corpus rights, habeas attorneys contemplated urging a compromise in which only jurisdiction over conditions of confinement would be stripped. See Gary A. Isaac, *The Great Writ Gets Political: Defending Habeas Corpus in Court, in Congress, and on the Campaign Trail*, in *The Guantánamo Lawyers*, *supra* note 3154, at 200, 205, 212–13.

3407. *Husayn v. Gates*, 588 F. Supp. 2d 7 (D.D.C. 2008).

3408. *Tumani v. Obama*, 598 F. Supp. 2d 67, 69 (D.D.C. 2008) (denying a motion for less restrictive detention); *In re* Guantanamo Bay Detainee Litig., 570 F. Supp. 2d 13, 19 (D.D.C. 2008) (same).

3409. *Khadr v. Bush*, 587 F. Supp. 2d 225, 234–37 (D.D.C. 2008) (overruling a challenge to confinement as an adult).

3410. *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 117–20 (D.D.C. 2009) (denying an injunction against the government's methods of force-feeding two hunger-striking detainees).

3411. Docket Sheet, *Husayn v. Gates*, No. 1:08-cv-1360 (D.D.C. Aug. 6, 2008) [hereinafter *Husayn* Docket Sheet]; see Joseph Hickman & John Kiriakou, *The Convenient Terrorist* xvii (2017) (expressing his name as Zain Abidin Mohammed Husain).

3412. See Judith Miller, *Dissecting a Terror Plot From Boston to Amman*, N.Y. Times, Jan. 15, 2001, at A1; James Risen, *Foiled Terror Plot on Tourists Linked to Bin Laden Aide*, N.Y. Times, Feb. 29, 2000, at A1; Soufan, *supra* note 3200, at 380–81; see also Hafetz, *supra* note 3174, at 232 (“Interrogators later realized that Zubaydah was merely a low-level personnel clerk who helped facilitate travel to training camps in Afghanistan.”); Soufan, *supra* note 3200, at 381 (“It was not until the Obama administration was in office that U.S. officials stopped calling him a senior al-Qaeda member.”). See generally Hickman & Kiriakou, *supra* note 3411; *id.* at 70 (reporting that confusion arose from there being two Abu Zubaydahs).

3413. Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, at 21 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], www.intelligence.senate.gov/sites/default/files/

was the first prisoner subjected to post-September 11 enhanced interrogation.³⁴¹⁴ Information derived from Abu Zubaydah reportedly helped to identify José Padilla as a terrorism suspect.³⁴¹⁵ Destruction of videotapes of Abu Zubaydah and other detainees' harsh interrogations led to a high-profile criminal investigation that ultimately resulted in no criminal charges.³⁴¹⁶ On September 6, 2006, President Bush announced that Abu

documents/CRPT-113srpt288.pdf; see Michael R. Gordon, *A Top Qaeda Commander Believed Seized in Pakistan*, N.Y. Times, Mar. 31, 2002, at 112; John Kiriakou & Michael Ruby, *The Reluctant Spy* 106–23 (2009); Soufan, *supra* note 3200, at 373–74.

3414. See *Frontline: Secrets, Politics and Torture* (PBS television broadcast May 19, 2015), www.pbs.org/wgbh/pages/frontline/secrets-politics-and-torture/; Mark Mazzetti, *Failure of Oversight Is Outlined—Agency Defends Program*, N.Y. Times, Dec. 10, 2014, at A1 (reporting that Abu Zubaydah was first transported to a CIA facility in Thailand); Greg Miller, Adam Goldman & Julie Tate, *Report Details Vicious Acts, Cites a Pattern of Deception*, Wash. Post, Dec. 10, 2014, at A1; see also Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. Times, Apr. 20, 2009, at A1 (reporting that Abu Zubaydah was waterboarded at least several dozen times in August 2002). See generally *The Forever Prisoner* (HBO Documentary film 2021).

3415. Hafetz, *supra* note 3174, at 46, 232; Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive, the White House Says*, N.Y. Times, Mar. 4, 2003, at A13; Terry McDermott & Josh Meyer, *The Hunt for KSM* 218–19 (2012); Soufan, *supra* note 3200, at 354, 427; see Chapter 8: Dirty Bomber, *supra* page 156.

The Senate Select Committee on Intelligence concluded that Abu Zubaydah provided information about Padilla before Abu Zubaydah received enhanced interrogation and after a foreign government provided information about Padilla. SSCI Executive Summary, *supra* note 3413, at 225–37.

3416. See Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal Inquiry Into C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, at A1; Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12; Larry Siems, *The Torture Report* 59–97 (2011); Soufan, *supra* note 3200, at 434 (“Declassified internal CIA e-mails show senior CIA officials stating the urgency and importance of destroying the tapes.”).

“There were 91 tapes in all, and they had been held in a safe at the CIA station in Thailand, [where detainees] were interrogated.” Carol Rosenberg, *Guantánamo Judge: CIA Officials May Testify on Destroyed “Black Site” Videotapes*, Miami Herald, Mar. 8, 2017, at 15A.

Southern District of New York Judge J. Paul Oetken denied a claim under the Freedom of Information Act by the *New York Times* for a copy of the criminal investigation’s report. *N.Y. Times Co. v. U.S. Dep’t of Just.*, 138 F. Supp. 3d 462, 476 (S.D.N.Y. 2015); see *Complaint*, *N.Y. Times Co. v. U.S. Dep’t of Just.*, No. 1:14-cv-3777 (S.D.N.Y. May 28, 2014), D.E. 2; see also *N.Y. Times Co. v. U.S. Dep’t of Just.*, 235 F. Supp. 3d 522 (S.D.N.Y.

Zubaydah and thirteen other terrorism suspects, including Khalid Shaikh Mohammed, who is understood to be the mastermind of the September 11, 2001, attacks, had been transferred from secret CIA prisons to Guantánamo Bay.³⁴¹⁷ On July 24, 2014, the European Court of Human Rights issued a €130,000 judgment against Poland for Poland's complicity in the torture and other mistreatment of Abu Zubaydah by extraordinary rendition.³⁴¹⁸ Abu Zubaydah received a €130,000 judgment by the court against Lithuania on May 31, 2018.³⁴¹⁹

2017) (ordering production of other documents with appropriate redactions), *aff'd in part and rev'd in part*, 939 F.3d 479 (2d Cir. 2019) (determining that what are produceable are "memoranda and associated exhibits that relate to the conclusion that some of the detainees were not in CIA custody").

The investigation of destroyed videotapes led to the Senate Select Committee on Intelligence's 2014 "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program." Foreword at 1, SSCI Executive Summary, *supra* note 3413; Executive Summary at 8, *id.* See generally *Frontline: Secrets, Politics and Torture*, *supra* note 3414.

3417. SSCI Executive Summary, *supra* note 3413, at 159–60 ("As all other detainees in the CIA's custody had been transferred to other nations, the CIA had no detainees in its custody at the time of the speech."); see Cucullu, *supra* note 3174, at 5; Hafetz, *supra* note 3174, at 48; Sheryl Gay Stolberg, David Johnston & Mark Mazzetti, *President Moves 14 Held in Secret to Guantánamo*, N.Y. Times, Sept. 7, 2006, at A1.

In September 2006, Mr. Bush ordered all of the detainees in C.I.A. custody to be transferred to the prison at Guantánamo Bay, Cuba, and after that the C.I.A. held a small number of detainees in secret at a different facility for several months at a time, before they were also moved to Guantánamo Bay.

Mazzetti, *supra* note 3414.

Five detainees in CIA custody at Guantánamo Bay were transferred to another country in 2004 to avoid possible habeas jurisdiction over them should the government not prevail in *Rasul v. Bush*, which it did not. SSCI Executive Summary, *supra* note 3413, at 140–41; see *Rasul v. Bush*, 542 U.S. 466 (2004); see also Carol Rosenberg, *Senate Report Confirms CIA Had "Black Site" at Guantánamo Base*, Miami Herald, Dec. 12, 2014, at 1A.

3418. Judgment, *Husayn v. Poland*, No. 7511/13 (Eur. Ct. H.R. July 24, 2014, final Feb. 16, 2015), hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047; see Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, N.Y. Times, July 25, 2014, at A9; Adam Goldman, *European Court Finds Poland Facilitated CIA Torture of Terrorism Suspects*, Wash. Post, July 25, 2014, at A22; International Commission of Jurists, *Transnational Injustices: National Security Transfers and International Law* 141–44 (2017), www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf; Gabriele Steinhauser & Jess Bravin, *Court Assails Poland on CIA Rendition*, Wall St. J., July 25, 2014, at A9; see also Judgment, *Al-Nashiri v. Poland*, No. 28761/11 (Eur. Ct. H.R. July 24, 2014), hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044 (a €100,000 judgment against Poland for Poland's assistance with the extraordi-

At Guantánamo Bay, Abu Zubaydah suffered from frequent and severe seizures.³⁴²⁰ He claimed that side effects from treatment provided at Guantánamo Bay “rendered him incoherent, interfered with his ability to write and speak, and made him acutely psychotic.”³⁴²¹ Judge Roberts granted Abu Zubaydah’s attorneys access to his medical records and gave them permission to share the records with an independent physician.³⁴²² Judge Urbina also granted a habeas petitioner’s attorneys access to the client’s medical records.³⁴²³ Judge Sullivan appointed the court’s “own medical/mental health expert to examine the Petitioner and provide the Court with a report and any recommendations” in response to representations that forcefeeding the detainee with a corn-based solution to which he might have been allergic was causing vomiting so extensive that it was interfering with attorney–client visits.³⁴²⁴ A court-appointed doctor visited the detainee the following month.³⁴²⁵

nary rendition of Guantánamo detainee Abd al-Rahim al-Nashiri, who is being prosecuted by military commission for the 2000 bombing of the USS *Cole*).

3419. Judgment, *Husayn v. Lithuania*, No. 46454/11 (Eur. Ct. H.R. May 31, 2018, final Oct. 8, 2018), hudoc.echr.coe.int/eng?i=001-183687; see Alan Cowell & Charlie Savage, *European Court Finds Lithuania and Romania Complicit in C.I.A. Prisons*, N.Y. Times, June 1, 2018, at A9 (also reporting a €100,000 judgment against Romania in favor of Al-Nashiri, who is being prosecuted by military commission for complicity in the *Cole* bombing).

3420. *Husayn v. Gates*, 588 F. Supp. 2d 7, 9 (D.D.C. 2008); *In re Guantánamo Bay Detainee Litig.*, 577 F. Supp. 2d 314, 315 (D.D.C. 2008); see also Soufan, *supra* note 3200, at 381–84 (describing Abu Zubaydah’s precarious health soon after his capture).

Abu Zubaydah remains detained. Appendix Table 4, *infra* page 641 (n.15).

3421. *Husayn*, 588 F. Supp. 2d at 9.

3422. *Id.* at 12.

Judge Roberts overruled the government’s redactions from the medical records of “certain, limited information based on a determination that Petitioner’s counsel does not have the requisite need-to-know the information,” reasoning that “[t]he petitioner’s counsel has a security clearance and is presumed to have a need to know the information that he is requesting.” Order, *Husayn v. Gates*, No. 1:08-cv-1360 (D.D.C. Mar. 4, 2009), D.E. 113, 2009 WL 544492. The government complied with the order, reserving the right to rebut need to know in appropriate cases. Government Response, *id.* (Mar. 6, 2009).

In 2020, Judge Sullivan modified the order to permit the government to redact from information produced to habeas counsel information about the detainee’s previous locations of detention. Opinion, *Husayn*, No. 1:08-cv-1360 (D.D.C. June 6, 2020), D.E. 549, 2020 WL 3035052.

3423. *Tumani v. Obama*, 598 F. Supp. 2d 67, 70–71 (D.D.C. 2008).

3424. *Zuhair v. Bush*, 592 F. Supp. 2d 16 (D.D.C. 2008); see *id.* at 17 (“in order to ensure that Petitioner has meaningful access to counsel, that his counsel are able to adequately communicate with him in order to represent his claims to this Court, and to pre-

In response to a June 18, 2009, motion by attorneys for Muhammad Ahmad Abdallah al-Ansi for medical records to determine “whether Mr. al Ansi has a serious or life-threatening medical condition and whether he is receiving adequate medical treatment that will keep him alive and competent to participate in these proceedings,”³⁴²⁶ Judge Kessler ruled that “counsel is entitled to the medical records in order to provide Petitioner effective access to his counsel”³⁴²⁷ and that the order “does not pertain to the conditions of Petitioner’s confinement.”³⁴²⁸ Al-Ansi was transferred to Oman in January 2017.³⁴²⁹

On February 11, 2014, in a case concerning the force-feeding of hunger strikers, a panel of the court of appeals held by a vote of two to one that the courts retained jurisdiction over conditions-of-confinement challenges pursued in habeas actions; what they lacked for Guantánamo detainees was jurisdiction over *Bivens* actions.³⁴³⁰

Abstention

One of the cases assigned to Judge Hogan for coordination was a petition by Omar Khadr, a Canadian citizen whose family moved to Afghanistan in 1997, who was fifteen when he was captured in Kabul in July 2002, and

serve this Court’s jurisdiction over Petitioner’s habeas petition”); see Order, *Zuhair v. Bush*, No. 1:08-cv-864 (D.D.C. Jan. 16, 2009), D.E. 134, 2009 WL 111690 (“The report shall not be filed on the public docket, however, the Court will provide copies to counsel for the parties.”).

3425. Docket Sheet, *Zuhair*, No. 1:08-cv-864 (D.D.C. May 19, 2008) (noting a January 2009 visit); see Report, *id.* (Aug. 24, 2009), D.E. 214.

In 2012, it was reported that attorneys for Abu Zubaydah requested his prosecution by military commission. See Ben Fox, *Trial Sought for Longtime Guantánamo Inmate*, Miami Herald, May 11, 2012, at 11A.

3426. Emergency Motion at 3, *Al-Ansi v. Obama*, No. 1:08-cv-1923 (D.D.C. June 18, 2009), D.E. 93.

3427. Order, *id.* (July 9, 2009), D.E. 104, 2009 WL 2020774.

3428. *Id.* at 1 n.1.

3429. See Carol Rosenberg, *Victims of Mistaken Identity Among the 10 Sent from Guantánamo to Oman*, Miami Herald, Jan. 18, 2017, at 8A.

3430. *Aamer v. Obama*, 742 F.3d 1023, 1026, 1028–38 (D.C. Cir. 2014) (opinion by Judge David S. Tatel, joined by Judge Thomas B. Griffith); see *id.* at 1044–50 (dissenting opinion by Judge Stephen F. Williams); see also Frederic J. Frommer, *Detainees Can File Force-Feeding Cases*, Miami Herald, Feb. 12, 2014, at 3A; Charlie Savage, *Appeals Court Allows Challenges by Detainees at Guantánamo Prison*, N.Y. Times, Feb. 12, 2014, at A15.

It was reported that the solicitor general declined to seek further review because “the ruling, for now, did not order the government to do anything, so they could still raise the jurisdictional issue at a later stage or in a different case.” Savage, *Power Wars*, *supra* note 3218, at 516.

who was sixteen when he arrived at Guantánamo Bay.³⁴³¹ He was seventeen when his grandmother filed a habeas petition on his behalf.³⁴³² The government brought war charges against Khadr in a military commission, alleging, among other things, murder of a U.S. soldier by throwing a hand grenade at U.S. forces and attempted murder by converting land mines to improvised explosive devices.³⁴³³ The merits judge for the habeas case was Judge Bates, who determined that the habeas action should be stayed pending military commission proceedings, because the commission result was subject to article III review.³⁴³⁴ Khadr pleaded guilty on October 25, 2010, pursuant to an agreement that he serve no more than eight years.³⁴³⁵ He was returned to Canada on September 29, 2012, to serve the remainder of his sentence.³⁴³⁶ In light of Hamdan's successful appeal, Khadr appealed his conviction to the U.S. Court of Military Commissions Review on No-

3431. *Khadr v. Bush*, 724 F. Supp. 2d 61, 62 (D.D.C. 2010); *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K. v. Bush*, 344 F. Supp. 2d 44, 49 (D.D.C. 2004).

"Born in Toronto, Khadr was a Canadian citizen. But his father, Ahmed Said Khadr, was a confidant of Osama bin Laden, and Omar spent much of his youth in Pakistan and Afghanistan, where he and his brothers attended al Qaeda camps and played with bin Laden's children." Bravin, *supra* note 3145, at 287.

3432. *Khadr*, 587 F. Supp. 2d at 228; *O.K.*, 344 F. Supp. 2d at 52; *Khadr* Docket Sheet, *supra* note 3179.

3433. *Khadr v. United States*, 529 F.3d 1112, 1114 (D.C. Cir. 2008).

The Defense Department posts docket information about military commission cases on the internet. Office of Military Commission Cases, www.mc.mil/CASES.aspx.

3434. *Khadr*, 724 F. Supp. 2d 61; *O.K.*, 344 F. Supp. 2d 44.

3435. See Carol Rosenberg, *Teen Terrorist Gets 40 Years, But Will Serve Only 8*, Miami Herald, Oct. 31, 2010, at 5A; Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. Times, Nov. 2, 2010, at A13; Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. Times, Oct. 26, 2010, at A12.

"Moreover, Khadr would be eligible for repatriation to Canada after just one year, and under Canadian law he would be eligible for parole after serving just a third of his sentence." Savage, *Power Wars*, *supra* note 3218, at 319.

3436. See Ian Austen, *Canadian Held at Guantánamo Bay Is Repatriated*, N.Y. Times, Sept. 30, 2012, at 27; Ernesto Londoño, *Youngest Detainee Leaves Guantanamo*, Wash. Post, Sept. 30, 2012, at A3; Kent Roach, *The Law Working Itself Pure? The Canadian Experience with Exceptional Courts and Guantánamo*, in *Guantánamo and Beyond* 201, 202–03, 217–22 (Fionnuala Ní Aoláin & Oren Gross eds., 2013); Carol Rosenberg, *Khadr Back in Canada from Guantánamo*, Miami Herald, Sept. 30, 2012, at 3A; see also Editorial, *Omar Khadr's Untold Story*, N.Y. Times, Aug. 4, 2014, at A20 ("[Khadr] has recanted his admission of guilt, saying he tendered it only to win release from Guantánamo and return to Canada.").

vember 14, 2013.³⁴³⁷ Khadr was released in 2015³⁴³⁸ and awarded the equivalent of \$8 million in 2017 as a settlement of his civil claims against the Canadian government for its complicity in his oppressive incarceration.³⁴³⁹

On January 6, 2009, Judge Kotelly agreed—concerning the habeas petitions of Kuwaitis Fouad Mahmoud al-Rabiah and Fayiz Mohammed Ahmen al-Kandari—that habeas cases should be stayed during military commission proceedings, but a stay was not warranted until a military commission was actually convened against the petitioner.³⁴⁴⁰ Each of these petitioners had been charged with violating the laws of war, but the convening authority, who was appointed by the secretary of defense to review such charges, had not yet decided whether to dismiss the charges or refer them to a military commission.³⁴⁴¹

Judge Kotelly held a merits hearing for al-Rabiah in August 2009.³⁴⁴² Al-Rabiah, who had studied in Perth, Scotland, and Daytona Beach, Flori-

3437. Appeal Case Record, *Khadr v. United States*, No. 13-5 (Ct. Mil. Comm’n Rev. Nov. 14, 2013), www.mc.mil/Cases.aspx?caseType=cmcr; see Carol Rosenberg, *Khadr Appeals Guantánamo Conviction*, Miami Herald, Nov. 9, 2013, at 3A.

3438. See Ian Austen, *Ex-Guantánamo Inmate Is Freed on Bail in Canada*, N.Y. Times, May 8, 2015, at A4; *Canadian Court Frees Former Guantanamo Inmate*, Wash. Post, May 8, 2015, at A9; *Ex-Gitmo Inmate Asks for Fresh Start*, Miami Herald, May 8, 2015, at 3A; Charmaine Noronha, *Judge Rules Former Guantánamo Captive Can Get Bail; Appeal Planned*, Miami Herald, Apr. 25, 2015, at 3A.

In 2019, Khadr’s release pending appeal of his military commission conviction was converted to an expiration of his sentence. See Anna Junker, *Judge Grants Khadr’s Request to End Sentence*, Edmonton J., Mar. 26, 2019, at A1.

3439. See Ian Austen, *Canada Pays Over \$8 Million to Man Held at Guantánamo*, N.Y. Times, July 8, 2017, at A5; Rob Gillies, *Canada to Apologize, Pay Millions to Former Guantánamo Prisoner*, Miami Herald, July 5, 2017, at 9A; Paul Vieira & David George-Cosh, *Canada Settles with Detainee Held by U.S.*, Wall St. J., July 8, 2017, at A8.

District of Utah Judge Tena Campbell awarded plaintiffs \$134,152,664.21 against Khadr in a default judgment for injuries and death arising from “a terrorist ambush in Afghanistan.” Default Judgment, *Morris v. Khadr*, No. 2:14-cv-391 (D. Utah June 8, 2015), D.E. 16; Amended Complaint, *id.* (Aug. 8, 2014), D.E. 7; Complaint, *id.* (May 23, 2014), D.E. 2; see Gillies, *supra* (reporting that there was little chance that the plaintiffs would collect on the judgment because Khadr lived in Canada).

3440. *Al Odah v. Bush*, 593 F. Supp. 2d 53, 61 (D.D.C. 2009); see Charge Sheet, *United States v. Al-Rabia* (Mil. Comm’n Oct. 21, 2008), [www.mc.mil/Portals/0/pdfs/alRabia/Rabia%20\(Government%20Sworn%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alRabia/Rabia%20(Government%20Sworn%20Charges).pdf); Charge Sheet, *United States v. Al-Kandari* (Mil. Comm’n Oct. 21, 2018), [www.mc.mil/Portals/0/pdfs/alKandari/Al%20Kandari%20\(Government%20Sworn%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alKandari/Al%20Kandari%20(Government%20Sworn%20Charges).pdf).

3441. *Al Odah*, 593 F. Supp. 2d at 54–55, 60–61.

3442. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 (D.D.C. 2009).

da, was an aviation engineer for Kuwait Airways.³⁴⁴³ He periodically took approved leave from his job to do charitable work in stressed locations such as Bosnia, Kosovo, and Bangladesh.³⁴⁴⁴ Al-Rabiah took two weeks' leave for a trip to Afghanistan in October 2001, but he was unable to return because the border was closed as a result of the military actions by the United States there that month.³⁴⁴⁵ Al-Rabiah was captured near the end of the year.³⁴⁴⁶ Judge Kotelly found the government's evidence that al-Rabiah was in Afghanistan for other than charitable purposes to be very inconsistent and ultimately not credible, so on September 17, 2009, she ordered his release.³⁴⁴⁷ Al-Rabiah was released to Kuwait on December 9.³⁴⁴⁸

On the other hand,

Al-Kandari was in the mountains near Tora Bora, during the height of the [December 2001] Battle of Tora Bora, armed with a Kalishnikov rifle, and in the company of several members and high-level leaders of al Qaeda, the Taliban, or associated enemy forces, who were actively engaged in fighting the United States and its Coalition allies.³⁴⁴⁹

Judge Kotelly denied al-Kandari's petition on September 15, 2010, following an October 2009 merits hearing,³⁴⁵⁰ and the court of appeals affirmed the denial.³⁴⁵¹ In 2012, the government decided not to prosecute al-Kandari.³⁴⁵² He was transferred to Kuwait on January 8, 2016.³⁴⁵³

3443. *Id.* at 20.

3444. *Id.* at 20–21.

3445. *Id.* at 21; see *United States v. Passaro*, 577 F.3d 207, 211 (4th Cir. 2009) (“After the September 11, 2001, terrorist attacks, the United States conducted a military operation in Afghanistan in an effort to topple the Taliban regime.”).

3446. *Al Rabiah*, 658 F. Supp. 2d at 21–22.

3447. *Id.* at 42; see Hafetz, *supra* note 3174, at 247; *Kuwaiti Ordered Released from Guantánamo Bay*, N.Y. Times, Sept. 26, 2009, at A15 (“Mr. Rabiah, 50, is the 30th Guantánamo detainee to be ordered released by a federal judge who has reviewed evidence justifying detention.”); Carol Rosenberg, *Guantánamo Detainees Sent to Kuwait, Belgium*, Miami Herald, Oct. 9, 2009.

3448. Transfer Notice, *Al-Odah v. Obama*, No. 1:02-cv-828 (D.D.C. Dec. 14, 2009), D.E. 676; see Carol Rosenberg, *Cleared Guantánamo Detainee Sent to Kuwait*, Miami Herald, Dec. 9, 2009.

3449. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

3450. *Id.*

3451. *Al-Kandari v. Obama*, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 901 (2012).

3452. See Carol Rosenberg, *Kuwaiti's War-Crimes Charges Are Dropped*, Miami Herald, June 30, 2012, at 4A.

Authority passed from President Bush to President Obama on January 20, 2009.³⁴⁵⁴ Four days before that, the government moved to stay habeas proceedings for Ahmad Mohammad al-Darbi because he had been referred to a military commission the previous February.³⁴⁵⁵ Because military commissions were suspended two days after President Obama's inauguration,³⁴⁵⁶ Judge Royce C. Lamberth denied the government's motion.³⁴⁵⁷ Judges Kotelly³⁴⁵⁸ and Huvelle³⁴⁵⁹ ruled similarly in cases before them.

Military commission proceedings against al-Darbi resumed in 2012.³⁴⁶⁰ He pleaded guilty in February 2014 and agreed to testify against Abd al-Rahim al-Nashiri, who was being prosecuted for the 2000 USS *Cole* bombing.³⁴⁶¹

Al-Darbi was to be sentenced three-and-one-half years after the plea and possibly repatriated to Saudi Arabia some time after that to serve out his sentence, which could be capped at fifteen years.³⁴⁶² His habeas petition was voluntarily dismissed without prejudice.³⁴⁶³

3453. Transfer Notice, *Al-Odah*, No. 1:02-cv-828 (D.D.C. Jan. 8, 2016), D.E. 779 [hereinafter *Al-Kandari Transfer Notice*] (sealed); see Carol Rosenberg, *Last Kuwaiti Captive Leaves Guantanamo*, Miami Herald, Jan. 9, 2016, at 14A.

3454. See Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. Times, Jan. 21, 2009, at A1.

3455. Government Motion, *Al-Darbi v. Bush*, No. 1:05-cv-2371 (D.D.C. Jan. 16, 2009), D.E. 108.

3456. Exec. Order No. 13,492, § 7, 74 Fed. Reg. 4897 (Jan. 27, 2009).

3457. Order, *Al-Darbi*, No. 1:05-cv-2371 (D.D.C. Apr. 7, 2009), D.E. 135, 2009 WL 949088.

3458. Order, *Alsawam v. Obama*, No. 1:05-cv-1244 (D.D.C. Apr. 15, 2009), D.E. 150 (Tariq Mahmoud Alsawam).

3459. Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Apr. 22, 2009), D.E. 234, 2009 WL 1078660 (Mohammed Jawad and Mohammed Kameen).

Mohammed Jawad's petition ultimately was successful, and he was released to Afghanistan. Writ, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 30, 2009), D.E. 323 [hereinafter *Jawad Writ*], 2009 WL 2365846; see David Frakt, *A Tale of Two Detainees*, in Obama's Guantanamo, *supra* note 3200, at 187, 193–94; *Guantánamo Detainee Released*, N.Y. Times, Aug. 25, 2009, at A8 [hereinafter *Detainee Released*].

3460. Office of Military Commission Cases, *supra* note 3433; see Carol Rosenberg, *Pentagon Charges Al-Qaida Suspect*, Miami Herald, Aug. 30, 2012, at 3A.

3461. Pretrial Agreement, *United States v. Al-Darbi* (Mil. Comm'n, Dec. 20, 2013, filed Feb. 20, 2014), A.E. 10, [www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20\(AE010\).pdf](http://www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20(AE010).pdf).

3462. *Id.*; see Jess Bravin, *Detainee Offers Plea in Deal for Testimony*, Wall St. J., Feb. 21, 2014, at A4; Adam Goldman, *Relative of Sept. 11 Hijacker to Plead Guilty*, Wash. Post, Feb. 20, 2014, at A8; Pauline Jelinek, *Guantanamo Bay Detainee Pleads Guilty to War*

Combatant Status Review Tribunal Appeals

In July 2004, the Defense Department created Combatant Status Review Tribunals (CSRTs) to determine whether each Guantánamo Bay detainee was an enemy combatant.³⁴⁶⁴ The department also created Administrative Review Boards (ARBs) to periodically review the status of detained enemy combatants to determine whether the detainee still posed a threat justifying detention.³⁴⁶⁵

The Detainee Treatment Act of 2005 was attached to the 2006 appropriation act for the Defense Department, enacted on December 30, 2005.³⁴⁶⁶ The act specified that the Defense Department would submit reports to Congress on CSRT and ARB proceedings.³⁴⁶⁷ It also conferred on the District of Columbia Circuit's court of appeals "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."³⁴⁶⁸

The court of appeals' docket shows 177 CSRT appeals.³⁴⁶⁹ The first was filed on behalf of Saifullah Paracha on January 24, 2006.³⁴⁷⁰ The second

Crimes, Bos. Globe, Feb. 21, 2014, at A7; Carol Rosenberg, *Saudi Pleads Guilty, Could Get Out in 2018*, Miami Herald, Feb. 21, 2014, at 3A.

3463. Order, *Al-Darbi v. Obama*, No. 1:05-cv-2371 (D.D.C. May 15, 2014), D.E. 262.

3464. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008); *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009); *Bismullah v. Gates*, 501 F.3d 178, 181 (D.C. Cir. 2007); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450 (D.D.C. 2005); see Lewis, *supra* note 3208; Meltzer, *supra* note 3168, at 6.

Former detainee Moazzam Begg reported that he received a notice of CSRT proceedings about a week after the CSRTs were established. Moazzam Begg, *Enemy Combatant* 261–62 (2006).

In 2011, the U.S. Court of Appeals for the District of Columbia Circuit ruled that some CSRT records could be withheld from inquiries pursuant to the Freedom of Information Act. *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612 (D.C. Cir. 2011), *aff'd* 664 F. Supp. 2d 72 (D.D.C. 2009); see Complaint, *ACLU v. Dep't of Def.*, No. 1:08-cv-437 (D.D.C. Mar. 13, 2008), D.E. 1.

3465. See Lewis, *supra* note 3208.

3466. Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005).

3467. *Id.*, § 1005.

3468. *Id.*, § 1005(e)(2)(A); see 28 U.S.C. § 2241(e) (2020); see also Meltzer, *supra* note 3168, at 6–7.

3469. The cases were assigned the following docket numbers: 06-1038, 06-1117, 06-1197, 06-1397, 07-1031, 07-1066, 07-1083, 07-1089, 07-1090, 07-1095, 07-1096, 07-1098 through 07-1101, 07-1104 through 07-1114, 07-1116 through 07-1119, 07-1122, 07-1125 through 07-1127, 07-1131, 07-1132, 07-1134 through 07-1137, 07-1149, 07-1150, 07-1154 through 07-1161, 07-1165 through 07-1167, 07-1169 through 07-1171, 07-1176, 07-1181

also was filed on behalf of Paracha, on March 30,³⁴⁷¹ and the court of appeals determined that the second appeal was from the ARB, over which the court was not given review jurisdiction.³⁴⁷²

The third CSRT appeal was filed on June 9 on behalf of Haji Bismullah,³⁴⁷³ and the fourth was filed on December 4 on behalf of seven Uighurs.³⁴⁷⁴ In these two cases, the court made a significant preliminary ruling that the court's review was not limited to the CSRT record, but "the court must have access to all the information available to the Tribunal."³⁴⁷⁵ The court of appeals granted relief to the Uighur Parhat,³⁴⁷⁶ but nearly one year later the court determined that had Congress known that the Supreme Court would nullify Congress's stripping of the detainees' habeas corpus rights, Congress would not have given the court of appeals review jurisdiction over CSRT decisions.³⁴⁷⁷

through 07-1186, 07-1188, 07-1189, 07-1191, 07-1192, 07-1195 through 07-1197, 07-1199, 07-1202 through 07-1204, 07-1213 through 07-1215, 07-1221, 07-1224, 07-1225, 07-1234, 07-1236, 07-1237, 07-1243 through 07-1246, 07-1249 through 07-1254, 07-1263, 07-1266, 07-1267, 07-1269, 07-1274, 07-1295, 07-1302, 07-1303, 07-1307, 07-1308, 07-1316, 07-1317, 07-1320, 07-1322, 07-1324, 07-1325, 07-1330, 07-1331, 07-1340 through 07-1342, 07-1349, 07-1350, 07-1357, 07-1358, 07-1365, 07-1368, 07-1373, 07-1374, 07-1384, 07-1393 through 07-1396, 07-1399, 07-1402, 07-1405, 07-1413, 07-1420, 07-1442, 07-1476, 07-1485, 07-1508 through 07-1512, 07-1519, 07-1520 through 07-1523, 07-1526, 07-1527, 08-1007, 08-1011, 08-1027 through 08-1029, 08-1033, 08-1042, 08-1043, 08-1049, 08-1053 through 08-1055, 08-1058, 08-1060, 08-1064, 08-1084, 08-1104, 08-1112, 08-1113, 08-1130, 08-1183, 08-1198, 08-1207, 08-1209, 08-1236, 09-1238, 09-1244, 09-1274, 09-1294, and 10-1067.

3470. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1038 (D.C. Cir. Jan. 24, 2006).

3471. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1117 (D.C. Cir. Mar. 30, 2006).

3472. Order, *id.* (Apr. 9, 2007).

3473. Docket Sheet, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir. June 9, 2006).

Bismullah was transferred to Afghanistan on January 17, 2009. See projects.nytimes.com/guantanamo.

3474. D.C. Cir. *Parhat* Docket Sheet, *supra* note 3380.

Later, the court ordered separate actions on behalf of each detainee. *Bismullah v. Gates*, 501 F.3d 178, 192 (D.C. Cir. 2007) (resulting in the assignment of docket numbers 07-1508 through 07-1512 and 07-1523).

3475. *Bismullah*, 501 F.3d at 180; see William Glaberson, *Court Tells U.S. to Reveal Data on Guantánamo*, N.Y. Times, July 21, 2007, at A1; Meltzer, *supra* note 3168, at 53; Josh White, *Government Must Share All Evidence on Detainees*, Wash. Post, July 21, 2007, at A2.

3476. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

3477. *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

Contempt

On March 13, 2009, Judge Sullivan issued an “order to show cause why the government and the attorneys for the government in this case should not be held in contempt for failure to . . . produce exculpatory information.”³⁴⁷⁸ The government was obliged, including by orders dated September 22, 2008,³⁴⁷⁹ and January 16, 2009,³⁴⁸⁰ to provide habeas counsel with exculpatory information about their client Aymen Saeed Batarfi.³⁴⁸¹ The government also was obliged to produce Batarfi’s medical records.³⁴⁸² Among those records, the government inadvertently included medical information about another detainee, who was a witness against Batarfi.³⁴⁸³ The identity of the witness was protected in the record, but it appeared to be the case that the medical information about him was that he suffered from antisocial personality disorder, of which deceit is a common symptom.³⁴⁸⁴ Judge Sullivan viewed this information as “highly exculpatory” and called the government to task for not producing it advertently.³⁴⁸⁵ In the end, Judge Sullivan did not issue an order of contempt,³⁴⁸⁶ and Batarfi was released to Yemen on December 19, 2009.³⁴⁸⁷

Detainability

On March 13, 2009, the government filed the new administration’s understanding of whom it could detain at Guantánamo Bay:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks

3478. *Batarfi v. Bush*, 602 F. Supp. 2d 118, 119 (D.D.C. 2009).

3479. See Government Contempt Response, *Batarfi v. Bush*, No. 1:05-cv-409 (D.D.C. Apr. 3, 2009), D.E. 183.

3480. Order, *id.* (Jan. 29, 2009), D.E. 162 [hereinafter *Batarfi* Discovery Order] (order issued orally on January 16, reduced to writing and signed on January 29, and filed on February 10).

3481. *Batarfi*, 602 F. Supp. 2d at 119.

3482. *Batarfi* Discovery Order, *supra* note 3480.

3483. Government Response at 8, *Batarfi*, No. 1:05-cv-409 (D.D.C. Feb. 20, 2009), as redacted, *id.* (Mar. 17, 2009), D.E. 174-2 [hereinafter *Batarfi* Government Response]; see Marisa Taylor, *Judge Blasts Government’s Conduct*, Miami Herald, Apr. 7, 2009, at 3A.

3484. *Batarfi* Government Response, *supra* note 3483, at 8–9; see Taylor, *supra* note 3483.

3485. Transcript at 2–9, *Batarfi*, No. 1:05-cv-409 (D.D.C. Apr. 1, 2009, filed Apr. 1, 2009), D.E. 179.

3486. Docket Sheet, *id.* (Mar. 1, 2005).

3487. Transfer Notice, *id.* (Dec. 22, 2009); see William Glaberson, *U.S. Decides to Release Detainee at Guantánamo*, N.Y. Times, Mar. 31, 2009, at A17.

that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.³⁴⁸⁸

The modification of support with the adverb “substantially” was a change from the previous administration’s position.³⁴⁸⁹

On April 22, Judge Walton announced the standard of detainability he would apply to his cases.³⁴⁹⁰ He agreed to adopt the government’s basic framework,³⁴⁹¹ “provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”³⁴⁹²

Judge Kessler decided to adopt Judge Walton’s framework.³⁴⁹³

On May 19, Judge Bates announced his standard of detainability:

Specifically, the Court rejects the concept of “substantial support” as an independent basis for detention. Likewise, the Court finds that “directly supporting hostilities” is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of “support” as a valid ground for detention. . . .

With the exception of these two “support”-based elements, however, the Court will adopt the government’s proposed framework.³⁴⁹⁴

3488. Government Brief at 2, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Mar. 13, 2009), D. E. 1689.

3489. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009); see Savage, Power Wars, *supra* note 3218, at 119–21 (reporting also that this definition “came to be known as the March 13 Standard”).

3490. *Gherebi*, 609 F. Supp. 2d at 54–71.

3491. *Id.* at 54, 70.

3492. *Id.* at 71; see Hafetz, *supra* note 3174, at 243.

3493. *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38, 42 (D.D.C. 2009); Opinion at 6, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Aug. 21, 2009), D.E. 459 [hereinafter *Al-Adahi Habeas Grant*], 2009 WL 2584685.

3494. *Hamili v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009); see Hafetz, *supra* note 3174, at 243; see also Adam R. Pearlman, *GQ: The Guantanamo Quagmire*, 27 Stanford L. & Pol’y Rev. 101, 103 (2016) (referring to the law of war as international humanitarian law).

Judges Lamberth,³⁴⁹⁵ Kotelly,³⁴⁹⁶ Robertson,³⁴⁹⁷ Hogan,³⁴⁹⁸ and Urbina³⁴⁹⁹ decided to adopt Judge Bates's framework. The court of appeals, however, held that detention could be justified by support, because the government's detention power was not constrained by international laws of war.³⁵⁰⁰

Unreliable Cooperation

On March 31, 2009, Judge Huvelle ordered a detainee released³⁵⁰¹ on a finding that he could "no longer constitute a threat to the United States."³⁵⁰² The detainee, whose association with Al-Qaeda appeared to have been more mercenary than ideological, apparently suffered serious reprisals for his heavy cooperation with the government.³⁵⁰³

3495. *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

3496. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 19 (D.D.C. 2009); *Al Odah v. United States*, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009).

3497. *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009).

3498. *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009).

3499. *Hatim v. Obama*, 677 F. Supp. 2d 1, 7 (D.D.C. 2009).

3500. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 929 (2011); see J. Wells Dixon, *President Obama's Failure to Transfer Detainees from Guantánamo*, in *Obama's Guantánamo*, *supra* note 3200, at 39, 49; Hafetz, *supra* note 3174, at 243; Savage, *Power Wars*, *supra* note 3218, at 301.

Declining to revisit the holding en banc, seven circuit judges wrote that "the panel's discussion of [the international law of war] question is not necessary to the disposition of the merits." *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc); see Savage, *Power Wars*, *supra* note 3218, at 301 (reporting, "Later, the full Court of Appeals . . . retracted [the] reasoning about international law.").

3501. Final Judgment, *Basardh v. Bush*, No. 1:05-cv-889 (D.D.C. Mar. 31, 2009), D.E. 131, 2009 WL 856345; see *Detainee to Be Released*, L.A. Times, Apr. 1, 2009, at 15.

3502. *Basardh v. Bush*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

3503. *Id.* at 32; see Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, Wash. Post, Feb. 3, 2009, at A1 [hereinafter *Quandary*]; see also Del Quentin Wilber, '08 *Habeas Ruling May Snag Obama Plans*, Wash. Post, Feb. 13, 2010, at A2 [hereinafter *Snag*] ("The Yemeni has serious psychological problems that include suicide attempts, hallucinations, a severe personality disorder and depression . . .").

The detainee signed a pro se petition on March 3, 2005. Petition, *Basardh*, No. 1:05-cv-889 (D.D.C. May 3, 2005), D.E. 1 ("Please look at my case, and also send a lawyer to look at my request for asylum because my life has been threatened by Saudis and Yemenis.").

The possible unreliability of his cooperation, however, was a factor in Judge Leon's granting Mohammed el-Gharani's petition,³⁵⁰⁴ Judge Kessler's granting a petition by Alla Ali Bin Ali Ahmed,³⁵⁰⁵ and Judge Urbina's granting a petition by Saeed Mohammed Saleh Hatim.³⁵⁰⁶

The cooperating detainee was transferred to Spain in May 2010.³⁵⁰⁷

Product of Torture

Judge Huvelle agreed, on July 17, 2009, to suppress "every statement made by [Mohammed Jawad] since his arrest as a product of torture."³⁵⁰⁸ The government had declined to contest the suppression motion³⁵⁰⁹ and determined after the motion was granted that it "will no longer treat peti-

3504. *El Gharani v. Bush*, 593 F. Supp. 2d 144, 147–49 (D.D.C. 2009); see Wilber, *Quandary*, *supra* note 3503.

The government released el-Gharani to Chad. *El-Gharani Transfer Notice*, *supra* note 3353.

3505. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56–57 (D.D.C. 2009); see Hafetz, *supra* note 3174, at 244–45; Dafna Linzer, *In Gitmo Case, a Reality Check*, Nat'l L.J., Oct. 11, 2010, at 1; Scott Shane & Benjamin Weiser, *Judging Detainees' Risk, Often with Flawed Evidence*, N.Y. Times, Apr. 25, 2011, at A1; Del Quentin Wilber, *Release of Yemeni Held at Guantanamo Ordered*, Wash. Post, May 13, 2009, at A5.

The government returned Ahmed to Yemen. *Transfer Notice, Ahmed v. Obama*, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009), D.E. 246; see Scott Shane, *Detainee's Case Illustrates Bind of Prison's Fate*, N.Y. Times, Oct. 4, 2009, at A1; Shane & Weiser, *supra*.

3506. *Hatim v. Obama*, 677 F. Supp. 2d 1, 16–18 (D.D.C. 2009); *id.* at 17 (the witness's "symptoms were consistent with a 'depressive disorder, psychosis, post traumatic stress, and a severe personality disorder'"); see Chisun Lee, *Judges Reject Evidence in Gitmo Cases*, Nat'l L.J., Aug. 16, 2010, at 1; Carol Rosenberg, *Federal Judge Orders 32nd Detainee Freed from Guantánamo*, Miami Herald, Dec. 16, 2009; Wilber, *Snag*, *supra* note 3503.

Hatim's writ was vacated and the case remanded for reevaluation in light of subsequent case law. *Hatim v. Obama*, 632 F.3d 720 (D.C. Cir. 2011); see *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 45 (D.D.C. 2013); see also *Court Orders Detainee Held*, N.Y. Times, Feb. 16, 2011, at A18.

Hatim was transferred to Oman on January 13, 2016. *Transfer Notice, Hatim v. Obama*, No. 1:05-cv-1429 (D.D.C. Jan. 14, 2016), D.E. 457 [hereinafter *Hatim Transfer Notice*]; see *Dismissal Order, id.* (Jan. 21, 2016), D.E. 459.

3507. See Mónica Ceberio Belaza, "Al Qaeda Will Kill Me if I Go Home," *El País*, June 29, 2010, at 3; Shane & Weiser, *supra* note 3505.

3508. *Order, Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. July 17, 2009), D.E. 303 [hereinafter *Jawad Suppression Order*], 2009 WL 2149949; see William Glaberson, *U.S. Judge Challenges Evidence on a Detainee*, N.Y. Times, July 23, 2009, at A22 (reporting that a military judge "wrote last year that Afghan officials had threatened to kill Mr. Jawad and his family if he did not confess to the grenade attack").

3509. *Government Response, Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 15, 2009), D.E. 302; see Glaberson, *supra* note 3508. See generally Frakt, *supra* note 3459, at 188–94.

tioner as detainable under the Authorization for Use of Military Force.”³⁵¹⁰ The government noted, however, that “the Attorney General has directed that the criminal investigation of petitioner in connection with the allegation that petitioner threw a grenade at U.S. military personnel continue.”³⁵¹¹

Jawad may have been as young as twelve years old when he was captured in Kabul in December 2002.³⁵¹² On October 9, 2007, military commission charges were filed against Jawad for the alleged throwing of a grenade.³⁵¹³ It was reported that a military prosecutor returned to civilian status after concluding that Jawad might not be guilty.³⁵¹⁴ On July 30, 2009, Judge Huvelle granted Jawad’s writ petition.³⁵¹⁵ Jawad was flown home on August 24 to Kabul, where he met with President Hamid Karzai.³⁵¹⁶

Weak Evidence

Judge Kotelly granted Khalid Abdullah Mishal al-Mutairi’s writ on July 29, 2009.³⁵¹⁷ Al-Mutairi, born in Kuwait City in 1975, traveled to Afghanistan a few days after the September 11, 2001, attacks with \$15,000 in U.S. cur-

3510. Notice at 1, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 24, 2009), D.E. 311 [hereinafter *Jawad Nondetainability Notice*].

3511. *Id.* at 2; see William Glaberson, *Government Might Allow Trial in U.S. for Detainee*, N.Y. Times, July 25, 2009, at A14 (“In a statement accompanying Friday’s court filing, the Justice Department said that an administration task force reviewing the cases of Guantanamo detainees had previously made the decision to refer Mr. Jawad’s case for possible prosecution.”).

3512. See *Detainee Released*, *supra* note 3459 (“Relatives say he was about 12 when he was arrested. The Pentagon said a bone scan showed that he was about 17 at the time.”).

3513. Charge Sheet, *United States v. Jawad* (Mil. Comm’n Oct. 9, 2007), [www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(Sworn%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(Sworn%20Charges).pdf); see William Glaberson, *Guantanamo Detainee Is Charged in ’02 Attack*, N.Y. Times, Oct. 12, 2007, at A19; Glaberson, *supra* note 3508; Hafetz, *supra* note 3174, at 246.

3514. Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, Wash. Post, Sept. 25, 2008, at A6; Frakt, *supra* note 3459, at 189; William Glaberson, *Guantanamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. Times, Sept. 25, 2008, at A18.

3515. *Jawad Writ*, *supra* note 3459; see Frakt, *supra* note 3459, at 193–94; William Glaberson, *Judge Orders a Detainee to Be Freed in August*, N.Y. Times, July 31, 2009, at A14; Hafetz, *supra* note 3174, at 247; see also Matt Apuzzo, Sheri Fink & James Risen, *U.S. Torture Leaves a Legacy of Detainees with Damaged Minds*, N.Y. Times, Oct. 9, 2016, at A1 (reporting that Jawad was living in Pakistan).

Military Commission proceedings against Jawad were dismissed on July 31, 2009. Direction, *Jawad* (Mil. Comm’n July 31, 2009), [www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(CA%20Dismiss%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(CA%20Dismiss%20Charges).pdf).

3516. See Frakt, *supra* note 3459, at 194; *Detainee Released*, *supra* note 3459.

3517. *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009).

rency.³⁵¹⁸ He was one of the detainees named in the 2002 petition filed by fathers and brothers of Kuwaiti detainees.³⁵¹⁹ The government claimed that al-Mutairi was part of Al-Wafa, an Islamic foundation accused of supporting terrorism,³⁵²⁰ but al-Mutairi claimed that he was in Afghanistan to fund the creation of a mosque and to support Al-Wafa's charitable projects.³⁵²¹ Judge Kotelly found al-Mutairi's story about charitable intents and his explanation of how he lost his passport of dubious credibility,³⁵²² but she also found the government's evidence justifying his detention weak.³⁵²³ The government released al-Mutairi to Kuwait.³⁵²⁴

Three Writs Denied; One Writ Reversed

From August through September 2009, Judges Robertson,³⁵²⁵ Kotelly,³⁵²⁶ and Collyer³⁵²⁷ each denied a habeas petition. The court of appeals affirmed the denials.³⁵²⁸

3518. *Id.* at 86.

3519. *Al-Odah* Docket Sheet, *supra* note 3157.

3520. See Thom Shanker & James Dao, *U.S. Planes Bomb Taliban Compound in Kandahar*, N.Y. Times, Nov. 28, 2001, at A1.

3521. *Al Mutairi*, 644 F. Supp. 2d at 86–87.

3522. *Id.* at 87–89.

3523. *Id.* at 89–96.

3524. Transfer Notice, *Al-Odah v. Obama*, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009), D.E. 660; see Rosenberg, *supra* note 3447.

3525. *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (finding that Adham Mohammed al-Awad was an Al-Qaeda fighter, but acknowledging that “[t]he case against Awad is gossamer thin” and “[i]t seems ludicrous to believe that he[—marginally literate who has spent more than seven of his 26 years in American custody—]poses a security threat now”).

Adham Mohammed Ali Awad was transferred to Oman on January 13, 2016. Transfer Notice, *Awad v. Obama*, No. 1:05-cv-2379 (D.D.C. Jan. 14, 2016), D.E. 217 [hereinafter *Awad* Transfer Notice].

3526. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009) (finding that Fawzi Khalid Abdullah Fahad al-Odah became a part of the forces of the Taliban and Al-Qaeda).

3527. Order, *Shafiq v. Obama*, No. 1:05-cv-1506 (D.D.C. Sept. 3, 2009), D.E. 219 [hereinafter *Barhoumi* Order] (denying the writ to Sufyan Barhoumi “[f]or the reasons stated on the record in a closed hearing”); Transcript, *id.* (Sept. 3, 2009, filed Jan. 4, 2010), D.E. 225 [hereinafter *Barhoumi* Transcript]; see *Shafiiq v. Obama*, 951 F. Supp. 2d 13 (D.D.C. 2013) (denying a motion for reconsideration in light of new evidence).

3528. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 917 (2011); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 917 (2011); see *Justices Reject Appeals*, *supra* note 3355.

On July 13, 2010, the court of appeals reversed a writ of habeas corpus granted to Mohammed al-Adahi by Judge Kessler on August 17, 2009.³⁵²⁹ Al-Adahi, a citizen of Yemen, arranged a marriage between his sister and Riyadh Abd al-Aziz Almujaheed, a Yemeni living in Kandahar, Afghanistan.³⁵³⁰ In July 2001, al-Adahi took a six-month leave of absence from his security job in Yemen and delivered his sister to Almujaheed, and Osama Bin Laden hosted a celebration of the marriage.³⁵³¹ In addition to meeting with Bin Laden while away from home, al-Adahi attended the al-Farouq training camp, but he was expelled from the camp—for smoking tobacco, he claimed.³⁵³² Judge Kessler saw the evidence as showing al-Adahi's brother-in-law as a close associate of Bin Laden's but not al-Adahi;³⁵³³ the court of appeals saw the evidence as more inculpatory of al-Adahi.³⁵³⁴

Reluctant Algerians

On November 19, 2009, Judge Kessler granted a writ to Farhi Saeed Bin Mohammed, an Algerian who lived in Europe under false names with false documents and traveled to Afghanistan along a "terrorist pipeline."³⁵³⁵ "The Government has failed to provide reliable evidence that Petitioner received any training in weaponry or fighting, or that he engaged in actual fighting of any kind on behalf of al-Qaida and/or the Taliban."³⁵³⁶

3529. *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1194 (2011); see Savage, *Power Wars*, *supra* note 3218, at 312; Charlie Savage, *Reversal Upholds Detention of Yemeni at Guantánamo*, N.Y. Times, July 14, 2010, at A19 ("Courts have now upheld the detention of 15 Guantánamo prisoners, while ordering 36 freed."). See generally Greenberg, *supra* note 3174, at 208–11 (reporting that the district court became much more skeptical of habeas claims after this decision).

3530. *Al-Adahi*, 613 F.3d at 1106; *Al-Adahi Habeas Grant*, *supra* note 3493, at 14.

3531. *Al-Adahi*, 613 F.3d at 1102, 1106; *Al-Adahi Habeas Grant*, *supra* note 3493, at 14–15, 17 & n.9.

3532. *Al-Adahi*, 613 F.3d at 1102, 1106–09; *Al-Adahi Habeas Grant*, *supra* note 3493, at 17, 20–31.

3533. *Al-Adahi Habeas Grant*, *supra* note 3493, at 40–41.

3534. *Al-Adahi*, 613 F.3d 1102; see Appendix Table 3, *infra* page 632 (noting al-Adahi's transfer to the United Arab Emirates on August 13, 2016, transfers noted by news media n.6).

3535. *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38, 39, 45–46 (D.D.C. 2009), *re-printed at* 704 F. Supp. 2d 1; see Carol Rosenberg, *Fearful Detainee Sent Home to Algeria*, Miami Herald, Jan. 7, 2011, at 4A; Siems, *supra* note 3416, at 16–17.

3536. *Bin Mohammed*, 689 F. Supp. 2d at 67.

On May 27, 2010, Bin Mohammed sought an injunction against his return to Algeria, because he feared he would be harmed there.³⁵³⁷

Petitioner asks to enjoin that transfer because of his great fear that he will be caught in a “no win” situation: either the Government of Algeria will arrest him as a terrorist because of his detention at Guantanamo Bay, and then torture, try, and possibly execute him, or he will be targeted for recruitment and retribution by Islamic extremist groups who have been terrorizing the Algerian population for close to 20 years and who will kill him if he refuses to join their ranks. Petitioner stated that he no longer has family ties, friends, or prospects in Algeria. He has declared that he would rather stay at Guantanamo Bay for the rest of his life than be returned to Algeria.³⁵³⁸

On June 29, Judge Kessler enjoined Bin Mohammed’s transfer to Algeria.³⁵³⁹ On July 8, the court of appeals summarily reversed and dissolved the injunction.³⁵⁴⁰ On July 16, the Supreme Court denied Bin Mohammed’s application for a stay of the appellate decision, with Justices Ginsburg, Breyer, and Sotomayor dissenting.³⁵⁴¹ The government transported Bin Mohammed to Algeria on January 6, 2011.³⁵⁴²

3537. Opinion at 4, *Bin Mohammed v. Obama*, No. 1:05-cv-1347 (D.D.C. June 29, 2010) [hereinafter *Bin Mohammed Injunction*], filed as ex. 1, Public (Redacted) Motion, *Bin Mohammed v. Obama*, No. 10-5218 (D.C. Cir. Sept. 21, 2010); Order, *Bin Mohammed*, No. 1:05-cv-1347 (D.D.C. June 3, 2010), D.E. 292; Notice of Filing, *id.* (May 26, 2010), D.E. 286; see Rosenberg, *supra* note 3535.

3538. *Bin Mohammed Injunction*, *supra* note 3537, at 4.

3539. *Id.* at 12.

3540. Order, *Bin Mohammed*, No. 10-5218 (D.C. Cir. July 8, 2010) [hereinafter *Bin Mohammed Injunction Reversal*]; see Peter Finn, *Six Algerians Say They Prefer Guantanamo Over Repatriation*, Wash. Post, July 10, 2010, at A3.

Judge David S. Tatel dissented in part from the decision by Judges Thomas B. Griffith and Brett M. Kavanaugh. Judge Tatel would have remanded for a determination of whether the government had taken into account danger to Bin Mohammed from entities other than the Algerian government. *Bin Mohammed Injunction Reversal*, *supra* (Judge Tatel, dissenting).

3541. *Bin Mohammed v. Obama*, 561 U.S. 1042 (2010); see Peter Finn, *Guantanamo Bay Detainee Is First to Be Sent Home Unwillingly*, Wash. Post, July 20, 2010, at A4; *Justices Decide U.S. May Send Two Detainees Back to Algeria*, N.Y. Times, July 18, 2010, at 15 [hereinafter *Back to Algeria*].

3542. Transfer Notice, *Mohammed*, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011), D.E. 330; see Rosenberg, *supra* note 3535.

Five other Algerians preferred staying at Guantánamo Bay to returning to Algeria.³⁵⁴³ Judge Walton denied Abdul Aziz Naji's application for an injunction against transfer on June 7, 2010.³⁵⁴⁴ On July 16, the court of appeals determined that its decision in Bin Mohammed's case governed Naji's case.³⁵⁴⁵ On the same day, the Supreme Court denied Naji's application for a stay pending a certiorari petition.³⁵⁴⁶ On July 19, the government filed a notice that Naji had been sent to Algeria.³⁵⁴⁷

One of the other four Algerians remained at Guantánamo Bay until March 2014. On February 22, 2007, the government notified Ahmed Belbacha that he was cleared for release.³⁵⁴⁸ In July, Judge Collyer denied Belbacha an injunction against transfer to Algeria.³⁵⁴⁹ The court of appeals remanded the case back to Judge Collyer to preserve jurisdiction over the matter pending the Supreme Court's resolution of *Boumediene*.³⁵⁵⁰ A day after the Supreme Court's *Boumediene* decision, Judge Collyer enjoined Belbacha's transfer "pending briefing and resolution of the issues left unresolved in *Boumediene*."³⁵⁵¹ On November 4, 2009, in a possibly merely symbolic gesture, the town of Amherst, Massachusetts, voted to accept Belbacha.³⁵⁵² In light of the court of appeals' decision in *Kiyemba v.*

3543. See Notice of Filing, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 31, 2009), D.E. 1836 (filing by Djamel Ameziane, No. 1:05-cv-392; Farhi Saeed Bin Mohammed, No. 1:05-cv-1347; Motai Saib, No. 1:05-cv-1353; Nabil Hadjarab, No. 1:05-cv-1504; Ahmed Belbacha, No. 1:05-cv-2349; and Abdul Aziz Naji, No. 1:05-cv-2386); see also Finn, *supra* note 3541; *Back to Algeria*, *supra* note 3541.

3544. Sealed Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. June 7, 2010), filed as ex. 8, Public (Redacted) Response, *Naji v. Obama*, No. 10-5191 (D.C. Cir. July 29, 2010) [hereinafter *Naji* Government Response].

3545. Order, *Naji*, No. 10-5191 (D.C. Cir. July 16, 2010).

3546. *Naji v. Obama*, 561 U.S. 1042 (2010).

3547. Transfer Notice, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 19, 2010), D.E. 1724; see Finn, *supra* note 3541; *Back to Algeria*, *supra* note 3541; see also Dixon, *supra* note 3500, at 47 (reporting that Naji "was jailed in a sham trial at which no evidence was presented against him by the prosecution").

3548. See Craig Whitlock, *82 Inmates Cleared but Still Held at Guantanamo*, Wash. Post, Apr. 29, 2007, at A1.

3549. Order, *Ben Bacha v. Bush*, No. 1:05-cv-2349 (D.D.C. July 27, 2007), D.E. 27, 2007 WL 2422031.

3550. *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008); see Joby Warrick, *U.S. Transfers Bin Laden Aide*, Wash. Post, Mar. 15, 2008, at A3.

3551. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. June 13, 2008), D.E. 44; see *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120, 121–22 (D.D.C. 2010).

3552. See Carol Rosenberg, *U.S. Court Orders Russian Detainee Freed from Guantánamo*, Miami Herald, May 14, 2010, at 6A.

Obama³⁵⁵³ that the courts did not have the power to enjoin detainee transfers, Judge Hogan dissolved Judge Collyer's injunction on February 4, 2010, by sealed order,³⁵⁵⁴ and denied reconsideration on April 19.³⁵⁵⁵

By sealed order, on June 17, 2010, Judge Collyer denied Motai Saib's sealed May 24 injunction motion.³⁵⁵⁶ On July 13, Nabil Hadjarab sought an injunction against his transfer to Algeria.³⁵⁵⁷ On August 20, Belbacha and Hadjarab moved that their cases proceed to merits hearings.³⁵⁵⁸ On January 14, 2011, Judge Collyer granted Belbacha's motion but denied Hadjarab's.³⁵⁵⁹ Hadjarab's motion for reconsideration was granted on March 30.³⁵⁶⁰ Belbacha and Hadjarab's proceedings were stayed by agreement of the parties.³⁵⁶¹ On August 29, 2013, Saib and Hadjarab were willingly transferred to Algeria.³⁵⁶² Belbacha consented to a March 13, 2014, transfer to Algeria so that he could see his elderly parents.³⁵⁶³

3553. 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010); see Hafetz, *supra* note 3174, at 170.

3554. Docket Sheet, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Dec. 8, 2005) [hereinafter *Ben Bacha* Docket Sheet]; *Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d at 122.

3555. *Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120.

3556. Notice, Saib v. Obama, No. 1:05-cv-1353 (D.D.C. May 26, 2010), D.E. 287 (noting the motion); Docket Sheet, *id.* (July 5, 2005) (noting the order).

3557. Notice of Filing, Nabil v. Obama, No. 1:05-cv-1504 (D.D.C. July 15, 2010), D.E. 332.

3558. Notice, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Aug. 20, 2010), D.E. 201; Notice, *Nabil*, No. 1:05-cv-1504 (D.D.C. Aug. 20, 2010), D.E. 242.

3559. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Jan. 14, 2011), D.E. 215; Order, *Nabil*, No. 1:05-cv-1504 (D.D.C. Jan. 14, 2011), D.E. 256.

3560. Docket Sheet, *Nabil*, No. 1:05-cv-1504 (D.D.C. July 28, 2005) [hereinafter *Nabil* Docket Sheet].

3561. *Ben Bacha* Docket Sheet, *supra* note 3554 (noting a stay order on May 6, 2013); *Nabil* Docket Sheet, *supra* note 3560 (same).

3562. Transfer Notice, Saib v. Obama, No. 1:05-cv-1353 (D.D.C. Aug. 30, 2013), D.E. 334 [hereinafter *Saib* Transfer Notice]; Transfer Notice, *Nabil*, No. 1:05-cv-1504 (D.D.C. Aug. 29, 2013), D.E. 313 [hereinafter *Nabil* Transfer Notice]; see David Nakamura & Billy Kenber, *Two Detainees Held at Guantanamo Will Be Transferred to Algeria*, Wash. Post, July 27, 2013, at A9; Carol Rosenberg, *U.S. Sends Two Detainees Home to Algeria*, Miami Herald, Aug. 30, 2013, at 3A; Charlie Savage, *U.S. to Send 2 at Guantánamo Back to Algeria, Saying Security Concerns Are Met*, N.Y. Times, July 27, 2013, at A10; Scott Shane, *2 Guantánamo Detainees Transferred to Algeria*, N.Y. Times, Aug. 30, 2013, at A12; Craig Whitlock, *Algerians Leave Guantanamo Bay Prison*, Wash. Post, Aug. 30, 2013, at A2.

3563. Transfer Notice, Belbacha v. Obama, No. 1:05-cv-2349 (D.D.C. Mar. 13, 2014), D.E. 272 [hereinafter *Belbacha* Transfer Notice]; see Carol Rosenberg, *Once Resistant, Detainee Returns to Algeria*, Miami Herald, Mar. 14, 2014, at 3A; Charlie Savage, *Military Repatriates Algerian Held for Years at Guantánamo*, N.Y. Times, Mar. 14, 2014, at A14.

While Hadjarab's transfer was in the works, novelist John Grisham championed Hadjarab's interests in an August 11, 2013, *New York Times* contribution; Grisham became interested in Hadjarab's cause after learning that the author's novels were considered unsuitable for detainees to read.³⁵⁶⁴

On March 21, 2011, the Supreme Court denied Djamel Ameziane's sealed petition for certiorari.³⁵⁶⁵ He was involuntarily transferred to Algeria on December 5, 2013.³⁵⁶⁶ Bensayah, the unsuccessful Bosnian petitioner among the first to have their cases heard by Judge Leon, was involuntarily transferred to Algeria at the same time.³⁵⁶⁷

On July 21, 2014, Judge Huvelle denied Ameziane's petition for return of "740 British pounds, 429,000 Afghanis, and 2300 Pakistani rupees" that were taken from him when he was captured, because the habeas case had become moot.³⁵⁶⁸

Ten Writs Denied and Another Writ Terminated; Two Writs Reversed and Two Writs Vacated; Two Detainees Transferred After One Writ Was Granted and Another Was on Appeal

From December 2009 through October 2010, Judges Hogan,³⁵⁶⁹ Kessler,³⁵⁷⁰ Lamberth,³⁵⁷¹ Kennedy,³⁵⁷² Robertson,³⁵⁷³ Bates,³⁵⁷⁴ Walton,³⁵⁷⁵ and Leon³⁵⁷⁶

3564. John Grisham, Opinion Essay, *After Guantánamo, Another Injustice*, N.Y. Times, Aug. 11, 2013, at 4.

3565. Ameziane v. Obama, 562 U.S. 1302 (2011).

3566. Transfer Notice, Ameziane v. Obama, No. 1:05-cv-392 (D.D.C. Dec. 5, 2013), D.E. 345 [hereinafter *Ameziane* Transfer Notice]; see Rosenberg, *supra* note 3336; Savage, *supra* note 3336. See generally Dixon, *supra* note 3500, at 39–60 (reporting in 2016, "Thankfully, after a very rough start, he has endured and is doing reasonably well in Algeria.").

"In a joint statement issued from Geneva, the U.N. Special Rapporteurs on torture, and on human rights and counterterrorism, Juan E. Méndez and Ben Emmerson, respectively, warned that former detainee Djamel Ameziane, 46, may be at risk after his involuntary transfer from Guantánamo Bay to Algeria." Carol Rosenberg, *Detainees' Move to Algeria Draws U.N. Criticism*, Miami Herald, Dec. 11, 2013, at 3A.

3567. Bensayah Transfer Notice, *supra* note 3336; see Rosenberg, *supra* note 3336; Savage, *supra* note 3336.

3568. Ameziane v. Obama, 58 F. Supp. 3d 99 (D.D.C. 2014); see *id.* at 101 ("The [Department of Defense] justifies its policy to retain all money associated with detainees 'based on a strong national security interest in preventing these funds from being used in a manner that would adversely impact the safety and security of the United States'—i.e., to finance terrorist activities.").

3569. Anam v. Obama, 696 F. Supp. 2d 1 (D.D.C. 2010) (finding that the detainee trained, traveled, and associated with Al-Qaeda members); Order, Anam v. Obama, No.

1:04-cv-1194 (D.D.C. Jan. 6, 2010), D.E. 697; *Anam* Docket Sheet, *supra* note 3179 (noting an oral ruling on December 14, 2009); see Rosenberg, *supra* note 3506; Del Quentin Wilber, *U.S. Can Continue to Detain Yemeni*, Wash. Post, Dec. 15, 2009, at A12.

The court of appeals affirmed the denial. *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 907 (2012).

Musa'ab Omar Al-Madhwani was transferred to Oman on January 16, 2017. Transfer Notice, *Anam*, No. 1:04-cv-1194 (D.D.C. Jan. 18, 2017), D.E. 1092 [hereinafter *Al-Madhwani Transfer Notice*].

3570. *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010) (finding that Fahmi Salem al-Assani received military training from Al-Qaeda); *Al-Adahi v. Obama*, 692 F. Supp. 2d 85 (D.D.C. 2010) (finding that Suleiman Awadh Bin Agil al-Nahdi received military training from Al-Qaeda and performed guard duties for Al-Qaeda at Tora Bora); *Orders*, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Feb. 24, 2010), D.E. 548, 551; Docket Sheet, *id.* (Feb. 7, 2005) [hereinafter *Al-Adahi Docket Sheet*]; see Carol Rosenberg & Mark Seibel, *Judge OKs Detention of 2 Men Bush Panel Cleared*, Miami Herald, Feb. 24, 2010.

Appeals were dismissed voluntarily. Order, *Al-Nahdi v. Obama*, No. 10-5127 (D.C. Cir. June 21, 2011); Order, *Al-Assani v. Obama*, No. 10-5126 (D.C. Cir. June 21, 2011).

The government announced that Fahmi Salem al-Assani and Suleiman Awadh Bin Agil al-Nahdi were approved for transfer once a transfer country could be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 3346. They were transferred to the United Arab Emirates on November 13, 2015. Transfer Notices, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. Nov. 16, 2015), D.E. 670, 671.

Another petitioner, Muhammad Ali Abdullah Bawazir, elected not to proceed with his scheduled January 2010 merits hearing, so Judge Kessler dismissed his petition without prejudice on December 22, 2009. Dismissal, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. Mar. 24, 2010), D.E. 556; see *Al-Adahi*, 698 F. Supp. 2d at 50 n.1, 51; *Al-Adahi*, 692 F. Supp. 2d at 86 n.1, 88. Bawazir, also known as Bwazir, was transferred to Saudi Arabia on January 5, 2017. Appendix Table 3, *infra* page 632 (transfers noted by news media, n.10).

3571. *Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (finding that the detainee assisted with medical care to Taliban fighters as part of the Taliban).

The court of appeals affirmed Judge Lamberth's finding that Mukhtar Yahia Naji al-Warafi acted as part of the Taliban but remanded the case for a more specific determination whether he satisfied the Geneva Conventions' criteria for protected medical personnel. *Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011). On August 31, 2011, Judge Lamberth concluded that al-Warafi could not prove permanent medical personnel status because he lacked required identification. *Al Warafi v. Obama*, 821 F. Supp. 2d 47, 55–56 (D.D.C. 2011). The court of appeals agreed. *Al-Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014).

Al-Warafi was transferred to Oman on January 13, 2016. Transfer Notice, *Al-Wrafie v. Obama*, No. 1:09-cv-2368 (D.D.C. Jan. 14, 2016), D.E. 100 [hereinafter *Al-Wrafie Transfer Notice*].

3572. *Abdah v. Obama*, 709 F. Supp. 2d 25 (D.D.C. 2010) (finding that the detainee fought on behalf of Al-Qaeda); see Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. June 23, 2010), D.E. 877, 2010 WL 2521431 (denying a motion for reconsideration); see also Lee, *supra* note 3506.

The court of appeals affirmed the denial. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); see *Shane & Weiser*, *supra* note 3505.

Yasein Khasem Mohammad Esmail was transferred to the United Arab Emirates on January 19, 2017. Appendix Table 3, *infra* page 632 (transfers noted by news media n.7).

3573. Opinion, *Khalifh v. Obama*, No. 1:05-cv-1189 (D.D.C. June 14, 2010), D.E. 168 [hereinafter *Khalifh* Opinion], 2010 WL 2382925 (finding that the detainee was part of Al-Qaeda).

An appeal was dismissed voluntarily. Order, *Khalifh v. Obama*, No. 10-5241 (D.C. Cir. Jan. 28, 2011).

Omar Mohammed Khalifh was transferred to Senegal on April 3, 2016. Transfer Notice, *Khalifh*, No. 1:05-cv-1189 (D.D.C. Apr. 4, 2016), D.E. 196 [hereinafter *Khalifh* Transfer Notice].

3574. *Khan v. Obama*, 741 F. Supp. 2d 1 (D.D.C. 2010) (finding that the detainee was a member of Hezb-i-Islami Gulbuddin, a terrorist organization affiliated with the Taliban and Al-Qaeda); Order, *Khan v. Obama*, No. 1:08-cv-1101 (D.D.C. Sept. 3, 2010), D.E. 229; see *Khan v. Obama*, 646 F. Supp. 2d 6 (D.D.C. 2009) (denying the detainee's motion for judgment on the preliminary record).

The court of appeals affirmed the denial on September 6, 2011. *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011). On September 23, the detainee filed a sealed motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60. Petitioner Notice, *Khan*, No. 1:08-cv-1101 (D.D.C. Sept. 26, 2011), D.E. 248. In advance of its response to this motion, the government announced that it would no longer rely "on statements made by Petitioner Shawali Khan during custodial interrogations, or during his Administrative Review Board ('ARB') proceedings, to justify his detention. . . . The sole statements by Petitioner upon which Respondents continue to rely are those made during his merits hearing testimony on May 17, 2010." Government Notice, *id.* (Oct. 12, 2011), D.E. 251.

Khan was transferred to Afghanistan on December 19, 2014. Transfer Notice, *Khan*, No. 1:08-cv-1101 (D.D.C. Dec. 22, 2014), D.E. 282 [hereinafter *Khan* Transfer Notice]; see *Kahn v. Obama*, 218 F. Supp. 3d 85 (D.D.C. 2016) (denying post-transfer habeas relief); see also Charlie Savage, *Ex-Guantánamo Detainee's Suit Dismissed*, N.Y. Times, Oct. 26, 2016, at A18.

3575. *Sulayman v. Obama*, 729 F. Supp. 2d 26 (D.D.C. 2010) (finding that Abd al-Rahman Abdu Abu al-Ghayth Sulayman was part of the Taliban); Opinion, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Oct. 7, 2010), D.E. 1773 [hereinafter *Al-Bihani* Writ Denial] (finding that Toffiq Nasser Awad al-Bihani was part of Al-Qaeda); see Carol Rosenberg, *Yemeni Captive Loses Ruling*, Miami Herald, Oct. 16, 2010 (concerning al-Bihani); Carol Rosenberg, *Yemeni Psych Patient Ordered Freed*, Miami Herald, July 21, 2010 [hereinafter *Psych Patient*] (concerning Sulayman).

The court of appeals affirmed denial of the writ to Abd al-Rahman Abdu Abu al-Ghayth Sulayman. *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir.), *cert. denied*, 568 U.S. 888 (2012). Agreeing that the denial of his petition was compelled by circuit law, al-Bihani moved for summary affirmance so that a petition for certiorari could be filed with the Supreme Court, and the Supreme Court denied certiorari. Order, *Al-Bihani v. Obama*, No. 10-5352 (D.C. Cir. Feb. 10, 2011), 2011 WL 611708, *cert. denied*, 567 U.S. 905 (2012).

denied habeas petitions. Only Toffiq Nasser Awad al-Bihani, one of the detainees before Judge Walton, remains detained.

Judge Huvelle's August 3, 2010, denial of Sabry Mohammad Ebrahim al-Qurashi's motion to suppress his testimony³⁵⁷⁷ had the practical effect of terminating his habeas petition.³⁵⁷⁸ Judge Huvelle found evidence of voluntariness to be credible and claims of coercion to be exaggerated.³⁵⁷⁹ Al-Qurashi was transferred to Kazakhstan on December 30, 2014.³⁵⁸⁰

On March 29, 2011, the court of appeals reversed a writ granted to Uthman Abdul Rahim Mohammed Uthman.³⁵⁸¹ Using a command-structure test to determine whether Uthman was part of Al-Qaeda, Judge Kennedy found that evidence Uthman was a bodyguard for Osama Bin Laden largely derived from torture-induced statements by other detainees.³⁵⁸² The court of appeals determined that the command-structure test had been rejected by subsequent appellate decisions³⁵⁸³ and Uthman's capture near Tora Bora in December 2001 "with a small group of men, two of whom were al Qaeda members and bodyguards for Osama Bin Laden and

Sulayman was transferred to the United Arab Emirates on August 13, 2016. Appendix Table 3, *infra* page 632 (transfers noted by news media n.6). Toffiq Nasser Awad al-Bihani remains detained. Appendix Table 4, *infra* page 641 (n.31).

3576. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010) (finding that the detainee was part of an Al-Qaeda bomb cell); see Charlie Savage, *New Questions Raised in Afghan Detainee Case*, N.Y. Times, Feb. 9, 2012, at A10 (reporting, "Of 220 Afghans sent to Guantánamo Bay, Cuba, he is among the 18 who remain.").

The court of appeals affirmed the denial. *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012), *cert. denied*, 570 U.S. 926 (2013); see *Obaydullah v. Obama*, 554 F. App'x 12 (D.C. Cir. 2014) (affirming the denial of reconsideration on the presentation of new evidence).

Obaydullah was transferred to the United Arab Emirates on August 13, 2016. Appendix Table 3, *infra* page 632 (transfers noted by news media n.6).

3577. *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010).

3578. Interview with Judge Ellen Segal Huvelle, June 13, 2011.

3579. *Al-Qurashi*, 733 F. Supp. 2d at 81.

3580. Transfer Notice, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Dec. 31, 2014), D.E. 549 [hereinafter *Al-Qurashi Transfer Notice*].

3581. *Uthman v. Obama*, 637 F.3d 400, 402, 408 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012).

3582. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010); see Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. May 19, 2010), D.E. 852 (denying a motion for reconsideration); see also *Judge Orders Release of Guantánamo Detainee*, Seattle Times, Feb. 26, 2010, at A5.

3583. *Uthman*, 637 F.3d at 402.

one of whom was a Taliban fighter,”³⁵⁸⁴ among other facts, made it more likely than not that Uthman was part of Al-Qaeda.³⁵⁸⁵

The court of appeals, on June 10, 2011, also reversed³⁵⁸⁶ a writ granted by Judge Friedman the previous July.³⁵⁸⁷ In 2009, the government obtained a stay in the case because it had approved Hussain Salem Mohammad Almerfedi’s transfer from Guantánamo Bay, but the government was unable to accomplish the transfer, so the case proceeded to the merits.³⁵⁸⁸ Almerfedi was transferred to Slovakia on November 20, 2014.³⁵⁸⁹

On November 5, 2010, the court of appeals vacated a writ³⁵⁹⁰ granted to Mohammedou Ould Slahi by Judge Robertson on March 22.³⁵⁹¹ Slahi, a Mauritanian, apparently swore bayat, an oath of loyalty, to Al-Qaeda in 1991, a time in which the United States and Al-Qaeda both opposed Afghanistan’s communist government.³⁵⁹² The courts determined that the question was whether Slahi was still part of Al-Qaeda when he was cap-

3584. *Id.* at 404.

3585. *Id.* at 402, 403–07.

Uthman remains detained. Appendix Table 4, *infra* page 641 (n.19).

3586. *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012).

3587. *Almerfedi v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (finding that the government’s claim that Hussain Salem Mohammad Almerfedi was an Al-Qaeda facilitator was not supported by sufficient evidence); see Charlie Savage, *Rulings Raise Doubts on Policy on Transfer of Yemenis*, N.Y. Times, July 9, 2010, at A9.

3588. *Almerfedi*, 725 F. Supp. 2d at 21; see *Almerfedi*, 654 F.3d at 4 n.3 (“whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully”).

3589. See Goldman & Tate, *supra* note 3347, at A15; Rosenberg, *supra* note 3347, at 3A; Savage, *supra* note 3347, at A19; see also Alex Potter, *Is There Life After Gitmo?*, Newsweek, Sept. 9, 2016, at 22 (reporting on Hussein al-Merfedy’s struggles to fit in in Slovakia).

3590. *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); see Bravin, *supra* note 3145, at 377.

3591. *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010); Docket Sheet, *Salahi v. Bush*, No. 1:05-cv-569 (D.D.C. Mar. 18, 2005); see Bravin, *supra* note 3145, at 377; *60 Minutes: Prisoner 760* (CBS television broadcast Mar. 12, 2017) [hereinafter *Prisoner 760*]. See generally “Forever Prisoner” Writes Book About Guantanamo; He’s One of 107 Still There, Morning Edition (NPR radio broadcast Jan. 4, 2016), www.npr.org/2016/01/04/461878675/forever-prisoner-writes-book-about-guantanamo-he-s-one-of-107-still-there.

3592. *Salahi*, 625 F.3d at 748, 751; *Salahi*, 710 F. Supp. 2d at 3–4, 9–10. See generally Ben Taub, *The Prisoner of Echo Special*, New Yorker, Apr. 22, 2019, at 32.

“When a nurse, who spoke only Hassaniya Arabic, filled out Mohamedou’s birth certificate in the Latin alphabet, she omitted a syllable from his last name. Salahi became ‘Slahi.’” *Id.* at 36.

tured in 2001.³⁵⁹³ The court of appeals remanded the case for reevaluation in light of guidance provided by intervening appellate decisions.³⁵⁹⁴ Because of Judge Robertson's June 1 retirement,³⁵⁹⁵ Slahi's petition was reassigned to Judge Lamberth.³⁵⁹⁶ (The district court decided that new judges—those joining the bench in 2010 or later—would not receive Guantánamo Bay habeas petitions.³⁵⁹⁷) In January 2015, while he was still detained, Slahi's Guantánamo Bay memoir was published by Little, Brown and Company.³⁵⁹⁸ The original publication was heavily redacted, but after his October 17, 2016, release,³⁵⁹⁹ Slahi endeavored to fill in the redactions from memory for a 2017 deredacted republication.³⁶⁰⁰ The book was adapted as *The Mauritanian*, a 2021 feature film.³⁶⁰¹

On October 14, 2011, the court of appeals vacated a writ³⁶⁰² granted on July 21, 2010, by Judge Kennedy to Adnan Farhan Abdul Latif.³⁶⁰³ Latif was born in Udayn, Yemen, and he traveled to Pakistan and Afghanistan in

3593. *Salahi*, 625 F.3d at 751; *Salahi*, 710 F. Supp. 2d at 6.

3594. *Salahi*, 625 F.3d at 746–47.

3595. FJC Biographical Directory, *supra* note 3190.

3596. Reassignment Notice, *Salahi*, No. 1:05-cv-569 (D.D.C. Oct. 11, 2011), D.E. 380.

3597. Interview with Judge Royce C. Lamberth, May 13, 2011.

3598. Mohamedou Ould Slahi and Larry Siems, *Guantánamo Diary* (2015) (portions redacted); see Helene Cooper, *Family Seeks Release of a Detainee Turned Author*, N.Y. Times, Jan. 21, 2015, at A3; *Inside the U.S. Torture Chambers: Prisoner's Guantánamo Diary Details 12 Years of Abuse, Terror*, Democracy Now! (webcast Jan. 22, 2015), www.democracynow.org/2015/1/22/inside_the_us_torture_chambers_prisoners.

3599. Transfer Notice, *Salahi*, No. 1:05-cv-569 (D.D.C. Oct. 17, 2016), D.E. 485 [hereinafter *Salahi* Transfer Notice].

3600. Mohamedou Ould Slahi and Larry Siems, *Guantánamo Diary: Restored Editions* (2017); see *Gitmo Unredacted*, On the Media (WNYC radio broadcast Nov. 3, 2017), www.wnycstudios.org/podcasts/otm/segments/gitmo-unredacted (interview with the memoir's editor); *Resilience in Guantánamo*, On the Media (WNYC radio broadcast Nov. 3, 2017), www.wnycstudios.org/story/resilience-guantanamo (interview with the memoir's primary author).

3601. In 2022, Slahi filed a lawsuit in Canada against the Canadian government alleging that inaccurate Canadian intelligence was partly responsible for Slahi's Guantánamo Bay detention. See Michelle Shephard, *Guantanamo Detainee Sues Ottawa for \$30M*, Toronto Star, Apr. 23, 2022, at A1.

3602. *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir.) (reissuing, with fewer redactions, a 2011 opinion), *cert. denied*, 567 U.S. 913 (2012); see Adam Liptak, *The "Fill In the Blanks" Court Game of Indefinite Detention*, N.Y. Times, Dec. 13, 2011, at A21.

3603. Opinion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. Aug. 16, 2010), D.E. 907 [hereinafter D.D.C. Latif Opinion], 2010 WL 3270761; see Liptak, *supra* note 3602; Rosenberg, *Psych Patient*, *supra* note 3575.

2001.³⁶⁰⁴ He claimed that he was traveling for medical care, and Judge Kennedy determined that the government did not prove that its contention that he was an Al-Qaeda recruit was more probable.³⁶⁰⁵ The court of appeals determined that Judge Kennedy failed to give the government's report on evidence against Latif a sufficient presumption of regularity.³⁶⁰⁶ Latif died of an apparent suicidal overdose of hoarded antipsychotic drugs on September 8, 2012.³⁶⁰⁷

Judge Kennedy granted habeas corpus relief to Mohamed Mohamed Hassan Odaini on May 26, 2010,³⁶⁰⁸ and the government transferred him to Yemen the following July.³⁶⁰⁹ Odaini was born in Taiz, Yemen, and his father worked for the Yemeni Security Service.³⁶¹⁰ On March 28, 2002, he was a student at Salafia University in Pakistan spending the night at a nearby guesthouse "after spending the evening talking to other Yemeni, Salafia University students who lived there about religion as well as 'their

3604. D.D.C. Latif Opinion, *supra* note 3603, at 5–6.

3605. *Id.* at 25–28; *see* Liptak, *supra* note 3602; Savage, Power Wars, *supra* note 3218, at 314.

3606. *Latif*, 677 F.3d at 1176, 1178–89; *see* Greenberg, *supra* note 3174, at 211–14; Liptak, *supra* note 3602; *see also* Savage, Power Wars, *supra* note 3218, at 324 (reporting, "That was essentially the end of habeas corpus lawsuits as a route out of Guantánamo.").

3607. *See* Greenberg, *supra* note 3174, at 213 ("[Navy investigators] were unable to explain how Latif had gotten hold of enough pills to kill himself; nonetheless the death was officially ruled to be suicide."); Carol Rosenberg, *Report: Military Faults Guards in Captive's Suicide*, Miami Herald, June 29, 2013, at 3A (reporting that guards failed to check on the detainee's well-being as often as required); Carol Rosenberg, *Yemeni's Death in Detention Still Under Investigation*, Miami Herald, Dec. 19, 2012, at 3A; Charlie Savage, *Guantánamo Detainee, a Former Hunger Striker, Dies*, N.Y. Times, Sept. 11, 2012, at A13; Savage, *supra* note 3312; Julie Tate, *Detainee Found Dead Had Gone on a Hunger Strike*, Wash. Post, Sept. 12, 2012, at A2; *see also* Falkoff, *supra* note 3226, at 394–95 (description by Latif's attorney at a March 23, 2007, symposium of Latif's psychological problems and suicidality).

"A military autopsy uncovered twenty-five capsules of Invega, a powerful antipsychotic medication in Latif's stomach. Investigators surmised that he had hoarded his medicine, probably hiding the pills next to his groin." Savage, Power Wars, *supra* note 3218, at 493.

3608. *Abdah v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010); *see* Peter Finn, *U.S. Revisits Transfers to Yemen*, Wash. Post, June 19, 2010, at A3; Carol Rosenberg, *U.S. Sends Yemeni Detainee Home*, Miami Herald, July 14, 2010, at 4A; Savage, *supra* note 3587.

3609. Transfer Notice, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. July 13, 2010), D.E. 888; *see* Dixon, *supra* note 3500, at 48–49; Peter Finn, *U.S. Will Repatriate Detainee to Yemen*, Wash. Post, June 26, 2010, at A8; Rosenberg, *supra* note 3608; Savage, Power Wars, *supra* note 3218, at 312–14; Savage, *supra* note 3587.

3610. *Abdah*, 717 F. Supp. 2d at 25; *see* Finn, *supra* note 3609.

past and where they lived in Yemen.”³⁶¹¹ “At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants.”³⁶¹² Odaini was transferred to Guantánamo Bay in June.³⁶¹³ Judge Kennedy concluded, “There is no evidence that Odaini has any connection to Al Qaeda.”³⁶¹⁴

The government appealed a May 13, 2010, writ of habeas corpus granted by Judge Kennedy to a Russian, Ravil Mingazov, who left Russia in 2000 to raise his child in a Muslim country and was captured in Pakistan in 2002.³⁶¹⁵ Judge Kennedy found that his claims in captivity of support of the Taliban were motivated by his desire not to be returned to Russia.³⁶¹⁶ While an appeal was pending, the government sought to present additional evidence to Judge Kennedy,³⁶¹⁷ and the court of appeals agreed to hold the appeal in abeyance until the district court resolved the government’s request.³⁶¹⁸ A motion considered by Berkeley, California’s city council to accept Mingazov was defeated.³⁶¹⁹ Mingazov was transferred to the United Arab Emirates in January 2017.³⁶²⁰

Guantánamo Review Task Force

Four cabinet departments, the Director of National Intelligence, and the joint chiefs of staff collaborated on a January 22, 2010, report on 240

3611. *Abdah*, 717 F. Supp. 2d at 26; see Finn, *supra* note 3608.

3612. *Abdah*, 717 F. Supp. 2d at 26.

3613. *Id.* at 23.

3614. *Id.* at 36; see Savage, *supra* note 3587 (reporting on “a scathing opinion denouncing the effort to keep imprisoning him despite ‘overwhelming’ evidence that he was innocent of Qaeda ties”).

3615. Opinion, *Al-Harbi v. Obama*, No. 1:05-cv-2479 (D.D.C. June 1, 2010), D.E. 342 [hereinafter *Mingazov Opinion*], 2010 WL 2398883; see Rosenberg, *supra* note 3552.

Mingazov was the last Russian detainee at Guantánamo Bay. See Begg, *supra* note 3464, at 332 n.*.

3616. *Mingazov Opinion*, *supra* note 3615.

3617. Opposition Brief, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. Dec. 27, 2010) [hereinafter D.C. Cir. *Mingazov* Opposition Brief].

3618. Order, *id.* (Apr. 19, 2011) [hereinafter *Mingazov* Abeyance Order]; Order, *id.* (Aug. 15, 2012) (remanding record).

3619. See Doug Oakley, *Berkeley Council Rejects Proposal to Invite Guantanamo Detainees to Live in City*, Oakland Trib., Feb. 16, 2011.

3620. Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. Jan. 23, 2017), D.E. 405 [hereinafter *Mingazov* Transfer Notice]; see Order, *Mingazov*, No. 10-5217 (D.C. Cir. Sept. 28, 2017) (dismissing an appeal as moot in light of the transfer); see also Missy Ryan, *Ex-Guantanamo Detainees Face Uncertain Fate in UAE*, Wash. Post, May 30, 2018, at A12 (reporting more than a year later that the detainee “suggested that conditions were worse than at Guantanamo, according to his mother”).

Guantánamo Bay detainees “subject to review.”³⁶²¹ A total of 779 men had been detainees at Guantánamo Bay.³⁶²² Of the 240 remaining detainees covered in the report, forty-four had already been transferred out.³⁶²³ The Guantánamo Review Task Force determined that 126 detainees could be transferred, including the forty-four already transferred, thirty-six should be prosecuted, forty-eight could not be prosecuted because of tainted evidence but were too dangerous to transfer, and thirty were Yemenis who could be transferred once a stable and suitable location was found for each.³⁶²⁴

In 2013, pursuant to a freedom-of-information action by *Miami Herald* reporter Carol Rosenberg, the government released the names of the forty-eight persons designated for indefinite detention.³⁶²⁵ In 2017, Southern District of New York Judge Richard Berman denied a freedom-of-information action by the *New York Times* for the report’s information on each of the detainees.³⁶²⁶

3621. Guantanamo Review Task Force Final Report (Jan. 22, 2010), www.justice.gov/ag/guantanamo-review-final-report.pdf; see Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, Wash. Post, Jan. 22, 2010, at A1; Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. Times, Jan. 22, 2010, at A14.

3622. Guantanamo Review Task Force Final Report, *supra* note 3621, at 1; see Omonira-Oyekanmi & Finn, *supra* note 3171; see also Fletcher & Stover, *supra* note 3153, at 42 (“The camp population peaked at 660 in July 2003 and began to decline in November of that year (Figure 3).”); *id.*, Fig. 3 (charting the size of the detainee population from January 2002 through July 2008).

3623. Guantanamo Review Task Force Final Report, *supra* note 3621, at ii.

3624. *Id.* at ii, 9–13; see Dixon, *supra* note 3500, at 44–45.

3625. See Carol Rosenberg, *Herald Suit Yields Names of “Indefinite Detainees,”* Miami Herald, June 18, 2013, at 3A.

The reporter filed a federal complaint in the District of Columbia on March 15, 2013, to pursue a Freedom of Information Act (FOIA) request submitted to the Department of Defense in December 2012. Complaint, *Rosenberg v. U.S. Dep’t of Def.*, No. 1:13-cv-342 (D.D.C. Mar. 15, 2013), D.E. 1. The government produced the document on June 17. See Rosenberg, *supra*. An October 24, 2016, FOIA complaint regarding Guantánamo Bay staffing resulted in the production of 2,628 pages. Status Report, *Rosenberg v. U.S. Dep’t of Def.*, No. 1:16-cv-2117 (D.D.C. Aug. 25, 2017), D.E. 20; Complaint, *id.* (Oct. 24, 2016), D.E. 1; see Stipulation, *id.* (Sept. 20, 2017), D.E. 22 (agreed award of \$6,630.33 in attorney fees and costs); see also James Rosen, *Miami Herald Journalist Sues Defense Department Over Guantánamo Staffing Data*, Miami Herald, Oct. 27, 2016, at 13A.

3626. Opinion, *N.Y. Times Co. v. U.S. Dep’t of Just.*, No. 1:16-cv-6120 (S.D.N.Y. Sept. 29, 2017), D.E. 49, 2017 WL 4712636; see *id.* at 7 (“The Court has carefully reviewed all 239 threat assessments *in camera* in the course of preparing this Decision & Order.”).

A Military Commission Guilty Plea

The first conviction before a Guantánamo Bay military commission in the Obama administration resulted from a guilty plea by Ibrahim Ahmed Mahmoud al-Qosi to conspiracy and material-support charges.³⁶²⁷

Al-Qosi “was captured by Pakistani forces in the Tora Bora mountains in December 2001.”³⁶²⁸ He “acknowledged following the Qaeda leader, Osama Bin Laden, from Sudan to Afghanistan in 1996 and serving variously as a quartermaster, cook, bodyguard and driver at Qaeda compounds.”³⁶²⁹ On August 11, 2010, a military jury returned a sentence verdict of fourteen years, but the plea agreement provided for a sentence cap of two years.³⁶³⁰

Al-Qosi’s habeas petition was dismissed by stipulation on August 23.³⁶³¹ He was returned to Sudan on July 10, 2012.³⁶³²

3627. Trial Report, *United States v. Al-Qosi* (Mil. Comm’n Aug. 11, 2010), [www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20\(Result%20of%20Trial\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20(Result%20of%20Trial).pdf); see *Guantanamo Detainee Pleads Guilty*, Wash. Post, July 8, 2010, at A3 (“Qosi is only the fourth prisoner convicted in the controversial military tribunals since the Guantanamo Bay detention camp opened in January 2002.”); Frances Robles, *Bin Laden Driver to War-Court Convict*, Miami Herald, July 8, 2010, at 1A; Carol Rosenberg, *Al Qaeda Cook Could Leave Guantanamo in 2012*, Miami Herald, Feb. 9, 2011; Charlie Savage, *Guantanamo Detainee Pleads Guilty in Terrorism Case*, N.Y. Times, July 8, 2010, at A15; see also Office of Military Commission Cases, *supra* note 3433.

3628. Savage, *supra* note 3627.

3629. *Id.*

3630. Final Action, *United States v. Al-Qosi* (Mil. Comm’n Feb. 3, 2011), [www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20\(CA%20Final%20Action\).pdf](http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20(CA%20Final%20Action).pdf); see Peter Finn, *U.S. Lacks Policy on Housing Military Commission Convicts*, Wash. Post, Aug. 12, 2010, at A2; Robles, *supra* note 3627; Carol Rosenberg, *Canadian Terror Trial Deal Would Test Obama Pledge*, Miami Herald, Oct. 24, 2010, at 3A; Carol J. Williams, *Guilty Plea at Guantanamo Tribunal*, Chi. Trib., Oct. 26, 2010, News, at 9.

In the military commission of Ibrahim Ahmed Mahmoud al Qosi, the sentence of 14 years confinement is approved and will be executed, but the execution of that part of the sentence extending to confinement in excess of two (2) years from July 2, 2010, is suspended until such time as the United States Government determines that the accused has complied with the terms of the pretrial agreement of June 9, 2010, or for a period of five (5) years from the date sentence was announced (August 11, 2010), whichever is sooner.

Final Action, *supra*.

3631. Order, *Al-Qosi v. Obama*, No. 1:04-cv-1937 (D.D.C. Aug. 23, 2010), D.E. 171.

3632. See *Guantanamo Inmate Home After 10 Years*, Wash. Post, July 12, 2012, at A8 [hereinafter *Inmate Home*]; Mohamed Osman & Ben Fox, *Guantanamo Prisoner Returns Home*, Miami Herald, July 12, 2012, at 11A; Carol Rosenberg, *Convicted Al-Qaida Operative Back in Sudan*, Miami Herald, July 11, 2012, at 1A; Charlie Savage, *Guantanamo*

Recusal

On April 22, 2009, the district court transferred eight detainees in the 158-detainee case filed by the Center for Constitutional Rights in December 2005 to a new case, which the court assigned to Judge Lamberth.³⁶³³ On January 29, 2010, one of the detainee's attorneys filed a motion for Judge Lamberth's recusal.³⁶³⁴ The attorney objected to a thought question attributed to Judge Lamberth in a reported interview by ProPublica: "How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?"³⁶³⁵ Although the thought question appears to pose a matter of general concern to all judges in all Guantánamo Bay habeas cases, the motion claimed that Judge Lamberth's observation created a question about a specific petitioner, Abdal Razak Ali: "will this Court be willing to enter the great writ in his case if the Government does not meet its burden or will this Court hold Petitioner indefinitely in fear that it might make a mistake?"³⁶³⁶

Rejecting "the notion that its publicly expressed views provide any basis for recusal," Judge Lamberth nevertheless recused himself "[b]ecause this is much ado about nothing, and petitioner's counsel has preferred to delay disposition of the merits of the petition to address this sideshow."³⁶³⁷

The court randomly assigned Ali's case to Judge Leon,³⁶³⁸ who denied Ali's petition on February 25, 2011.³⁶³⁹

Rejecting on July 23, 2013, a motion for Circuit Judge Brett M. Kavanaugh's recusal,³⁶⁴⁰ the court of appeals affirmed Judge Leon's decision on December 3.³⁶⁴¹

Prisoner Is Repatriated to Sudan, N.Y. Times, July 12, 2012, at A9; see also Carol Rosenberg, *Guantánamo Convict Returns to the Fight*, Miami Herald, Dec. 11, 2015, at 1A.

3633. Docket Sheet, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Apr. 22, 2009) [hereinafter *Mattan* Docket Sheet].

3634. Recusal Motion, *id.* (Jan. 29, 2010), D.E. 1361.

3635. *Id.* at 3, 10.

3636. *Id.* at 3.

3637. Order, *id.* (June 16, 2010).

3638. *Mattan* Docket Sheet, *supra* note 3633.

3639. *Ali v. Obama*, 770 F. Supp. 2d 1 (D.D.C. 2011); see Order, *Ali v. Obama*, No. 1:10-cv-1020 (D.D.C. June 12, 2012), D.E. 1500 (denying a motion for rehearing); Order, *id.* (May 17, 2011), D.E. 1496 (same); Docket Sheet, *id.* (June 17, 2010) (minute order, Mar. 11, 2011, same); see also *Judge Upholds Algerian's Detention at Guantánamo*, Miami Herald, Jan. 11, 2011.

3640. Order, *Ali v. Obama*, No. 11-5102 (D.C. Cir. June 26, 2013); see Motion, *id.* (July 22, 2013).

Five More Writs and a Preliminary Injunction Denied; a New Petition Filed

In 2011, Judge Urbina denied petitions for writs of habeas corpus by Mashour Abdullah Muqbel Alsabri³⁶⁴² and Khirulla Said Wali Khairkhwa.³⁶⁴³ The court of appeals affirmed the denials.³⁶⁴⁴

To resolve Guantánamo Bay habeas petitions, Judge Urbina required both parties to submit proposed findings of fact and conclusions of law.³⁶⁴⁵ He found that this not only focused the judge's attention on key issues, but it helped illuminate the credibility of the parties' positions.³⁶⁴⁶ Judge Urbina noticed that over the years the government's presentation of its cases improved substantially and the petitioners' presentations also improved.³⁶⁴⁷

In 2011, Judge Kennedy denied one writ petition³⁶⁴⁸ and Judge Walton denied two.³⁶⁴⁹

The Supreme Court had denied a mandamus petition on January 9, 2012. *In re Bakhouche*, 565 U.S. 1109 (2012).

3641. *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), *cert. denied*, 574 U.S. 848 (2014).

Ali remains detained. Appendix Table 4, *infra* page 641 (n.32).

3642. *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011) (finding that the petitioner served as part of Taliban or Al-Qaeda forces); see Carol Rosenberg, *Court OKs Yemeni's Detention*, Miami Herald, Feb. 5, 2011, at 5A.

3643. *Khairkhwa v. Obama*, 793 F. Supp. 2d 1 (D.D.C. 2011) (finding that the petitioner "was, without question, a senior member of the Taliban"); see Frank Goldsmith, *The "Taliban Five" and the Prisoner Exchange*, in *Obama's Guantánamo*, *supra* note 3200, at 134, 145.

3644. *Khairkhwa v. Obama*, 703 F.3d 547 (D.C. Cir. 2012); *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012); see *Court Upholds Detention of Guantánamo Prisoner*, Miami Herald, Dec. 15, 2012, at 3A (Khairkhwa); see Goldsmith, *supra* note 3643, at 146 (same).

Khairkhwa was transferred to Qatar on May 31, 2014, Transfer Notice, *Khairkhwa v. Obama*, No. 1:08-cv-1805 (D.D.C. June 4, 2014), D.E. 225 [hereinafter *Khairkhwa* Transfer Notice], and Alsabri was transferred to Saudi Arabia on April 16, 2016, Appendix Table 3, *infra* page 632 (transfers noted by news media n.5).

3645. Interview with Judge Ricardo M. Urbina, Aug. 15, 2011.

3646. *Id.*

3647. *Id.*

3648. *Hentif v. Obama*, 810 F. Supp. 2d 33 (D.D.C. 2011) (finding that Fadhel Hussein Saleh Hentif was more likely than not part of Al-Qaeda or the Taliban); *In re Guantánamo Bay Detainee Litig.*, 953 F. Supp. 2d 40, 44 (D.D.C. 2013).

Following Judge Kennedy's retirement, Judge Lamberth denied Hentif's motion for reconsideration. *Hentif v. Obama*, 883 F. Supp. 2d 97 (D.D.C. 2012), *appeal dismissed*, 733 F.3d 1243 (D.C. Cir. 2013).

Hentif was transferred to Oman on January 14, 2015. Transfer Notice, *Hentif v. Obama*, No. 1:06-cv-1766 (D.D.C. Jan. 15, 2015), D.E. 317 [hereinafter *Hentif* Transfer Notice].

Meanwhile, a sealed habeas petition on behalf of high-value detainee Mohd Farik Bin Amin, also known as Zubair, was filed on May 16, 2011.³⁶⁵⁰

On May 21, 2013, Judge Roberts denied Hani Saleh Rashid Abdullah's preliminary-injunction motion seeking relief from indefinite detention pursuant to a friendship agreement between the United States and Abdullah's home country, Yemen.³⁶⁵¹ Judge Roberts reasoned that pre-adjudicative release posed excessive risks to the government should the habeas petition later be determined to be without merit.³⁶⁵² On April 4, 2014, the court of appeals affirmed Judge Roberts's decision.³⁶⁵³

Another Military Commission Guilty Plea

Majid Khan's 2012 guilty plea before a military commission³⁶⁵⁴ resulted in the voluntary dismissal of his habeas petition.³⁶⁵⁵ Khan's sentencing was

3649. *Bostan v. Obama*, 821 F. Supp. 2d 80 (D.D.C. 2011) (finding that Karim Bostan's admitted membership in Jamaat al-Tablighi and other evidence implied affiliation with Al-Qaeda); *Hussein v. Obama*, 821 F. Supp. 2d 67 (D.D.C. 2011) (finding that Abdul Qader Ahmed Hussein's travels and activities in Afghanistan and Pakistan were consistent with his being part of Al-Qaeda or the Taliban).

The court of appeals affirmed the denial of a writ to Hussein. *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), *cert. denied*, 572 U.S. 1079 (2014). *But see Hussain*, 572 U.S. at 1080 (Justice Breyer, concurring in the denial of certiorari: "The Court has not directly addressed whether . . . either the [2001 Authorization for Use of Military Force] or the Constitution limits the duration of detention"); *Hussein*, 718 F.3d at 971 (Judge Harry T. Edwards, concurring in the judgment: "The result in this case is unsurprising because, in my view, it fits the mold of a number of the decisions of this court that have recited the 'preponderance of the evidence' standard while in fact requiring nothing more than substantial evidence to deny habeas petitions."); Greg Stohr, *High Court Rejects Yemeni's Appeal*, Miami Herald, Apr. 22, 2014, at 9A.

Hussein was transferred to Estonia on January 14, 2015, Transfer Notice, *Al-Jayfi v. Obama*, No. 1:05-cv-2104 (D.D.C. Jan. 15, 2015), D.E. 420 [hereinafter *Hussein Transfer Notice*], and Bostan was transferred to Oman on January 16, 2017, Appendix Table 3, *infra* page 632 (transfers noted by news media n.11).

3650. Docket Sheet, *Bin Amin v. Obama*, No. 1:11-cv-923 (D.D.C. May 16, 2011) [hereinafter *Bin Amin Docket Sheet*].

Bin Amin remains detained. Appendix Table 4, *infra* page 641 (n.10).

3651. *Abdullah v. Bush*, 945 F. Supp. 2d 64 (D.D.C. 2013).

3652. *Id.* at 67.

3653. *Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014).

Abdullah, also known as Said Salih Said Nashir, remains detained. Appendix Table 4, *infra* page 641 (n.21).

3654. Plea Agreement, *United States v. Khan* (Mil. Comm'n Feb. 29, 2012), A.E. 12, [www.mc.mil/Portals/0/pdfs/Khan/Khan%20\(AE012\)%20-%20PTA.pdf](http://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE012)%20-%20PTA.pdf); see Peter Finn, *High-*

delayed pending an opportunity for him to testify against other defendants.³⁶⁵⁶ On July 13, 2020, Military Commission Judge Douglas K. Watkins prospectively reduced Khan's sentence by one year as a sanction against the government's discovery violations.³⁶⁵⁷ On October 28, 2021, a sentencing jury sentenced Khan to twenty-six years, measured from his February 2012 guilty plea.³⁶⁵⁸ Seven out of eight jurors also submitted a letter criticizing abuse of the defendant and urging clemency.³⁶⁵⁹ In response, the convening authority reduced the sentence to ten years, which expired on March 1, 2022.³⁶⁶⁰ Khan's habeas corpus petition is pending.³⁶⁶¹

Value Detainee Agrees to Cooperate in Exchange for 19-Year Sentence, Wash. Post, Mar. 1, 2012, at A3; Peter Finn, *Plea Agreement for Terror Suspect Sparks a Debate*, Wash. Post, Mar. 2, 2012, at A3; Carol Rosenberg, *Terrorist's Deal: Testimony for a Hope of Release*, Miami Herald, Mar. 1, 2012, at 1A; Scott Shane, *Testimony on Al Qaeda Is Required in Plea Deal*, N.Y. Times, Mar. 1, 2012, at A17; see also Carol Rosenberg, *Prisoner Makes New Claims of CIA Torture*, Miami Herald, June 3, 2015, at 4A. See generally McDermott & Meyer, *supra* note 3415, at 187–88 (describing Khan's affiliation with Khalid Shaikh Mohammed).

3655. Docket Sheet, Khan v. Obama, No. 1:06-cv-1690 (D.D.C. Sept. 29, 2006) [hereinafter *Khan* Docket Sheet].

3656. See Carol Rosenberg, *2 Guantánamo Inmates Are Cleared for Transfer*, N.Y. Times, June 18, 2021, at A14 (reporting that Khan's guilty plea "might permit his release next year"); Carol Rosenberg & Julian E. Barnes, *Detainee's Deal Spares C.I.A. Court Testimony About Torture*, N.Y. Times, May 15, 2021, at A1; Carol Rosenberg, *Guantánamo Prisoner Agrees to 3-Year Delay in Sentencing*, Miami Herald, Nov. 3, 2015, at 10A; Carol Rosenberg, *Maryland High School Grad Khan Back in War Court*, Miami Herald, Sept. 14, 2016, at 14A.

3657. Opinion, United States v. Khan (Mil. Comm'n July 13, 2020), A.E. 47K, [www.mc.mil/Portals/0/pdfs/Khan/Khan%20\(AE047K\).pdf](http://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE047K).pdf); see Carol Rosenberg, *Obstacles to Restarting Trials at Guantánamo*, N.Y. Times, July 28, 2020, at A13.

3658. See Case Record, United States v. Khan, www.mc.mil/CASES.aspx; Carol Rosenberg, *For First Time in Public, Ex-Detainee Describes Torture at C.I.A.'s Hands*, N.Y. Times, Oct. 30, 2021, at A9; see also Missy Ryan & Abigail Hauslohner, *Rare Resolution in Guantanamo Trial*, Wash. Post, Oct. 29, 2021, at A2.

3659. See Carol Rosenberg, *Military Jurors Rebuke Torture as Moral Stain*, N.Y. Times, Nov. 1, 2021, at A1; Carol Rosenberg, *Military Jury Shows Its Disgust Over C.I.A. Torture*, N.Y. Times, Nov. 7, 2021, at 18 (interview with the jury foreperson).

3660. See Carol Rosenberg, *Guantánamo Detainee Tortured in C.I.A. Black Sites Has Sentence Cut Short*, N.Y. Times, Mar. 12, 2022, at A14.

3661. Petition, Khan v. Biden, No. 1:22-cv-1650 (D.D.C. June 7, 2022), D.E. 1; see Carol Rosenberg, *His Sentence Done, a Guantánamo Prisoner Sues the U.S. for Release*, N.Y. Times, June 10, 2022, at A20 ("The military discontinued Mr. Khan's legal meetings by videoconference after he completed his sentence, the lawyers said."); Carol Rosenberg, *U.S. Casts a Global Net as It Seeks a Country to Resettle a Qaeda Informant*, N.Y. Times

Congressional Restrictions on Transfers

Transfers Interrupted

After Farhi Saeed Bin Mohammed was transferred to Algeria over his objection in January 2011, no detainee was transferred out of Guantánamo Bay until two Uighurs accepted transfer to El Salvador in April 2012.³⁶⁶² After Khadr was returned to Canada in September 2012 to serve out his military commission sentence, the next transfers were four detainees transferred to Algeria: two in August 2013³⁶⁶³ and another two the following December.³⁶⁶⁴

The defense appropriation act for 2011 prohibited the transfer of Guantánamo Bay detainees except by court order or upon certification by the secretary of defense and the secretary of state that the transferee country can ensure that the detainee “cannot engage or re-engage in terrorist activity.”³⁶⁶⁵ The 2012 appropriation extended the prohibition for another year,³⁶⁶⁶ but it also provided for a waiver by the secretary of defense “with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence” upon a determination that the transfer would further national security and the risk of future terrorist activity by the detainee would be mitigated.³⁶⁶⁷ The government relied on Judge Urbina’s 2008 court order for the Uighurs’ transfer.³⁶⁶⁸

Aug. 10, 2022, at A10 (“U.S. diplomats have asked 11 countries if they would be willing to take [Khan].”).

3662. See Peter Finn, *Detainees Cleared for Release Are Still Waiting*, Wash. Post, Nov. 9, 2011, at A16; Rosenberg, *supra* note 3288; Savage, *supra* note 3369; Jane Sutton, *Two Uighur Detainees Sent to El Salvador*, Wash. Post, Apr. 20, 2012, at A9.

3663. Saib Transfer Notice, *supra* note 3562; Nibal Transfer Notice, *supra* note 3562.

3664. Ameziane Transfer Notice, *supra* note 3566; Bensayah Transfer Notice, *supra* note 3336; see Jess Bravin, *Prisoners Fight U.S. Over Exit from Gitmo*, Wall St. J., Nov. 29, 2013, at A1; Rosenberg, *supra* note 3336; Savage, *supra* note 3336.

3665. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351 (2011); see Dixon, *supra* note 3500, at 50; Finn, *supra* note 3662; Greenberg, *supra* note 3174, at 206. See generally Deborah N. Pearlstein, *How Wartime Detention Ends*, 36 Cardozo L. Rev. 625 (2014) (describing congressional restrictions on the transfer of Guantánamo Bay detainees as “without identifiable precedent”).

3666. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(b)(1)(E), 125 Stat. 1298, 1567 (2011).

3667. *Id.*, § 1028(d)(1); see Dixon, *supra* note 3500, at 50.

3668. See Rosenberg, *supra* note 3288; Savage, *supra* note 3369.

The 2013 appropriation continued transfer restrictions.³⁶⁶⁹ On signing the appropriation bill, President Obama issued a signing statement reserving his right to preserve the constitutional separation of powers:

My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.³⁶⁷⁰

On September 21, 2012, the government released a list of fifty-five petitioners who had been approved for transfer once a suitable transfer location could be identified, and a fifty-sixth petitioner was also approved for transfer, but his name was sealed pursuant to orders by the court of appeals.³⁶⁷¹

Judge Lamberth denied, on March 21, 2014, Ahmed Adnan Ahjam's challenge to the constitutionality of Congress's tying the President's hands on detainee relocation.³⁶⁷² Because "the Constitution confers no right to be free upon enemy belligerents detained at Guantanamo," the detainee did not have standing to challenge the congressional action in court.³⁶⁷³ Nor were the transfer restrictions bills of attainder, because military detention is not punishment.³⁶⁷⁴ Relying on that decision, Judge Lamberth denied, on July 3, a motion for release by Adil Bin Muhammed al-Wirghi, who had

3669. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1027–1028, 126 Stat. 1632, 1914–17 (2013); *Ahjam v. Obama*, 37 F. Supp. 3d 273, 276 (D.D.C. 2014).

3670. Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, Daily Comp. Pres. Docs., 2013 DCPD No. 00004; see White House Press Release, Jan. 3, 2013, www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310; see also Peter Finn, *Activists Blast Obama for Signing Defense Bill*, Wash. Post, Jan. 4, 2013, at A2; Carol Rosenberg, *Obama: Guantánamo a Waste of Resources*, Miami Herald, Jan. 4, 2012, at 1A; Charlie Savage, *Obama Disputes Limits on Detainee Transfers Imposed in Defense Bill*, N.Y. Times, Jan. 4, 2013, at A1.

3671. Sept. 21, 2012, Transfer Approval List, *supra* note 3346; see Carol Rosenberg, *U.S. Names 55 Guantánamo Captives Cleared for Release*, Miami Herald, Sept. 22, 2012, at 3A; *U.S. Names 55 Set for Transfer from Guantánamo*, N.Y. Times, Sept. 22, 2012, at A6; see also Emma Kantrowitz, *No New Closing Date Given for Guantánamo*, Miami Herald, Mar. 14, 2013, at 4A (reporting that eighty-six detainees had been cleared for release).

The three remaining Uighurs were on this list. Sept. 21, 2012, Transfer Approval List, *supra* note 3346.

3672. *Ahjam*, 37 F. Supp. 3d 273.

3673. *Id.* at 277–80.

3674. *Id.* at 280–81.

been cleared for release by the Guantánamo Review Task Force.³⁶⁷⁵ Their appeals were mooted by their transfers to Uruguay in December.³⁶⁷⁶

On June 16, 2016, Judge Friedman determined that a detainee not granted a writ of habeas corpus did not have standing to challenge transfer restrictions as bills of attainder,³⁶⁷⁷ and the court of appeals agreed.³⁶⁷⁸

Transfers Resumed

On October 2, 2013, the government notified Judge Lamberth that it would no longer oppose a writ of habeas corpus for Ibrahim Osman Ibrahim Idris, who was suffering from severe mental and physical illnesses.³⁶⁷⁹ Judge Lamberth granted the writ two days later.³⁶⁸⁰ Idris died in Sudan in 2021.³⁶⁸¹

In addition to the two detainees transferred to Algeria in December, seven other detainees were transferred that month: two to Saudi Arabia,³⁶⁸² two to Sudan (including Idris),³⁶⁸³ and the last three Uighurs to Slovakia,³⁶⁸⁴ bringing the detention population down to 155.³⁶⁸⁵

3675. *Al-Wirghi v. Obama*, 54 F. Supp. 3d 44 (D.D.C. 2014).

3676. Order, *Ahjam v. Butler*, No. 14-5116 (D.C. Cir. Jan. 16, 2015); Order, *Al-Wirghi v. Obama*, No. 14-5176 (D.C. Cir. Dec. 16, 2014).

3677. *Paracha v. Obama*, 194 F. Supp. 3d 7 (D.D.C. 2016).

3678. *Paracha v. Trump*, 697 F. App'x 703 (D.C. Cir. 2017), *cert. denied*, 586 U.S. ___, 139 S. Ct. 52 (2018).

3679. Response, *Idris v. Obama*, No. 1:05-cv-1555 (D.D.C. Oct. 2, 2013), D.E. 278; see Ben Fox, *U.S. Won't Contest Release of Ill Inmate*, Miami Herald, Oct. 4, 2013, at 3A; see also Savage, *Power Wars*, *supra* note 3218, at 502–05 (reporting that a widespread hunger strike prompted President Obama to more aggressively seek transfer of Guantánamo Bay detainees).

3680. Order, *Idris*, No. 1:05-cv-1555 (D.D.C. Oct. 4, 2013), D.E. 279.

3681. See Carol Rosenberg, *Ibrahim Idris, 60, Sudanese Man Taken to Guantánamo Bay on Its First Day in Operation*, N.Y. Times, Feb. 12, 2021, at A21 (“Christopher Curran, a lawyer who represents Sudanese interests in Washington, attributed the death ‘to medical complications he had from Guantánamo.’”).

Idris “never found a job, never married and essentially lived as a shut-in at his mother’s home in Port Sudan before he died.” Rosenberg, *20 Lives*, *supra* note 3177.

3682. Transfer Notice, *Al-Wady v. Obama*, No. 1:08-cv-1237 (D.D.C. Dec. 16, 2013), D.E. 267 [hereinafter *Al-Wady* Transfer Notice] (Hamoud Abdullah Hamoud Hassan al-Wady); Transfer Notice, *Said v. Obama*, No. 1:05-cv-2384 (D.D.C. Dec. 16, 2013), D.E. 325 (Saad al-Qahtani); see Carol Rosenberg, *2 Saudi Detainees Sent Home*, Miami Herald, Dec. 17, 2013, at 3A; *Two Guantánamo Detainees Sent Home to Saudi Arabia*, Wash. Post, Dec. 17, 2013, at A3.

3683. See Carol Rosenberg, *U.S. Repatriates Two War-on-Terror Prisoners*, Miami Herald, Dec. 19, 2013, at 4A; see also Mohamed Osman, *Detainee Contends US Tortured*

Signing the National Defense Authorization Act for Fiscal Year 2014 on December 26, 2013, President Obama praised Congress for giving his “Administration additional flexibility to transfer detainees abroad by easing rigid restrictions that have hindered negotiations with foreign countries and interfered with executive branch determinations about how and where to transfer detainees.”³⁶⁸⁶ President Obama also criticized the continuation of “unwise funding restrictions” prohibiting the relocation of detainees to the States for detention or trial.³⁶⁸⁷

Section 1039 of the 2014 appropriations act required a report from the attorney general on what legal rights would be conferred on Guantánamo detainees if they were moved to a facility within the United States proper.³⁶⁸⁸ On May 14, 2014, the Justice Department provided Congress with a report promising that “existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.”³⁶⁸⁹

Belbacha’s transfer to Algeria in March 2014 left 154 detainees at Guantánamo Bay. At the end of May, five Afghan detainees were transferred to Qatar as part of a deal with the Taliban in exchange for Bowe Bergdahl, the only American held prisoner by the Taliban in Afghanistan.³⁶⁹⁰ Four of the detainees—Abdul Haq Wasiq, Mohammed Habi,

Him, Bos. Globe, Dec. 20, 2013, at A7 (reporting that Idris “said his jailers had ‘systematically tortured’ him, with punishment ‘doubled’ for those who attempted hunger strikes”).

3684. Dec. 31, 2013, *Kiyemba Transfer Notice*, *supra* note 3401; *see* Goldman, *supra* note 3401; Rosenberg, *supra* note 3401; Savage, *supra* note 3401.

3685. *See* Carol Rosenberg, *Gitmo Prisoner Releases Hastened in 2013*, Miami Herald, Jan. 2, 2014, at 1A. *See generally* *Reporter Reflects on Obama’s Stalled Effort to Close Guantánamo*, Fresh Air (NPR radio broadcast Sept. 4, 2014), www.npr.org/2014/09/04/345788141/reporter-reflects-on-obamas-stalled-effort-to-close-guantanamo (interview with Charlie Savage).

3686. Statement by the President on H.R. 3304, www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304; *see* Pub. L. No. 113-66, § 1035, 127 Stat. 672, 851 (2013); *see also* Philip Rucker, *Obama Signs Measure Easing Detainee Transfers*, Wash. Post, Dec. 27, 2013, at A4.

3687. Statement by the President on H.R. 3304, *supra* note 3686; *see* Pub. L. No. 113-66, §§ 1033, 1034, 127 Stat. at 850–51.

3688. Pub. L. No. 113-66, § 1039, 127 Stat. at 855–56.

3689. Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (May 14, 2014), www.hsdl.org/?view&did=753466; *see* Charlie Savage, *U.S. Report Addresses Concern Over Obama’s Plan to Close Guantánamo*, N.Y. Times, May 16, 2014, at A17.

3690. *See* Adam Entous & Julian E. Barnes, *Secret Deal Freed U.S. Soldier*, Wall St. J., June 2, 2014, at A1; Ernesto Londoño, *U.S. Swaps 5 Taliban Detainees for Captive Soldier*,

Khairullah Khairkhwa, and Mullah Norullah Noori—were habeas petitioners;³⁶⁹¹ Mohammed Fazl was not. Relying on superior authority, Presi-

Wash. Post, June 1, 2014, at A1; Carol Rosenberg & Mark Seibel, *Prisoner Exchange Has U.S. P.O.W. on Way Home*, Miami Herald, June 1, 2014, at 1A; Eric Schmitt & Charlie Savage, *American Soldier Freed by Taliban in Prisoner Trade*, N.Y. Times, June 1, 2014, at A1; Adam Taylor & Kevin Sieff, *Case Files Describe the 5 Taliban Commanders*, Wash. Post, June 3, 2014, at A9; see also Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Deal*, N.Y. Times, May 10, 2012, at A1; Karen DeYoung, *Parents of U.S. Prisoner Appeal for Release*, Wash. Post, May 10, 2012, at A20; Anne Gearan & Ernesto Londoño, *Taliban Prisoner Swap Possible*, Wash. Post, Feb. 18, 2014, at A1; Ernesto Londoño, *Taliban Suggests Peace Talks with U.S.*, Wash. Post, Jan. 4, 2012, at A1; Charlie Savage, *Taliban Talks Could Depend on Detainees*, N.Y. Times, June 21, 2013, at A1.

In October 2017, Bergdahl pleaded guilty to military charges of desertion and endangering rescue troops. See Dan Lamothe, *Bergdahl Pleads Guilty to Desertion*, Wash. Post, Oct. 17, 2017, at A3; Richard A. Oppel, Jr., *Soldier Called “Traitor” by Trump Pleads Guilty to Desertion and Endangering*, N.Y. Times, Oct. 17, 2017, at A10; see also Alex Horton, *Bergdahl Expected to Plead Guilty to Desertion*, Wash. Post, Oct. 7, 2017, at A7. He was given a dishonorable discharge but no prison term. See Jonathan Drew, *Bergdahl Is Spared Prison Time*, Miami Herald, Nov. 4, 2017, at 8A; Alex Horton, *Bergdahl Avoids Prison Time for Deserting Post*, Wash. Post, Nov. 4, 2017, at A1; Richard A. Oppel, Jr., *Bergdahl Is Spared Prison, to President’s Chagrin*, N.Y. Times, Nov. 4, 2017, at A1; Nancy A. Youssef, *Bergdahl Avoids Jail Time*, Wall St. J., Nov. 4, 2017, at A3.

Charges that Bergdahl’s capture resulted from his desertion were filed in military court in March 2015. See Michael Ames, *The Walkabout Lie*, Newsweek, Apr. 17, 2015, at 24; Helene Cooper & Richard A. Oppel, Jr., *Soldier Released by Taliban Is Charged by U.S. as Deserter*, N.Y. Times, Mar. 26, 2015, at A1; Dan Lamothe, *Bergdahl Arraigned in Desertion Case*, Wash. Post, Dec. 23, 2015, at A2; Dan Lamothe, *Desertion Charge for One-time POW*, Wash. Post, Mar. 26, 2015, at A1; Dion Nissenbaum & Julian E. Barnes, *Ex-POW to Face Desertion Charges*, Wall St. J., Mar. 26, 2015, at A1; Richard A. Oppel, Jr. & Helene Cooper, *In Bergdahl Case, the Rare Charge of Misbehavior*, N.Y. Times, Mar. 27, 2015, at A3; see also Jonathan Drew, *Bowe Berghdahl Is Arraigned at Base*, Miami Herald, Dec. 23, 2015, at 13A; Dan Frosch, *Bergdahl to Face Army Trial*, Wall St. J., Dec. 15, 2015, at A2; Dan Lamothe & Thomas Gibbons-Neff, *Accused Deserter Bergdahl Faces Trial*, Wash. Post, Dec. 15, 2015, at A1; Richard A. Oppel, Jr., *General Orders Bergdahl to Face a Court-Martial*, N.Y. Times, Dec. 12, 2015, at A1; Richard A. Oppel, Jr., *No Jail Time Is Being Sought for Bergdahl, Lawyer Says*, N.Y. Times, Oct. 12, 2015, at A3; Will Weissert, *No Prison Time Recommended for Bergdahl*, Miami Herald, Oct. 11, 2015, at 10A. See generally *Serial: Season Two* (podcast 2015–16), serialpodcast.org/season-two; Rebecca Boone, *Bergdahl Says He Left Base to Expose “Leadership Failure,”* Miami Herald, Dec. 11, 2015, at 17A; Dan Lamothe, *Breaking His Silence, Bergdahl Recounts a Plan Gone Awry*, Wash. Post, Dec. 11, 2015, at A3; Richard A. Oppel, Jr. & John Koblin, *Bergdahl Saga to Play on “Serial,”* N.Y. Times, Dec. 11, 2015, at B1.

3691. Transfer Notice, *Noori v. Obama*, No. 1:08-cv-1828 (D.D.C. June 5, 2014), D.E. 115; Transfer Notice, *Zadran v. Obama*, No. 1:05-cv-2367 (D.D.C. June 5, 2014), D.E. 426

dent Obama did not inform Congress of the transfer thirty days in advance, as required by 2014 defense appropriations.³⁶⁹² Reflecting the delicacy of the negotiations, neither did President Obama inform the president of Afghanistan in advance.³⁶⁹³ The deal required Qatar to hold the five men within its borders for at least a year.³⁶⁹⁴ In 2019, they were participating across the table from the United States in negotiations over an Afghan peace.³⁶⁹⁵

News media reported in March 2014 that the president of Uruguay had agreed to the possibility of taking some detainees.³⁶⁹⁶ By the time a thirty-

(Wasiq and Nabi); *Khairkhwa* Transfer Notice, *supra* note 3644; see Goldsmith, *supra* note 3643 (reflections by *Khairkhwa*'s habeas attorney, reporting that the detainees' consent to the transfer to Qatar was required under Afghan law).

3692. See Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013); Statement by the President on H.R. 3304, *supra* note 3686 (concluding that the funding statute, "in certain circumstances, would violate constitutional separation of powers principles"); see also Jess Bravin, *Exchange Took Place in a Legal Gray Area*, Wall St. J., June 5, 2014, at A8; James Rosen, *Bergdahl Swap Broke Law, Watchdog Says*, Miami Herald, Aug. 22, 2014, at 1A; Savage, *Power Wars*, *supra* note 3218, at 519–23, 671; Charlie Savage & David E. Sanger, *Prisoner Deal Puts President on Defensive*, N.Y. Times, June 4, 2014, at A1; Karen Tumulty, *Obama Criticized Over "Signing Statements"*, Wash. Post, June 3, 2014, at A8.

3693. See Maria Abi-Habib, *Kabul Objects to Conditions for Freed Taliban*, Wall St. J., June 2, 2014.

3694. See *id.*; Londoño, *supra* note 3690; see also Carol Morello, *Qatar Extends Travel Ban on 5 Ex-Taliban Leaders*, Wash. Post, June 1, 2015, at A14 (reporting on a temporary extension of travel restrictions pending negotiations for a six-month extension); Rod Nordland, *For Swapped Taliban Prisoners, Few Doors to Depart from Qatar*, N.Y. Times, June 1, 2015, at A1 (same).

After an initial period of confinement, they now live with their families in housing provided by the Qataris. They can move freely around the cosmopolitan capital—the women shop in local markets, the children study in a Pakistani-run school—but need the blessing of their host country as well as the United States and destination nation to travel abroad.

Rosenberg, *20 Lives*, *supra* note 3177.

3695. See Mujib Mashal, *From Guantanamo to Negotiating Table: 5 Taliban Talk Peace with U.S.*, N.Y. Times, Mar. 27, 2019, at A8; Missy Ryan & Haq Nawaz Khan, *"Taliban Five" Ex-Detainees Helped Clinch Pact with U.S.*, Wash. Post, Mar. 31, 2020, at A1; see also Douglas Schorzman, *Who Are New Leaders Appointed to Positions in the Taliban Cabinet?*, N.Y. Times, Sept. 8, 2021, at A7.

3696. *Mujica: Detainees Would Be Free to Leave Uruguay*, Miami Herald, Mar. 25, 2014, at 3A; *Uruguay Is Open to Taking Detainees*, S.F. Chron., Mar. 21, 2014, at A5; see Charlie Savage, *U.S. Is Said to Plan to Send 6 Detainees to Uruguay*, N.Y. Times, July 17, 2014, at A3; Mary Beth Sheridan, *Uruguay's President Says He Is Willing to Accept Six Guantanamo Detainees*, Wash. Post, May 16, 2014, at A6; *Six Gitmo Men Set to Be Sent to Uruguay*, Wall St. J., July 17, 2014, at A4; see also Joshua Partlow, *Men Are Out of Guan-*

days' notice to Congress had elapsed, in August, Uruguay's president decided that pending October elections were too close in time to make the transfer politically feasible then.³⁶⁹⁷

Fawzi al-Odah was transferred to Kuwait on November 5; he was the lead petitioner in the second Guantánamo habeas case, which was filed on May 1, 2002.³⁶⁹⁸ Four Yemenis and a Tunisian were transferred on November 20, 2014: two to Slovakia³⁶⁹⁹ and three to Georgia.³⁷⁰⁰ A Saudi was transferred to Saudi Arabi on November 21.³⁷⁰¹

tanamo but Not Yet Free, Wash. Post, Mar. 22, 2015, at A1 (reporting that negotiations began in December 2013 between the U.S. ambassador to Uruguay and Uruguay's president).

3697. See Leonardo Haberkorn, *Guantánamo Prisoner Transfer Faces Delay*, Miami Herald, Sept. 2, 2014, at 3A; Partlow, *supra* note 3696; Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. Times, Sept. 1, 2014, at A1; Felicia Schwartz & Taos Turner, *Six Gitmo Prisoners Transferred to Uruguay*, Wall St. J., Dec. 8, 2014, at A4.

3698. Transfer Notice, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Nov. 5, 2014), D.E. 773 [hereinafter *Al-Odah* Transfer Notice]; see Carol Rosenberg, *Former "Forever Prisoner" Goes Home*, Miami Herald, Nov. 6, 2014, at 1A; Charlie Savage, *Kuwaiti Released from Guantánamo Under New Review System*, N.Y. Times, Nov. 6, 2014, at A16.

3699. Transfer Notice, *Almerfedi v. Obama*, No. 1:05-cv-1645 (D.D.C. Nov. 21, 2014), D.E. 315 (Yemeni Hussain Salem Mohammed Almerfedi); Transfer Notice, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Nov. 21, 2014) (Tunisin Hisham Sliti), D.E. 317; see Order, *Sliti v. Obama*, No. 09-5104 (D.C. Cir. Jan. 21, 2015) (dismissing Sliti's appeal as moot); see also Matt Apuzzo, Sheri Fink & James Risen, *U.S. Torture Leaves a Legacy of Detainees with Damaged Minds*, N.Y. Times, Oct. 9, 2016, at A1 ("Today in Slovakia, Hussein al-Marfadi describes permanent headaches and disturbed sleep, plagued by memories of dogs inside a blackened jail."); *Life After Guantánamo: Exiled in Kazakhstan*, Vice News, Oct. 15, 2015, www.youtube.com/watch?v=dUBBxIoGNaw (web video, reporting on a post-transfer conversation with a detainee transferred to Kazakhstan).

3700. Transfer Notice, *Al-Jayfi v. Obama*, No. 1:05-cv-2104 (D.D.C. Nov. 21, 2014), D.E. 419 (Yemeni Saleh Mohammed Seleh al-Thabbii); Transfer Notice, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Nov. 21, 2014), D.E. 1072 (Yemenis Abdel Ghalib Hakim, also known as Abdul Hakim Alhag, and Abdulkhaliq Ahmed al-Baidhani); see Goldman & Tate, *supra* note 3347, at A15; Rosenberg, *supra* note 3347, at 3A; Savage, *supra* note 3347, at A19.

3701. Transfer Notice, *Zahrani v. Obama*, No. 1:05-cv-2384 (D.D.C. Nov. 24, 2015), D.E. 332 (Muhammed Zahrani); see Carol Rosenberg, *Another Detainee Is Released*, Miami Herald, Nov. 23, 2014, at 3A; *Saudi Detainee Is Released from Guantánamo Bay After 12 Years*, N.Y. Times, Nov. 23, 2014, at 33; see also Carol Rosenberg, *Security Panel: Saudi Captive Can Go Home*, Miami Herald, Oct. 21, 2014, at 3A; Charlie Savage, *Board Says Saudi Detainee Should Be Repatriated*, N.Y. Times, Oct. 21, 2014, at A18.

On December 7, six detainees arrived in Uruguay, following the November 30 runoff victory of an ally of Uruguay's president to become his successor.³⁷⁰²

The number of Afghanis at Guantánamo Bay was reduced from twelve to eight in December 2014 as a result of an agreement with Afghanistan's

3702. Transfer Notices, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Dec. 8, 2014), D.E. 1851, 1852 (Syrian Ahmed Adnan Mohammad Ahjam and Palestinian Mohammed Abdullah Taha Mattan); Transfer Notice, *Al-Wirghi v. Obama*, No. 1:05-cv-1497 (D.D.C. Dec. 8, 2014), D.E. 218 (Tunisian Adil Bin Muhammed al-Wirghi); Transfer Notice, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Dec. 8, 2014), D.E. 319 [hereinafter *Faraj* Transfer Notice] (Syrian Abdul Hadi Omar Mahmoud Faraj); Transfer Notice, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. Dec. 8, 2014), D.E. 381 [hereinafter *Dhiab* Transfer Notice] (Syrian Abu Wa'el Jihad Dhiab); Transfer Notice, *Shaaban v. Obama*, No. 1:05-cv-892 (D.D.C. Dec. 8, 2014), D.E. 267 (Syrian Ali Hussian Mohammad Muety Shaaban); see Adam Goldman, *6 Guantanamo Detainees Turned Over to Uruguay*, Wash. Post, Dec. 8, 2014, at A3; Rosenberg, *supra* note 3398 (noting that this transfer included the last of the Syrian detainees); Charlie Savage, *Uruguay Accepts 6 Detainees Held at Guantánamo*, N.Y. Times, Dec. 8, 2014, at A1; Schwartz & Turner, *supra* note 3697; Taos Turner, *Deal for Ex-Guantanamo Inmates in Uruguay Increasingly Strained*, Wall St. J., May 2, 2015, at A8 ("When the ex-detainees arrived, Uruguay's labor confederation lent them a house they share and gave them job training, while Montevideo gave them a \$600 month stipend."); see also *Detainee Wants Asylum for Others*, Miami Herald, Feb. 13, 2015, at 2A (reporting that Abu Wa'el Dhiab appeared in Argentina to lobby for asylum for other detainees); *Ex-Guantanamo Prisoners Stroll Streets*, Miami Herald, Dec. 13, 2014, at 6A ("The men . . . are staying at a house in a middle class neighborhood as guests of a major labor union, which has been asked to help by President Jose Mujica."); Leonardo Haberkorn, *Controversy Erupts About Ex-Guantánamo Captives*, Miami Herald, Feb. 20, 2015, at 3A ("A labor union that has been helping the men says . . . that they have turned down job offers.").

In 2015, Abdul Hadi Omar Mahmoud Faraj and Adil Bin Muhammed al-Wirghi married local women. See *Ex-Detainee Weds in Uruguay*, Miami Herald, June 6, 2015, at 3A; Leonardo Haberkorn & Peter Prengaman, *2 Ex-Guantánamo Detainees to Marry Uruguayan Women*, Miami Herald, May 29, 2015, at 5A (reporting that el-Wirghi's Pakistani wife divorced him while he was in captivity). Ahmed Ahjam "is the only one of the six who has managed to find a regular job." *Ex-Gitmo Detainee Now Selling Sweets in Uruguay*, Miami Herald, Aug. 14, 2018, at 6A (reporting that Ahjam "opened a small stall selling Arabic pastries").

Abu Wa'el Jihad Dhiab engaged in another hunger strike in Uruguay. See *Uruguay Official: Guantanamo Ex-Prisoner's Health Worsens*, Miami Herald, Sept. 15, 2016, at 15A (reporting that he "would like to join his wife and daughter in Turkey"); see also *Former Gitmo Detainee Trying to Leave Uruguay Fails Again*, Miami Herald, Dec. 18, 2016, at 17A (reporting on Dhiab's failed attempt to travel to South Africa). Later, he relocated to Turkey. See Leonardo Haberkorn, *Ex-Guantánamo Detainee Leaves Uruguay*, Miami Herald, July 25, 20-18, at 8A; Rosenberg, *supra* note 3399.

new president to return four detainees.³⁷⁰³ Five detainees were transferred to Kazakhstan on December 30.³⁷⁰⁴

New Litigation

Hostilities Are Not Over

Fawzi Khalid Abdullah al-Odah, one of the Kuwaitis in the second Guantánamo Bay habeas petition, whose petition was denied in 2009, filed another petition on September 18, 2013, seeking a plan for release in light of an anticipated end of active combat in Afghanistan.³⁷⁰⁵ Judge Kotelly determined on August 3, 2014, that the claim was not ripe: “Although it may be certain that the hostilities in Afghanistan will end at some point, the injury that Petitioner might suffer at the conclusion of these hostilities is

3703. Transfer Notice, Ghani v. Obama, No. 1:09-cv-904 (D.D.C. Dec. 22, 2014), D.E. 122 (Abdul Ghani); *Khan* Transfer Notice, *supra* note 3574 (Shawali Khan); Transfer Notice, Zadran v. Obama, No. 1:05-cv-2367 (D.D.C. Dec. 22, 2014), D.E. 435 (Mohammed Zahir); Transfer Notice, Khiali-Gul v. Obama, No. 1:04-cv-877 (D.D.C. Dec. 22, 2014), D.E. 201 (Khiali Gul); *see* Helene Cooper, *Four Afghans Released from Guantánamo Bay*, N.Y. Times, Dec. 21, 2014, at 16; Carol E. Lee & Jess Bravin, *More Gitmo Transfers Set for Coming Weeks*, Wall St. J., Dec. 22, 2014, at A4; Carol Rosenberg, *Four Afghans Returned Home from Guantánamo*, Miami Herald, Dec. 21, 2014, at 3A.

3704. Al-Qurashi Transfer Notice, *supra* note 3580 (Yemeni Sabry Mohammed Ebrahim al-Qurashi); Transfer Notice, Ghazy v. Obama, No. 1:05-cv-2223 (D.D.C. Dec. 31, 2014), D.E. 149 (Yemeni Mohammed Ali Hussain Khanina); Transfer Notice, Al-Khalaqi v. Obama, No. 1:05-cv-999 (D.D.C. Dec. 31, 2014), D.E. 269 (Yemeni Asim Ben Thabit al-Khalaqi); Transfer Notice, *Sliti*, No. 1:05-cv-429 (D.D.C. Dec. 31, 2014), D.E. 318 (Tunisian Adel al-Hakeemy); Transfer Notice, Alhami v. Obama, No. 1:05-cv-359 (D.D.C. Dec. 31, 2014), D.E. 279 (Tunisian Mohammed Abdul Rahman); *see* Helene Cooper, *127 Prisoners Remain at Guantánamo as U.S. Sends 5 to Kazakhstan*, N.Y. Times, Jan. 1, 2015, at A10; Carol Rosenberg, *5 Released to Kazakhstan After Glitch*, Miami Herald, Jan. 1, 2015, at 1A (reporting that transportation of the detainees was delayed one day because of mechanical problems with the airplane after takeoff); *see also* Mansoor Adayfi, *Lost and Found at Guantánamo* 358 (2021) (reporting, “In Kazakhstan, our brother Asim Thabit al-Khalaqi died after the government refused to give him medical care for a kidney condition”); Apuzzo et al., *supra* note 3515 (“In Kazakhstan, Lutfi bin Ali is haunted by nightmares of suffocating at the bottom of a well.”); *Life After Guantanamo: Exiled in Kazakhstan*, *supra* note 3699 (reporting that al-Khalaqi died shortly after his transfer and describing the living conditions of al-Qurashi and Rahman, known as Lofti Bin Ali, under the control of the Red Crescent in Semey).

3705. Docket Sheet, Al-Odah v. United States, No. 1:13-cv-1420 (D.D.C. Sept. 18, 2013) (D.E. 2); Al Odah v. United States, 62 F. Supp. 3d 101, 104 (D.D.C. 2014).

purely hypothetical at this point.”³⁷⁰⁶ An appeal was dismissed following al-Odah’s November 5 transfer to Kuwait.³⁷⁰⁷

On July 30, 2015, Judge Lamberth denied a renewed habeas corpus challenge on the grounds that hostilities with the Taliban had ended by then, finding that they had not.³⁷⁰⁸ While an appeal was pending,³⁷⁰⁹ Mukhtar Yahia Naji al-Warafi was transferred to Oman.³⁷¹⁰ The court of appeals therefore vacated Judge Lamberth’s ruling.³⁷¹¹

A similar pattern befell Fayeze Mohammed Ahmed al-Kandari’s renewed petition before Judge Kotelly; al-Kandari was transferred to Kuwait while his appeal was pending.³⁷¹²

Judge Kessler’s March 29, 2016, determination that hostilities in Afghanistan had not ended, denying Haji Hamdullah a writ of habeas corpus,³⁷¹³ was vacated by the court of appeals on October 5,³⁷¹⁴ because Hamdullah was transferred to the United Arab Emirates on August 16.³⁷¹⁵

On August 7, 2018, however, the court of appeals affirmed Judge Leon’s February 22, 2017, conclusion that hostilities in Afghanistan had not ended, denying Moath Hamza Ahmed al-Alwi’s second habeas petition, which he filed on May 4, 2015.³⁷¹⁶

3706. *Al-Odah*, 62 F. Supp. 3d at 109; see *Al-Odah* Transfer Notice, *supra* note 3698.

3707. Order, *Al-Odah v. United States*, No. 14-5233 (D.C. Cir. Feb. 6, 2015).

3708. Opinion at 4, 13–14, *Al-Wrafie v. Obama*, No. 1:09-cv-2368 (D.D.C. July 30, 2015), D.E. 95, 2015 WL 4600420.

3709. Docket Sheet, *Al-Warafie v. Obama*, No. 15-5266 (D.C. Cir. Sept. 30, 2015).

3710. *Al-Wrafie* Transfer Notice, *supra* note 3571.

3711. Order, *Al-Warafie*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).

3712. Opinion, *Al-Kandari v. United States*, No. 1:15-cv-329 (D.D.C. Aug. 31, 2015), D.E. 24, *appeal dismissed*, Order, No. 15-5268 (D.C. Cir. Mar. 4, 2016); Docket Sheet, *id.* (Mar. 6, 2015) (transfer notice, D.E. 28); see Docket Sheet, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. May 1, 2002) (original case; transfer notice, D.E. 779).

3713. *Al-Razak v. Obama*, 174 F. Supp. 3d 300 (D.D.C. 2016) (noting that the detainee’s identification in the original petition as “Hamid al-Razak” was an error).

3714. Order, *Al-Razak v. Obama*, No. 16-5074 (D.C. Cir. Oct. 5, 2016); Order, *Al-Razak v. Obama*, No. 1:05-cv-1601 (D.D.C. Dec. 20, 2016), D.E. 318.

3715. Transfer Notice, *Al-Razak*, No. 1:05-cv-1601 (D.D.C. Aug. 18, 2016), D.E. 316 [hereinafter *Hamdullah* Transfer Notice].

3716. *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018) (“hostilities . . . have not ended”), *aff’d* 236 F. Supp. 3d 417, 421 (D.D.C. 2017) (“Unfortunately for the petitioner, the record establishes clearly that both Congress and the President agree that the military is engaged in active hostilities in Afghanistan against al Qaeda, the Taliban, and their associated forces.”), *cert. denied*, 587 U.S. ___, 139 S. Ct. 1893 (2019); see Petition, *Al-Alwi*, No. 1:15-cv-681 (D.D.C. May 4, 2015), D.E. 1; Ann E. Marimow & Missy Ryan, *Appeals Court Hears Challenge to Indefinite Detention at Guantánamo Bay*, Wash. Post, Mar. 21,

Judge Lamberth denied Uthman Abdul Rahim Mohammed Uthman's second habeas petition on August 28, 2020, concluding "that the Government has easily established that the conflict in which Uthman was captured continues."³⁷¹⁷ An appeal is pending.³⁷¹⁸

The Structure of Military Commissions

A habeas petition on behalf of Abd al-Rahim Hussain Mohammed al-Nashiri was filed on July 15, 2008.³⁷¹⁹ On June 30, 2008,³⁷²⁰ and again on April 20, 2011,³⁷²¹ he was referred to a military commission for trial on charges that he was one of the persons responsible for the October 2000 bombing of the USS *Cole*.³⁷²² As capital proceedings against him were underway, he filed a motion on April 21, 2014, in his habeas case to enjoin his military commission proceedings, arguing that the *Cole* bombing did not occur on a battlefield.³⁷²³ Judge Roberts decided, on December 29, to abstain from consideration of al-Nashiri's challenge, pending proceedings in the congressionally established military commission,³⁷²⁴ a decision the court of appeals affirmed, by a vote of two to one, on August 30, 2016.³⁷²⁵

On June 23, 2015, the U.S. Court of Appeals for the District of Columbia Circuit denied to al-Nashiri mandamus interference with the govern-

2018, at A13; Charlie Savage & Carol Rosenberg, *Justice Questions Indefinite Detention at Guantánamo*, N.Y. Times, June 11, 2019, at A17; *see also* Al-Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011) (affirming the denial of relief in Al-Alwai's first habeas petition), *aff'g* 593 F. Supp. 2d 24 (D.D.C. 2008).

Al-Alwi remains detained. Appendix Table 4, *infra* page 641 (n.26).

3717. Uthman v. Trump, 486 F. Supp. 3d 350, 357 (D.D.C. 2020).

3718. Docket Sheet, Uthman v. Biden, No. 20-5319 (D.C. Cir. Oct. 28, 2020).

3719. Petition, Al-Nashiri v. Bush, No. 1:08-cv-1207 (D.D.C. July 15, 2008), D.E. 1.

3720. *See* William Glaberson, *Guantánamo Detainee Faces War Crimes Charges in Attack on Destroyer*, N.Y. Times, July 1, 2008, at A19; Josh White, *Charges Are Filed in Cole Bombing*, Wash. Post, July 1, 2008, at A3.

3721. *See New Charges Filed Against Suspect in U.S.S. Cole Bombing*, N.Y. Times, Apr. 21, 2011, at A8.

3722. Office of Military Commission Cases, *supra* note 3433.

3723. Preliminary Injunction Motion, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Apr. 21, 2014, filed May 1, 2014), D.E. 228; *see* Order, *In re Al-Nashiri*, No. 14-5229 (D.C. Cir. Nov. 18, 2014) (denying a mandamus order that the district court rule promptly on al-Nashiri's military commission injunction motion); *see also* Mandamus Petition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014, filed Nov. 3, 2014) (challenging the composition of a panel of the Court of Military Commission Review hearing an interlocutory appeal by the government in al-Nashiri's case).

3724. *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218 (D.D.C. 2014).

3725. *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (also denying a writ of mandamus), *cert. denied*, 583 U.S. ___, 138 S. Ct. 354 (2017).

ment's interlocutory appeal to the U.S. Court of Military Commission Review from the military commission's dismissal of charges relating to the October 2002 bombing of the French merchant vessel *Limburg*.³⁷²⁶ Although the court of appeals noted possible violations of the Appointments Clause, depending upon whether military commission review judges are deemed principal or inferior officers, the court of appeals determined that a constitutional challenge to the structure of the military commission review court could be considered on appeal from the review court.³⁷²⁷

Heard in the U.S. Court of Appeals for the District of Columbia Circuit on May 4, 2022, was a mandamus action by al-Nashiri seeking a ban on evidence in the military commissions derived from torture or similar treatment.³⁷²⁸

On July 29, 2019, Judge Friedman stayed a 2008 habeas petition by Ammar al-Baluchi pending resolution of his military commission prosecution for participation in the September 11, 2001, attacks.³⁷²⁹

Triable Crimes

On July 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit reversed en banc, as ex post facto violations, the military commission convictions of Ali Hamza Ahmad Suliman al-Bahlul for material support of terrorism and solicitation of others to commit war crimes.³⁷³⁰

Reviewing al-Bahlul's conviction for conspiracy, a majority of the court held that because al-Bahlul's pro se defense did not include an ex post facto challenge, plain error review applied, and the Supreme Court's four-to-three analysis of the issue in its 2006 decision in *Hamdan v.*

3726. *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015).

3727. *Id.* at 82–86; *see id.* at 86 (noting that presidential appointment and Senate confirmation of the military judges on the military commission review court would cure the potential constitutional violation); *see also* Carol Rosenberg, *Prosecution Gets New Delay in USS Cole Case*, Miami Herald, June 30, 2015, at 3A (reporting on a delay in al-Nashiri's prosecution while the government considers whether to seek an amendment to how military commission appellate judges are appointed).

Al-Nashiri remains detained. Appendix Table 4, *infra* page 641 (n.4).

3728. Docket Sheet, *In re Al-Nashiri*, No. 21-1208 (D.C. Cir. Oct. 15, 2021); *see* Carol Rosenberg, *Administration Will Not Use Evidence Gained by Torture*, N.Y. Times Feb. 2, 2022, at A13.

3729. *Al-Baluchi v. Esper*, 392 F. Supp. 3d 46 (D.D.C. 2019).

3730. *Al-Bahlul v. United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014); *Al-Bahlul v. United States*, 792 F.3d 1, 3 (D.C. Cir. 2015); *see* Michael Doyle, *Ex-Aide to Bin Laden Has Two Convictions Overturned*, Miami Herald, July 15, 2014, at 3A; Charlie Savage, *Court Sidesteps How to Prosecute Detainees*, N.Y. Times, July 15, 2014, at A15.

Rumsfeld left doubt about whether conspiracy is triable by military commission.³⁷³¹

Later, on October 20, 2016, the court affirmed en banc al-Bahlul's conviction for conspiracy, but no single theory was adopted by a majority of the court.³⁷³² Four judges concluded that article I of the Constitution gives Congress the power to make conspiracy triable by military commission.³⁷³³ Three judges dissented and concluded that because conspiracy does not violate the international law of war, it is triable only pursuant to article III, which generally reserves judicial power to civilian courts.³⁷³⁴ Two judges concurring in the conviction affirmance concluded that the conviction was not for *inchoate* conspiracy; the conviction required proof of acts that could be war crimes under international law.³⁷³⁵ Another two judges did not participate in the decision.³⁷³⁶ The Supreme Court declined to review the case.³⁷³⁷

3731. *Al-Bahlul*, 767 F.3d at 18–27 (observing that Justices Stevens, Souter, Ginsburg, and Breyer concluded that conspiracy is not triable by military commission; Justices Thomas, Scalia, and Alito concluded that conspiracy is; Justice Kennedy declined to reach a conclusion on the issue; and Chief Justice Roberts was recused); see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); see also Savage, *Power Wars*, *supra* note 3218, at 497–501 (reporting that the attorney general overruled the solicitor general's recommendation that the government not pursue an argument that conspiracy is triable by military commission).

3732. *Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016); see Sam Hananel, *Federal Appeals Court Upholds Guantánamo Conspiracy Conviction of Bin Laden Assistant*, Miami Herald, Oct. 21, 2016, at 12A; Ann E. Marimow, *Guantanamo Detainee's Conviction Is Upheld*, Wash. Post, Oct. 21, 2016, at A8; Charlie Savage, *Appeals Court Backs Tribunal's Conspiracy Conviction*, N.Y. Times, Oct. 21, 2016, at A3.

3733. *Al Bahlul*, 840 F.3d at 759–74 (concurring opinion by Circuit Judge Kavanaugh, joined by Circuit Judges Janice Rogers Brown and Griffith); *id.* at 759 (concurring opinion by Circuit Judge Henderson), *incorporating Al-Bahlul*, 792 F.3d at 27–72.

3734. *Id.* at 804–15 (dissenting opinion by Circuit Judges Judith W. Rogers, Tatel, and Cornelia T.L. Pillard).

3735. *Id.* at 774–97 (concurring opinion by Circuit Judge Patricia A. Millett); *id.* at 797–815 (concurring opinion by Circuit Judge Robert L. Wilkins).

3736. *Id.* at 757–58 nn.*, ** (Chief Circuit Judge Merrick B. Garland and Circuit Judge Sri Srinivasan).

3737. *Al Bahlul v. United States*, 583 U.S. ___, 138 S. Ct. 313 (2017); see Robert Barnes, *High Court Rejects Guantanamo Detainee's Appeal*, Wash. Post, Oct. 11, 2017, at A10; Carol Rosenberg, *Conviction of Guantánamo's Lone Lifer Won't Be Reviewed by Supreme Court*, Miami Herald, Oct. 11, 2017, at 11A.

Al-Bahlul remains detained. Appendix Table 4, *infra* page 641 (n.1).

Two New Petitioners, One Detainee's Petitions Denied, and One Denial Remanded

Asadullah Haroon Gul filed his first habeas petition on July 15, 2016.³⁷³⁸ High-value detainee Guled Hassan Duran filed his first petition on November 30.³⁷³⁹

Judge Collyer denied Haji Wali Mohammed Morafa's June 7, 2005, petition on June 8, 2016.³⁷⁴⁰ While this decision was on appeal,³⁷⁴¹ Morafa was transferred to the United Arab Emirates in January 2017.³⁷⁴²

Judge Hogan denied the petition of Khaled Ahmed Qassim, one of the original four dozen habeas petitioners, on May 8, 2018, "for the reasons given during the classified hearing."³⁷⁴³ On June 21, 2019, the court of appeals reversed the denial and remanded the case for a more careful determination of whether the government could use undisclosed classified information as a basis for detention.³⁷⁴⁴

Kansas Suit to Keep Detainees Out

Kansas filed a Freedom of Information Act (FOIA) complaint against the Department of Defense on July 22, 2016, in the District of Kansas seeking

3738. Petition, Haroon Gul v. Obama, No. 1:16-cv-1462 (D.D.C. July 15, 2016), D.E. 1.

Because of a clerk's office error, this case was assigned to Judge Amit P. Mehta, who joined the bench in 2014, rather than to a judge who joined the bench before 2010 and therefore had familiarity with Guantánamo Bay habeas petitions. Email from Angela D. Caesar, Clerk of Court, U.S. District Court for the District of Columbia, to Tim Reagan, Sept. 3, 2018; see FJC Biographical Directory, *supra* note 3190; "Ten Writs Denied and Another Writ Terminated; Two Writs Reversed and Two Writs Vacated; Two Detainees Transferred After One Writ Was Granted and Another Was on Appeal," *supra* page 502.

3739. Petition, Duran v. Obama, No. 1:16-cv-2358 (D.D.C. Nov. 30, 2016), D.E. 1; see Joint Status Report, *id.* (June 28, 2019), D.E. 70 ("The parties have identified five outstanding discovery issues that will have to be litigated.").

Duran remains detained. Appendix Table 4, *infra* page 641 (n.36).

3740. Opinion, Mousovi v. Obama, No. 1:05-cv-1124 (D.D.C. June 8, 2016, filed July 11, 2016), D.E. 443, 2016 WL 3771240 (redacted).

3741. Docket Sheet, Mohammed v. Obama, No. 16-5266 (D.C. Sept. 23, Cir. 2016) (cross-appeal); Docket Sheet, Mohammed v. Obama, No. 16-5225 (D.C. Cir. Sept. 23, 2016) (appeal).

3742. Transfer Notice, *Mousovi*, No. 1:05-cv-1124 (D.D.C. Jan. 23, 2017), D.E. 454 [hereinafter Mohammed Transfer Notice].

3743. Judgment, Anam v. Trump, No. 1:04-cv-1194 (D.D.C. May 8, 2018), D.E. 1139.

3744. Qassim v. Trump, 927 F.3d 522 (D.C. Cir. 2019) (noting that it was error to conclude that binding precedent implied no due-process rights for detainees).

Qassim remains detained. Appendix Table 4, *infra* page 641 (n.13).

information on “unlawful” plans to move Guantánamo Bay (GTMO) detainees to the mainland.³⁷⁴⁵ After the production of “more than 2,000 pages of documents about GTMO’s closure,” on March 21, 2018, Judge Daniel D. Crabtree ordered five documents produced to the court for in camera review.³⁷⁴⁶ On July 23, he determined that one document was properly withheld, but three unclassified documents and one classified document were excessively redacted.³⁷⁴⁷ The case was dismissed as settled in October.³⁷⁴⁸

The Last Obama Transfers

Twenty detainees were transferred in 2015, leaving a population of 107:³⁷⁴⁹ ten to Oman,³⁷⁵⁰ five to the United Arab Emirates,³⁷⁵¹ one each to Esto-

3745. Complaint, *Kansas ex rel. Schmidt v. U.S. Dep’t of Def.*, No. 5:16-cv-4127 (D. Kan. July 22, 2016), D.E. 1; see John Hanna & Jim Salter, *Plan to Move Guantanamo Detainees at Center of Suit*, Miami Herald, July 25, 2016, at 7A.

3746. *Kansas ex rel. Schmidt v. U.S. Dep’t of Def.*, 320 F. Supp. 3d 1227, 1234 (D. Kan. 2018).

3747. Opinion, *Schmidt*, No. 5:16-cv-4127 (D. Kan. July 23, 2018), D.E. 34, 2018 WL 3536271.

3748. Stipulation, *id.* (Oct. 17, 2018), D.E. 41.

3749. See Missy Ryan & Adam Goldman, *Race to Resettle Military Inmates*, Wash. Post, Apr. 23, 2015, at A1 (“In all, the Pentagon hopes that 57 inmates who are approved for transfer will be resettled by the end of 2015.”).

3750. Transfer Notice, *Al-Qyati v. Obama*, No. 1:08-cv-2019 (D.D.C. June 15, 2015), D.E. 315 (Yemeni Saad Masir Mukbl al-Azani); Transfer Notice, *Al-Zarnouqi v. Obama*, No. 1:06-cv-1767 (D.D.C. June 15, 2015), D.E. 432 (Yemeni Mohamed al-Zarnouqi); Transfer Notice, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. June 15, 2015), D.E. 2039 (Yemeni Sharaf al-Sanani); Transfer Notices, *Abdah v. Obama*, No. 1:04-cv-1194 (D.D.C. June 15, 2015), D.E. 1078, 1079 [hereinafter Hassan Transfer Notice] (Yemenis Jalal Salim Bin Amer and Imad Abdullah Hassan); Transfer Notice, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Jan. 19, 2015), D.E. 1853 (Mohammed Ahmed Salam); Transfer Notice, *Al-Shubati v. Obama*, No. 1:07-cv-2338 (D.D.C. Jan. 16, 2015), D.E. 281 (Abdurrahman Abdallah Ali Mahmoud al-Shubati); Transfer Notice, *Mohammon*, No. 1:05-cv-2386 (D.D.C. Jan. 16, 2015), D.E. 2029 (Yemeni Alkhadr Abdullah al-Yafie); *Hentif* Transfer Notice, *supra* note 3648 (Yemeni Fadhel Hussein Saleh Hentif); see Adam Goldman & Missy Ryan, *Six Detainees Sent from Guantanamo Bay to Oman*, Wash. Post, June 14, 2015, at A4 (reporting on the transfers, among others, of Idris Ahmad Abdu Qadir Idris, petitioner in No. 1:09-cv-745); Carol Rosenberg, *Six Guantánamo Detainees Moved to Resettle in Oman*, Miami Herald, June 14, 2015, at 3A [hereinafter *Six to Oman*] (same); see also Helene Cooper, *Guantanamo Releases 5, Angering Senators*, N.Y. Times, Jan. 15, 2015, at A13; Carol Rosenberg, *Five Yemeni Detainees Go to Oman, Estonia*, Miami Herald, Jan. 15, 2015, at 4A; Missy Ryan & Adam Goldman, *Five More Yemeni De-*

nia,³⁷⁵² Morocco,³⁷⁵³ Saudi Arabia,³⁷⁵⁴ and Mauritania;³⁷⁵⁵ and Shaker Aamer was transferred to the United Kingdom.³⁷⁵⁶

tainees Released, Wash. Post, Jan. 15, 2015, at A9; Charlie Savage, 6 *Guantánamo Detainees Are Transferred to Oman*, N.Y. Times, June 14, 2015, at 12.

3751. Transfer Notice, Othman v. Obama, No. 1:05-cv-2088 (D.D.C. Nov. 16, 2015), D.E. 184 (Khalid Abd Elgabar Mohammed Othman); Transfer Notices, Al-Adahi v. Obama, No. 1:05-cv-280 (D.D.C. Nov. 16, 2015), D.E. 670, 671 (Suleiman Awadh Bin Aqil al-Nahdi and Fahmi Salem al-Assani); Transfer Notice, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. Nov. 16, 2015), D.E. 1052 (Adil el-Haj Obaid); Transfer Notice, Anam, No. 1:04-cv-1194 (D.D.C. Nov. 16, 2015), D.E. 1082 (Ali Ahmed Mohammed al-Razehi); see Adam Goldman, 5 *Yemeni Inmates at Guantanamo Sent to UAE as U.S. Seeks to Close Prison*, Wash. Post, Nov. 16, 2015, at A5; Carol Rosenberg, 5 *Guantánamo Detainees Released to Settle in United Arab Emirates*, Miami Herald, Nov. 16, 2015, at 1A; Charlie Savage, 5 *Guantánamo Prisoners Sent Overseas*, N.Y. Times, Nov. 16, 2015, at A15.

3752. Hussein Transfer Notice, *supra* note 3649 (Yemeni Abdul Qader Ahmed Hussein); see Charlie Savage, *Yemeni Seeks Freedom for Soul After 13 Years at Guantánamo*, N.Y. Times, July 30, 2016, at A1.

3753. Transfer Notice, Chekkouri v. Obama, No. 1:05-cv-329 (D.D.C. Sept. 17, 2015), D.E. 379 (Younous Chekkouri); see Charlie Savage, *U.S. Repatriates Moroccan from Guantánamo, and Approves a Kuwaiti's Transfer*, N.Y. Times, Sept. 19, 2015, at A14; see also Chekkouri v. Obama, 158 F. Supp. 3d 4 (D.D.C. 2016) (disclosure order noting Moroccan detention); Opinion, *Chekkouri*, No. 1:05-cv-329 (D.D.C. July 29, 2016), D.E. 424 (dismissing the habeas petition as moot and noting house arrest in Morocco “pending a decision by Moroccan authorities on whether to file charges against petitioner”); Apuzzo et al., *supra* note 3515 (“Despite diplomatic assurances that he would face no charges, Morocco jailed [Chekkouri] for several months . . .”); Sudarsan Raghavan, *An Ex-Detainee's Struggle to Escape the Mental Cage of Guantanamo Bay*, Wash. Post, Apr. 26, 2018, at A13 (“He takes pills for anxiety, and he has yet to find a job.”); Charlie Savage, *Ex-Guantánamo Detainee Is Freed*, N.Y. Times, Feb. 12, 2016, at A5 (reporting Morocco’s release of the detainee from Moroccan detention); Charlie Savage, *Ex Guantánamo Prisoner Said to Be Held by Morocco*, N.Y. Times, Oct. 2, 2015, at A18 (reporting that Morocco was detaining the repatriated prisoner in violation of the repatriation agreement).

“The Moroccan government initiated prosecutions of all 11 Moroccan citizens repatriated from Guantánamo during George W. Bush’s presidency; four were convicted and the rest were released for insufficient evidence, a leaked cable shows.” Charlie Savage & Aida Alami, *Released from Guantánamo but in Legal Limbo in Morocco*, N.Y. Times, Feb. 7, 2016, at A1.

3754. Transfer Notice, Al-Oshan v. Obama, No. 1:05-cv-520 (D.D.C. Sept. 22, 2015), D.E. 377 [hereinafter Shalabi Transfer Notice] (Abdul Rahman Shalabi to Saudi Arabia); see Adam Goldman, *Saudi Detainee at Guantanamo Bay is Repatriated*, Wash. Post, Sept. 23, 2015, at A12; Carol Rosenberg, *9-Year Hunger Striker Sent to Saudi Arabia*, Miami Herald, Sept. 23, 2015, at 12A; Charlie Savage, *Saudi Held at Guantánamo Is Repatriated, Reducing Number of Detainees to 114*, N.Y. Times, Sept. 23, 2015, at A20.

3755. Transfer Notice, Aziz v. Obama, No. 1:05-cv-492 (D.D.C. Oct. 30, 2015), D.E. 265 (Ahmed Ould Abdel Aziz); see Adam Goldman, *Guantanamo Detainee Returns*

Forty-eight detainees were transferred in 2016, leaving fifty-nine captives at the detention facility.

Fourteen detainees were transferred in early January: ten to Oman,³⁷⁵⁷ two to Ghana,³⁷⁵⁸ and one each to Kuwait³⁷⁵⁹ and Saudi Arabia.³⁷⁶⁰ On Jan-

Home, Wash. Post, Oct. 30, 2015, at A2; Carol Rosenberg, *U.S. Repatriates Guantánamo Detainee to West African Nation*, Miami Herald, Oct. 30, 2015, at 11A.

3756. Transfer Notice, Deghayes v. Obama, No. 1:04-cv-2215 (D.D.C. Oct. 30, 2015), D.E. 287 [hereinafter Aamer Transfer Notice]; see Karla Adam & Adam Goldman, *Released Guantanamo Prisoner Arrives in Britain*, Wash. Post, Oct. 31, 2015, at A9; Adam Goldman & Missy Ryan, *Guantanamo Detainee to Be Sent Back to Britain*, Wash. Post, Sept. 26, 2015, at A2; Carol Rosenberg, *British Resident Released from Guantánamo*, Miami Herald, Oct. 31, 2015, at 3A; Charlie Savage, *Pentagon Says High-Profile Guantánamo Detainee Will Be Sent to Britain*, N.Y. Times, Sept. 26, 2015, at A19; Charlie Savage & Steven Erlanger, *Guantánamo Release Ends Yearslong Battle*, N.Y. Times, Oct. 31, 2015, at A14; see also Carol Rosenberg, *Pinching Pennies at Guantánamo Prison?*, Miami Herald, Oct. 9, 2015, at 3A (“When attorney Ramzi Kassem met detainee Shaker Aamer to share the news that the long-held Saudi prisoner was approved for transfer to Britain after Oct. 24, the captive was brought to their meeting in prison-issue canvas shoes held together by duct tape.”).

3757. *Al-Wrafie* Transfer Notice, *supra* note 3571 (Mukhtar Yahia Naji al-Warafi); *Awad* Transfer Notice, *supra* note 3525 (Adham Mohammed Ali Awad); Hatim Transfer Notice, *supra* note 3506 (Said Muhammed Salih Hatim); Transfer Notices, Alladeen v. Obama, No. 1:05-cv-748 (D.D.C. Jan. 14, 2016), D.E. 223, 224 (Sameer Najy Hasan Mukbel and Mohammed Saeed Bin Salman); Transfer Notice, Al-Daini v. Obama, No. 1:05-cv-634 (D.D.C. Jan. 14, 2016), D.E. 207 (Omer Saeed Salem al-Daini); Transfer Notice, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Jan. 14, 2016), D.E. 1083 (Fahmi Abdullah Ahmed al-Tawlaqi); see Docket Sheet, Salih v. Bush, No. 1:08-cv-1234 (D.D.C. July 17, 2008) (Abdul al-Razzaq Muhammad Salih); Docket Sheet, Ghazy v. Bush, No. 1:05-cv-2223 (D.D.C. Nov. 15, 2005) (Fahd Abdullah Ahmed Ghazy); *Al-Jayfi* Docket Sheet, *supra* note 3306 (Othman Ali Mohammed al-Shamrany); see also Carol Rosenberg, *In Largest Obama Era Transfer, Guantánamo Sends 10 More Captives to Oman*, Miami Herald, Jan. 15, 2016, at 11A; Missy Ryan & Adam Goldman, *With 10 More Detainee Releases from Guantanamo, Obama’s Goal Draws Near*, Wash. Post, Jan. 14, 2016, at A5; Charlie Savage, *10 Detainees Sent to Oman from Prison in Cuba*, N.Y. Times, Jan. 15, 2016, at A16; Felicia Schwartz, *Guantanamo Detainees Are Sent to Oman*, Wall St. J., Jan. 15, 2016, at A3.

One of the first twenty detainees, Samir Naji al-Hasan Moqbel “has found work in a factory, married and is now father to two children.” Rosenberg, *20 Lives*, *supra* note 3177.

3758. See Carol Rosenberg, *U.S. Sends 2 Guantánamo Captives to New Lives in Ghana*, Miami Herald, Jan. 7, 2016, at 10A (reporting on the transfers of Khalid al-Dhuby, petitioner in No. 1:05-cv-2104, and Mahmoud Omar Bin Atef, petitioner in 1:08-cv-1232); Missy Ryan & Adam Goldman, *2 Guantanamo Detainees Being Resettled in Ghana*, Wash. Post, Jan. 7, 2016, at A9 (same).

3759. Al-Kandari Transfer Notice, *supra* note 3453 (Fayiz al-Kandari); see Rosenberg, *supra* note 3453.

uary 20, one detainee each was transferred to Montenegro³⁷⁶¹ and to Bosnia;³⁷⁶² Mohammad Bwazir was scheduled to board a plane that same day for transfer to an undisclosed country, but the Yemeni detainee decided not to go where he knew no one.³⁷⁶³ Bwazir was transferred to Saudi Arabia in January 2017.³⁷⁶⁴

In April 2016, two detainees were transferred to Senegal³⁷⁶⁵ and nine were transferred to Saudi Arabia.³⁷⁶⁶ A second detainee was transferred to

3760. Transfer Notice, *Al-Shimrani v. Obama*, No. 1:05-cv-2249 (D.D.C. Jan. 11, 2016), D.E. 263 (Mohammed Abdul Rahman al-Shimrani); see Carol Rosenberg, *Saudi Who Protested Guantánamo Groin Searches Goes Home*, Miami Herald, Jan. 12, 2016, at 9A; Missy Ryan, *Saudi Man Detained 14 Years Is Sent Home*, Wash. Post, Jan. 12, 2016, at A2; Charlie Savage, *U.S. Repatriates a Saudi Man Held 14 Years at Guantánamo*, N.Y. Times, Jan. 12, 2016, at A12; see also *Guantanamo Prisoner Was Low-Level Fighter*, U.S. Says, Wash. Post, Dec. 2, 2015, at A14; Carol Rosenberg, *Mistakenly Profiled Guantánamo “Forever Prisoner” Seeks Release*, Miami Herald, Dec. 2, 2015, at 15A.

3761. Transfer Notice, *Anam*, No. 1:04-cv-1194 (D.D.C. Jan. 21, 2016), D.E. 1084 (Abdulaziz al-Swidi).

3762. Transfer Notice, *Alsawam v. Obama*, No. 1:05-cv-1244 (D.D.C. Jan. 21, 2016), D.E. 346 [hereinafter *Alsawam* Transfer Notice] (Tariq Mahmoud Alsawam); see Apuzzo et al., *supra* note 3515 (“Today in Bosnia, Mr. Sawah, 58, complains of frequent headaches and begs a doctor for antidepressants.”).

3763. See Adam Goldman, *Two Guantanamo Bay Inmates Sent to Balkans*, Wash. Post, Jan. 22, 2016, at A2; Carol Rosenberg, *2 Captives Released; 3rd Opts Not to Leave*, Miami Herald, Jan. 22, 2016, at 1A; Carol Rosenberg, *Guantánamo Captive Balked at Last Minute*, Miami Herald, Feb. 12, 2016, at 1A; Charlie Savage, *Guantánamo Detainee Refuses Offer of Release After 14 Years in Prison*, N.Y. Times, Jan. 22, 2016, at A16; see also Charlie Savage, *17 Guantánamo Prisoner Transfers Said to Be Pending*, N.Y. Times, Dec. 17, 2015, at A25.

3764. See Carol Rosenberg, *Saudi Arabia Accepts 4 Captives from Guantánamo; Prison Holds 55*, Miami Herald, Jan. 6, 2017, at 5A.

3765. *Khalifh* Transfer Notice, *supra* note 3573 (Libyan Omar Mohammed Khalifh, also known as Omar Khalifa Mohammed Abu Bakr and Omar Khalif Mohammed Abu Baker Mahjour Umar); see Carol Rosenberg, *Senegal Takes in 2 Libyan Detainees from Guantánamo*, Miami Herald, Apr. 5, 2016, at 10A (also reporting on the transfer of Salim Gharebi, petitioner in No. 1:04-cv-1164); Missy Ryan, *Two Guantanamo Detainees from Libya Sent to Senegal*, Wash. Post, Apr. 5, 2016, at A7 (same, referring to the detainee as Salem Abdu Salam Ghareby); Charlie Savage, *2 Libyan Guantánamo Detainees Are First to Be Transferred to Senegal*, N.Y. Times, Apr. 5, 2016, at A18 (same, referring to the detainee as Salem Abdul Salem Ghareby).

In 2018, it was reported that Senegal deported the two detainees to their native Libya. Dionne Searcey & Charlie Savage, *Ex-Guantánamo Inmate, Sent to Senegal, Disappears*, N.Y. Times, Apr. 7, 2018, at A9; Charlie Savage, Declan Walsh & Dionne Searcey, *Program to Resettle Guantánamo Detainees Shows Signs of Strain*, N.Y. Times, Apr. 24, 2018, at A11.

Montenegro in June.³⁷⁶⁷ In July, two detainees were transferred to Serbia,³⁷⁶⁸ and one was transferred to Italy.³⁷⁶⁹ On August 13, fifteen detainees

3766. Transfer Notice, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Apr. 18, 2016), D.E. 1874 (Nadir Omar Abdullah Bin Sa'Adoun Alsy'ary); Transfer Notice, *Al-Qyati v. Obama*, No. 1:08-cv-2019 (D.D.C. Apr. 18, 2016), D.E. 318 (Abdul Rahman Umil al-Qyati); Transfer Notice, *Qattaa v. Obama*, No. 1:08-cv-1233 (D.D.C. Apr. 18, 2016), D.E. 167 (Monsoor Muhammed Ali Qattaa); Transfer Notice, *Al-Badah v. Obama*, No. 1:06-cv-1668 (D.D.C. Apr. 18, 2016), D.E. 289 [hereinafter *Al-Badah* Transfer Notice] (Tariq Ali Abdullah Ba Odah and Mohammed Abdullah Mohammed Ba Odah, also known as Mohammed Abdullah Mohammed al-Hamiri); see Max Ehrenfreund, *9 Guantanamo Detainees Sent to Saudi Arabia*, Wash. Post, Apr. 17, 2016, at A2 (also reporting on the transfers of Abdul Rahman Mohammed Saleh Nasir, petitioner in No. 1:07-cv-1710; Ali Yahya Mahdi al-Raimi, petitioner in No. 1:04-cv-1194; Ahmed Yaslam Said Kuman, petitioner in No. 1:08-cv-1235; and Mashur Abdullah Muqbil Ahmed al-Sabri, petitioner in No. 1:06-cv-1767); Carol Rosenberg, *Saudi Arabia Takes in Nine Yemenis from Guantánamo*, Miami Herald, Apr. 17, 2016, at 18A (same); Charlie Savage, *9 Guantánamo Prisoners from Yemen Are Transferred to Saudi Arabia*, N.Y. Times, Apr. 17, 2016, at 6 (same); see also Adam Goldman, *Hunger Striker Among Prisoners at Guantanamo Slated for Transfer*, Wash. Post, Mar. 31, 2016, at A2 (Tariq Ba Odah); Carol Rosenberg, *Another "Forever Prisoner" Cleared*, Miami Herald, Apr. 18, 2015, at 3A (al-Sabri); Carol Rosenberg, *Judge: Guantánamo Hunger Striker May Be Entitled to Medical Review*, Miami Herald, Oct. 16, 2015, at 12A (Tariq Ba Odah); Charlie Savage, *U.S. Is Poised to Oppose Freeing Guantánamo Inmate*, N.Y. Times, Aug. 15, 2015, at A3 (same); Charlie Savage, *Guantánamo Hunger Striker's Petition Divides Officials*, N.Y. Times, Aug. 8, 2015, at A3 (same).

3767. Transfer Notice, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. June 24, 2016), D.E. 1060 (Abd al-Malik Abd al-Wahab, also known as Abdul Malik Abdul Wahab al-Rahabi); see Carol Rosenberg, *Detainee Since Day 1 Is Released to Montenegro*, Miami Herald, June 24, 2016, at 11A; see also Nicholas Fandos, *Pentagon Plans More Prisoner Transfers from Guantanamo*, N.Y. Times, Mar. 31, 2016, at A14 ("The Defense Department has informed Congress that it intends to transfer up to a dozen more prisoners . . ."); Carol Rosenberg, *"Forever Prisoner" Asks to Leave Guantánamo*, Miami Herald, Jan. 29, 2014, at 3A; Charlie Savage, *Panel Says Yemeni Man Should Stay in Detention*, N.Y. Times, Mar. 13, 2014, at A18.

3768. Transfer Notice, *Davliatov v. Obama*, No. 1:15-cv-1959 (D.D.C. July 11, 2016), D.E. 39 (Muhammadi Davliatov, also a petitioner in No. 1:05-cv-2386); Transfer Notice, *Mattan*, No. 1:09-cv-745 (D.D.C. July 11, 2016) (Abdul Rahman Ahmed); see Carol Rosenberg, *2 Guantánamo Captives Sent to Serbia; Prison Now Has 76*, Miami Herald, July 12, 2016, at 11A (referring to Ahmed as Mansoor al-Dayfi and referring to Davliatov as Umar Abdulayev); Missy Ryan, *Two Guantánamo Detainees Transferred to Serbia*, Wash. Post, July 12, 2016, at A2 (referring to Ahmed as Mansur Ahmad Saad al-Dayfi and to Davliatov as Muhammadi Davlatov); Charlie Savage, *2 Guantanamo Prisoners Are Transferred to Serbia*, N.Y. Times, July 12, 2016, at A3 (referring to Davliatov as Omar Hamza-yavich Abdulayev); see also Carol Rosenberg, *Guantánamo Parole Board Clears Yemeni "Forever Prisoner,"* Miami Herald, Nov. 4, 2015, at 7A (al-Dayfi).

were transferred to the United Arab Emirates in the Obama administration's largest single transfer.³⁷⁷⁰

That meant that 199 habeas petitioners had been transferred since the Supreme Court's 2008 decision in *Boumediene v. Bush*, and 198 habeas petitioners were transferred before *Boumediene*.³⁷⁷¹

Diarist Mohamedou Old Slahi was returned to Mauritania on October 17, 2016,³⁷⁷² and Shawki Awad Balzuhair was transferred to Cape Verde on December 4.³⁷⁷³

Mansur Ahmad Saad al-Dayfi "has chronicled life after detention among some former prisoners." Rosenberg, *20 Lives*, *supra* note 3177.

3769. Transfer Notice, Suleiman v. Obama, No. 1:10-cv-1411 (D.D.C. July 13, 2016), D.E. 44 [hereinafter *Suleiman* Transfer Notice] (Fayiz Ahmad Yahia Suleiman); see Carol Rosenberg, *Yemeni Prisoner at Guantánamo Resettled in Italy*, Miami Herald, July 11, 2016, at 11A; Charlie Savage, *A Yemeni Guantánamo Bay Prisoner Is Transferred to Italy After 14 Years*, N.Y. Times, July 11, 2016, at A11.

3770. Hamdullah Transfer Notice, *supra* note 3715 (Haji Hamdullah); Transfer Notice, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Aug. 17, 2016), D.E. 2052 (Jamil Ahmad Saeed); Transfer Notice, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. Aug. 17, 2016), D.E. 552 (Mohammed Kameen); Transfer Notice, Hatim v. Obama, No. 1:05-cv-1429 (D.D.C. Aug. 17, 2016), D.E. 462 (Mohammed Nasser Yahia Abdullah Khussrof); Transfer Notice, Alladeen v. Obama, No. 1:05-cv-748 (D.D.C. Aug. 17, 2016), D.E. 227 (Mohsen Abdrub Aboassy); Transfer Notice, *Abdah*, No. 1:04-cv-1254 (D.D.C. Aug. 17, 2016), D.E. 1062 (Mahmoad Abdah); Transfer Notice, Saleh v. Obama, No. 1:06-cv-1765 (Iyob Murshad Ali Saleh); Transfer Notice, *Abdah*, No. 1:04-cv-1254 (D.D.C. Aug. 16, 2016), D.E. 1061 (Majid Mahmoud Ahmed); Transfer Notice, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Aug. 16, 2016), D.E. 1087 (Saeed al-Sarim); see Jess Bravin, *More Guantanamo Detainees Relocated*, Wall St. J., Aug. 16, 2016, at A2 (also reporting on the transfers of Bashir Nasir Ali al-Marwalah, petitioner in No. 1:04-cv-1194; Mohammed Ahmad Said al-Edah, Mohammed al-Adahi in No. 1:05-cv-280; Zahar Omar Hamis Bin Hamdoun, petitioner in Nos. 1:05-cv-280 and 1:05-cv-2223; Abdel Qadir Hussein al-Mudhaffari, petitioner in Nos. 1:05-cv-2185 and 1:05-cv-2200; Abdul Rahman Abdul Abu Ghityh Sulayman, petitioner in Nos. 1:06-cv-1757 and 1:05-cv-2386; and Obaidullah, petitioner in No. 1:08-cv-1173); Dan Lamothe, *15 Guantanamo Inmates Head to U.S. Ally in Gulf*, Wash. Post, Aug. 16, 2016, at A3 (same); Carol Rosenberg, *Gitmo Population Plunges with Transfer of 15 to UAE*, Miami Herald, Aug. 16, 2016, at 1A (same); Charlie Savage, *15 Guantanamo Detainees Are Sent to Emirates in Largest Obama-Era Transfer*, N.Y. Times, Aug. 16, 2016, at A13 (same); see also Carol Rosenberg, *Guantánamo Limbo: Dozens Still Waiting for First Review President Obama Ordered in 2011*, Miami Herald, Mar. 28, 2016, at 3A [hereinafter *Guantánamo Limbo*] (Saleh); Carol Rosenberg, *Guantánamo Parole Board OKs Release of "Bin Laden Bodyguard"*, Miami Herald, Feb. 21, 2016, at 10A (Ahmed); Carol Rosenberg, *New Guantánamo Intelligence Upends Old "Worst of the Worst" Assumptions*, Miami Herald, Oct. 2, 2016, at 1A.

3771. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

During the days immediately preceding President Trump's inauguration, eighteen detainees were transferred in January 2017, bringing the number still detained at Guantánamo Bay down to forty-one.³⁷⁷⁴ Oman accepted ten,³⁷⁷⁵ Saudi Arabia accepted five,³⁷⁷⁶ and the United Arab Emirates accepted three.³⁷⁷⁷

3772. *Salahi* Transfer Notice, *supra* note 3599; see *Prisoner 760*, *supra* note 3591 (including an extended interview with Slahi broadcast in 2017); Carol Rosenberg, "Guantánamo Diary" Author Freed, Sent Back to Home in West Africa, *Miami Herald*, Oct. 18, 2016, at 1A; Carol Rosenberg, "Guantánamo Diary" Prisoner Thanked Captors, *Miami Herald*, Oct. 23, 2016, at 20A; Carol Rosenberg, *One Legacy of Sept. 11: A Torture Policy's Stain*, *N.Y. Times*, Sept. 13, 2021, at A1; Missy Ryan, *Detainee and Memoirist Freed from Guantanamo*, *Wash. Post*, Oct. 18, 2016, at A7; Charlie Savage, *Detainee Who Wrote of His Abuse in "Guantánamo Diary" Is Sent Home to Mauritania*, *N.Y. Times*, Oct. 18, 2016, at A14; see also Helene Cooper, *Family Seeks Release of a Detainee Turned Author*, *N.Y. Times*, Jan. 21, 2015, at A3; Carol Rosenberg, "Guantánamo Diary" Author Is Cleared for Release, *Miami Herald*, July 21, 2016, at 10A; Carol Rosenberg, "Guantánamo Diary" Author Wants Return of Belongings, *Miami Herald*, June 11, 2016, at 3A; Rosenberg, *Guantánamo Limbo*, *supra* note 3770; Matthew Rosenberg & Charlie Savage, *One Guantánamo Detainee Pleads for Release, but Another Does Not Appear*, *N.Y. Times*, June 3, 2016, at A16; Charlie Savage, *Panel Recommends "Guantánamo Diary" Author's Release from Detention*, *N.Y. Times*, July 21, 2016, at A18.

As a condition of Slahi's return, Mauritania agreed to deny Slahi a passport for a period of time that would not be disclosed to Slahi. See Taub, *supra* note 3592, at 53, 55. In 2019, an American lawyer living in Europe gave birth to Slahi's son. See *id.* at 55.

3773. Transfer Notice, *Balzuhair v. Obama*, No. 1:08-cv-1238 (D.D.C. Dec. 6, 2016), D.E. 187; see Carol Rosenberg, *Cape Verde Takes Detainee; 59 Remain at Guantánamo*, *Miami Herald*, Dec. 5, 2016, at 15A; Charlie Savage, *Guantánamo Detainee Is Sent to Cape Verde in First Transfer Since the Election*, *N.Y. Times*, Dec. 5, 2016, at A8.

3774. See Carol Rosenberg, *Final Obama Transfer of 4 Cleared Captives Leaves 41 Prisoners at Guantánamo*, *Miami Herald*, Jan. 20, 2017, at 9A; Charlie Savage, *Obama Transfers 4 from Guantánamo, Leaving 41 in Prison He Intended to Close*, *N.Y. Times*, Jan. 20, 2017, at A25 [hereinafter *Leaving 41*]; see also Missy Ryan & Julie Tate, *Obama's Guantanamo Policy Comes to an End with Last Resettlement Plan*, *Wash. Post*, Dec. 29, 2016, at A8; Charlie Savage, *Obama Administration Intends to Transfer 17 or 18 Guantanamo Detainees*, *N.Y. Times*, Dec. 20, 2016, at A20.

3775. Transfer Notice, *Al-Ansi v. Obama*, No. 1:08-cv-1923 (D.D.C. Mar. 8, 2017), D.E. 243 (Mohammed Ahmad Abdallah al-Ansi); Al-Madhwani Transfer Notice, *supra* note 3569 (Musaab Omar al-Madhwani); Transfer Notice, *Adah*, No. 1:04-cv-1254 (D.D.C. Jan. 18, 2017), D.E. 1065 (Salman Yahya Hassan Mohammed Rabeii); Transfer Notice, *Zajir v. Obama*, No. 1:05-cv-1623 (D.D.C. Jan. 17, 2017), D.E. 177 (Abdul Zahir); see Rosenberg, *supra* note 3429 (also reporting on the transfers of Bostan Karin, petitioner in 1:05-cv-883; Ghaleb al-Bihani, petitioner in 1:05-cv-1312; Walid Said Bin Said Zaid, petitioner in 1:05-cv-1646; Hayl al-Maythali, petitioner in 1:05-cv-2186; and Mustafa al-Shamiri and Muhammed Ahmad Said Haydar, petitioners in 1:05-cv-2386); see also Carol

One week before President Trump's inauguration, attorneys for two detainees cleared for transfer by the Periodic Review Board in the summer of 2016 filed an emergency motion for their clients' release.³⁷⁷⁸ Judges Collyer³⁷⁷⁹ and Kotelly³⁷⁸⁰ denied the motion on January 18 and 19, 2017, respectively, finding that the secretary of defense had discretion whether or not to accept the board's recommendation.

Rosenberg, *U.S. Sends 10 Guantánamo Captives to Oman*, Miami Herald, Jan. 17, 2017, at 10A; Charlie Savage, *10 More Prisoners Are Transferred from Guantánamo*, N.Y. Times, Jan. 17, 2016, at A11; Kebriai, *supra* note 3354, at 74 (reporting on al-Bihani's clearance for transfer); *Yemeni Cleared for Release*, Miami Herald, May 29, 2014, at 3A (same); Carol Rosenberg, *Guantánamo Board Approves Release of "Forever Prisoner,"* Miami Herald, Dec. 11, 2016, at 23A (reporting on Rabei's clearance for transfer); Rosenberg, *Guantánamo Limbo*, *supra* note 3770 (reporting on Mustafa al-Shamiri's clearance for transfer); Carol Rosenberg, *Guantanamo Parole Board Clears 34th Detainee*, Miami Herald, Aug. 5, 2016, at 12A (reporting on Hayl Aziz al-Maythali's clearance for transfer); Carol Rosenberg, *Half of Guantanamo's Uncharged Captives Get the OK to Go*, Miami Herald, Aug. 2, 2016, at 9A (reporting on al-Madhwani's clearance for transfer); Carol Rosenberg, *Panel Cleared Bin Laden Guard Before Deadline*, Miami Herald, Dec. 23, 2016, at 12A (reporting on Muhammed al-Ansi's clearance for transfer); Carol Rosenberg, *Guantanamo Parole Board Declines to Clear Former Bin Laden Bodyguard*, Miami Herald, Apr. 1, 2016, at 16A (reporting on an earlier decision not to clear al-Ansi for transfer).

3776. Transfer Notice, *Al-Quhtani v. Obama*, No. 1:05-cv-2387 (D.D.C. Jan. 23, 2017), D.E. 225 (Jobran Saad al-Quhtani); *see* Rosenberg, *supra* note 3764 (reporting on the transfers of Mohammed Bwazir, petitioner in 1:05-cv-280; Mohammed Abu Ghanem, petitioner in 1:05-cv-1638; Abdullah al-Shibli, petitioner in 1:05-cv-2223; and Salem Bin Kanad, petitioner in 1:05-cv-1228); *see also* Carol Rosenberg, *Parole Board Approves Yemeni's Release from Guantánamo on 5th Review*, Miami Herald, May 10, 2016, at 12A (reporting on Salem Bin Kanad's clearance for transfer); Carol Rosenberg, *Parole Panel Clears Day 1 Guantánamo Detainee*, Miami Herald, July 9, 2016, at 9A (reporting on Muhammed al-Ghanim's clearance for transfer).

3777. Mohammed Transfer Notice, *supra* note 3742 (Haji Wali Mohammed); Mingazov Transfer Notice, *supra* note 3620 (Ravil Mingazov); *see* Rosenberg, *supra* note 3774 (reporting also on the transfer of Yasin Qasem Muhammad Ismail, petitioner in 1:04-cv-1254); Savage, *Leaving 41*, *supra* note 3774 (same); *see also* *Panel Clears Last Russian for Release*, Miami Herald, July 26, 2016, at 9A (reporting on Mingazov's clearance for transfer); Carol Rosenberg, *Guantánamo Parole Board OK's 21st Captive for Release While Naming 29th "Forever Prisoner,"* Miami Herald, Nov. 30, 2016, at 3A (reporting on al-Quhtani's clearance for transfer); Ryan, *supra* note 3620 (reporting in 2018 that several detainees transferred to the United Arab Emirates "have disappeared from public view").

3778. Motion, *Nasser v. Obama*, No. 1:05-cv-764 (D.D.C. Jan. 13, 2017), D.E. 257.

3779. *Barhoumi v. Obama*, 234 F. Supp. 3d 84 (D.D.C. 2017) (Sufyian Barhoumi); *see Judge: Algerian Must Stay at Guantanamo*, Wash. Post, Jan. 19, 2017, at A3.

3780. *Nasser v. Obama*, 234 F. Supp. 3d 121 (D.D.C. 2017) (Abdullatif Nasser).

Litigation During the Trump Administration

Detention of a Defense Attorney

Air Force Colonel Vance Spath presided over the military commission prosecution of detainee al-Nashiri for complicity in the *Cole* bombing.³⁷⁸¹ On November 1, 2017, Judge Spath sentenced the military head of defense representation for military commission defendants, Brigadier General John Baker, to three weeks of home detention as punishment for Baker's allowing al-Nashiri's capital-prosecution-qualified attorneys to withdraw from representation upon their discovery that communications with the client were subject to improper government monitoring.³⁷⁸²

Baker filed a habeas corpus petition on November 2.³⁷⁸³ The court assigned Baker's petition to Judge Lamberth, who was presiding over al-Nashiri's petition.³⁷⁸⁴ Judge Lamberth heard from the parties on November 2 and planned a second hearing for the following day.³⁷⁸⁵ About an hour before the second hearing, the military commission convening authority released Baker from confinement pending further review.³⁷⁸⁶ At the second hearing, Judge Lamberth declined to stay the habeas proceeding but agreed to "wait a reasonable time" to "see what the convening authority

3781. Charge Sheet, *United States v. Al-Nashiri* (Mil. Comm'n Sept. 28, 2011), [www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Referred%20Charges).pdf); see Carol Rosenberg, *Army Judge Steps Down from USS Cole Case* *Miami Herald*, July 11, 2014, at 5A (reporting on Spath's appointment); Carol Rosenberg, *Millionaire Faces Death-Penalty Trial*, *Miami Herald*, Sept. 29, 2011, at 3A (reporting on the filing of pending charges); see also *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (abstaining from a decision on whether the *Cole* bombing occurred on a battlefield), *aff'g* *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218 (D.D.C. 2014); *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015) (denying mandamus interference with an interlocutory appeal from dismissal of charges relating to the bombing of the *Limburg*); Docket Sheet, *Al-Nashiri v. Bush*, No. 1:08-cv-1207 (D.D.C. July 15, 2008) [hereinafter *Al-Nashiri* Docket Sheet].

3782. See Dan Lamothe, *American General Is Ordered Confined*, *Wash. Post*, Nov. 3, 2017, at A12; Carol Rosenberg, *Guantánamo Judge Sentences Marine General Lawyer to 21 Days Confinement for Disobeying Orders*, *Miami Herald*, Nov. 2, 2017, at 14A.

3783. Petition, *Baker v. Spath*, No. 1:17-cv-2311 (D.D.C. Nov. 2, 2017), D.E. 1, 2.

3784. Docket Sheet, *id.* (Nov. 2, 2017) [hereinafter *Baker* Docket Sheet]; *Al-Nashiri* Docket Sheet, *supra* note 3781; Notice of Related Case, *Baker*, No. 1:17-cv-2311 (D.D.C. Nov. 2, 2017), D.E. 3.

3785. Transcript, *Baker*, No. 1:17-cv-2311 (D.D.C. Nov. 2, 2017, filed Nov. 14, 2017), D.E. 10; *Baker* Docket Sheet, *supra* note 3784.

3786. Notice, *Baker*, No. 1:17-cv-2311 (D.D.C. Nov. 3, 2017), D.E. 6; see Kate Irby & Carol Rosenberg, *Confined Marine General at Guantánamo Freed, for Now*, *Miami Herald*, Nov. 4, 2017, at 15A.

does.”³⁷⁸⁷ “I think the petitioner at some point can file a motion when the reasonable time has expired and if the convening authority has not acted I will.”³⁷⁸⁸

“The convening authority completed its review on November 21, 2017. The convening authority decided to leave Judge Spath’s contempt finding intact, but remitted the remainder of General Baker’s sentence (both the confinement term and [a \$1,000] fine).”³⁷⁸⁹ Judge Lamberth granted Baker a writ of habeas corpus on June 18, 2018, because Judge Spath did not have the authority to impose a contempt sanction; that power belonged to the military commission as a whole.³⁷⁹⁰

Baker’s sanction followed al-Nashiri’s “entire civilian legal team, including its capital defense attorney, [quitting] the case over a secret ethical conflict,” as reported by the *Miami Herald* on October 14, 2017.³⁷⁹¹ On October 27, attorney Richard Kammen filed in the Southern District of Indiana a “Notice of Intent to File Petition for Writ of Habeas Corpus” “in the event process issues from the Military Commission in Guantánamo Bay commanding his detention or arrest.”³⁷⁹² Kammen filed a petition on the day that Baker was sentenced for contempt.³⁷⁹³ With the petition, Kammen filed an October 5 advisory from an ethics attorney declaring, “[y]ou cannot, consistent with your ethical obligation continue to represent Mr. al-Nashiri,” because, “[e]ssential to competent representation is the lawyer’s corollary duty to maintain confidential communication” and there was evidence of “listening devices in attorney–client meeting rooms.”³⁷⁹⁴ On November 3, Judge Tanya Walton Pratt stayed Kammen’s obligation to appear before Judge Spath pending resolution of his pending petition.³⁷⁹⁵

3787. Transcript at 10, *Baker*, No. 1:17-cv-2311 (D.D.C. Nov. 3, 2017, filed Jan. 8, 2018), D.E. 15.

3788. *Id.*

3789. Opinion at 3, *id.* (June 18, 2018), D.E. 25, 2018 WL 3029140.

3790. *Id.* at 21–27; see Carol Rosenberg, *Federal Judge Overturns Marine General’s Guantánamo War-Court Contempt Conviction*, *Miami Herald*, June 20, 2018, at 10A.

3791. Carol Rosenberg, *Guantánamo’s USS Cole Death-Penalty Case in Limbo After Key Defense Lawyer Quits*, *Miami Herald*, Oct. 14, 2017, at 4A; see Carol Rosenberg, *Civilian Lawyers Defy Judge’s Order to Travel to Guantánamo for Hearings*, *Miami Herald*, Oct. 30, 2017, at 4A; Carol Rosenberg, *Military Judge Orders Defense Lawyers Who Quit to Return to Guantánamo Court*, *Miami Herald*, Oct. 24, 2017, at 9A.

3792. Notice, *Kammen v. Mattis*, No. 1:17-cv-3951 (S.D. Ind. Oct. 27, 2017), D.E. 1.

3793. Petition, *id.* (Nov. 2, 2017), D.E. 6.

3794. Ex. A, Yatoshefsky Letter, *id.* (Nov. 2, 2017), D.E. 7.

3795. Order, *id.* (Nov. 3, 2017), D.E. 15; see Amended Petition, *id.* (Feb. 16, 2018), D.E. 28.

The ethics attorney filed her own habeas corpus petition on Thursday, November 9, 2017, in the Southern District of New York.³⁷⁹⁶ She sought relief from an order by Judge Spath to appear before him.³⁷⁹⁷ The habeas petition resulted in relaxation of Judge Spath's appearance order so that instead of the ethics attorney's having to appear on Monday she would be compelled to appear later that week, giving the parties time to consider the habeas petition.³⁷⁹⁸ At the conclusion of a hearing on Wednesday, November 15, Judge Gregory H. Woods denied the ethics attorney relief.³⁷⁹⁹ The ethics attorney testified before Judge Spath, from a facility in Alexandria, Virginia, two days later.³⁸⁰⁰

On February 16, 2018, Judge Spath suspended al-Nashiri's case, ostensibly because al-Nashiri was no longer represented by learned counsel qualified to represent a capital defendant.³⁸⁰¹ The Court of Military Commission Review, however, determined on October 11 that because the attorneys had not proved that their conversations with their client were monitored they were not entitled to withdraw representation, but neither did the defendant have an absolute right to learned counsel, so Judge Spath's suspending the case was improper.³⁸⁰²

A petition for mandamus relief by al-Nashiri's civilian learned counsel was heard by the U.S. Court of Appeals for the District of Columbia Circuit on January 22, 2019.³⁸⁰³ Also heard by the same panel that day was an October 4, 2018, mandamus petition by al-Nashiri seeking relief from

3796. Petition, *Yaroshefsky v. Mattis*, No. 1:17-cv-8718 (S.D.N.Y. Nov. 9, 2017), D.E. 6.

3797. *Id.*; see Carol Rosenberg, *Law Professor Seeks Federal Court Protection Against Forced Video Testimony to Guantánamo*, Miami Herald, Nov. 11, 2017, at 17A.

3798. Transcript at 3–6, *Yaroshefsky*, No. 1:17-cv-8718 (S.D.N.Y. Nov. 9, 2017, filed Nov. 20, 2017), D.E. 24.

3799. Transcript at 44–63, *id.* (Nov. 15, 2017, filed Nov. 20, 2017), D.E. 22; Order, *id.* (Nov. 17, 2017), D.E. 21.

3800. Letter, *id.* (Nov. 29, 2017), D.E. 27.

3801. See Carol Rosenberg, *Frustrated Judge Halts Guantánamo's USS Cole Trial*, Miami Herald, Feb. 17, 2018, at 19A; Missy Ryan, *Judge Indefinitely Suspends USS Cole Case*, Wash. Post, Feb. 17, 2018, at A2; Charlie Savage, *Military Tribunal Judge Indefinitely Halts Cole Bombing Case*, N.Y. Times, Feb. 17, 2018, at A10.

3802. *United States v. Al-Nashiri*, 374 F. Supp. 3d 1190 (Ct. Mil. Comm'n Rev. 2018); *In re Al-Nashiri*, 921 F.3d 224, 232 (D.C. Cir. 2019); see Carol Rosenberg, *Military Court Rules Against Accused USS Cole Bomber's Lawyers in Ethics Standoff*, Miami Herald, Oct. 13, 2018, at 14A.

3803. Oral Argument, *In re Spears*, No. 18-1315 (D.C. Cir. Jan. 22, 2019), [www.cadc.uscourts.gov/recordings/recordings2018.nsf/625AE18EB552B6EC8525838A005F5E88/\\$file/18-1279.mp3](http://www.cadc.uscourts.gov/recordings/recordings2018.nsf/625AE18EB552B6EC8525838A005F5E88/$file/18-1279.mp3) (audio recording).

Judge Spath's alleged conflict of interest arising from the judge's seeking alternative government employment while presiding over the government's prosecution of al-Nashiri.³⁸⁰⁴

Colonel Spath retired from military service on August 6,³⁸⁰⁵ and Colonel Shelly Schools was appointed to replace him.³⁸⁰⁶ A few months later, she also retired from military service to become an immigration judge,³⁸⁰⁷ so Colonel Lanny J. Acosta was appointed to replace her.³⁸⁰⁸

Granting al-Nashiri mandamus relief on April 16, 2019, the Court of Appeals for the District of Columbia Circuit vacated all orders issued by Judge Spath in al-Nashiri's case since Judge Spath applied for a position as an immigration judge on November 19, 2015.³⁸⁰⁹ "[I]t is beyond question that judges may not adjudicate cases involving their prospective employers."³⁸¹⁰ Records showed that Judge Spath suspended al-Nashiri's case on the day after Judge Spath received a job offer that required him to negotiate a retirement date with the military and a start date with the immigration courts.³⁸¹¹ Judge Spath also included an opinion issued in al-Nashiri's case as a writing sample when he applied for the immigration job.³⁸¹²

3804. Oral Argument, *In re Al-Nashiri*, No. 18-1279 (D.C. Cir. Jan. 22, 2019); [www.cadc.uscourts.gov/recordings/recordings2018.nsf/1F28FD0A96A0A04B8525838A005F5E7D/\\$file/18-1315.mp3](http://www.cadc.uscourts.gov/recordings/recordings2018.nsf/1F28FD0A96A0A04B8525838A005F5E7D/$file/18-1315.mp3) (audio recording); see Carol Rosenberg, *War Court Judge Sought Civilian Post While Hearing USS Cole Case*, Miami Herald, Nov. 20, 2018, at 1A.

3805. See Carol Rosenberg, *USS Cole Case Judge Retiring from Military Service*, Miami Herald, July 6, 2018, at 6A.

3806. Letter from Military Commissions Chief Judge to Col. Schools, *United States v. Al-Nashiri* (Mil. Comm'n Aug. 6, 2018), A.E. 302A, [www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE302A\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE302A).pdf); *In re Al-Nashiri*, 921 F.3d 24, 231 (D.C. Cir. 2019); see Carol Rosenberg, *Sept. 11 Judge Retiring, Names Marine Successor*, Miami Herald, Aug. 28, 2018, at 6A.

3807. *Al-Nashiri*, 921 F.3d at 233; see Carol Rosenberg, *New USS Cole Case Judge Is Quitting Military to Join Immigration Court*, Miami Herald, Jan. 9, 2019, at 3A.

3808. Letter from Military Commissions Chief Judge to Col. Acosta (Feb. 12, 2019), filed as Notice, *Al-Nashiri*, No. 18-1279 (D.C. Cir. Feb. 13, 2019); *Al-Nashiri*, 921 F.3d at 233.

3809. *Al-Nashiri*, 921 F.3d at 226, 241; see Carol Rosenberg, *Court Throws Out 2 Years of Judge's Decisions in U.S.S. Cole Tribunal*, N.Y. Times, Apr. 17, 2019, at A12; Missy Ryan, *Court Throws Out Three Years of Proceedings in USS Cole Case*, Wash. Post, Apr. 17, 2019, at A2.

3810. *Al-Nashiri*, 921 F.3d at 235.

3811. *Id.* at 231, 237.

3812. *Id.* at 227, 237.

Judge Pratt granted Kammen a voluntary dismissal of his habeas petition in the Southern District of Indiana on September 11, 2019.³⁸¹³

Judge Acosta set al-Nashiri's military commission trial for February 2022.³⁸¹⁴ Pre-trial proceedings continued past that date.³⁸¹⁵

A Challenge to Trump's Change in Policy

As put by the *New York Times*, President Trump "halted transfers, dismantled the State Department office that was negotiating them and made clear that it was reversing President Barack Obama's efforts to close the prison."³⁸¹⁶

A habeas motion filed on behalf of eleven detainees in nine cases on January 11, 2018, sought relief for the detainees from President Trump's declared opposition to detainee release.³⁸¹⁷ The motion in cases not before Judges Sullivan or Leon was assigned to Judge Hogan, who presided over the earliest filed case.³⁸¹⁸ Judge Hogan heard the motion on behalf of eight detainees on July 11 and expressed doubt that he would be able to grant relief.³⁸¹⁹

On May 15, 2020, the court of appeals affirmed Judge Leon's August 10, 2018, denial of relief.³⁸²⁰

3813. Order, *Kammen v. Spencer*, No. 1:17-cv-3951 (S.D. Ind. Sept. 11, 2019), D.E. 46.

3814. See Carol Rosenberg, *Judge Proposes 2022 Trial for 2000 Attack on the Cole*, N.Y. Times, Feb. 26, 2020, at A21.

3815. See, e.g., Carol Rosenberg, *Witness Says Haspel, Before Becoming C.I.A. Chief, Observed Use of Waterboard*, N.Y. Times, June 4, 2022, at A17.

3816. Carol Rosenberg, *Trump Halted Release of 5 Prisoners Cleared to Leave Guantánamo*, N.Y. Times, Oct. 10, 2020, at A17.

3817. E.g., Habeas Motion, *Anam v. Trump*, No. 1:04-cv-1194 (Jan. 11, 2018), D.E. 1109; see Alex Daugherty, *Group Challenges Trump's Guantánamo Policy*, Miami Herald, Jan. 12, 2018, at 5A.

3818. *Ali v. Trump*, 317 F. Supp. 3d 480, 484 n.3 (D.D.C. 2018); e.g., Docket Sheet, *Abu Imran v. Bush*, No. 1:05-cv-764 (D.D.C. Apr. 15, 2005) (January 18, 2018, minute order); see *Husayn* Docket Sheet, *supra* note 3411 (noting, on March 6, 2019, Judge Hogan's pending resolution of the motion); *Abdullah* Docket Sheet, *supra* note 3228 (staying the case on September 4, 2018, pending resolution of the motion).

3819. E.g., Transcript, *Anam*, No. 1:04-cv-1194 (D.D.C. July 11, 2018, filed July 31, 2018), D.E. 1148 [hereinafter July 11, 2018, *Anam* Transcript]; see Carol Rosenberg, *Lawyers for 8 Guantanamo Detainees Say War Has Changed Enough to Let Them Go*, Miami Herald, July 12, 2018, at 9A.

3820. *Ali v. Trump*, 959 F.3d 364 (D.C. Cir. 2020) (rejecting the argument "that the Due Process Clause's procedural and substantive requirements apply wholesale, without any qualifications, to habeas corpus petitions filed by all Guantanamo detainees"), *affg* 317 F. Supp. 3d 480, *cert. denied*, 593 U.S. ___, 141 S. Ct. 2657 (2021).

A Trump Transfer

As Ahmed Mohammed al-Darbi's promised transfer date approached, his eventual testimony against al-Nashiri was preserved on August 1, 2017.³⁸²¹ He also provided testimony in two other cases, and he was sentenced on October 13 to thirteen years.³⁸²² According to his plea agreement, he was to be transferred to Saudi Arabia, where he had family, by February 2018 to serve out the remainder of his sentence.³⁸²³ He was transferred to Saudi Arabia on May 2, bringing the number of detainees down to forty.³⁸²⁴

In June 2018, the United Kingdom's Intelligence and Security Committee of Parliament issued reports on that government's complicity in detainee mistreatment.³⁸²⁵

Ali's detention, far from open-ended and "indefinite," is tied to this ongoing conflict against al Qaeda, the Taliban, and associated forces. . . .

. . . In essence, Ali invites this Court to undertake a wide ranging factual inquiry into whether active hostilities persist. To say the least, it would not be proper for this Court to do so.

Ali, 317 F. Supp. 3d at 486.

3821. See Carol Rosenberg, *Admitted Terrorist Testifies Behind Closed Doors at Gitmo*, Miami Herald, Aug. 2, 2017, at 12A; Carol Rosenberg, *To Go Home, Saudi Terrorist IDs Al-Qaida Commander*, Miami Herald, Aug. 16, 2017, at 9A.

3822. See Carol Rosenberg, *Terrorist Turned Informant Apologizes at Guantánamo, Gets 13-Year Prison Sentence*, Miami Herald, Oct. 14, 2017, at 4A; Charlie Savage, *Prison Term at Guantánamo Is Rare Success for a Military Commission*, N.Y. Times, Oct. 14, 2017, at A12.

3823. See Carol Rosenberg, *A Terrorist Struck a Deal to Go Home to Saudi Arabia, but He's Still at Guantánamo*, Miami Herald, Feb. 21, 2018, at 9A; Charlie Savage, *Missed Deadline to Repatriate Guantánamo Detainee May Jeopardize Cooperation*, N.Y. Times, Feb. 21, 2018, at A17; Savage, *supra* note 3822; *see also* Carol Rosenberg, *As U.S. Weighs Guantánamo Options, Saudi Center May Offer Solution*, N.Y. Times, Aug. 14, 2022, at 10 [hereinafter *Guantánamo Options*] (reporting in mid-2022 that al-Darbi was "currently serving a prison sentence in Riyadh").

3824. Transfer Notice, *Al-Darbi v. Trump*, No. 1:05-cv-2371 (D.D.C. May 3, 2018), D.E. 282; *see* Carol Rosenberg, *U.S. Transfers Gitmo Convict to Saudi Arabia*, Miami Herald, May 3, 2018, at 1A; Missy Ryan, *Guantanamo Inmate Is Turned Over to Saudis*, Wash. Post, May 3, 2018, at A11; Charlie Savage, *Despite Trump's Vow to Fill Prison, Guantánamo Population Drops*, N.Y. Times, May 3, 2018, at A8.

3825. Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: 2001–2010* (June 28, 2018), [isc.independent.gov.uk/wp-content/uploads/2021/01/20180628-HC1113-Report-Detainee-Mistreatment-and-Rendition-2001-10.pdf](https://www.isc.independent.gov.uk/wp-content/uploads/2021/01/20180628-HC1113-Report-Detainee-Mistreatment-and-Rendition-2001-10.pdf); Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: Current Issues* (June 28, 2018), [isc.independent.gov.uk/wp-content/uploads/2021/01/20180628-HC1114-Report-Detainee-Mistreatment-and-Rendition-Current-Issues.pdf](https://www.isc.independent.gov.uk/wp-content/uploads/2021/01/20180628-HC1114-Report-Detainee-Mistreatment-and-Rendition-Current-Issues.pdf); *see* Government Response to the Intelligence and Security Committee of Parliament Re-

The *New York Times* identified five detainees on the verge of release when President Trump took office: Sufyan Barhoumi, Abdul Latif Nasser, Mohammed al-Qahtani, Ridah bin Saleh al-Yazidi, and Muieen Abd al-Sattar.³⁸²⁶ Three were transferred from Guantánamo Bay by the Biden administration; al-Yazidi and al-Sattar remain.³⁸²⁷

Two More Writ Denials on Appeal

Judge Lambert denied Abdulsalam Ali Abdulrahman al-Hela's habeas petition on January 30, 2019, finding that he "more likely than not provided substantial support to al Qaeda and its associated forces."³⁸²⁸ A panel of the court of appeals affirmed the denial on August 28, 2020, two judges concluding that "the Due Process Clause cannot be invoked by Guantanamo detainees,"³⁸²⁹ but the court reheard the appeal en banc on September 30, 2021.³⁸³⁰

Judge Friedman found on January 23, 2020, that Saifullah Paracha had provided support to the Taliban, Al-Qaeda, and Osama Bin Laden.³⁸³¹ The court of appeals decided to hold the appeal in abeyance pending the en banc review of Judge Lambert's decision.³⁸³² On October 4, 2021, Paracha sought a limited remand to consider new facts: The United States' withdrawal from Afghanistan and the a Periodic Review Board's decision that Paracha was eligible for transfer.³⁸³³ Paracha had filed a new habeas corpus petition alleging the same grounds on October 2.³⁸³⁴

ports Into Detainee Mistreatment and Rendition (Nov. 2018), isc.independent.gov.uk/wp-content/uploads/2021/01/HMG_ResponseToISCDetaineeReports.pdf; see also Richard Pérez-Peña, *Britain Abetted Torture of Terrorism Suspects by the U.S., Parliament Finds*, N.Y. Times, June 29, 2018, at A4.

3826. Rosenberg, *supra* note 3816.

3827. Appendix Table 4, *infra* page 641 (nn.33, 34).

3828. Opinion, *Al-Hela v. Trump*, No. 1:05-cv-1048 (D.D.C. Jan. 30, 2019, filed Mar. 15, 2019), D.E. 485 [hereinafter *Al-Hela Writ Denial*] (redacted).

3829. *Al Hela v. Trump*, 972 F.3d 120, 150 (D.C. Cir. 2020).

3830. Order, *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. Apr. 23, 2021); see Jess Bravin & Aruna Viswanatha, *Justice Department Recasts Legal Stance on Guantanamo*, Wall St. J., Aug. 1, 2021, at A5; Ann E. Marimow & Missy Ryan, *Court Seems Loath to Affirm Detainees' Due Process Rights*, Wash. Post, Oct. 1, 2021, at A3; Charlie Savage & Carol Rosenberg, *Justice Dept. Debates Due Process Rights for Guantánamo Bay Detainees*, N.Y. Times, July 9, 2021, at A11.

3831. *Paracha v. Trump*, 453 F. Supp. 3d 168 (D.D.C. 2020) (redacted).

3832. Order, *Paracha v. Biden*, No. 20-5039 (D.C. Cir. June 2, 2021).

3833. Motion, *id.* (Oct. 4, 2021).

3834. Petition, *Paracha v. Biden*, No. 1:21-cv-2567 (D.D.C. Oct. 2, 2021), D.E. 1.

Judge Friedman decided on November 12 to hold Paracha's second petition in abeyance pending the appellate court's remand ruling,³⁸³⁵ and the court of appeals granted the limited remand on December 10.³⁸³⁶ Judge Friedman again denied Paracha relief on June 6, 2022.³⁸³⁷ There now are two appeals held in abeyance.³⁸³⁸

Enjoining Military Commission Activity

In 2020, Mohammed Nazir Bin Lep was in military commission limbo.³⁸³⁹ Draft charges were sworn against Bin Lep in 2017, but "twenty-one months later, the Convening Authority [had] still not referred the charges to a military commission."³⁸⁴⁰ "Those charges were returned by the Convening Authority at least twice because they did not attach the requisite endorsement attesting whether a trial would be harmful to national security."³⁸⁴¹ In a renewed habeas petition filed on September 18, 2019, Bin Lep challenged "allegedly unlawful restrictions on his ability to access and use exculpatory evidence and exercise other procedural rights while in confinement."³⁸⁴² On September 23, Judge Bates enjoined the government "from conducting the first [redacted] scheduled to commence on [redacted]."³⁸⁴³ Following a rescission by the convening authority, Judge Bates dismissed the case as moot on November 26.³⁸⁴⁴ About one year later, Judge Bates denied Bin Lep a preliminary injunction against a possible military commission trial for new charges submitted on April 5, 2019.³⁸⁴⁵ An appeal is pending.³⁸⁴⁶

3835. Opinion, *id.* (Nov. 12, 2021), D.E. 14, 2021 WL 5279613.

3836. Order, *Paracha*, No. 20-5039 (D.C. Cir. Dec. 10, 2021).

3837. Order, *Paracha*, No. 1:21-cv-2567 (D.D.C. June 6, 2022), D.E. 41, 2022 WL 1978733; *see* Opinion, *id.* (June 6, 2022, filed redacted July 26, 2022), D.E. 587.

3838. Order, *Paracha*, No. 20-5039 (Aug. 2, 2022); Docket Sheet, *Paracha v. Biden*, No. 22-5186 (D.C. Cir. June 30, 2022).

3839. Opinion at 26, *Bin Lep v. Trump*, No. 1:20-cv-3344 (D.D.C. Dec. 14, 2020), D.E. 56 [hereinafter Dec. 14, 2020, *Bin Lep* Opinion], 2020 WL 7340059.

3840. Redacted Opinion at 2, *Bin Lep v. Trump*, No. 1:19-cv-2799 (D.D.C. Sept. 23, 2019, filed Nov. 1, 2019), D.E. 25 [hereinafter Redacted Sept. 23, 2019, *Bin Lep* Opinion].

3841. Dec. 14, 2020, *Bin Lep* Opinion, *supra* note 3839, at 3–4.

3842. *Id.* at 5; Docket Sheet, *Bin Lep*, No. 1:20-cv-3344 (D.D.C. Sept. 18, 2019).

3843. Redacted Sept. 23, 2019, *Bin Lep* Opinion, *supra* note 3840, at 1.

3844. Order, *Bin Lep*, No. 1:19-cv-2799 (D.D.C. Nov. 26, 2019), D.E. 32; *see* Redacted Notice, *id.* (Oct. 3, 2019, filed Oct. 29, 2019), D.E. 24.

3845. Dec. 14, 2020, *Bin Lep* Opinion, *supra* note 3839.

3846. Docket Sheet, *Bin Lep v. Biden*, No. 21-5014 (D.C. Cir. Feb. 9, 2021).

On January 21, 2021, the convening authority referred military commission charges against Encep Nurjaman,³⁸⁴⁷ Mohammed Farik Bin Amin,³⁸⁴⁸ and Bin Lep “arising from the bombing of nightclubs in Bali, Indonesia in 2002 and the bombing of a J.W. Marriott hotel in Jakarta, Indonesia in 2003.”³⁸⁴⁹ About one year later, Judge Bates held in abeyance much of Bin Lep’s habeas case:

But because the Court’s consideration of two of Bin Lep’s habeas claims—specifically the challenges to his High Value Detainee designation and respondents’ alleged interference with his ability to request a mixed medical commission—is not likely to interfere with Bin Lep’s military commission proceedings, the Court will permit those two claims to proceed in this habeas litigation.³⁸⁵⁰

Bin Lep appealed Judge Bates’s denial of an injunction against military commission proceedings, and the appeal was consolidated with the earlier appeal of Judge Bates’s injunction denial.³⁸⁵¹

Transfers from Guantánamo Bay Early in the Biden Administration

Abdul Latif Nasser was transferred to Morocco on July 19, 2021, reducing the number of detainees to thirty-nine.³⁸⁵²

3847. See Docket Sheet, *Hambali v. Obama*, No. 1:10-cv-407 (D.D.C. Mar. 11, 2010) [hereinafter *Hambali* Docket Sheet].

3848. See *Bin Amin* Docket Sheet, *supra* note 3650.

3849. Joint Status Report at 1, *Bin Lep v. Trump*, No. 1:20-cv-3344 (D.D.C. Jan. 28, 2021), D.E. 60; see Office of Military Commission Cases, *supra* note 3433; see Carol Rosenberg, 3 *Guantánamo Detainees Formally Face Charges Linked to 2002 Bali Bombing*, N.Y. Times, Sept. 1, 2021, at A16; Carol Rosenberg, *Guantánamo Trial of 3 Men for Indonesia Bombings Is Approved*, N.Y. Times, Jan. 22, 2021, at A17.

3850. Opinion at 1, *Bin Lep*, No. 1:20-cv-3344 (D.D.C. Jan. 13, 2022), D.E. 102, 2022 WL 123957; see Opinion, *id.* (June 25, 2021), D.E. 86, 2021 WL 2634663 (deferring an abeyance decision until after Bin Lep’s military commission arraignment).

3851. Docket Sheet, *Bin Lep v. Biden*, No. 22-5026 (D.C. Cir. Jan. 27, 2022).

3852. Dismissal, *Nasser v. Biden*, No. 1:05-cv-764 (D.D.C. Nov. 5, 2021), D.E. 339; Notice, *id.* (July 19, 2021), D.E. 337; Joint Status Report, *id.* (D.D.C. Sept. 9, 2016), D.E. 254 (noting a recommendation that the detainee be transferred to Morocco); see Missy Ryan & Anne Gearan, *Biden Transfers Inmate from Guantánamo Bay*, Wash. Post, July 20, 2021, at A8; Carol Rosenberg & Charlie Savage, *Biden Administration Sends Guantánamo Detainee to Morocco*, N.Y. Times, July 20, 2021, at A9; see also Rosenberg, *supra* note 3816. See generally *The Other Latif*, WNYC Radiolab podcast (2020–21) (reporting by journalist Latif Nasser about detainee Abdul Latif Nasser), www.wnycstudios.org/podcasts/other-latif.

Judge Mehta granted Asadullah Haroon Gul habeas corpus relief on October 18, 2021.³⁸⁵³ Haroon Gul had been detainable as a member of Hezb-E-Islami Gulbuddin (HIG), but HIG signed a peace agreement with Afghanistan in 2016 and disavowed connections with terrorist organizations.³⁸⁵⁴ “Because HIG is at peace and Gul acted solely as a member of HIG during the Afghan conflict, the United States no longer has legal authority to detain him. He must be released.”³⁸⁵⁵

Judge Mehta denied Haroon Gul’s motion for release on the ground that hostilities in Afghanistan ended with the withdrawal of U.S. troops. “[T]he court is . . . constrained to respect the decision of Congress to grant the Executive a broad power that is not bound by geography and to defer to the Executive’s representations that its conflict with al Qaeda is ongoing.”³⁸⁵⁶ Similarly, Judge Sullivan denied habeas relief to Abu Zubaydah on June 10, 2022, because the United States’ departure from Afghanistan did not mean that hostilities with Al-Qaeda and associated forces did not remain ongoing.³⁸⁵⁷

Several days before Judge Mehta granted Haroon Gul habeas release, the Periodic Review Board determined that Haroon Gul could be transferred to the custody of another country because detention was “no longer necessary to protect against a continuing significant threat to the security of the United States.”³⁸⁵⁸ He was transferred to Afghanistan via Qatar on June 24.³⁸⁵⁹

3853. *Gul v. Biden*, 573 F. Supp. 3d 148 (D.D.C. 2021) (redacted); see Transcripts, *Haroon Gul v. Biden*, No. 1:16-cv-1462 (D.D.C. May 10 and 28, 2021, filed July 8, 2021), D.E. 127, 128 (habeas hearing transcripts); Spencer S. Hsu, *Judge Rules Afghan Held at Guantánamo Illegally*, Wash. Post, Oct. 22, 2021, at A1; Carol Rosenberg, *Detention of Afghan at Guantánamo Bay Is Ruled Unlawful*, N.Y. Times, Oct. 21, 2021, at A16; see also Spencer S. Hsu, Abigail Hauslohner & Missy Ryan, *Guantánamo Detainee Petitions for Freedom as U.S. Troops Leave Afghanistan*, Wash. Post, May 11, 2021, at A7; Carol Rosenberg, *Afghanistan Files Brief for Return of Detainee*, N.Y. Times, Feb. 26, 2021, at A10; Carol Rosenberg, *U.S. Defends Detention of Afghan Citizen, Even as It Withdraws from Afghanistan*, N.Y. Times, May 11, 2021, at A15.

3854. *Gul*, 573 F. Supp. 3d at 153.

3855. *Id.*

3856. Opinion, *Haroon Gul*, No. 1:16-cv-1462 (D.D.C. Oct. 18, 2021, filed Nov. 9, 2021), D.E. 142 [hereinafter Redacted *Haroon Gul* End-of-Hostilities Habeas Opinion], 2021 WL 5206199 (redacted).

3857. Opinion, *Husayn v. Ausin*, No. 1:08-cv-1360 (D.D.C. June 10, 2022), D.E. 609, 2022 WL 2093067.

3858. Unclassified Summary of Final Determination: Haroon al-Afghani (Oct. 7, 2021), attached to Petitioner’s Notice, *Haroon Gul*, No. 1:16-cv-1462 (D.D.C. Oct. 14, 2021), D.E. 139; see Government Notice, *id.* (Oct. 14, 2021), D.E. 138; see also Abigail

“The Biden administration on [March 7, 2022,] repatriated to Saudi Arabia for mental health care a prisoner who had been tortured so badly by U.S. interrogators that he was ruled ineligible for trial as the suspected would-be 20th hijacker in the Sept. 11 attacks.”³⁸⁶⁰ Judge Friedman dismissed Mohammed al-Qahtani’s habeas petition about three weeks later.³⁸⁶¹

On April 2, Sufyian Barhoumi was transferred to Algeria.³⁸⁶²

Petitioners Remaining Detained

Of Guantánamo Bay’s thirty-six remaining detainees, as of August 28, 2022, thirty-four are or have been habeas petitioners.³⁸⁶³

Challenge: Attorney–Client Contacts

The court’s management of Guantánamo Bay cases benefited from attorneys’ representing the detainees.

Hauslohner, *Prisoners Cleared for Transfer Remain*, Wash. Post, Oct. 17, 2021, at A6; Hsu, *supra* note 3853; Carol Rosenberg, *Board Clears Guantánamo to Transfer More Prisoners*, N.Y. Times, Oct. 14, 2021, at A6 [hereafter *Board Clears*]; Rosenberg, *supra* note 3853.

3859. See Docket Sheet, *Haroon Gul*, No. 1:16-cv-1462 (D.D.C. July 15, 2016) (D.E. 155); see also Carol Rosenberg, *U.S. Releases Afghan Held in Detention for 15 Years*, N.Y. Times, June 25, 2022, at A5.

3860. Carol Rosenberg, *9/11 Suspect Is Sent to Saudi Arabia for Mental Health Care*, N.Y. Times, Mar. 8, 2022, at A18; see Adam Goldman, *Saudi Suspected of Wanting to Join 9/11 Hijackers Seeks to Leave Prison*, Wash. Post, June 15, 2016, at A17; Rosenberg, *Guantánamo Limbo*, *supra* note 3770; Rosenberg, *Guantánamo Options*, *supra* note 3823 (reporting that al-Qahtani was repatriated to Saudi Arabia for psychiatric treatment for schizophrenia); Carol Rosenberg & Charlie Savage, *Panel Says It Supports Sending a 9/11 Detainee to Saudi Arabia*, N.Y. Times, Feb. 5, 2022, at A1 (“A senior pentagon official . . . determined that, because of how Mr. Qahtani was initially treated, he could not be prosecuted.”).

3861. Order, *Al-Qahtani v. Biden*, No. 1:05-cv-1971 (D.D.C. Mar. 29, 2022), D.E. 436 [hereinafter *Al-Qahtani Habeas Dismissal*] (reserving litigation rights over discovery protections); see Transfer Notice, *id.* (Mar. 8, 2022), D.E. 429 [hereinafter *Al-Qahtani Transfer Notice*].

3862. Transfer Notice, *Barhoumi v. Biden*, No. 1:05-cv-1506 (D.D.C. Apr. 6, 2022), D.E. 299; see Carol Rosenberg, *Guantánamo Inmate Sent Home to Algeria*, N.Y. Times, Apr. 3, 2022, at 25; see also *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (affirming the denial of habeas relief); Carol Rosenberg, *Parole Board Clears Guantánamo Captive Who Wants to Open a Pizza Parlor in Algiers*, Miami Herald, Aug. 12, 2016, at 10A; Rosenberg, *supra* note 3803.

3863. Appendix Table 4, *infra* page 641.

Walid Bin Attash and Khalid Sheik Mohammad have not filed habeas petitions.

Right to Counsel

After the Supreme Court decided in *Rasul v. Bush*³⁸⁶⁴ that the courts have jurisdiction over Guantánamo Bay detainees' habeas petitions, the solicitor general's office convened a meeting with attorneys from the Justice Department's civil division, representatives from the Department of Defense, and members of the Justice Department's Litigation Security Group.³⁸⁶⁵ The Litigation Security Group is a unit in the Justice Department that works independently of the attorneys representing the government in court, and it provides the courts with classified information security officers.³⁸⁶⁶ Among the services that classified information security officers provide the courts is facilitation of security clearances for attorneys.

In October 2004, Judge Kotelly determined that the detainees had rights to counsel.³⁸⁶⁷ Soon thereafter, the clerk's office issued notices to all detainees of their rights to counsel in habeas proceedings.³⁸⁶⁸

Attorneys had to obtain security clearances to meet with the detainees.³⁸⁶⁹ All of the petitioners were provided cleared counsel.³⁸⁷⁰

Travel to Guantánamo Bay

Reflections by habeas attorneys illuminated some logistical issues for client visits:

To get to Guantánamo, you fly to Fort Lauderdale and then continue on to the base on one of two small prop-plane carriers, Air Sunshine or Lynx Air. The planes have a dozen or so seats but no toilet on board. When you check in for the three-and-a-half-hour flight, you're weighed

3864. 542 U.S. 466 (2004).

3865. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

3866. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

3867. *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004); see Hafetz, *supra* note 3174, 134.

3868. Interview with Judge Alan Kay, June 21, 2011.

3869. *Al Odah*, 346 F. Supp. 2d at 14; see Ruben, *supra* note 3169, at 15; Thomas P. Sullivan, *Imagine*, in *The Guantánamo Lawyers*, *supra* note 3154, at 42, 43–44 (“Before being permitted to write or visit your clients, you must first obtain a ‘secret’ security clearance, a process which involves the FBI and usually consumes months.”).

Initially, the government proposed that attorneys be permitted to meet with their clients one and only one time, but that could have been malpractice. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

3870. Interview with Judge Joyce Hens Green, Sept. 21, 2011; Interview with Judge Royce C. Lamberth, May 13, 2011.

along with your luggage to determine if the plane will be too heavy to fly all the way to the base without a stop to refuel at Exuma in the Bahamas. The plane may not enter Cuban air space, so you fly to the easternmost end of the island, make a right turn, and descend to the airport on the leeward side of the base. There is no prison on that side of the bay, and unsupervised movements are permitted, but amenities such as restaurants or grocery stores are scarce. You stay at the former “CBQ”—Combined Bachelors’ Quarters—at an attractive government room rate of approximately \$20 per night. A kitchenette and four twin beds furnish each two-room “suite.”³⁸⁷¹

... The morning routine for counsel is to take the 7:40 bus from the CBQ to a ferry, and then the 8:00 ferry to the windward side of the base where the prison camp is located and where we lawyers are met by a military escort. While the leeward side is ramshackle and barren, the windward side is surreal. There is a Starbucks, a McDonald’s, a combined Subway–Pizza Hut, a Wal-Mart–like big-box store called the Nex, and a gift shop.³⁸⁷²

... At every jail and prison at which I had previously visited a client, a lawyer was forbidden to bring the prisoner anything but legal papers. The rules at Guantánamo, though, permit lawyers to bring all manner of food and drink to client meetings. The only limitation seems to be that the prisoner may consume it only during the meeting. ...

I had been alerted that my client would feel free to eat only if we lawyers ate. Always ready to go the extra mile for a client, I had prepared by eating nothing before boarding the ferry.³⁸⁷³

Monitoring Communication

The government sought to perform a classification review of all documents, including attorney notes, taken out of a meeting with a detained

3871. Sullivan, *supra* note 3869, at 43; *see also* Khan, *supra* note 3309, at 31 (“With the exception of one corporate law firm that always makes a grand entrance in a chartered private jet, the attorneys doing habeas work at Gitmo fly one of two commercial airlines, Air Lynx or Air Sunshine.”).

Military personnel had other options for getting to the base. *See* Wax, *supra* note 3154, at 23.

3872. Gorman, *supra* note 3272, at 12. *See generally* Inside Guantanamo, *supra* note 3307.

The Nex is the Navy Exchange. *See* Greenberg, *supra* note 3174, at 9.

3873. David Marshall, *Escort Required*, in *The Guantánamo Lawyers*, *supra* note 3154, at 47, 48.

client and to monitor all attorney conversations with selected detainees.³⁸⁷⁴ Judge Kotelly rejected this infringement on the attorney–client privilege.³⁸⁷⁵ She identified alternative procedures as more appropriate: Only one attorney would meet with a detainee; a classification review would only be required of any communications about the meeting to another person, including the attorney’s legal colleagues and staff.³⁸⁷⁶

Judge Green later specified a slightly more relaxed standard of sharing for attorneys for other detainees: “counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients.”³⁸⁷⁷

Meetings with Clients for Petition Authorizations

When the government began to challenge the validity of fellow detainees as habeas petitioners’ next friends, the district court observed that applicable protective orders granted detainees a right to meet directly with counsel, which would moot the need for next friends.³⁸⁷⁸

One of Salim Muhood Adem’s co-detainees was represented by counsel and suggested that Adem should obtain counsel as well.³⁸⁷⁹ With the help of the co-detainee’s attorney, volunteer counsel was found for Adem.³⁸⁸⁰ But the government prevented attorneys from meeting with Adem until Adem provided written authorization for the representation (by attorneys he had been unable to meet yet).³⁸⁸¹

On December 9, 2005, the attorneys filed a motion for contempt, arguing that the government was preventing them from meeting with Adem in order to thwart Adem’s habeas petition.³⁸⁸² Judge Roberts referred the matter to Magistrate Judge Kay, who ordered the government to comply with the applicable protective order and permit counsel to visit Adem.³⁸⁸³ Judge

3874. *Al Odah v. United States*, 346 F. Supp. 2d 1, 3–4 (D.D.C. 2004).

3875. *Id.* at 8–15.

3876. *Id.* at 13–15.

3877. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004).

3878. *E.g.*, Oct. 6, 2006, *Ahmed* Report and Recommendation, *supra* note 3294.

3879. Interview with Judge Alan Kay, June 21, 2011.

3880. *Id.*

3881. *Id.*

3882. Contempt Motion, *Adem v. Bush*, No. 1:05-cv-723 (D.D.C. Dec. 9, 2005), D.E. 23.

3883. *Adem v. Bush*, 425 F. Supp. 2d 7, 26 (D.D.C. 2006); *see Fogler, supra* note 3259, at 116.

Roberts affirmed Judge Kay's order,³⁸⁸⁴ and other judges affirmed similar orders by Judge Kay in their cases.³⁸⁸⁵ Adem was transferred to Sudan in 2007.³⁸⁸⁶

On December 13, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of sixty-three detainees.³⁸⁸⁷ According to the center's deputy legal director, "Having conducted as complete a factual inquiry as the circumstances have permitted to date, it is my good faith belief that, although they have been unable to provide *written* authorization, the following Petitioners in fact desire that the legal remedies available to them be pursued."³⁸⁸⁸ Among the sixty-three detainees listed was Houmad Warzly.³⁸⁸⁹

On December 13, 2006, a Sami al-Hajj of Guantánamo Bay signed a statement that he wished to act as next friend on behalf of apparently twenty-two detainees.³⁸⁹⁰ One of the detainees listed was Hamoud Abdullah Hamoud Hassan al-Wady.³⁸⁹¹ The signed statement bore a fax date of January 15, 2007, and it was filed as a pro se habeas petition on July 17, 2008, with the other twenty-one names redacted.³⁸⁹²

3884. Opinion, *Adem*, No. 1:05-cv-723 (D.D.C. Apr. 28, 2006), D.E. 42, 2006 WL 1193853; see Fogler, *supra* note 3259, at 116.

3885. Order, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. Aug. 7, 2006), D.E. 82 (Urbina), 2006 WL 2255736; Order, *Razakah v. Bush*, No. 1:05-cv-2370 (D.D.C. May 18, 2006), D.E. 23 (Sullivan); Docket Sheet, *Said v. Bush*, No. 1:05-cv-2384 (D.D.C. Dec. 13, 2005) (minute order by Judge Roberts, May 26, 2006).

3886. Transfer Notice, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69.

3887. Petition, *Al-Halmandy v. Bush*, No. 1:05-cv-2385 (D.D.C. Dec. 13, 2005), D.E. 1 [hereinafter *Al-Halmandy* Petition].

On July 29, 2008, Judge Hogan dismissed without prejudice all but seven of the petitioners from this case. Order, *id.* (July 29, 2008), D.E. 50.

3888. Ex. A ¶ 15, *Al-Halmandy* Petition, *supra* note 3887.

3889. *Id.*

3890. Petition, *Al-Wady v. Bush*, No. 1:08-cv-1237 (D.D.C. July 17, 2008), D.E. 1.

3891. *Id.*

3892. *Id.*; see *Al Wady v. Obama*, 623 F. Supp. 2d 20, 21 (D.D.C. 2009).

Filed the same day were five other pro se petitions that appear to be on behalf of detainees on the same list. Petition, *Balzuhair v. Bush*, No. 1:08-cv-1238 (D.D.C. July 17, 2008), D.E. 1; Petition, *Kuman v. Bush*, No. 1:08-cv-1235 (D.D.C. July 17, 2008), D.E. 2; Petition, *Salih v. Bush*, No. 1:08-cv-1234 (D.D.C. July 17, 2008), D.E. 1; Petition, *Bin Atef v. Bush*, No. 1:08-cv-1232 (D.D.C. July 17, 2008), D.E. 1; Petition, *Hadi v. Bush*, No. 1:08-cv-1228 (D.D.C. July 17, 2008), D.E. 1.

Also filed the same day were seven other pro se petitions that appear to be on behalf of detainees on three other lists also signed by al-Hajj on December 13, 2006, and faxed on January 15, 2007, apparently in the same fax. Petition, *Al-Sattar v. Bush*, No. 1:08-cv-1236

On August 1, the government notified the court that Warzly and al-Wady were the same detainee.³⁸⁹³ Judge Urbina therefore dismissed the action under the Warzly name.³⁸⁹⁴ In December 2008, appointed counsel traveled to Guantánamo Bay to meet with the detainee, but authorities there said that he did not want to meet with the attorneys.³⁸⁹⁵ Magistrate Judge Kay granted the attorneys' motion that the government be required to arrange a meeting between the detainee and the attorneys with an interpreter.³⁸⁹⁶ Judge Walton issued a similar order in a case before him.³⁸⁹⁷

"[I]t is to the trial court's benefit that a non-governmental attorney provide confirmation beyond the assurances of guard personnel that a detainee's decision to refuse legal assistance and abandon a *habeas* petition filed on his behalf is voluntary and fully informed."³⁸⁹⁸

On May 14, 2009, appointed counsel—from the federal defender's office in the Central District of California—met with the detainee.³⁸⁹⁹ They came to understand that his correct name was Hamoud Abdullah

(D.D.C. July 17, 2008), D.E. 1 [hereinafter *Al-Sattar* Petition] (p.7 of fax apparently listing two detainees); Petition, *Al-Hamiri v. Bush*, No. 1:08-cv-1231 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Qattaa v. Bush*, No. 1:08-cv-1233 (D.D.C. July 17, 2008), D.E. 1 (p.16 of fax apparently listing thirty-six detainees); Petition, *Mohammed v. Bush*, No. 1:08-cv-1230 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Yakubi v. Bush*, No. 1:08-cv-1229 (D.D.C. July 17, 2008), D.E. 1 (p.14 of fax apparently listing thirty-four detainees); Petition, *Gul v. Bush*, No. 1:08-cv-1224 (D.D.C. July 17, 2008), D.E. 1 (same); Petition, *Hafizullah v. Bush*, No. 1:08-cv-1227 (D.D.C. July 17, 2008), D.E. 1 (same).

A petition filed ten days earlier showed one of the faxed lists unredacted. Petition, *Obaydullah v. Bush*, No. 1:08-cv-1173 (D.D.C. July 7, 2008), D.E. 1 (p.14 of fax listing thirty-four detainees).

3893. Status Report, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 1, 2008), D.E. 7; see *Al Wady*, 623 F. Supp. 2d at 21 n.2.

3894. Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Feb. 23, 2009), D.E. 202; see *Al Wady*, 623 F. Supp. 2d at 21 n.2.

3895. *Al Wady*, 623 F. Supp. 2d at 22; Status Report at 2 n.1, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 27, 2010), D.E. 188 [hereinafter Aug. 27, 2010, *Al-Wady* Status Report].

3896. *Al Wady*, 623 F. Supp. 2d at 22.

3897. Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. May 12, 2009), D.E. 1206, 2009 WL 1312537 (denying reconsideration of the order pertaining to Jamil Ahmad Saeed); Order, *id.* (May 1, 2009), D.E. 1177 (granting an ore tenus motion for an expeditious, unobstructed, face-to-face visit).

3898. *Al Wady*, 623 F. Supp. 2d at 22.

3899. Notice of Authorization, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. May 22, 2009), D.E. 126 [hereinafter *Al-Wady* Notice of Authorization]; Aug. 27, 2010, *Al-Wady* Status Report, *supra* note 3895, at 2 n.1.

Hamoud Hasan al-Waeli.³⁹⁰⁰ According to the attorneys, “During that visit, Mr. Al Waeli told us unequivocally that he authorized our continued representation of him in this case and that he wanted us to continue pursuing his release through habeas corpus relief or through any other means.”³⁹⁰¹ But the attorneys

did not feel it was appropriate to ask Mr. Al Waeli to provide written authorization. Mr. Al Waeli has been incarcerated for more than seven years without meeting with anyone other than interrogators. Moreover, Mr. Al Waeli described a recent encounter during which interrogators falsely portrayed themselves as representatives of the Interagency Review Task Force. Given his experience, we were concerned about creating mistrust by demanding that he sign a form.³⁹⁰²

On September 9, 2010, Judge Urbina ordered the attorneys to submit a written authorization from the detainee for the action.³⁹⁰³ Al-Waeli refused to meet with his attorneys in August 2010 and January 2011, so the attorneys suggested that new counsel be appointed.³⁹⁰⁴ Efforts by the federal defender’s office to provide al-Waeli with an attorney in whom al-Waeli had confidence continued until al-Waeli’s transfer to Saudi Arabia in December 2013.³⁹⁰⁵

Al-Hajj also submitted a next-friend petition on behalf of Muieen Adeen Jamal Adeen Abd al-Fusal Abd al-Sattar.³⁹⁰⁶ Judge Bates granted al-Sattar’s attorney an order that she be permitted a face-to-face meeting with her client: the government “may transfer him to the designated meeting place without informing him of the purpose of the transfer.”³⁹⁰⁷ As the date of the planned meeting approached, Judge Bates refined his order: “respondents shall inform petitioner of the following: ‘You have a meeting with Ms. Cleary and [name of translator].’”³⁹⁰⁸ The effort to induce al-Sattar to attend the meeting by not telling him it would be a meeting with

3900. *Al-Wady* Notice of Authorization, *supra* note 3899.

3901. *Id.*

3902. *Id.*

3903. Docket Sheet, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

3904. Response, *id.* (Jan. 11, 2011), D.E. 200.

3905. *Al-Wady* Transfer Notice, *supra* note 3682; Joint Status Report, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Sept. 27, 2013), D.E. 263.

3906. *Al-Sattar* Petition, *supra* note 3892.

3907. Order, *Al-Sattar v. Obama*, No. 1:08-cv-1236 (D.D.C. Sept. 2, 2009), D.E. 140, 2009 WL 2899907.

3908. Order, *id.* (Sept. 18, 2009), D.E. 141 (quotation alteration in original), 2009 WL 3060319.

his attorney failed.³⁹⁰⁹ After five refusals by al-Sattar to meet with his attorney, Judge Bates dismissed the petition.³⁹¹⁰ The Obama administration was unable to transfer al-Sattar out of Guantánamo Bay because of al-Sattar's lack of cooperation.³⁹¹¹

Judge Lamberth dismissed Idris Ahmad Abdu Qadir Idris's petition, originally filed with al-Hajj as next friend, on October 6, 2009, for failure to file a signed authorization.³⁹¹² "By refusing to meet with counsel on at least five occasions, petitioner has unequivocally refused to authorize counsel to go forward with his case."³⁹¹³ Idris was included among the 158 detainees in the Center for Constitutional Rights' December 2005 petition, and Idris was among the eight detainees transferred from that case by Judge Walton to Judge Lamberth on April 21, 2009.³⁹¹⁴ Judge Lamberth ruled further, "Without some evidence that petitioner suffers from a mental incapacity, the Court will not compel discovery into petitioner's competence, knowledge, and voluntariness."³⁹¹⁵ Idris was transferred to Oman on June 12, 2015.³⁹¹⁶

Judge Lamberth stayed the habeas petition of Nadir Omar Abdullah Bin Sa'adoun Alsa'ary on representations that habeas counsel was making progress in establishing rapport with the detainee.³⁹¹⁷

On October 22, 2009, Judge Urbina gave attorneys one last chance to get authorization from a putative client.³⁹¹⁸ Judge Urbina observed that it was often difficult to determine whether a detainee did not want to pursue a petition, was too sick to meet with counsel to discuss it, or was just still undecided.³⁹¹⁹ Rhode Island attorneys, in cooperation with the Center for

3909. Status Report, *id.* (Oct. 15, 2009), D.E. 142.

3910. Order, *id.* (Oct. 21, 2009), D.E. 146, 2009 WL 3416195.

3911. See Carol Rosenberg, *2 Guantánamo Detainees Refused to Leave, Commander Says*, Miami Herald, Oct. 18, 2018, at 11A.

Al-Sattar remains detained. Appendix Table 4, *infra* page 641 (n.34).

3912. Idris v. Obama, 667 F. Supp. 2d 25 (D.D.C. 2009).

3913. *Id.* at 28 (noting attempted visits by counsel in Guantánamo Bay in February, March, April, May, and June of 2009).

3914. *Id.* at 27 n.1; Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Apr. 21, 2009), D.E. 1153.

3915. Idris, 667 F. Supp. 2d at 28.

3916. See Goldman & Ryan, *supra* note 3750; Rosenberg, *Six to Oman*, *supra* note 3750; Savage, *supra* note 3750.

3917. Order, Mattan v. Obama, No. 1:09-cv-745 (D.D.C. Apr. 11, 2013), D.E. 1704; Order, *id.* (Jan. 17, 2013), D.E. 1681; Status Report, *id.* (June 16, 2013), D.E. 1733.

3918. Noori v. Obama, 664 F. Supp. 2d 116 (D.D.C. 2009).

3919. Interview with Judge Ricardo M. Urbina, Aug. 15, 2011.

Constitutional Rights, had filed a petition on behalf of the detainee, Mullah Norullah Noori, on October 24, 2008, with al-Hajj listed as next friend.³⁹²⁰ Noori, a Taliban official, was captured in Afghanistan in 2001.³⁹²¹ On March 16, 2009, the attorneys attempted to meet with Noori in Guantánamo Bay, but he refused to see them.³⁹²² By the time of Judge Urbina's order, the attorneys had not attempted a second visit, but they had attempted to send Noori letters and they had dispatched an investigator to Afghanistan to attempt to locate family members.³⁹²³ Judge Urbina gave the attorneys thirty days to secure authorization for the petition.³⁹²⁴ The attorneys met with Noori on November 23, 2009, and Noori declined to authorize the representation,³⁹²⁵ so Judge Urbina dismissed the action on February 18, 2010.³⁹²⁶ Noori was transferred to Qatar on May 31, 2014, as part of a deal to free an American soldier from the Taliban.³⁹²⁷

In 2011, Judges Walton³⁹²⁸ and Collyer³⁹²⁹ granted motions to dismiss without prejudice petitions on behalf of detainees whose attorneys were never successful in meeting them. Judge Walton's detainee was transferred to Yemen in 2006,³⁹³⁰ and Judge Collyer's detainee was transferred to Italy in 2016.³⁹³¹

3920. *Noori*, 664 F. Supp. 2d at 117; Petition, *Noori v. Bush*, No. 1:08-cv-1828 (D.D.C. Oct. 24, 2008), D.E. 1; see Katie Mulvaney, *Their Reluctant Defendant Is a Detainee*, Providence J. Bull., June 3, 2009, at 1.

3921. See Mulvaney, *supra* note 3920.

3922. *Noori*, 664 F. Supp. 2d at 117 n.3; Petitioner's Response, *Noori*, No. 1:08-cv-1828 (D.D.C. Mar. 31, 2009), D.E. 42.

3923. *Noori*, 664 F. Supp. 2d at 118 n.4; see Mulvaney, *supra* note 3920.

3924. *Noori*, 664 F. Supp. 2d at 117, 120.

3925. Status Report, *Noori*, No. 1:08-cv-1828 (D.D.C. Nov. 24, 2009), D.E. 85.

3926. Order, *id.* (Feb. 18, 2010), D.E. 88.

3927. See Entous & Barnes, *supra* note 3690; Londoño, *supra* note 3690; Rosenberg & Seibel, *supra* note 3690; Schmitt & Savage, *supra* note 3690.

3928. *Al-Jayfi* Docket Sheet, *supra* note 3306 (noting a dismissal on September 1, 2011); see Motion, *Al-Jayfi v. Bush*, No. 1:05-cv-2104 (D.D.C. July 7, 2011), D.E. 383.

3929. Docket Sheet, *Suleiman v. Obama*, No. 1:10-cv-1411 (D.D.C. Aug. 19, 2010) (noting a dismissal on September 16, 2011); see Joint Notice, *id.* (July 5, 2011), D.E. 24 ("Petitioner's counsel was unable to learn anything regarding Petitioner's wishes with respect to this case during counsel's visit to Guantánamo Bay on June 22 and 23, 2011, because Petitioner declined to meet with counsel.").

3930. Transfer Notice, *Al-Jayfi*, No. 1:05-cv-2104 (D.D.C. Dec. 20, 2006), D.E. 35 (Isam Hamid Ali Bin Ali al-Jayfi).

3931. *Suleiman* Transfer Notice, *supra* note 3769.

Suicides' Notes

On June 10, 2006, three detainees were found dead in their cells, having apparently bound and hanged themselves with torn bed sheets and clothes.³⁹³² These were the first Guantánamo Bay detainee deaths.³⁹³³ The Naval Criminal Investigative Service discovered in the cells of the deceased detainees, and others on the same block, notes related to the suicides that were marked as attorney–client privileged material.³⁹³⁴ Although the government maintained that the courts had no jurisdiction over detainees' habeas petitions, it asked the court to issue orders authorizing review of the potentially privileged material.³⁹³⁵

3932. *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 105–07 (D.D.C. 2010); *Hicks v. Bush*, 452 F. Supp. 2d 88, 94–95 (D.D.C. 2006); *Boumediene v. Bush*, 450 F. Supp. 2d 25, 28 (D.D.C. 2006); see James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantánamo*, N.Y. Times, June 11, 2006, at 11; Charlie Savage, *As Acts of War or Despair, Suicides Rattle a Prison*, N.Y. Times, Apr. 25, 2011, at A13; Josh White, *Signs of Detainees' Planning Alleged*, Wash. Post, July 8, 2006, at A1. *But see* Joseph Hickman, *Murder at Camp Delta: A Staff Sergeant's Pursuit of the Truth About Guantánamo Bay 221* (2015) (“[N]one of the guards or their commanding officers tasked with protecting them was ever punished for negligence or any other infraction. . . . I suspect that the deaths of the three detainees were accidental—the result of a punishment session that went too far”); Scott Horton, *The Guantánamo “Suicides,”* Harper’s, Mar. 2010, at 27 (reporting on “evidence that suggests the current administration failed to investigate seriously—and may even have continued—a cover-up of the possible homicides of three prisoners at Guantánamo in 2006”); Scott Horton, *The Guantánamo “Suicides,” Revisited*, Harper’s, June 2014, at 66 (reporting that new evidence supported the author’s theory that the deaths resulted from harsh interrogation techniques); Khan, *supra* note 3309, at 160–63, 230, 234, 297 (reporting that one deceased detainee’s repatriated body was missing organs, including organs in the throat, that would have provided evidence of the cause of his death); Alexander Nazaryan, *You’re Doing It Wrong If They Die*, Newsweek, Jan. 23, 2015, at 22 (suggesting that the deaths followed failed informant agreements).

The court of appeals affirmed Judge Huvelle’s dismissal of a tort action by two of the detainees’ survivors as beyond the court’s jurisdiction. *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012) (action by survivors of Yasser al-Zahrani and Salah Ali Abdullah Ahmed al-Salami), *affirming Al-Zahrani*, 684 F. Supp. 2d 103; see *Guantánamo Suicide Suit Disallowed*, N.Y. Times, Feb. 22, 2012, at A16.

3933. See Savage, *supra* note 3932.

3934. *Boumediene*, 450 F. Supp. 2d at 29; see Kamins, *supra* note 3153, at 320; White, *supra* note 3932.

3935. *Hicks*, 452 F. Supp. 2d at 98; *Boumediene*, 450 F. Supp. 2d at 27–28.

A habeas attorney reported that the military was “looking for evidence, in part, that lawyers had something to do with facilitating the suicides.” Falkoff, *supra* note 3236, at 163. Compare Cucullu, *supra* note 3174, at 101 (speculating that “the attorneys apparently began to coach detainees in hunger strike techniques”), and *id.* at 180–86, 200, with Patri-

Judge Leon, whose decision that the court did not have jurisdiction over the habeas petitions was on appeal, decided that he did not have jurisdiction to offer the government the protection it sought.³⁹³⁶ “[T]here is nothing about the circumstances of this situation that would or will prevent this, or another court at a later time, from ensuring that any information learned by the Government’s reviewers is never used by the Government against any detainee in the future.”³⁹³⁷

Judge Robertson, to whom the matter had been referred by nine other judges,³⁹³⁸ decided, “my idea of prudence is to give the government the guidance it seeks. If jurisdiction has been improperly asserted, the Court of Appeals will correct the error. If I do have jurisdiction, both sides will be better off having received judicial guidance sooner rather than later.”³⁹³⁹ Judge Robertson approved a plan calling “for the use of a ‘Filter Team,’ walled off from government investigators and prosecutors, that would review the seized materials and set aside anything arguably protected by the attorney–client privilege.”³⁹⁴⁰

Classified Detainee Statements and the Privilege Review Team

When Judge Hogan accepted coordination and management of the habeas petitions in 2008, he issued a protective order specifying that the detainees’ attorneys had to regard any information they received from their clients as classified until a privilege review team determined otherwise.³⁹⁴¹

“Privilege team” means a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee. If required, the privilege team

cia M. Wald, *Forward* to Fletcher & Stover, *supra* note 3153, at xi, xii–xiv (“Hunger strikes and suicide attempts (labeled ‘manipulative self-injurious behavior’) became the only recourse of detainees until lawyers finally appeared on the scene and courts intervened.”).

3936. *Boumediene*, 450 F. Supp. 2d at 28, 31–34 (resolving the motion in thirteen cases).

3937. *Id.* at 33.

3938. *Hicks*, 452 F. Supp. 2d at 94 n.2 (noting referrals by Judges Bates, Collyer, Friedman, Kennedy, Kotelly, Roberts, Sullivan, Urbina, and Walton).

3939. *Id.* at 99.

3940. *Id.* at 94 (resolving the motion in 100 cases).

3941. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 163 (D.D.C. 2008) (¶ II.I.29).

may include interpreters/translators, provided that such personnel meet these same criteria.³⁹⁴²

Attorneys were prohibited from sharing classified information with their clients (1) unless the information was provided by the detainee or (2) they received permission from the government.³⁹⁴³ The privilege review team reviewed attorney–client communications and work product to determine if they included classified information.³⁹⁴⁴

An attorney for Tariq Mahmoud Alsawam, who filed his petition on June 22, 2005,³⁹⁴⁵ submitted statements made by the detainee included in the government’s classified return to the privilege review team to determine what she could share with her client on her next visit.³⁹⁴⁶ The privilege team determined which statements clearly originated from the detainee and gave the attorney permission to discuss those statements with her client.³⁹⁴⁷ The government, however, asserted that according to the protective order, “while counsel may discuss with a petitioner-detainee information provided by that petitioner-detainee in communications with counsel, counsel may not disclose classified information that originated in classified Government documents to the petitioner-detainee, even if those classified documents contain petitioner-detainee’s own statements.”³⁹⁴⁸

Judge Hogan ruled against the government and granted the attorney permission to “review [the petitioner’s statements] with Petitioner, provided that the Privilege Review Team determines that [the statements] contain[] only statements made by Petitioner to agents of the United States government, and contain[] no information other than Petitioner’s statements, Petitioner’s name, and the date the statements were made.”³⁹⁴⁹

In one of the cases before her, Judge Kessler determined that “any classified statements that the Government relies on and alleges were made by the Petitioner may be shared with the Petitioner by counsel, provided that

3942. *Id.* at 156 (¶ II.B.6); see Cucullu, *supra* note 3174, at 198.

3943. *Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 150 (¶ I.D.29).

3944. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, July 28, 2011; see Gorman, *supra* note 3272, at 11; David H. Remes, *Negotiating the Protective Order*, in *The Guantánamo Lawyers*, *supra* note 3154, at 109, 110 (noting that the privilege review team was bound to keep the communications confidential).

3945. Petition, *Alsawam v. Bush*, No. 1:05-cv-1244 (June 22, 2005), D.E. 1.

3946. Motion at 2–3, *id.* (Jan. 6, 2009), D.E. 100.

3947. *Id.* at 3.

3948. Government Opposition at 6, *id.* (Jan. 13, 2009), D.E. 105.

3949. Order, *id.* (Jan. 15, 2009), D.E. 109.

Alsawam was transferred to Bosnia in 2016. *Alsawam Transfer Notice*, *supra* note 3762.

the Privilege Review Team determines that such statements were made by Petitioner to agents of the United States Government.”³⁹⁵⁰

Shortly after a detainee had been released to the United Kingdom,³⁹⁵¹ the Privilege Review Team brought to the attention of the court allegedly unprofessional actions by habeas attorneys for the detainee, Benjamin Mohammed al-Habashi, following a *Guardian* report that Defense Department officials were withholding from President Obama evidence that Binyam Mohamed—apparently a more common version of al-Habashi’s name—had been tortured.³⁹⁵² The *Guardian* article was apparently based, in part, on a letter that the attorneys wrote to the President about the alleged torture, attached to which was an apparent memo about the matter from one of the attorneys.³⁹⁵³ The intended recipient of the memo and all of its contents were redacted.³⁹⁵⁴ The letter stated that it and the attached memo were also submitted to the review team with a request that the team either declassify the redacted material or forward the redacted material to the President under secure conditions.³⁹⁵⁵ It is not clear whether the review team ever had access to the information redacted from the memo, but the team objected to the implication that it was withholding information from the President.³⁹⁵⁶ The review team argued that its purview did not include screening letters to the President or declassifying information classified by other entities; it was created “for the limited purpose of reviewing privi-

3950. Order, Ahmed v. Obama, No. 1:05-cv-1678 (D.D.C. Feb. 12, 2009), D.E. 151, 2009 WL 377065.

3951. Transfer Notice, Al-Habashi v. Obama, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009), D.E. 134; see Lee, *supra* note 3506 (“He’s now free in Britain, where he has mounted a public campaign to have the British officers he claims were complicit in his torture held accountable.”).

3952. Privilege Review Team’s Report, Ben Bacha v. Obama, No. 1:05-cv-2349 (Feb. 26, 2009), D.E. 115 (filed initially in the wrong case, where Binyam Mohammed had been identified as a next friend), *also filed in Al-Habashi*, No. 1:05-cv-765 (D.D.C. Mar. 5, 2009), D.E. 137; see Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 57–61 (D.D.C. 2009) (describing Mohamed’s accounts of torture as a basis for excluding evidence obtained from him against another detainee); see also Omonira-Oyekanmi & Finn, *supra* note 3171 (reporting on a British damages settlement paid to Mohamed); Chapter 37: Torture Flights, *infra* page 829 (discussing a civil action by Mohamed against a company that allegedly provided transportation services for extraordinary rendition).

3953. Ex. A, Privilege Review Team’s Report, *supra* note 3952; see also Stafford Smith, *supra* note 3154, at 49–80 (account by Mohamed’s attorney of Mohamed’s detention experiences).

3954. Ex. A, Privilege Review Team’s Report, *supra* note 3952.

3955. *Id.*

3956. Privilege Review Team’s Report, *supra* note 3952.

leged communications between detainees and their counsel.”³⁹⁵⁷ Judge Sullivan addressed the matter in sealed filings.³⁹⁵⁸

An attorney for Ismail Mohamed, detained at Guantánamo Bay since 2007, identified twenty-one statements by the detainee that the government was relying on in its factual return to justify his detention.³⁹⁵⁹ The attorney sought declassification of the statements so that she could discuss them with her client during a planned June 12, 2009, meeting, but as the meeting date approached the government had provided her with only seven.³⁹⁶⁰ Judge Roberts declined to order that all statements be provided to the detainee for the scheduled meeting, because the attorney “did not follow [procedures] establishing the method to request access for a petitioner to material before a visit from counsel”³⁹⁶¹ and because the seven statements already provided ensured that the planned meeting would not be fruitless.³⁹⁶² Judge Roberts noted, however, that

the respondent may not justify Mohamed’s detention with statements of Mohamed’s that he has not had a meaningful opportunity to discuss with his counsel. If the respondent were to choose not to divulge these statements to Mohamed, the respondent presumably would have to seek leave to file a new amended factual return that does not rely upon the undisclosed statements.³⁹⁶³

Judge Roberts also determined that, despite the government’s wishes to the contrary, the detainee would be entitled to have copies of the statements available to review after the meeting with the attorney.³⁹⁶⁴ Mohamed was released to Somaliland by December 22, 2009.³⁹⁶⁵

Coordination with Military Defense Attorneys

Judge Kotelly was presented with a request by habeas attorneys to share what they knew with military defense attorneys for two detainees who had

3957. *Id.* at 3.

3958. Docket Sheet, *Al-Habashi v. Bush*, No. 1:05-cv-765 (Apr. 15, 2005).

3959. *Mohamed v. Gates*, 624 F. Supp. 2d 40, 42 (D.D.C. 2009).

3960. *Id.*

3961. *Id.* at 41.

3962. *Id.* at 43–44.

3963. *Id.* at 44.

3964. *Id.* (“the respondent’s assertion that national security interests would not be imperiled if petitioner and counsel discuss petitioner’s statements, yet would somehow be jeopardized if petitioner keeps paper copies of his own statements, is unpersuasive”).

3965. Transfer Notice, *Mohamed v. Gates*, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009), D.E. 92.

been referred to military commissions.³⁹⁶⁶ The government denied the defense attorneys access to classified information that it had shared with habeas attorneys.³⁹⁶⁷ Judge Kotelly determined that she did not have jurisdiction over the matters concerning the defense attorneys unless they made appearances in the habeas cases, and her response to representations that they were not sure that they were authorized to do so was that they should try first.³⁹⁶⁸

Attorney Contacts After Voluntary Habeas Dismissals

In 2012, the government adopted a policy on detainees' ability to voluntarily dismiss their habeas petitions while retaining access to counsel: The government decided that it would permit postdismissal contacts as a matter of discretion, but it would oppose court-ordered contacts.³⁹⁶⁹ On September 6, 2012, Judge Lamberth overruled the government's position that only detainees with pending or imminent habeas petitions had a right to counsel:

The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme.³⁹⁷⁰

3966. *Al Odah v. United States*, 608 F. Supp. 2d 46, 48 (D.D.C. 2009).

3967. *Id.*

3968. *Id.* at 48–50.

3969. Government Opposition Brief at 8–9, *Al-Mithali v. Obama*, No. 1:05-cv-2186 (D.D.C. Apr. 30, 2012), D.E. 281; Government Opposition Brief at 7–9, *Al-Mudafari v. Obama*, No. 1:05-cv-2185 (D.D.C. Apr. 30, 2012), D.E. 280; Status Report at 2–3 & n.1, *Abu Ghanem v. Obama*, No. 1:05-cv-1638 (D.D.C. Apr. 30, 2012), D.E. 260; see Mike Scarcella, *Justices' Gitmo Gamble*, Legal Times, Aug. 6, 2012, at 23.

3970. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 28 (D.D.C. 2012); see Michael Doyle, *Judge Rejects New Limits on Attorneys*, Miami Herald, Sept. 7, 2012, at 3A; Charlie Savage, *Judge Rejects New Rules on Access to Prisoners*, N.Y. Times, Sept. 7, 2012, at A20; Mike Scarcella, *Slapped Down*, Nat'l L.J., Sept. 10,

Appeals were dismissed voluntarily on December 14.³⁹⁷¹

The government withheld petitioners' legal mail pending resolution of the counsel-access issue "without notifying the Court or petitioners' counsel or moving for a stay pending appeal after [Judge Lamberth's] decision."³⁹⁷² After the government withdrew its appeal, it apparently mistakenly withheld a piece of one detainee's legal mail a few weeks too long.³⁹⁷³ Judge Lamberth declined to order a sanction hearing, but he did order a complete accounting of how all unsuccessful detainees' legal mail had been handled.³⁹⁷⁴

Following Judge Lamberth's assurances that petitioners' access to counsel could be preserved, several habeas petitions were voluntarily dismissed without prejudice.³⁹⁷⁵

2012, at 23; Del Quentin Wilber, *Judge Says U.S. Can't Block Lawyer Access to Detainees*, Wash. Post, Sept. 7, 2012, at A3.

3971. Voluntary Dismissals, Nos. 12-5350, 12-5351, 12-5353, 12-5354, and 12-5356 (D.C. Cir. Jan. 11, 2013); *Al-Zarnouqi v. Obama*, 964 F. Supp. 3d 1, 2 (D.D.C. 2013).

3972. *Al-Zarnouqi*, 964 F. Supp. 3d at 3 (emphasis omitted).

3973. *Id.* at 2.

3974. *Id.* at 3–4; see Mike Scarcella, *Government Credibility Threatened*, Nat'l L.J., May 13, 2013, at 20.

3975. *E.g.*, Stipulated Dismissal, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (Dec. 17, 2013), D.E. 51 [hereinafter *Abdulrazzaq* Stipulated Dismissal] (*Nashwan al-Ramer Abdulrazzaq*); Stipulated Dismissal, *Bin Attash v. Obama*, No. 1:05-cv-1592 (June 14, 2013), D.E. 271 (*Hassan Bin Attash*); Stipulated Dismissal, *Mohammon v. Obama*, No. 1:05-cv-2386 (May 20, 2013), D.E. 1994 (*Mohammed Ahmed Saeed Hidar*); Stipulated Dismissal, *Zaid v. Obama*, No. 1:05-cv-1646 (May 20, 2013), D.E. 341 (*Waleed Saeed Bn Saeed Zaid*); Stipulated Dismissal, *Bin Lep v. Obama*, No. 1:09-cv-31 (Apr. 5, 2013), D.E. 91 (*Mohammed Nazir Bin Lep*); Stipulated Dismissal, *Nasser v. Obama*, No. 1:07-cv-1710 (D.D.C. Mar. 13, 2013), D.E. 205 (*Muhammed Muhammad Saleh Nasser*); Stipulated Dismissal, *Al-Shubati v. Obama*, No. 1:07-cv-2338 (D.D.C. Mar. 12, 2013), D.E. 261 (*Abdurrahman Abdallah Ali Mahmoud al-Shubati*); *Al-Marwalah* Stipulated Dismissal, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Mar. 11, 2013), D.E. 973 (*Bisheer al-Marwalah*); Stipulated Dismissal, *id.* (Mar. 11, 2013), D.E. 972 (*Abdulaziz al-Swidi*); Stipulated Dismissal, *id.* (Mar. 11, 2013), D.E. 971 (*Ali Yaha Mahdi*); Stipulated Dismissal, *Al-Shimrani v. Obama*, No. 1:05-cv-2249 (D.D.C. Mar. 1, 2013), D.E. 255 (*Mohammed Abdul Rahman al-Shimrani*); Stipulated Dismissal, *Mohammon*, No. 1:05-cv-2386 (D.D.C. Feb. 22, 2013), D.E. 1986 (*Umar Hamazayevich Abdulayev*); Voluntary Dismissal, *Alkhemisi v. Obama*, No. 1:05-cv-1983 (D.D.C. Nov. 2, 2012), D.E. 220 (*Ismael Ali Farag al-Bakush*); Docket Sheet, *Al-Khalaqi v. Bush*, No. 1:05-cv-999 (D.D.C. May 18, 2005) (*Asim Ben Thabit al-Khalaqi*, noting a dismissal on July 2, 2012); Order, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Oct. 28, 2011), D.E. 1595 (*Sharqawi Abdu Ali al-Hajj*, *Abdo Ali al-Haj* in No. 1:05-cv-2385 and *Shargowi* in No. 1:05-cv-2386); Notice, *Abdesalam v. Obama*, No. 1:06-cv-1761 (D.D.C. Oct. 4, 2011), D.E. 187 (*Achraf Salim Abdes-*

Arduous Visits with Counsel

On July 11, 2013, Judge Lamberth ruled that the government was improperly interfering with detainees' access to counsel by making counsel visits, and even telephone calls to counsel, excessively arduous.³⁹⁷⁶ (1) Judge Lamberth found that it was not necessary for the government to always transport detainees to another camp for counsel visits, and Judge Lamberth ordered the government to work with counsel to develop a protocol for allocating local visits fairly, giving priority to hunger strikers and other detainees with medical needs.³⁹⁷⁷ (2) In order to provide detainees with air-conditioned transport, the government had brought in new transportation vans, but the vans' overhead air-conditioning equipment prevented detainees from sitting upright during the trip, resulting in a forced stress position.³⁹⁷⁸ Judge Lamberth ordered use of the old vans while the new vans were being modified to afford sitting transportation.³⁹⁷⁹ (3) Judge Lamberth ordered the government to replace new, invasive search procedures, which typically occurred four times during transportation to and from meetings with counsel, and in which "the guard will search the detainee's groin area by placing the guard's hand as a wedge between the detainee's scrotum and thigh and using a flat hand to press against the groin to detect anything foreign attached to the body," in addition to frisking the detainee's buttocks, with a customary "modified search procedure whereby a guard would grasp the waistband of a detainee's trousers and shake the detainee's pants in order to dislodge any contraband."³⁹⁸⁰

On July 17, the court of appeals stayed Judge Lamberth's order.³⁹⁸¹ A little over one year later, on August 1, 2014, the court of appeals concluded

salam); Dismissal, *Al-Adahi v. Obama*, No. 1:05-cv-280 (D.D.C. Mar. 24, 2010), D.E. 556 (Zahar Omar Khamis Bin Hamdoun); Order, *id.* (Dec. 22, 2009), D.E. 526, 2009 WL 5196155 (Muhammad Ali Abdullah Bawazir).

3976. *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40 (D.D.C. 2013); Order, *Guantanamo Bay Detainee Continued Access to Counsel*, No. 1:12-mc-398 (D.D.C. July 11, 2013), D.E. 46; see Charlie Savage, *Judge Orders Halt to Groin Searches at Guantánamo, Citing Offense to Muslims*, N.Y. Times, July 12, 2013, at A13; Julie Tate, *Judge Forbids Genital Searches of Guantanamo Inmates Before Legal Meetings*, Wash. Post, July 12, 2013, at A5.

3977. *Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d at 59–61.

3978. *Id.* at 46–47.

3979. *Id.* at 61–62.

3980. *Id.* at 46, 53–59 (quotation marks omitted).

3981. Order, *Hatim v. Obama*, No. 13-5218 (D.C. Cir. July 17, 2013); *Hatim v. Obama*, 760 F.3d 54, 57 (D.C. Cir. 2014).

that the search procedures were reasonable security precautions.³⁹⁸² Noting that “[s]tandard protocol in military prisons calls for a non-invasive search of the genital area of a prisoner,” the court observed that security concerns at Guantánamo Bay “escalated with the suicide of a detainee who took an overdose of medication that he had smuggled into his cell and the discovery of shanks, a wrench, and other weapons in the housing camps that had evaded . . . searches.”³⁹⁸³ The court concluded that the search procedures “promote the safety of the guards and inmates by more effectively preventing the hoarding of medication and the smuggling of dangerous contraband.”³⁹⁸⁴

COVID-19

Extreme social distancing became necessary in 2020 because of the COVID-19 pandemic. Travel became very risky.

Counsel for high-value detainee Guled Hassan Duran filed a motion on April 20, 2020, for court-ordered telephone access to the detainee.³⁹⁸⁵ In addition to risks resulting from an attorney’s traveling to Guantánamo Bay, an attorney would have to quarantine at the base for two weeks before seeing the client.³⁹⁸⁶ The government refused to establish a way for habeas counsel to communicate with their clients by telephone. All communications with high-value detainees are presumptively classified,³⁹⁸⁷ so a very special communication link would be required.³⁹⁸⁸ Detainees were permitted telephone conversations with family members, but those were monitored.³⁹⁸⁹ The government proposed a modification to attorney mail protocols by which there would be a confidential mail link between Guantánamo Bay and Northern Virginia.³⁹⁹⁰ A cleared attorney could elect

3982. *Hatim*, 760 F.3d 54; see Carol Rosenberg, *Accused 9/11 Plotter Declares Secret Prison’s Groin Searches Are Sexual Harassment*, Miami Herald, Jan. 9, 2018, at 8A.

3983. *Hatim*, 760 F.3d at 56.

3984. *Id.* at 61.

3985. Motion, *Duran v. Trump*, No. 1:16-cv-2358 (D.D.C. Apr. 20, 2020), D.E. 84.

3986. Transcript at 3–4, *id.* (May 29, 2020, filed June 5, 2020), D.E. 94 [hereinafter May 29, 2020, *Duran* Transcript].

3987. Sur-Reply Brief at 2, *id.* (May 26, 2020), D.E. 92; see Response Brief at 3–11, *id.* (May 8, 2020), D.E. 86 [hereinafter May 8, 2020, *Duran* Response Brief].

3988. May 29, 2020, *Duran* Transcript, *supra* note 3986, at 7 (“equipment is not in place in an area that could also be appropriately accessed for a confidential privileged conversation by [the] detainee”).

3989. *Id.* at 10–11.

3990. May 8, 2020, *Duran* Response Brief, *supra* note 3987; May 29, 2020, *Duran* Transcript, *supra* note 3986, at 13–14.

to risk travel to Northern Virginia to read the mail.³⁹⁹¹ Or an unclassified version of the mail could be forwarded to the attorney after a classification review.³⁹⁹²

Judge Walton ordered the government to determine by June 30 “whether there is a means for the petitioner’s counsel to have secure and classified telephonic communications with the petitioner during the COVID-19 pandemic.”³⁹⁹³

Following a June 30 status conference, Judge Walton approved a stipulated modification to legal mail protocols on July 23.³⁹⁹⁴

Challenge: Classified Evidence

Because of the extensive amount of classified information in these cases, Chief Judge Lamberth worked with the Justice Department to double the number of classified information security officers in the department’s Litigation Security Group.³⁹⁹⁵ The court decided to apply to these cases the security principles of the Classified Information Procedures Act (CIPA),³⁹⁹⁶ which technically applies only to criminal cases.³⁹⁹⁷

The Secure Facility

The Litigation Security Group’s classified information security officers set up a secure facility in Crystal City, which is in Arlington, Virginia, for habeas attorneys to view, discuss, and work on classified information concerning their clients’ cases.³⁹⁹⁸ The suite of rooms included office space,

3991. See May 29, 2020, *Duran* Transcript, *supra* note 3986, at 8 (observation by counsel that “we are presently not easily able to travel to the Washington, D.C. area”).

3992. *Id.* at 14.

3993. Order, *Duran v. Trump*, No. 1:16-cv-2358 (D.D.C. June 1, 2020), D.E. 93; see Carol Rosenberg, *Order May Let Lawyers Call Guantánamo Detainees*, N.Y. Times, May 30, 2020, at A6.

3994. Stipulated Order, *Duran*, No. 1:16-cv-2358 (D.D.C. July 23, 2020), D.E. 98; Docket Sheet, *id.* (Nov. 30, 2016) (minutes, June 30, 2020).

3995. Interview with Judge Royce C. Lamberth, May 13, 2011; see Reagan, *supra* note 3866, at 21–22 (describing the Litigation Security Group).

3996. 18 U.S.C. app. 3 (2020).

3997. Interview with Judge Royce C. Lamberth, May 13, 2011; see Reagan, *supra* note 3866 (discussing CIPA).

3998. Interview with Dep’t of Just. Litig. Sec. Grp. Staff, July 28, 2011; see Gorman, *supra* note 3272, at 11, 15; Shayana Kadidal, *Mental Illness Before Guantánamo*, in Obama’s Guantánamo, *supra* note 3200, at 75, 82–83; Remes, *supra* note 3944, at 110; Ruben, *supra* note 3169, at 15; Sullivan, *supra* note 3869, at 43; Wax, *supra* note 3154, at 118.

cubicle space, and safes for storing classified information.³⁹⁹⁹ With the exception of a few cases involving high-value detainees, all of the classified information to which the petitioners' attorneys were given access was classified as secret.⁴⁰⁰⁰

Attorneys were not permitted to bring back to their offices notes taken during their meetings with their clients, because the notes were presumptively classified until they had been reviewed.⁴⁰⁰¹ Attorneys found reviewed notes waiting for them at the secure facility.⁴⁰⁰² Documents containing no classified information and unclassified redacted versions of documents could be faxed to the attorneys' remote offices.⁴⁰⁰³

The secure facility was staffed by cleared contract personnel under the supervision of the Litigation Security Group.⁴⁰⁰⁴ Originally, the facility operated according to business hours, but when litigation became heavy, it began to operate twenty-four hours a day.⁴⁰⁰⁵ Cleared habeas attorneys wishing to work on classified materials in their cases could show up at will, and office space was available on a first-come, first-served basis.⁴⁰⁰⁶ Computers were available for their use; separate hard drives for each case were stored in the safes.⁴⁰⁰⁷ When Guantánamo Bay habeas litigation became less heavy, the secure facility's hours became business hours again, including weekend hours, and earlier or later on request.⁴⁰⁰⁸

Some information pertaining to high-value detainees was designated sensitive compartmented information (SCI).⁴⁰⁰⁹ Access to SCI requires a higher security clearance, and storage requirements for SCI are more

3999. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4000. *Id.*

4001. *Id.*; see Joshua Colangelo-Bryan, *Habeas on the Gate, Part I*, in *The Guantánamo Lawyers*, *supra* note 3154, at 59, 63; Remes, *supra* note 3944, at 110.

4002. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011; see Colangelo-Bryan, *supra* note 4001, at 63; Matthew O'Hara, *I Love Cowboys*, in *The Guantánamo Lawyers*, *supra* note 3154, at 119, 123; Remes, *supra* note 3944, at 110.

4003. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011; see Patricia A. Bronte, *Classified Art*, in *The Guantánamo Lawyers*, *supra* note 3154, at 111, 111.

4004. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4005. *Id.*

4006. *Id.*

4007. *Id.*

4008. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 21, 2015 (noting that hours returned to business hours in October 2013).

4009. *Id.*, July 28, 2011; see Reagan, *supra* note 3866, at 3 (describing sensitive compartmented information).

stringent. SCI must be stored in a sensitive compartmented information facility (SCIF).⁴⁰¹⁰ The secure facility came to include a SCIF.⁴⁰¹¹

Factual Returns

Following the Supreme Court's decision in *Rasul v. Bush*⁴⁰¹² that the courts have jurisdiction over Guantánamo Bay detainees' habeas petitions, the government began to submit factual returns based on CSRT designations of the detainees as enemy combatants.⁴⁰¹³ The government designated some return information for the court's eyes only and some information as for attorney and court eyes only.⁴⁰¹⁴ Habeas attorneys were permitted to see some classified information, but they were not permitted to share it with their clients, and some classified information was shared only with the court.⁴⁰¹⁵

4010. See Reagan, *supra* note 3866, at 22–23 (describing SCIFs).

4011. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4012. 542 U.S. 466 (2004).

4013. Returns, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. Oct. 13 to Nov. 3, 2004), D.E. 27 to 30, 41, 42 (six detainees); Returns, *Begg v. Bush*, No. 1:04-cv-1137 (D.D.C. Oct. 25 and Nov. 3, 2004), D.E. 34, 46 (two detainees); Returns, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Oct. 21 and Nov. 3, 2004), D.E. 53, 54, 67 (three detainees); Returns, *Al-Odah v. Bush*, No. 1:02-cv-828 (D.D.C. Sept. 17 to Nov. 3, 2004), D.E. 85, 86, 92, 94, 104, 108 to 111, 113, 124, 133 (twelve detainees); Returns, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Oct. 12 to Nov. 1, 2004), D.E. 31, 32, 38, 39, 41, 45 (six detainees); Returns, *Abdah v. Bush*, No. 1:04-cv-1254 (D.D.C. Oct. 1 to 21, 2004), D.E. 19, 20, 24, 30 to 35, 38, 42, 45 (thirteen detainees; an additional detainee could not be found at Guantánamo Bay by the government); Return, *Khalid v. Bush*, No. 1:04-cv-1142 (D.D.C. Oct. 18, 2004), D.E. 31 (one detainee); Return, *Kurnaz v. Bush*, No. 1:04-cv-1135 (D.D.C. Oct. 18, 2004), D.E. 25 (one detainee); Returns, *Anam v. Bush*, No. 1:04-cv-1194 (D.D.C. Sept. 17 to Oct. 14, 2004), D.E. 15, 23, 27 to 34, 39 to 42 (fourteen detainees; an additional detainee was omitted from an amended petition); Return, *Gherebi v. Bush*, No. 1:04-cv-1164 (D.D.C. Oct. 6, 2004), D.E. 30 (one detainee); Return, *Khadr v. Bush*, No. 1:04-cv-1136 (D.D.C. Sept. 15, 2004), D.E. 22 (one detainee); Return, *Habib v. Bush*, No. 1:02-cv-1130 (D.D.C. Oct. 6, 2004), D.E. 32 (one detainee); Return, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Oct. 6, 2004), D.E. 83 (return for Hicks only, because Rasul and Iqbal had already been released); see Status Report, *id.* (Oct. 22, 2004), D.E. 94 [hereinafter Oct. 22, 2004, Status Report] ("Respondents hereby submit this report on the status of the submission of records of proceedings before the Combatant Status Review Tribunals as factual returns to petitioners' petitions for writ of habeas corpus."); Order, *Khalid*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004), D.E. 21 (dismissing two petitioners who had been sent to France for prosecution); see also *Al Odah v. United States*, 559 F.3d 539, 542 (D.C. Cir. 2009).

4014. *Al Odah*, 559 F.3d at 543; Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Oct. 29, 2004), D.E. 99 (ordering the government to present complete returns to the court for examination by the judge and her cleared staff); Oct. 22, 2004, Status Report, *supra* note 4013.

4015. Notice, *Rasul*, No. 1:02-cv-299 (D.D.C. Nov. 5, 2004), D.E. 109.

On November 8, 2004, at which time eleven cases were pending before her, Judge Green issued a protective order specifying how habeas attorneys who had obtained security clearances would be given access to classified information.⁴⁰¹⁶ At the end of the following January, Judge Green ruled that attorneys with security clearance had to be given access to all classified information in the returns, overruling the government's designation of some of it as for the court's eyes only.⁴⁰¹⁷

The court of appeals, on March 6, 2009, determined that the government could be required to disclose to habeas counsel only classified information that was helpful to the petitioners' cases,⁴⁰¹⁸ and that it was necessary to permit the government to suggest unclassified substitutions for the classified information.⁴⁰¹⁹ The district judges reviewed the original classified evidence and proposed substitutions—either unclassified or classified at a lower level—and decided individually whether the substitutions were adequate and what to do about the evidence if the substitutions were not.⁴⁰²⁰

Judge Green's January 31, 2005, order also approved of the government's designation of some of the unclassified information in the returns as protected, which meant that it was shared with habeas attorneys under seal.⁴⁰²¹ The habeas attorneys did not object to this designation.⁴⁰²²

In one of Judge Kotelly's cases, counsel for the petitioners asked her to order the government to either declassify the classified portions of the returns or provide adequate summaries that the attorneys could share with their clients.⁴⁰²³ Because the government failed to respond to the motion, Judge Kotelly dismissed one of its attorneys.⁴⁰²⁴ She deferred consideration

4016. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

An additional case had been filed the previous week. *Belmar* Docket Sheet, *supra* note 3228.

4017. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Jan. 31, 2005), D.E. 155 [hereinafter Jan. 31, 2005, Attorney Access Order].

4018. *Al Odah*, 559 F.3d at 544.

4019. *Id.* at 547.

4020. Interview with Judge Joyce Hens Green, Sept. 21, 2011; Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

4021. Jan. 31, 2005, Attorney Access Order, *supra* note 4017.

4022. *Id.* at 2.

4023. *Al Odah v. United States*, 608 F. Supp. 2d 42, 43 (D.D.C. 2009).

4024. *Id.*; Order at 7–8, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Feb. 13, 2009), D.E. 474, 2009 WL 382098 (“The Court has lost confidence in Respondents’ current counsel, and the Court does not view his representations as credible.”).

of whether the government should be able to rely on any information in the returns that the attorneys could not share with their clients.⁴⁰²⁵

In 2009, the government sought to designate all of the unclassified information in a large number of factual returns as protected, in part because the versions of the returns designated unclassified had inadvertently included classified information in some cases.⁴⁰²⁶ Judge Hogan determined that this would violate the public's First Amendment and common-law rights of access to the court's files, and he gave the government four weeks to designate with precision what information in the returns had to be protected.⁴⁰²⁷

Judge Friedman observed that returns and traverses were only the beginning of documentary evidence relating to the merits; they were typically supplemented with substantial subsequent filings.⁴⁰²⁸

For the habeas petition by Wali Mohammed Morafa, the government submitted to Judge Collyer *ex parte* evidence relating to recently identified documents.⁴⁰²⁹ The government provided Morafa's attorneys with what the government characterized as "robust substitutes for substantial portions of the *ex parte* information at issue" and argued that "those substitutes provide counsel with sufficient information to ensure Petitioner receives meaningful habeas review."⁴⁰³⁰ The new evidence was classified as top secret, but Morafa's attorneys were cleared only to see secret information.⁴⁰³¹

Judge Collyer determined that the *ex parte* evidence was inculpatory.⁴⁰³² She ordered the government to establish the adequacy of its substitutions.⁴⁰³³

The government's motion to reconsider the attorney's dismissal was denied. *Al Odah v. United States*, 606 F. Supp. 2d 141 (D.D.C. 2009) ("Respondents' Motion is based on a shockingly revisionist version of the events that transpired . . .").

4025. *Al Odah*, 608 F. Supp. 2d at 44–46.

4026. *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 3–4 (D.D.C. 2009); *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 29–30 (D.D.C. 2009).

4027. *Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d at 7–8; *Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d at 34.

4028. Interview with Judge Paul L. Friedman, Oct. 12, 2011.

4029. *Mousovi v. Obama*, 916 F. Supp. 2d 67, 69 (D.D.C. 2013); Order at 1, *Mousovi v. Obama*, No. 1:05-cv-1124 (D.D.C. Sept. 28, 2011), D.E. 343 [hereinafter *Morafa Order*]; Government Response at 1–3, *id.* (Jan. 21, 2011), D.E. 320 [hereinafter *Government Morafa Response*]; Notice, *id.* (Oct. 22, 2010), D.E. 317.

4030. Government Morafa Response, *supra* note 4029, at 2; see *Morafa Order*, *supra* note 4029, at 6.

4031. *Mousovi*, 916 F. Supp. 2d at 70.

4032. *Morafa Order*, *supra* note 4029, at 6.

On January 9, 2013, Judge Collyer determined that withholding from the detainee’s attorneys top-secret source information imposed

a minor detrimental impact on Mr. Morafa’s ability to contest the basis for his detention. However, the Court concludes that the incremental value to the Court of considering that evidence, in tandem with the exceptionally grave damage to the national security that could result from the unauthorized disclosure of Top Secret information outweighs the marginal impact of withholding the information in question.⁴⁰³⁴

The government, therefore, could “rely on Top Secret source-identifying information for which there is no adequate substitute and that cannot be released to Petitioner’s counsel, even if it might assist his petition.”⁴⁰³⁵

Morafa was transferred to the United Arab Emirates in 2017.⁴⁰³⁶

Appeals from the Combatant Status Review Tribunals

In 2006, detainees began to file appeals of their CSRT enemy-combatant designations. Although the detainees were not permitted access to counsel in the CSRT proceedings, and they were not granted access to classified evidence against them, their appellate attorneys were given access to complete CSRT records, including the classified evidence.⁴⁰³⁷

Internment Serial Numbers

The government assigned to each detainee an internment serial number (ISN).⁴⁰³⁸ For example, David Hicks was 002, Huzaifa Parhat was 320, and Omar Khadr was 766.⁴⁰³⁹ Originally, ISNs were classified as secret.⁴⁰⁴⁰ After a time, they became regarded as protected, which meant that they were

4033. *Id.* at 7–8.

4034. *Mousovi*, 916 F. Supp. 2d at 74 (citation, footnote, and quotation marks omitted).

4035. *Id.* at 68–69.

4036. Mohammed Transfer Notice, *supra* note 3742.

4037. *Parhat v. Gates*, 532 F.3d 834, 840 (D.C. Cir. 2008).

4038. *Abdah v. Obama*, 709 F. Supp. 2d 25, 27–28 n.2 (D.D.C. 2010).

4039. *E.g.*, ex. A, Government Motion to Dismiss, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Apr. 19, 2007), D.E. 224.

John Walker Lindh was ISN 001. See Bravin, *supra* note 3145, at 116; Cucullu, *supra* note 3174, at 67; David Leigh, *What Are These Files?*, *Guardian* (London), Apr. 25, 2011, at 2; Jesselyn Radack, *Traitor: The Whistleblower and the “American Taliban”* 37 (2012). See generally Chapter 7: American Taliban, *supra* page 146.

4040. *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010); Interview with Dep’t of Just. Litig. Sec. Grp. Staff, July 28, 2011.

afforded confidentiality approximately equivalent to social security numbers, but later they became neither classified nor protected.⁴⁰⁴¹

In 2005, while the ISNs were still classified, a navy lawyer sent the Center for Constitutional Rights a list of detainees' names and ISNs in a Valentine's Day card addressed to an attorney who had been seeking a list of names.⁴⁰⁴² Realizing that she should not have received this information that way, the attorney contacted the district court, and then classified information security officers retrieved the list.⁴⁰⁴³ The leaker was convicted of removing classified material, communicating classified information, violating a lawful general order, and conduct unbecoming an officer and a gentleman.⁴⁰⁴⁴ He was sentenced to six months in prison and dismissed from the navy.⁴⁰⁴⁵

Petitioner Statements

Judge Hogan ruled that the government could not easily withhold from the detainee petitioners themselves records of their own statements even if the records were classified.⁴⁰⁴⁶ Judge Hogan observed that it would be difficult for the government to "deny the materiality of statements that it has chosen to rely upon to justify a petitioner's detention."⁴⁰⁴⁷ Also, "the security risk from providing petitioners access to their own statements is not comparable to the risk from disclosing other classified information."⁴⁰⁴⁸ "At a minimum, the government cannot rely on a petitioner's statement if it does not timely provide the petitioner with a sufficient alternative to that statement."⁴⁰⁴⁹

4041. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011; see *Assoc. Press v. Dep't of Def.*, 462 F. Supp. 2d 573, 574 (S.D.N.Y. 2006) (noting the release of ISNs); *Assoc. Press v. Dep't of Def.*, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006) (noting, in an action under the Freedom of Information Act, that ISNs were redacted to protect detainees' privacy rather than to protect national security).

4042. *Diaz*, 69 M.J. at 130; see Tim Golden, *Naming Names at Gitmo*, N.Y. Times, Oct. 21, 2007, at 678; Wax, *supra* note 3154, at 169.

4043. *Diaz*, 69 M.J. at 131; see Golden, *supra* note 4042.

4044. *Diaz*, 69 M.J. at 129.

4045. *Id.*; see Golden, *supra* note 4042.

4046. *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d 17 (D.D.C. 2009).

4047. *Id.* at 25.

4048. *Id.* at 23.

4049. *Id.* at 25.

WikiLeaks

On April 24, 2011, news media posted on their websites information derived from several hundred classified files on Guantánamo Bay detainees.⁴⁰⁵⁰ Newspapers and National Public Radio's news programs ran stories on the documents, beginning on the following morning.⁴⁰⁵¹ The documents were leaked to WikiLeaks in 2010, and another source shared them with some news media, who in turn shared them with other news media.⁴⁰⁵²

The documents were mostly risk-assessment reports on detainees written from February 2002 through January 2009, and the classified information was classified as secret.⁴⁰⁵³ The *New York Times* and National Public Radio collaborated on an internet database that included leaked information about Guantánamo Bay detainees.⁴⁰⁵⁴

On December 3, 2010, and on April 25, 2011, classified information security officers notified the detainees' attorneys that because a leak of classified information does not render the information declassified the attorneys should continue to handle classified information on their clients in appropriate ways.⁴⁰⁵⁵

On April 27, 2011, Saifullah Paracha's attorney filed an emergency motion with Judge Friedman seeking assurance that he could view internet

4050. See Motion at 2, *Alhag v. Obama*, No. 1:05-cv-2199 (D.D.C. May 3, 2011), D.E. 341 [hereinafter *Alhag WikiLeaks Motion*]; Motion at 1–2 & n.2, *Paracha v. Obama*, No. 1:04-cv-2022 (D.D.C. Apr. 27, 2011), D.E. 362 [hereinafter *Paracha WikiLeaks Motion*].

4051. E.g., Peter Finn, *New Revelations on al-Qaeda's 9/11 Movements*, Wash. Post, Apr. 25, 2011, at A1; "High-Risk" Detainees Released from Guantanamo, Morning Edition (NPR radio broadcast Apr. 25, 2011), www.npr.org/2011/04/25/135697167/detainee-assessments-included-in-classified-documents; *Military Documents Detail Life at Guantanamo*, Morning Edition (NPR radio broadcast Apr. 25, 2011) [hereinafter *Military Documents*], www.npr.org/2011/04/25/135690218/military-documents-detail-life-at-guantanamo; Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1.

4052. See, e.g., *Military Documents*, *supra* note 4051 ("The Guantanamo files were leaked last year to the website WikiLeaks. An anonymous source obtained the documents from WikiLeaks and then passed them to the New York Times, and the newspaper shared them with us.").

4053. See Savage et al., *supra* note 4051.

4054. See *A Note to Readers*, N.Y. Times, Apr. 25, 2011, at A1.

4055. See Motion at 1, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Apr. 18, 2012), D.E. 279 [hereinafter *Faraj WikiLeaks Motion*]; ex. A, *id.*; *Alhag WikiLeaks Motion*, *supra* note 4050, at 2–3; *Paracha WikiLeaks Motion*, *supra* note 4050, at 3; see also John Hickman, *Selling Guantánamo* 216 (2013); Scott Shane, *Detainees' Lawyers Can't Click on Leaked Documents*, N.Y. Times, Apr. 27, 2011, at A1.

information on his client without repercussion, such as loss of his security clearance.⁴⁰⁵⁶ Judge Friedman denied the motion's emergency status.⁴⁰⁵⁷ Four days later, Abd al-Hakim Ghalib Ahmad Alhag's attorney filed a motion similar to the Paracha motion with Judge Kennedy, noting that a merits hearing in the case was scheduled for less than three weeks later.⁴⁰⁵⁸ Judge Kennedy canceled the merits hearing while he considered the motion.⁴⁰⁵⁹

On June 10, classified information security officers informed counsel that they could view on home and office computers classified information about their clients posted on WikiLeaks, but they could not "download, save, print, disseminate, or otherwise reproduce, maintain, or transport potentially classified information" derived from the internet.⁴⁰⁶⁰ They could, however, prepare unclassified discovery requests for purported government documents referred to by WikiLeaks so long as the requests identified the documents sought with particularity without revealing their contents.⁴⁰⁶¹ The government provided counsel with "purported detainee assessments posted on the WikiLeaks website" at the Crystal City facility.⁴⁰⁶²

The restrictions on access to WikiLeaks information did not apply to "secondary reporting such as news articles, blogs, transcripts of broadcasts, and the like. You may download, print, copy, or otherwise access, maintain, disseminate, and transport secondary reporting that discusses or refers to potentially classified information."⁴⁰⁶³ "You may not make any public or private statements revealing personal knowledge from nonpublic sources regarding the classified status of the information or disclosing that you had personal access to classified information confirming, contradict-

4056. *Paracha* WikiLeaks Motion, *supra* note 4050; see Scott Shane, *Guantánamo Detainee's Lawyer Seeks a Voice on WikiLeaks Documents*, N.Y. Times, Apr. 28, 2011, at A16.

4057. Opinion, *Paracha v. Obama*, No. 1:04-cv-2022 (D.D.C. Apr. 29, 2011), D.E. 364, 2011 WL 1639259.

4058. *Alhag* WikiLeaks Motion, *supra* note 4050.

4059. Docket Sheet, *Alhag v. Obama*, No. 1:05-cv-2199 (D.D.C. Nov. 10, 2005).

4060. Ex. A, Government Brief, *Paracha*, No. 1:04-cv-2022 (D.D.C. June 15, 2011) [hereinafter WikiLeaks Guidelines]; Government Motion at 1-2 & ex. A, *id.* (June 10, 2011); see Charlie Savage, *Lawyers for Detainees Allowed to See Leaked Files*, N.Y. Times, June 11, 2011, at A8.

4061. WikiLeaks Guidelines, *supra* note 4060.

4062. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 26, 2011; see Savage, *supra* note 4060.

4063. WikiLeaks Guidelines, *supra* note 4060.

ing, or otherwise relating to the information already in the public domain.”⁴⁰⁶⁴ “Although the U.S. Government has confirmed that purported detainee assessments were leaked to WikiLeaks, it has neither confirmed nor denied that individual reports are official government documents.”⁴⁰⁶⁵

On April 18, 2012, Abdulhadi Omer Mahmoud Faraj’s attorney filed a motion with Judge Friedman for release from some restrictions on the use of classified information about Faraj on WikiLeaks.⁴⁰⁶⁶ Because some of the WikiLeaks information about Faraj cast Faraj in a bad light, the attorney wanted to be able to discuss the information with Faraj and possibly rebut the information in public for the sake of Faraj’s family in Syria and Faraj’s possible transfer from Guantánamo Bay.⁴⁰⁶⁷ Faraj was transferred to Uruguay in December 2014.⁴⁰⁶⁸

Videotapes of Force-Feeding

In a challenge to the force-feeding of a hunger-striking detainee, the government produced as discovery twenty-eight videotapes of the procedure, and the detainee’s attorneys filed the videotapes in the court record, under seal, to support the challenge.⁴⁰⁶⁹ Judge Kessler granted the news media’s motion to unseal the videotapes once the identities of persons other than the detainee had been redacted.⁴⁰⁷⁰ Judge Kessler rejected the government’s argument that courts have no discretion over or review of public access to parts of court records that the government has designated to be classified.⁴⁰⁷¹

⁴⁰⁶⁴. *Id.*

⁴⁰⁶⁵. *Id.*

⁴⁰⁶⁶. *Faraj* WikiLeaks Motion, *supra* note 4055; see Notice of Classified Reply Brief, *Faraj v. Obama*, No. 1:05-cv-1490 (D.D.C. Aug. 6, 2012), D.E. 289.

⁴⁰⁶⁷. *Faraj* WikiLeaks Motion, *supra* note 4055, at 2, 4–7.

⁴⁰⁶⁸. *Faraj* Transfer Notice, *supra* note 3702; see Order, *Faraj*, No. 1:05-cv-1490 (D.D.C. June 24, 2015), D.E. 330 (dismissing the habeas petition as moot).

⁴⁰⁶⁹. *Dhiab v. Trump*, 852 F.3d 1087, 1089 & 1090 n.4 (D.C. Cir. 2017); *Dhiab v. Obama*, 70 F. Supp. 3d 486, 490–92 (D.D.C. 2014); see Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. June 20, 2014), D.E. 262 (granting permission to file the videotapes). See generally Alka Pradhan, *First, Do No Harm*, in *Obama’s Guantánamo*, *supra* note 3200, at 108.

⁴⁰⁷⁰. *Dhiab*, 70 F. Supp. 3d 486; Order, *Dhiab*, No. 1:05-cv-1457 (D.D.C. Oct. 3, 2014), D.E. 348; *Dhiab*, 852 F.3d at 1090; see Pradhan, *supra* note 4069, at 116–18; Carol Rosenberg, *Judge Orders Release of Videos Showing Detainee’s Tube Feedings*, *Miami Herald*, Oct. 4, 2014, at 3A; Charlie Savage, *Judge Rules on Disclosing Guantánamo Video*, *N.Y. Times*, Oct. 4, 2014, at A10.

⁴⁰⁷¹. *Dhiab*, 70 F. Supp. 3d at 494.

The court of appeals denied jurisdiction over an appeal filed before final determinations of video redactions.⁴⁰⁷² Noting the government's ever-increasing estimates of how long it would take to redact the video recordings, Judge Kessler ordered the government to adhere to a recent estimate, which would result in partial compliance with her production order by August 31, 2015.⁴⁰⁷³ On October 27, Judge Kessler denied a motion for reconsideration,⁴⁰⁷⁴ and she denied a motion for redaction mitigation on December 22.⁴⁰⁷⁵ On March 1, 2017, the court of appeals held that because the videos were classified, news media had no right to see them.⁴⁰⁷⁶

A Classified Footnote

Counsel for Saifullah Paracha challenged the government's withholding exculpatory information that it decided counsel did not need to know.⁴⁰⁷⁷ On May 24, 2018, Judge Friedman ruled that the government could not withhold such exculpatory evidence without court permission.⁴⁰⁷⁸

One year later, Judge Friedman ordered the government to provide cleared counsel with an opportunity to inspect in a secure facility an unredacted footnote that "discuss[es] petitioner by name and appear[s] to show

4072. *Dhiab v. Obama*, 787 F.3d 563 (D.C. Cir. 2015); *Dhiab*, 852 F.3d at 1090; see Transcript at 19–20, *Dhiab*, No. 1:05-cv-1457 (D.D.C. July 9, 2015, filed Mar. 23, 2016), D.E. 427 ("the Government's appeal was as frivolous an appeal as I have ever seen").

4073. Order, *Dhiab*, No. 1:05-cv-1457 (D.D.C. July 10, 2015), D.E. 387; see Eric Tucker, *Judge Orders U.S. to Prep Some Force-Feeding Videos*, Miami Herald, July 11, 2015, at 3A.

4074. *Dhiab v. Obama*, 141 F. Supp. 3d 23 (D.D.C. 2015); see Michael Doyle, *Judge Sticks to Video Decision*, Miami Herald, Oct. 28, 2015, at 6A; Spencer S. Hsu, *Judge Again Orders Release of Guantanamo Feeding Videos*, Wash. Post, Oct. 28, 2015, at A11; Zoe Tillman, *Judge Again Orders Release of Gitmo Videos*, Nat'l L.J., Nov. 2, 2015, at 22.

4075. *Dhiab v. Obama*, 151 F. Supp. 3d 28 (D.D.C. 2015).

4076. *Dhiab*, 852 F.3d at 1090; see Charlie Savage, *Court Upholds Secrecy of Guantanamo Videos*, N.Y. Times, Apr. 1, 2017, at A17; see also *Appeals Court Has Concerns Over Possible Video Release*, Mimi Herald, Sept. 9, 2016, at 12A.

4077. *Paracha v. Trump*, 314 F. Supp. 3d 27, 28 (D.D.C. 2018); see Government Response at 2, *Paracha v. Trump*, No. 1:04-cv-2022 (D.D.C. Apr. 3, 2018), D.E. 487 ("arguably exculpatory material that for reasons of national security or sensitivity, the relevant classification authorities have determined that Petitioner's counsel does not have a sufficient need to know to outweigh the risks inherent in disclosure even to Petitioner's counsel who hold a security clearance").

4078. *Paracha*, 314 F. Supp. 3d at 29.

the government considering whether and how he can be detained” in a 2014 Senate report on torture.⁴⁰⁷⁹

Reviewing Classified Materials

All judges reviewing Guantánamo Bay habeas cases received special safes to store classified materials.⁴⁰⁸⁰ Although for most petitioners cleared attorneys were granted access only to secret information, the government presented judges with additional top-secret information.⁴⁰⁸¹ In general, judges were permitted to keep secret information in their chambers’ safes, but some top-secret information was delivered to them for private review as needed.⁴⁰⁸²

Many judges were concerned about surrendering control of classified materials they reviewed. Judge Hogan, for example, dated and initialed all classified documents that he reviewed.⁴⁰⁸³

In a 2021 letter to the court of appeals, the government rebutted a concern that detainee information might be deemed too sensitive to disclose to a judge: “Near the end of argument, government counsel was asked about whether exculpatory information could be deemed too sensitive to be disclosed to the district judge even in an *ex parte* setting in a Guantanamo habeas case. To clarify any confusion, in this matter, the answer is no.”⁴⁰⁸⁴

Indeed, in Asadullah Haroon Gul’s habeas case, Judge Mehta reviewed in camera potentially exculpatory evidence and determined that disclosure of portions of nine documents to habeas counsel was not required.⁴⁰⁸⁵ For five, the exculpatory information had been otherwise adequately disclosed.⁴⁰⁸⁶ For four documents, the withheld information was particularly sensitive, not heavily relied upon, and otherwise disclosed in part to the

4079. Opinion, *Paracha*, No. 1:04-cv-2022 (D.D.C. June 12, 2019), D.E. 517; see SSCI Executive Summary, *supra* note 3413.

4080. Interview with Judge Paul L. Friedman, Oct. 12, 2011; Interview with Judge Thomas F. Hogan, Jan. 12, 2010.

4081. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

4082. Interview with Judge Paul L. Friedman, Oct. 12, 2011; Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

4083. Interview with Judge Thomas F. Hogan, Jan. 12, 2010.

4084. Letter, *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. Sept. 30, 2021).

4085. Opinion, *Haroon Gul v. Biden*, No. 1:16-cv-1462 (D.D.C. Nov. 9, 2021), D.E. 143.

4086. *Id.* at 3.

detainee's attorneys.⁴⁰⁸⁷ Significantly, the potentially exculpatory evidence was disclosed to Judge Mehta.⁴⁰⁸⁸

Challenge: Sensitive Unclassified Information

Although the executive branch determines what information is classified, the courts determine what part of a judicial record is otherwise protected or sealed.⁴⁰⁸⁹

Judge Hogan's 2008 protective order provided for the government's designation of unclassified information in returns and other court documents as protected:

Should government counsel in these consolidated cases wish to have the Court deem any document or information "protected," government counsel shall disclose the information to qualified counsel for petitioners—i.e., counsel who have satisfied the necessary prerequisites of this Protective Order for the viewing of protected information—and attempt to reach an agreement about the designation of the information prior to filing a motion with the Court. Petitioners' counsel shall treat such disclosed information as protected unless and until the Court rules that the information should not be designated as protected.⁴⁰⁹⁰

On June 30, 2009, Judge Huvelle overruled the government's designation of some information as protected.⁴⁰⁹¹ Judge Huvelle ruled by sealed order after a closed proceeding.⁴⁰⁹² In a heavily redacted published opinion, the court of appeals reversed Judge Huvelle's ruling,⁴⁰⁹³ but it was very difficult to determine from the public record why the government should or should not have been entitled to designate the information as protected. The Supreme Court denied a sealed petition for certiorari.⁴⁰⁹⁴

4087. *Id.* at 3–4.

4088. *Id.* at 4.

4089. *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007); see Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* (Federal Judicial Center 2010).

4090. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 151 (D.D.C. 2008) (¶ 34).

4091. *Ameziane v. Obama*, 620 F.3d 1, 3 (D.C. Cir. 2010); Docket Sheet, *Ameziane v. Bush*, No. 1:05-cv-392 (D.D.C. Feb. 24, 2005) [hereinafter *Ameziane* Docket Sheet].

4092. *Ameziane* Docket Sheet, *supra* note 4091.

4093. *Ameziane*, 620 F.3d 1; see *Appeals Court Upholds Secrecy in Algerian's Case*, *Miami Herald*, Oct. 8, 2010; *Guantanamo Detainee Loses Bid to Have US Release Information to the Public*, *Bos. Globe*, Oct. 9, 2010, at 2 (reporting that the detainee had been waterboarded).

4094. *Ameziane v. Obama*, 562 U.S. 1302 (2011).

The matter became clear in 2012 when the government informed the court of appeals that its opinion could be released unredacted.⁴⁰⁹⁵ Djamel Ameziane had moved to unseal his approval for transfer so that he could negotiate directly with countries of his choice for transfer.⁴⁰⁹⁶ In order to prevent detainees from interfering with the government's negotiations, the government sought to keep transfer approvals secret.⁴⁰⁹⁷ In 2012, "the [potential] diplomatic and national security harms [were] no longer as acute."⁴⁰⁹⁸

On September 4, 2009, Judge Huvelle again overruled the government's designation of some information as protected, and her ruling did not receive appellate review.⁴⁰⁹⁹ Respecting the government's statement of material facts in Mohammed Jawad's case, the government sought to designate as protected the dates of interrogations so that a reader could not induce the identities of interrogators. Judge Huvelle, noting that the government did not regard this information as classified, determined that dates for Jawad's interrogations were already public so those dates could not be regarded as protected and only dates of the month, but not month and year, needed to be protected for interrogations of others.⁴¹⁰⁰ "The public has a legitimate interest in gaining access to the month and year of the reports containing inculpatory statements to determine whether those statements are reliable (*i.e.*, whether the interrogation occurred a substantial time after the event in question)."⁴¹⁰¹

Between the government's sealed motion to designate the dates protected and Jawad's sealed opposition to that motion, Judge Huvelle issued an order suppressing Jawad's out-of-court statements as the products of torture.⁴¹⁰² Before she issued her ruling on whether the dates could be pro-

4095. Motion to Unseal, *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. Sept. 21, 2012) [hereinafter *Ameziane Motion to Unseal*].

Judge Huvelle's two-page order is unsealed in the appellate record. Appendix at 86–87, *id.* (Aug. 6, 2009) ("The government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected, or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries.").

4096. *Ameziane v. Obama*, 699 F.3d 488, 490 (D.C. Cir. 2010).

4097. *Id.*

4098. *Ameziane Motion to Unseal*, *supra* note 4095, at 3–4.

4099. *Bacha v. Obama*, 653 F. Supp. 2d 32 (D.D.C. 2009).

4100. *Id.* at 34.

4101. *Id.* at 35.

4102. Jawad Suppression Order, *supra* note 3508; Docket Sheet, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. July 17, 2009).

tected, the government decided to no longer regard Jawad detainable,⁴¹⁰³ Judge Huvelle granted the writ,⁴¹⁰⁴ and Jawad was released.⁴¹⁰⁵ On December 30, 2010, Judge Huvelle approved redactions in the public filing of Jawad's return,⁴¹⁰⁶ which was filed on March 15, 2011.⁴¹⁰⁷

On May 12, 2011, Judge Hogan further clarified under what circumstances the government could designate unclassified information as protected from public disclosure:

Pursuant to [the] first step, the government must identify the categories of information it seeks to protect and provide a valid basis for withholding information in those categories. To satisfy this step, the government must proffer a specific, tailored rationale for protecting a general category of information. To be clear, the rationale must be tailored to the category for which protection is sought but need not necessarily be tailored to a particular case. It will not suffice for the government to identify broad categories for which the rationale for protection is brief, spare and generic. On the other hand, the government's rationale need not be so specific that it precludes any generalized categorization. Furthermore, the narrower the category for which the government seeks protection, the more likely the government's rationale will be sufficiently tailored.

With respect to [the] second step, the Court must determine whether the specific information the government has designated for protection properly falls within the category identified in the first step. . . . [D]etermining whether the information falls within the protected category requires evaluating whether the rationale for protection asserted in the first step is implicated by the specific information the government has designated for protection in the second step. . . . Thus, determining whether designated information falls within a protected category requires the Court to evaluate whether the rationale for the category applies to the designated information.

. . . [I]f the government satisfies [this] two-step test . . . , the district court is required to defer to the government's assessment of the harm to foreign relations and national security that would result from disclosure of the information the government seeks to protect.⁴¹⁰⁸

4103. Jawad Nondetainability Notice, *supra* note 3510.

4104. Jawad Writ, *supra* note 3459.

4105. *See Detainee Released*, *supra* note 3459.

4106. Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. Dec. 30, 2010), D.E. 498.

4107. Order, *id.* (Mar. 15, 2011), D.E. 504.

4108. *In re Guantanamo Bay Detainee Litig.*, 787 F. Supp. 2d 5, 13–14 (D.D.C. 2011) (citations and quotation marks omitted).

Challenge: Classified Arguments

Judge Green's November 2004 protective order specified that documents that might contain classified information were to be filed with the classified information security officers, at which time they would be deemed filed with the court; the security officers would arrange for a classification review, and redacted versions of the documents, if redaction was necessary, would be filed in the public record.⁴¹⁰⁹ A protective order issued by Judge Hogan in 2008, two months after he accepted pretrial consolidation of the habeas petitions, provided for similar procedures.⁴¹¹⁰

Sometimes inferences about classified filings can be drawn from unclassified filings. To ask Judge Kennedy to accept new evidence following the judge's grant of habeas corpus relief to the Russian detainee Mingazov, the government filed a classified motion.⁴¹¹¹ Mingazov's attorneys filed a classified opposition.⁴¹¹² The government filed a classified motion with the court of appeals seeking abeyance pending resolution of the motion before Judge Kennedy.⁴¹¹³ Mingazov's attorneys filed an unclassified—and unsuccessful—opposition, which disclosed that the motion before Judge Kennedy was a request to present additional evidence, without disclosing what the evidence was.⁴¹¹⁴ The government's reply brief on the abeyance motion also was unclassified.⁴¹¹⁵

In March 2011, the government filed notices of top-secret ex parte filings in ten habeas cases for high-value detainees,⁴¹¹⁶ a category used for

4109. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 182 (D.D.C. 2004); see Gorman, *supra* note 3272, at 14.

4110. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. 2008).

4111. Notice of Filing, *Al-Harbi v. Obama*, No. 1:05-cv-2479 (D.D.C. Dec. 15, 2010), D.E. 358.

4112. Notice of Filing, *id.* (Jan. 31, 2011), D.E. 360.

4113. Docket Sheet, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. June 28, 2010).

4114. D.C. Cir. *Mingazov* Opposition Brief, *supra* note 3617; see *Mingazov* Abeyance Order, *supra* note 3618 (granting abeyance).

4115. Reply Brief, *Mingazov*, No. 10-5217 (D.C. Cir. Jan. 3, 2011).

4116. Notice of Filing, *Bin Lep v. Obama*, No. 1:09-cv-31 (D.D.C. Apr. 8, 2011), D.E. 69; Notice of Filing, *Hambali v. Obama*, No. 1:10-cv-407 (D.D.C. Mar. 24, 2011), D.E. 28; Notice of Filing, *Al-Baluchi v. Obama*, No. 1:08-cv-2083 (D.D.C. Mar. 24, 2011), D.E. 112; Notice of Filing, *Al-Nashiri v. Obama*, No. 1:08-cv-1207 (D.D.C. Mar. 24, 2011), D.E. 185; Notice of Filing, *Bin al-Shibh v. Obama*, No. 1:06-cv-1725 (D.D.C. Mar. 24, 2011), D.E. 134; Notice of Filing, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (D.D.C. Mar. 23, 2011), D.E. 33; Notice of Filing, *Rahim v. Obama*, No. 1:09-cv-1385 (D.D.C. Mar. 23, 2011), D.E. 83; Notice of Filing, *Mohammad v. Obama*, No. 1:09-cv-873 (D.D.C. Mar. 23, 2011), D.E. 82; Notice of Filing, *Husayn v. Obama*, No. 1:08-cv-1360 (D.D.C. Mar. 23,

central figures in terrorism planning.⁴¹¹⁷ Judges Kotelly,⁴¹¹⁸ Walton,⁴¹¹⁹ Bates,⁴¹²⁰ Friedman,⁴¹²¹ and Roberts⁴¹²² referred the matter to Judge Sullivan, to whom two of the cases had been assigned.⁴¹²³ The briefing in this matter was classified, but the filings of papers were noted on the public record.⁴¹²⁴ On May 9, 2012, Judge Sullivan entered a notice in each case

2011), D.E. 272; Notice of Filing, *Khan v. Obama*, No. 1:06-cv-1690 (D.D.C. Mar. 23, 2011), D.E. 270.

4117. See Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. Times, Jan. 20, 2011, at A1 (defining high-value detainee as “a senior terrorism suspect who was held for a time in secret C.I.A. prisons and subjected to what the Bush administration called ‘enhanced interrogation techniques’”); see also Fox, *supra* note 3269 (reporting that high-value detainees are so designated “because of their previous CIA detention”).

On September 11, 2014, Judge Beryl A. Howell denied a request under the Freedom of Information Act for cost information on the housing of high-value detainees. *Rosenberg v. U.S. Dep’t of Def.*, 67 F. Supp. 3d 219 (D.D.C. 2014); see Mark Seibel, *Judge: U.S. Doesn’t Have to Give Cost*, Miami Herald, Sept. 12, 2014, at 3A.

4118. Order, *Mohammad*, No. 1:09-cv-873 (D.D.C. Apr. 15, 2011), D.E. 84.

4119. Order, *Khan*, No. 1:06-cv-1690 (D.D.C. Apr. 15, 2011), D.E. 272.

4120. Order, *Hambali*, No. 1:10-cv-407 (D.D.C. Apr. 18, 2011), D.E. 31; Order, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Apr. 18, 2011), D.E. 71.

4121. Order, *Rahim*, No. 1:09-cv-1385 (D.D.C. Apr. 18, 2011), D.E. 87; Order, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Apr. 18, 2011), D.E. 113.

4122. Order, *Husayn v. Obama*, No. 1:08-cv-1360 (D.D.C. Apr. 18, 2011), D.E. 279; Order, *Al-Nashiri v. Obama*, No. 1:08-cv-1207 (D.D.C. Apr. 18, 2011), D.E. 188.

4123. Docket Sheet, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (D.D.C. Aug. 3, 2009) [hereinafter *Abdulrazzaq* Docket Sheet]; Docket Sheet, *Bin al-Shibh v. Obama*, No. 1:06-cv-1725 (D.D.C. Aug. 30, 2005) [hereinafter *Bin al-Shibh* Docket Sheet]; see Opinion at 2, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Nov. 1, 2012), D.E. 199 [hereinafter *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion], 2012 WL 5382730.

4124. The briefing concluded with government replies filed on June 15 and 16, 2011.

1. Majid Khan: Government Reply Notice, *Khan*, No. 1:06-cv-1690 (D.D.C. June 16, 2011), D.E. 276; Petitioner’s Response Notice, *id.* (June 2, 2011), D.E. 275; Strike Reply Notice, *id.* (Apr. 29, 2011), D.E. 274; Strike Opposition Notice, *id.* (Apr. 20, 2011), D.E. 273; Petitioner’s Motion to Strike, *id.* (Apr. 8, 2011), D.E. 271.
2. Ramzi Bin al-Shibh: Government Reply Notice, *Bin al-Shibh*, No. 1:06-cv-1725 (D.D.C. June 15, 2011), D.E. 139; Petitioner’s Response Notice, *id.* (June 7, 2011), D.E. 138; Extension Opposition Notice, *id.* (Apr. 8, 2011), D.E. 136; Extension Motion, *id.* (Apr. 1, 2011), D.E. 135.
3. Abd al-Rahim Hussain Mohammed al-Nashiri: Government Reply Notice, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. June 15, 2011), D.E. 191; Petitioner’s Joinder, *id.* (May 31, 2011), D.E. 190; Petitioner’s Response Notice, *id.* (May 31, 2011), D.E. 189; Extension Motion, *id.* (Apr. 8, 2011), D.E. 187.

that he had issued a classified opinion on the matter.⁴¹²⁵ A November 1, 2012, denial of one detainee's motion to reconsider discloses that the classified opinion was issued on May 7 and that the opinion granted a government motion with additional conditions.⁴¹²⁶

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4. Zayn al-Abidin Muhammad Husayn (Abu Zubaydah): Government Reply, *Husayn*, No. 1:08-cv-1360 (D.D.C. June 15, 2011), D.E. 282; Strike Opposition Notice, *id.* (Apr. 12, 2011), D.E. 278; Petitioner's Motion to Strike, *id.* (Apr. 12, 2011), D.E. 277. Note that the petitioner's response to the original filing does not appear to be docketed.
 5. Ammar al-Baluchi: Government Reply Notice, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. June 15, 2011), D.E. 114.
 6. Mohammed Nazir Bin Lep: Government Reply Notice, *Bin Lep*, No. 1:09-cv-31 (D.D.C. June 16, 2011), D.E. 74; Petitioner's Response Notice, *id.* (June 2, 2011), D.E. 73; Extension Opposition, *id.* (Apr. 8, 2011), D.E. 70; Extension Motion, *id.* (Apr. 6, 2011), D.E. 67.
 7. Mustafa Frarj Mohammad: Government Reply Notice, *Mohammad v. Obama*, No. 1:09-cv-873 (D.D.C. June 15, 2011), D.E. 92; Petitioner's Response Notice, *id.* (May 31, 2011), D.E. 91; Extension Opposition Notice, *id.* (Apr. 20, 2011), D.E. 85; Extension Motion, *id.* (Apr. 8, 2011), D.E. 83.
 8. Muhammed Rahim: Government Reply Notice, *Rahim*, No. 1:09-cv-1385 (D.D.C. June 15, 2011), D.E. 96; Petitioner's Joinder Notice, *id.* (May 31, 2011), D.E. 93; Petitioner's Response Notice, *id.* (May 31, 2011), D.E. 93; Disclosure Opposition Notice, *id.* (May 5, 2011), D.E. 91; Motion to Disclose Notice, *id.* (May 2, 2011), D.E. 90; Extension Notice, *id.* (Apr. 20, 2011), D.E. 89; Extension Motion, *id.* (Apr. 18, 2011), D.E. 88; Opposition Notice, *id.* (Apr. 8, 2011), D.E. 86; Extension Notice, *id.* (Apr. 8, 2011), D.E. 85; Extension Motion, *id.* (Mar. 30, 2011), D.E. 84.
 9. Nashwana al-Ramer Abdulrazzaq: Government Reply Notice, *Abdulrazzaq*, No. 1:09-cv-1462 (D.D.C. June 15, 2011), D.E. 37; Extension Reconsideration Motion Notice, *id.* (Apr. 13, 2011), D.E. 36; Extension Motion, *id.* (Apr. 5, 2011), D.E. 35.
 10. Riduan Bin Isomuddin Hambali: Government Filing Notice, *Hambali*, No. 1:10-cv-407 (D.D.C. June 15, 2011), D.E. 33; Government Notice of Opposition to Motion to Enlarge Time, *id.* (Apr. 12, 2011), D.E. 30; Motion to Enlarge Time, *id.* (Apr. 11, 2011), D.E. 29 (motion for an extension of time to consult with the detainee and counsel for other detainees).

4125. *Hambali* Docket Sheet, *supra* note 3847; *Abdulrazzaq* Docket Sheet, *supra* note 4123; Docket Sheet, *Rahim*, No. 1:09-cv-1385 (D.D.C. July 27, 2009); Docket Sheet, *Mohammad*, No. 1:09-cv-873 (D.D.C. May 11, 2009); Docket Sheet, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Jan. 8, 2009); Docket Sheet, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Dec. 2, 2008); *Husayn* Docket Sheet, *supra* note 3411; *Al-Nashiri* Docket Sheet, *supra* note 3781; *Bin al-Shibh* Docket Sheet, *supra* note 4123; *Khan* Docket Sheet, *supra* note 3655.

4126. *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion, *supra* note 4123.

Both habeas counsel⁴¹²⁷ and the government⁴¹²⁸ filed classified briefs in a motion to reconsider Judge Lamberth's order denying leave to depose Ali H. Soufan, who interrogated the petitioner when Soufan worked for the FBI and who published a book that discussed the interrogation.⁴¹²⁹ The book was published in September 2011, and counsel moved on October 21 for leave to depose Soufan.⁴¹³⁰ Judge Lamberth, to whom the case had been assigned after Judge Kennedy's disability retirement,⁴¹³¹ ruled the discovery motion untimely on January 23, 2012.⁴¹³²

Classification reviews of habeas filings—so that cleared or redacted versions could appear on the public record—required a considerable amount of effort. In 2013, Judge Lamberth informed the government in an order concerning one case that the amount of effort was not an excuse for excessive delays in providing the public with records of the court's proceedings.

The Court is troubled by the government's apparent lack of urgency in issuing public versions of classified materials filed in Guantanamo proceedings. In this case in particular, the government has failed to produce public versions of the petitioner's traverse and hearsay briefs, which were filed on July 31, 2009. The government argues that because petitioner's habeas petition was dismissed and he has been released from the Guantanamo Bay Detention Facility, there is no urgent need to produce these documents. However, this ignores the inherent public interest in Guantanamo litigation generally, and in the facts related to the release of this detainee in particular. Moreover, the practice of publicly disclosing court documents is deeply rooted in our system of government. See *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978). The public interest served by releasing court filings includes allowing "citizens . . . to keep a watchful eye on the workings of public agencies." *Id.* (citations omitted).

4127. Notice of Filing, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. Mar. 30, 2012), D.E. 999 (reply brief); Notice of Filing, *id.* (Mar. 7, 2012), D.E. 995 (motion brief).

4128. Notice of Filing, *id.* (Mar. 26, 2012), D.E. 998 (opposition brief).

4129. Order at 1, *id.* (Jan. 23, 2012), D.E. 993 [hereinafter *Abdah* Deposition Order]; Government Opposition to Deposition at 2, *id.* (Nov. 7, 2011), D.E. 989; see Soufan, *supra* note 3200, at 470–71, 536 (referring to the petitioner as detainee number 37 and al-Batar).

4130. Deposition Motion, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 21, 2011), D.E. 985; *Abdah* Deposition Order, *supra* note 4129, at 1.

4131. Reassignment, *Abdah*, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2011), D.E. 991; FJC Biographical Directory, *supra* note 3190 (noting that Judge Kennedy "[a]ssumed senior status due to certified disability on November 18, 2011").

Adnan Farhan Abdul Latif's petition was reassigned to Judge Roberts as a new case. Docket Sheet, *Latif v. Obama*, No. 1:11-cv-2294 (D.D.C. Dec. 23, 2011).

4132. *Abdah* Deposition Order, *supra* note 4129.

More importantly, it is the judiciary and not the executive that determines whether the public can access and inspect court records. *See Bismullah v. Gates*, 501 F.3d [178,] 188 [(D.C. Cir. 2007)] (citations omitted). Here, petitioner's documents have remained essentially under seal for approximately 42 months, and the Court sees no reason to write the government a blank check and allow them to produce the documents at some unknown point in the future.⁴¹³³

To help judges with classified materials, chambers staff persons must have security clearances. Some judges permitted some staff members to forgo the clearance process and the special responsibility that came with handling classified material. Also, not all of the court's court reporters agreed to seek security clearances.

When classified materials are not in use, they must be stored in combination safes, and the combinations must be memorized.

Challenge: Closed Proceedings and Remote Participation

A very important part of managing a Guantánamo Bay habeas case was determining when to close proceedings for purposes of national security.⁴¹³⁴

Judges often tried to conduct as much of the proceeding as possible in open session. An important challenge during an open session was keeping track of what information was classified and therefore not something to be discussed openly. Especially difficult to remember as classified were details, such as the date the detainee was arrested, that had a classified status not intuitively obvious.⁴¹³⁵ Complicating the burden for judges was the fact that sometimes their unredacted copies of documents, such as factual returns, did not clearly show what parts of the documents were classified.⁴¹³⁶

Transitioning from an open session to a closed session always took several minutes, in part because the reporter had to set up special equipment to transcribe classified proceedings.⁴¹³⁷

All persons present at classified proceedings must have security clearances. If a judge's courtroom clerk was not cleared, then a cleared law clerk

4133. *Barre v. Obama*, 932 F. Supp. 2d 5, 13–14 (D.D.C. 2013) (retaining original citation conventions).

4134. Interview with Judge John D. Bates, Oct. 15, 2009.

4135. Interview with Judge Ellen Segal Huvelle, June 13, 2011.

4136. Transcript at 3–4, *Al-Halmandy v. Bush*, No. 1:05-cv-2385 (D.D.C. June 19, 2009, filed Aug. 27, 2009), D.E. 346; Interview with Judge Ellen Segal Huvelle, June 13, 2011.

4137. Interview with Judge Gladys Kessler, May 31, 2011.

could act as courtroom clerk.⁴¹³⁸ Classified materials used by habeas attorneys in court had to be transported by cleared couriers from the secure facility in Crystal City to the courthouse.⁴¹³⁹

In cooperation with Attorney General Michael Mukasey, the court established a direct satellite connection with Guantánamo Bay.⁴¹⁴⁰ The court identified one courtroom to fit with a secure connection to the satellite for Guantánamo Bay hearings.⁴¹⁴¹

Obtaining detainees' participation from Guantánamo Bay presented the court with one of its most substantial logistical challenges.⁴¹⁴² Timing of the proceeding had to be coordinated with, among other things, the timing of flights to Guantánamo Bay.⁴¹⁴³

If the detainee did not testify, then classified information would not be transmitted between the courtroom and Guantánamo Bay, because the detainee was not permitted access to classified information.⁴¹⁴⁴ If, however, a detainee testified, either as the petitioner or as a witness, then the detainee's testimony was presumptively classified.⁴¹⁴⁵ The testimony was transmitted by secure audiovisual link, which required FBI security specialists at both locations.⁴¹⁴⁶

The first few habeas hearings set the mold for how future hearings were conducted. By the time of the hearing, the government had identified

4138. Interview with Judge Reggie B. Walton, May 23, 2011.

4139. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4140. Interview with Judge Royce C. Lamberth, May 13, 2011.

Detainees were not brought to court for proceedings so that they would not be able to pursue asylum rights. *Id.* Proceedings were not held at Guantánamo Bay, because the judges did not believe that they could hear cases outside of the United States. *Id.*

4141. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011; Interview with Judge Reggie B. Walton, May 23, 2011; Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4142. Interview with Judge Gladys Kessler, May 31, 2011.

4143. *Id.*

4144. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4145. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011; Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011; *see* Winke, *supra* note 3330, at 356.

4146. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

The video link between the courthouse and Guantánamo Bay was established pursuant to a letter request by Chief Judge Lamberth on September 18, 2008, to the FBI's Technical Response Unit. *Id.*, Sept. 26, 2011.

Judge Collyer observed that because the video presentation of the detainee's testimony did not include a close-up, she could not observe the detainee's facial demeanor nearly as well as she could that of a witness testifying in the courtroom. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

a specific number of issues, and it needed to prevail on any one issue to justify detention, so the structure of the hearing usually tracked the enumerated case-specific issues.⁴¹⁴⁷

On November 6, 2008, Judge Leon began the first evidentiary hearing on the government's evidence supporting a Guantánamo Bay detention.⁴¹⁴⁸ Attorneys for both sides made opening statements in open court.⁴¹⁴⁹ The detainees were to listen to proceedings by a live audio feed, but because of technical difficulties they were only able to listen on the next day to an audio recording of the proceeding.⁴¹⁵⁰ They received a written Arabic translation soon afterward.⁴¹⁵¹

Lakhdar Boumediene recalled the hearing in a 2017 memoir:

I was huddled at a small table with Mustafa, Mohamed, Hadj, and Belkacem Bensyah, in a room where I had once been interrogated. One of our lawyers, a man named Paul Winke, and his interpreter were also there. The sixth member of the so-called “Algerian Six,” Saber Lahmar, wasn’t allowed in the room. He was being punished for something, I don’t know what.

A speakerphone had been set up on the table so we could listen to the proceedings in Judge Leon’s courtroom in Washington, D.C., where our trial was getting underway. We were sitting on hard chairs with our feet chained to the floor.

...
... [N]o sound came forth from the speakerphone. We sat there for four hours, chained, in total silence.

That evening, Paul told us that there had been some sort of “technical difficulty”—I wasn’t sure whether to believe that—and that Judge Leon had been furious when he found out about it, so furious that he had a courier fly an audiotape of the court session to Guantanamo that night. We gathered in the same room the next day and listened to it.⁴¹⁵²

4147. Interview with Judge Paul L. Friedman, Oct. 12, 2011.

4148. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008); see William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantánamo Detainees*, N.Y. Times, Nov. 7, 2008, at A21; Glaberson & Becker, *supra* note 3329.

4149. *Boumediene*, 579 F. Supp. 2d at 193; see Fleming, *supra* note 3327, at 63–64; Glaberson, *supra* note 4148.

4150. *Boumediene*, 579 F. Supp. 2d at 193; see Fleming, *supra* note 3327, at 63–64; Glaberson, *supra* note 4148; Winke, *supra* note 3330, at 353–55 (describing the petitioners’ reactions to the recording).

4151. *Boumediene*, 579 F. Supp. 2d at 193.

4152. *Boumediene & Idir*, *supra* note 3268, at 185–86.

On the afternoon of the same day, Judge Leon continued the proceeding in closed session because classified evidence would be presented and discussed.⁴¹⁵³ During the next few days of the proceeding, two detainees testified by audiovisual feed from Guantánamo Bay.⁴¹⁵⁴ Their attorneys provided them with shirts and ties; one was able to testify in English.⁴¹⁵⁵ Closing arguments on November 14 were also held in closed session, from which the detainees were excluded, because much of the argument was classified.⁴¹⁵⁶ Judge Leon arranged for the detainees to listen as he delivered his decisions from the bench.⁴¹⁵⁷

The 2008 and 2009 hearings for al-Alwi, Sliti, al-Bihani, and Hammamy, whose habeas petitions were denied, and for el-Gharani and al-Janko, whose petitions were granted, were conducted similarly.⁴¹⁵⁸ Judge Leon began with public opening statements.⁴¹⁵⁹ The hearings continued in closed session because classified information would be discussed.⁴¹⁶⁰ Sliti

4153. *Boumediene*, 579 F. Supp. 2d at 193; see Fleming, *supra* note 3327, at 64.

4154. *Id.*; see also *Boumediene & Idir*, *supra* note 3268, at 191–93; Winke, *supra* note 3330, at 356–57.

4155. See Winke, *supra* note 3330, at 355.

4156. *Boumediene*, 579 F. Supp. 2d at 193.

4157. See Sheryl Gay Stolberg, “Passionate” Judge Has Record of Wrestling with Thorny Issues, and the U.S. Government, N.Y. Times, Dec. 17, 2013, at A17.

As *Boumediene* recalled,

Again we were gathered around the conference table. Again our feet were chained to the floor. This time, there were no “technical difficulties.” We could all hear Judge Leon’s voice, and his interpreter’s, crackling over the speakerphone. We gazed at the pone and at each other, none of us saying a word.

...

I was impressed. Once the Supreme Court had required Judge Leon to consider the evidence, he had done so fairly and seriously.

Boumediene & Idir, *supra* note 3268, at 187, 189.

4158. *Al-Ginco v. Obama*, 626 F. Supp. 2d 123, 125 (D.D.C. 2009) (hearing May 28–29, 2009); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 241 (D.D.C. 2009) (March 12, 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 36 (D.D.C. 2009) (January 15–16, 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 145 (D.D.C. 2009) (December 17–18, 2008); *Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008) (December 16–17, 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46, 47 (D.D.C. 2008) (December 18, 2008).

4159. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47.

4160. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47; see Glaberson, *supra* note 4148.

elected not to participate,⁴¹⁶¹ but al-Alwi, el-Gharani, al-Bihani, Hammamy, and al-Janko listened to live translations of the public opening statements by telephone from Guantánamo Bay.⁴¹⁶²

Fawzi Khalid Abdullah Fahad al-Odah,⁴¹⁶³ al-Rabiah,⁴¹⁶⁴ and al-Kandari⁴¹⁶⁵ also listened to the public opening statements in their habeas merits proceedings.

At a March 31, 2009, habeas hearing, Judge Huvelle began with a closed session on classified and other evidence and then held a closed session that did not include classified information but was sealed at the request of the petitioner, who expressed fear of reprisals for his cooperation with the government.⁴¹⁶⁶ He listened to the unclassified session by telephone from Guantánamo Bay.⁴¹⁶⁷

On June 18, 2009, Judge Kessler ruled that al-Adahi's testimony from Guantánamo Bay at his merits hearing would be in open court.⁴¹⁶⁸ "Petitioner will not be giving any classified testimony on direct or re-direct because he has access to none, and the Government will not be able to cross-examine him on any classified testimony."⁴¹⁶⁹ On the following day, however, Judge Kessler rescinded the order, but she did order the government to preserve a videotape of al-Adahi's testimony.⁴¹⁷⁰ A four-day hearing began on June 22, 2009.⁴¹⁷¹ Al-Adahi testified on June 23 and 24.⁴¹⁷² A redacted transcript was filed publicly on June 26.⁴¹⁷³ Redacted were the identities of the interpreter and an informant detainee.⁴¹⁷⁴ On July 23, the government filed a notice that it did not videotape al-Adahi's testimony as or-

4161. *Sliti*, 592 F. Supp. 2d at 47.

4162. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25.

4163. *Al Odah v. United States*, 648 F. Supp. 2d 1, 3 (D.D.C. 2009).

4164. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 n.1 (D.D.C. 2009).

4165. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

4166. *Basardh v. Bush*, 612 F. Supp. 2d 30, 31 (D.D.C. 2009).

4167. *Id.*

4168. Order, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. June 18, 2009), D.E. 420, 2009 WL 1743758.

4169. *Id.*

4170. Order, *id.* (June 19, 2009), D.E. 423, 2009 WL 1764540.

4171. *Al-Adahi Habeas Grant*, *supra* note 3493, at 4; *Al-Adahi Docket Sheet*, *supra* note 3570.

4172. Transcript, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. June 23 and 24, 2009, filed June 26, 2009), D.E. 431.

4173. *Id.*

4174. *Id.*

dered,⁴¹⁷⁵ and Judge Kessler found the government in contempt on December 10.⁴¹⁷⁶ On January 8, 2010, the government promised more reliable videotaping procedures.⁴¹⁷⁷

Judge Kessler's hearing on September 3, 2009, on Bin Mohammed's successful writ petition began with unclassified opening arguments and continued in closed session.⁴¹⁷⁸ Bin Mohammed chose not to listen to the opening arguments or testify.⁴¹⁷⁹

Judge Walton began Abd al-Rahman Abdu Abu al-Ghayth Sulayman's unsuccessful merits hearing on May 3, 2010.⁴¹⁸⁰ The detainee elected to testify and to listen to the unclassified portions of the hearing.⁴¹⁸¹ One of Sulayman's attorneys and an interpreter were in Guantánamo Bay; another Sulayman attorney was in the courtroom.⁴¹⁸² Overcoming a few difficulties with the transmission feed, the four-day hearing concluded successfully.⁴¹⁸³

Proceedings on Bin Mohammed's ill-fated injunction against his transfer to Algeria were largely under seal.⁴¹⁸⁴ On the day it decided the case, the court of appeals issued an order to show cause why its reversal of Judge Kessler's injunction should not be released publicly.⁴¹⁸⁵ One week later, the order was unsealed.⁴¹⁸⁶ Eleven weeks later, the government filed redacted copies of its appellate briefs, including a redacted copy of Judge Kessler's injunction opinion,⁴¹⁸⁷ but the opinion remains sealed in the district court file.⁴¹⁸⁸ Redactions appear to be protected but not classified.

4175. Notice, *id.* (July 23, 2009), D.E. 446.

4176. Order, *id.* (Dec. 10, 2009), D.E. 509.

4177. Government Brief, *id.* (Jan. 8, 2010), D.E. 535.

4178. Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 40 (D.D.C. 2009); Docket Sheet, Bin Mohammed v. Bush, No. 1:05-cv-1347 (D.D.C. July 6, 2005) [hereinafter D.D.C. *Bin Mohammed* Docket Sheet].

4179. *Bin Mohammed*, 689 F. Supp. 2d at 40.

4180. Sulayman v. Obama, 729 F. Supp. 2d 26, 29 (D.D.C. 2010).

4181. Notice, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Feb. 26, 2010), D.E. 1585.

4182. Interview with Judge Reggie B. Walton, May 23, 2011.

4183. *Id.*

4184. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 4178.

4185. Order, Bin Mohammed v. Obama, No. 10-5218 (D.C. Cir. July 8, 2010).

4186. *Bin Mohammed* Injunction Reversal, *supra* note 3540.

4187. Docket Sheet, *Bin Mohammed*, No. 10-5218 (D.C. Cir. June 30, 2010).

4188. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 4178.

Proceedings on Naji's efforts to avoid transfer to Algeria also were sealed; sealed district court filings appear unsealed in the court of appeals' case file.⁴¹⁸⁹

Judge Kessler denied the government's motion to close a hearing on a challenge to the force-feeding of a hunger striker.⁴¹⁹⁰ She concluded that the government's concern about the hearing's involving classified and other protected information could be addressed by bifurcating the hearing.⁴¹⁹¹ In addition to open-court evidence and arguments, Judge Kessler used another courtroom for closed-session portions of the three-day proceeding.⁴¹⁹²

In a 2018 hearing on requested relief from the shutting down of opportunities for transfer by President Trump, Judge Hogan promised that detainees would receive a record of the hearing:

I'd had a request of oral accessibility by the petitioners themselves in Guantanamo that just recently came in. It was impractical to arrange that in such short notice to have all the petitioners moved and brought to a room where there was ability to hear these arguments. The Government has indicated and I have agreed that they will be having either a playback of this argument for them each to be played or they will have a transcript of these arguments made available to them properly translated for their consideration so that they can understand the proceedings we're in today.⁴¹⁹³

Classified information security officers typically attended open proceedings at which there was a possibility that someone would inadvertently say something that was classified. The security officers would interrupt if it looked like someone was about to say something improper for an open session. If something slipped out, it was common to redact it from the transcript.

4189. *Naji* Government Response, *supra* note 3544.

4190. *Dhiab v. Obama*, 70 F. Supp. 3d 465 (D.D.C. 2014); see Pradhan, *supra* note 4069, at 116; Carol Rosenberg, *U.S. Attorney Defends Forced-Feedings*, Miami Herald, Oct. 7, 2014, at 3A; Matt Zapotosky, *Detainee at Guantánamo Bay Seeks Changes in Force-Feeding*, Wash. Post, Oct. 7, 2014, at A7.

4191. *Dhiab*, 70 F. Supp. 3d at 467–68.

4192. Transcript at 66–67, *Dhiab v. Obama*, 1:05-cv-1457 (D.D.C. Oct. 8, 2014, filed Nov. 14, 2014), D.E. 372; Transcript at 81–83, *id.* (Oct. 7, 2014, filed Nov. 14, 2014), D.E. 371; Transcript at 5–8, 95–96, 199–203, *id.* (Oct. 6, 2014, filed Nov. 14, 2014), D.E. 370.

4193. July 11, 2018, *Anam* Transcript, *supra* note 3819, at 6.

Challenge: Classified Orders and Opinions

If an order or opinion might contain classified information, it can be submitted to a classified information security officer, who can forward it to members of the intelligence community for a walled-off classification review.⁴¹⁹⁴ The court can either issue a potentially classified opinion and serve it on cleared attorneys for the parties, with a classification review to follow, or the court can submit the opinion to a classification review before it is issued.⁴¹⁹⁵ Persons reviewing an opinion before it has been issued must be walled off from persons working with those representing the government in court.⁴¹⁹⁶

Habeas attorneys generally had to travel to the secure facility in Crystal City to review unredacted classified opinions and other classified filings.⁴¹⁹⁷

The District Court

Each judge presiding over a Guantánamo Bay habeas petition was provided with a safe for storing classified materials and a secure laptop computer, which was stored in the safe.⁴¹⁹⁸ It was determined to be too expensive to

4194. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

In addition to the Office of the Director of National Intelligence, www.odni.gov, the intelligence community has been understood to have sixteen members.

The U.S. intelligence community, or IC, consists of sixteen agencies and organizations within the Executive Branch: Air Force Intelligence, Army Intelligence, the Central Intelligence Agency, Coast Guard Intelligence, the Defense Intelligence Agency, the Department of Energy's intelligence arm, the Department of Homeland Security's intelligence arm, the Department of State's Bureau of Intelligence and Research, the Department of the Treasury's intelligence arm, the Drug Enforcement Administration, the Federal Bureau of Investigation, Marine Corps Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the National Security Agency, and Navy Intelligence. The Office of the Director of National Intelligence is the seventeenth member of the intelligence community; and some consider the Department of Defense another member; but by executive order, the IC consists of sixteen agencies.

Dana Priest & William M. Arkin, *Top Secret America* xx n.3 (2011); see 1 David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* 20–28 (3d ed. 2019); see also Peter Lance, *Triple Cross* 69 & n.* (2006) (identifying as the big five the FBI, the CIA, the DIA, the NSA, and the U.S. State Department's Bureau of Intelligence and Research).

A seventeenth member is the U.S. Space Force, www.intelligence.gov/how-the-ic-works/our-organizations/1041-space-force, which was created in December 2019.

4195. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4196. *Id.*

4197. *Id.*

4198. Interview with Judge Royce C. Lamberth, May 13, 2011.

provide each judge with a classified printer, so one was established on each floor of the district court.⁴¹⁹⁹ Most of the judges' law clerks did not have security clearances before these cases were filed, but law clerks for all of the judges hearing these cases obtained clearances.⁴²⁰⁰

Some law clerks were cleared to work with SCI, but access to SCI requires an executive-branch decision that the person can be read into the specific SCI program.⁴²⁰¹ Judge Friedman, for example, had one law clerk read into SCI for Guantánamo Bay cases and another law clerk read into SCI for another case.⁴²⁰²

Judge Green's January 31, 2005, opinion resolving the government's motion to dismiss the coordinated cases included some classified information.⁴²⁰³ An unredacted opinion was served on the attorneys for both sides and preserved for the court of appeals, and a redacted version was filed in the public record.⁴²⁰⁴ In cooperation with classified information security officers, Judge Green and her staff blacked out redactions electronically, printed the opinion on a secure printer, and then filed a scanned image of the opinion in the court's electronic case file.⁴²⁰⁵ This procedure prevented persons from unredacting the electronic redactions.⁴²⁰⁶ Judge Green denied a government attorney's request for an advance copy so that government attorneys could tell her what to redact.⁴²⁰⁷

Judge Leon's denials of Sliti, al-Alwi, al-Bihani, and Hammamy's habeas petitions and his granting of el-Gharani and al-Janko's habeas petitions were memorialized in both published opinions and more complete classified opinions.⁴²⁰⁸

4199. *Id.*

4200. *Id.*

4201. Interview with Judge Paul L. Friedman, Oct. 12, 2011.

4202. *Id.*

4203. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (noting in the public version, "Material redacted by court"); Interview with Judge Joyce Hens Green, Sept. 21, 2011.

4204. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

4205. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 26, 2011.

4206. Interview with Judge Joyce Hens Green, Sept. 21, 2011.

4207. *Id.*

4208. *Al-Ginco v. Obama*, 626 F. Supp. 2d 123, 125 (D.D.C. 2009); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 241 (D.D.C. 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 145 (D.D.C. 2009); *Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46, 47 (D.D.C. 2008).

In granting Ahmed's habeas corpus petition, Judge Kessler cited Judge Leon's classified *El-Gharani* opinion.⁴²⁰⁹

Six months after Judge Leon ruled that the government had presented sufficient evidence to detain Belkacem Bensayah at Guantánamo Bay, Bensayah filed a motion under Federal Rule of Civil Procedure 60(b)(2) for relief from the judgment based on newly discovered evidence.⁴²¹⁰ The parties filed their briefing on this motion with the classified information security officer and filed public notices of the filings with the clerk.⁴²¹¹ Within three months, Judge Leon denied the motion in a classified memorandum order filed with the classified information security officer.⁴²¹² The case became moot when Bensayah was transferred to Algeria.⁴²¹³

Judge Kotelly's opinion ordering al-Rabiah's release was issued on September 17, 2009, but it contained classified information so it was not released publicly.⁴²¹⁴ A redacted version, containing 519 redactions in sixty-five pages, was released on September 25.⁴²¹⁵ The redacted version of her opinion denying al-Kandari's petition, containing eighty-two redactions in sixty-four pages, was released on September 29, 2010, two weeks after the full classified opinion was issued.⁴²¹⁶ Her other opinions resolving habeas petitions also were put in the public record in redacted form.⁴²¹⁷

Judges Huvelle,⁴²¹⁸ Kessler,⁴²¹⁹ Robertson,⁴²²⁰ Urbina,⁴²²¹ Kennedy,⁴²²² Bates,⁴²²³ Leon,⁴²²⁴ Friedman,⁴²²⁵ Walton,⁴²²⁶ and Lamberth⁴²²⁷ also resolved

4209. Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. 2009).

4210. Notice, Boumediene v. Obama, No. 1:04-cv-1166 (D.D.C. May 26, 2009), D.E. 291.

4211. *Boumediene* Docket Sheet, *supra* note 3179.

4212. *Id.*

4213. Bensayah Transfer Notice, *supra* note 3336; Voluntary Dismissal, Bensayah v. Obama, No. 09-5376 (D.C. Cir. Mar. 20, 2014).

4214. *Al-Odah* Docket Sheet, *supra* note 3157.

4215. Redacted Opinion, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 25, 2009), D.E. 645.

4216. Redacted Opinion, *id.* (Sept. 29, 2010), D.E. 707.

4217. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009) (redacted opinion filed seven days after the classified opinion); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009) (six days).

4218. *Basardh v. Bush*, 612 F. Supp. 2d 30 (D.D.C. 2009) (redacted opinion filed two days after the classified opinion); *see also* *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010) (denying a motion to suppress a confession; redacted opinion filed sixteen days after the classified opinion).

4219. *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010) (redacted opinion filed fourteen days after the classified opinion); *Al-Adahi v. Obama*, 692 F. Supp. 2d 85 (D.D.C. 2010) (fourteen days); *Bin Mohammed v. Obama*, 689 F. Supp. 2d 38 (D.D.C.

habeas petitions with opinions containing classified information, so the opinions were filed with a classified information security officer and redacted versions were filed in the public record later.

Judge Collyer denied Sufyian Barhoumi's petition from the bench without a written opinion.⁴²²⁸ A redacted transcript of her ruling was filed four months later.⁴²²⁹ Judge Collyer often issued rulings in the Guantánamo cases from the bench because of the many logistical hurdles required when an opinion was written later.⁴²³⁰ All of the work had to be done on a

2009) (twenty-seven days); *Al-Adahi* Habeas Grant, *supra* note 3493 (four days; redactions included the names of copetitioners and the detainee's brother-in-law, whose identities were otherwise public); *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009) (one day).

4220. *Khalifh* Opinion, *supra* note 3573 (redacted opinion filed seventeen days after the classified opinion); *Salahi v. Obama*, 710 F. Supp. 2d 1 (D.D.C. 2010) (eighteen days); *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (seven days).

4221. *Khairkhwa v. Obama*, 793 F. Supp. 2d 1 (D.D.C. 2011) (redacted opinion filed twenty-three days after the classified opinion); *Alsabri v. Obama*, 764 F. Supp. 2d 60 (D.D.C. 2011) (fifteen days); *Hatim v. Obama*, 677 F. Supp. 2d 1 (D.D.C. 2009) (twenty days).

4222. *Hentif v. Obama*, 810 F. Supp. 2d 33 (D.D.C. 2011) (redacted opinion filed fourteen days after the classified opinion); *Mingazov* Opinion, *supra* note 3615 (eighty days); *D.D.C. Latif* Opinion, *supra* note 3603 (twenty-six days); *Abdah v. Obama*, 717 F. Supp. 2d 21 (D.D.C. 2010) (fifteen days); *Abdah v. Obama*, 709 F. Supp. 2d 25 (D.D.C. 2010) (twenty-six days).

4223. *Khan v. Obama*, 741 F. Supp. 2d 1 (D.D.C. 2010) (redacted opinion filed thirty-two days after the classified opinion).

4224. *Ali v. Obama*, 770 F. Supp. 2d 1 (D.D.C. 2011) (redacted opinion filed seventeen days after the classified opinion was issued).

4225. *Almerfed v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (redacted opinion filed fifteen days after the classified opinion).

4226. *Bostan v. Obama*, 821 F. Supp. 2d 80 (D.D.C. 2011) (redacted opinion filed nineteen days after the classified opinion); *Hussein v. Obama*, 821 F. Supp. 2d 67 (D.D.C. 2011) (fifteen days); *Al-Bihani Writ Denial*, *supra* note 3575 (fifteen days); *Sulayman v. Obama*, 729 F. Supp. 2d 26 (D.D.C. 2010) (fifteen days).

4227. *Al-Hela Writ Denial*, *supra* note 3828 (forty-four days); *Hentif v. Obama*, 883 F. Supp. 2d 97 (D.D.C. 2012) (denying a motion for reconsideration, redacted opinion filed fourteen days after the classified opinion); *Al Warafi v. Obama*, 821 F. Supp. 2d 47 (D.D.C. 2011) (fifty-three days).

4228. *Barhoumi* Order, *supra* note 3527; *see Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010). *Barhoumi* Transcript, *supra* note 3527.

4229. *Barhoumi* Transcript, *supra* note 3527 (transcribing a September 3, 2009, proceeding); Docket Sheet, *Shafiq v. Bush*, No. 1:05-cv-1506 (D.D.C. July 28, 2005) (noting the filing on January 4, 2010).

4230. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

special laptop computer, which had to be stored with all classified documents in a safe, and none of the work could be done at home.⁴²³¹ Her 2014 opinion denying Shaker Aamer's release for medical reasons was submitted for classification review before it was released publicly,⁴²³² as was her 2016 opinion denying the writ to Ali Shah Mousovi.⁴²³³

Judge Hogan denied al-Madhwani's petition with an oral ruling on December 14, 2009.⁴²³⁴ On January 6, 2010, Judge Hogan filed an unclassified opinion supporting his ruling, "part of which was classified."⁴²³⁵ On April 28, Judge Hogan denied al-Madhwani's motion for reconsideration,⁴²³⁶ filing a classified opinion with classified information security officers.⁴²³⁷ Although the docket sheet promised a later filing of a redacted opinion, it does not appear to reflect such a filing.

On February 24, 2010, Judge Kennedy resolved a habeas petition with an opinion filed with a security officer, and he filed nearly two months later an opinion without apparent redactions.⁴²³⁸ A redacted opinion had been filed on March 16, but it had to be withdrawn because it was insufficiently redacted:

A day after his March 16 order was filed on the court's electronic docket, Kennedy's opinion vanished. Weeks later, a new ruling appeared in its place. While it reached the same conclusion, eight pages of material had been removed, including key passages in which Kennedy dismantled the government's case against Uthman.

...

The creation of the additional opinion stemmed from a mishap inside the Justice Department: Kennedy's first opinion was accidentally

4231. *Id.*

4232. *Aamer v. Obama*, 58 F. Supp. 3d 16 (D.D.C. 2014) (redacted opinion filed twenty-three days after the classified opinion was issued).

4233. Opinion, *Mousovi v. Obama*, No. 1:05-cv-1124 (D.D.C. June 8, 2016, filed July 11, 2016), D.E. 443, 2016 WL 3771240 (redacted opinion filed thirty-three days after the opinion was issued).

4234. *Anam* Docket Sheet, *supra* note 3179.

4235. *Anam v. Obama*, 696 F. Supp. 2d 1, 3 (D.D.C. 2010).

4236. Order, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010), D.E. 822.

Al-Madhwani was transferred to Oman on January 16, 2017. Al-Madhwani Transfer Notice, *supra* note 3569.

4237. *Anam* Docket Sheet, *supra* note 3179.

4238. *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010) (public opinion filed fifty-six days after the original opinion), *rev'd sub nom.* *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011).

cleared for public release before government agencies had blacked out all the classified information it cited.⁴²³⁹

Judge Lamberth resolved a habeas petition with an opinion that was marked secret and filed with a security officer, but it appears that no redactions were necessary.⁴²⁴⁰ Judges commonly strove to craft opinions that required as few redactions as possible.⁴²⁴¹

Judge Leon denied Obaydullah's petition on October 19, 2010, filing a public opinion⁴²⁴² and promising a more complete classified opinion in the coming weeks.⁴²⁴³ On November 24, Judge Leon filed a classified opinion with the court security officers; a redacted version was filed in the public record on March 23, 2011.⁴²⁴⁴

Judge Bates granted Mohammed Nazir Bin Lep an injunction against certain military-commission activity in 2019 in an opinion issued on September 23 and filed in the public docket, heavily redacted, on November 1.⁴²⁴⁵ Bin Lep submitted a renewed habeas petition and an injunction motion on September 18 to classified information security officers.⁴²⁴⁶ Although a postclassification-review version of the opinion appears in the public record, postclassification-review versions of the petition and the motion do not.⁴²⁴⁷

Redacted opinions by Judge Mehta resolving Asadullah Haroon Gul's habeas case were filed publicly twenty-two days after the classified opinions were issued.⁴²⁴⁸

4239. Linzer, *supra* note 3505.

4240. *Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (public opinion filed fifteen days after the classified opinion).

Judge Lamberth tried to tell the public as much as he could about high-visibility cases and tried to avoid the speculation that results from redactions. Interview with Judge Royce C. Lamberth, May 13, 2011.

4241. Interview with Judge Ellen Segal Huvelle, June 13, 2011.

4242. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010).

4243. *Id.* at 346.

4244. Opinion, *Obaydullah v. Obama*, No. 1:08-cv-1173 (D.D.C. Mar. 23, 2011), D.E. 117.

4245. Redacted Sept. 23, 2019, *Bin Lep* Opinion, *supra* note 3840.

4246. Notice, *Bin Lep v. Trump*, No. 1:19-cv-2799 (D.D.C. Sept. 18, 2019), D.E. 1.

4247. Docket Sheet, *id.* (Sept. 18, 2019).

4248. *Gul v. Biden*, ___ F. Supp. 3d ___, ___, 2021 WL 5217352 (D.D.C. 2021) (p.1 of opinion filed at D.D.C. No. 1:16-cv-1462, D.E. 141) (redacted); Redacted *Haroon Gul* End-of-Hostilities Habeas Opinion, *supra* note 3856.

The Court of Appeals

Many of the opinions resolving appeals in these cases contained classified information, so redacted opinions were filed in the public record, sometimes on the same day and sometimes a few days later.⁴²⁴⁹ Sometimes a classification review determined that the opinion could be publicly released in full.⁴²⁵⁰

One of these opinions was released in redacted form twenty-six days after the classified opinion was issued⁴²⁵¹ and then reissued in less redacted form nearly six months later,⁴²⁵² upon the government's motion⁴²⁵³ with the detainee's support,⁴²⁵⁴ because some of the originally redacted information had been declassified "in connection with ongoing proceedings" in the detainee's petition for a Supreme Court writ of certiorari.⁴²⁵⁵

On July 22, 2011, the court of appeals filed a sealed opinion reviewing an April 9, 2010, sealed order by Judge Hogan concerning former detainees.⁴²⁵⁶ After sealed briefing, the Supreme Court denied certiorari.⁴²⁵⁷

4249. *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012) (redacted opinion filed seven days after the classified opinion); *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir. 2012) (eleven days); *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) (twenty-six days), *reissued*, 677 F.3d 1175 (D.C. Cir. 2012) (reissued in less redacted form after some material had been declassified while a petition for Supreme Court certiorari was pending); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (same day); *Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (seven days); *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (three days); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (eleven days); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010) (same day); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (same day).

4250. *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012) (opinion issued under seal on April 27, 2012, and publicly on May 3, 2012); *see* Government Response, *Alsabri v. Obama*, No. 11-5081 (D.C. Cir. May 2, 2012) (confirming that the opinion contained no classified information).

In another case, an order was filed initially under seal with an order to show cause why it should not be unsealed, and the order was unsealed seven days later. *Bin Mohammed Injunction Reversal*, *supra* note 3540.

4251. *Latif*, 666 F.3d 746.

4252. *Latif*, 677 F.3d 1175 (unredacting references to an interrogation report).

4253. Government Motion, *Latif v. Obama*, No. 10-5319 (D.C. Cir. Apr. 24, 2012) [hereinafter D.C. Cir. *Latif* Government Motion].

4254. Petitioner Support, *id.* (Apr. 25, 2012) ("In supporting the government's motion, Latif does not concede that any of the retained redactions are proper.").

4255. D.C. Cir. *Latif* Government Motion, *supra* note 4253; *see* Docket Sheet, *Latif v. Obama*, No. 11-1027 (U.S. Oct. 14, 2011).

4256. Docket Sheet, *El-Falesteny v. Obama*, No. 10-5180 (D.C. Cir. June 3, 2010); *see* Former Guantánamo Detainees Docket Sheet, *supra* note 3319; Docket Sheet, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Dec. 13, 2005).

Redactions from appellate opinions usually were blacked out in the public opinion and represented by “[redacted]” in West’s publication of the opinions. This meant that although the West opinion would not show how much material was redacted, the version of the opinion in the case file would show whether each redaction was the size of a word, a phrase, a paragraph, or a page. On September 6, 2011, an opinion by Judge Merrick B. Garland indicated redactions a different way.⁴²⁵⁸ Redactions in this opinion were indicated similarly to how they are indicated in West’s published opinions, except that the redactions were numbered from “[Redaction 1]” to “[Redaction 11].”⁴²⁵⁹ A separate classified appendix, filed under seal, specified what was redacted.⁴²⁶⁰

A 2010 opinion affirming denial of habeas corpus relief contained classified information.⁴²⁶¹ The court shaded the material it thought was classified and ordered the government to show cause why any other parts of the opinion should also be redacted.⁴²⁶² The government identified four additional parts of the opinion for redaction.⁴²⁶³ The show-cause order also stated, “no person may disclose, receive, or use the opinion, or this order and attached judgment, for any purpose other than that of responding to this order.”⁴²⁶⁴

The government asked the court to modify its order so that it could cite the court’s new precedent in a draft brief in another case.⁴²⁶⁵ The government also asked the court to adopt a protective order: “this Court should order the Government to provide a public, unclassified version of

4257. *El-Falesteny v. Obama*, 567 U.S. 929 (2012); Docket Sheet, *El-Falesteny v. Obama*, No. 11-9344 (U.S. Mar. 19, 2010).

4258. *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011) (affirming the denial of habeas corpus relief).

Judge Garland retired from the bench on March 10, 2021, to become President Biden’s attorney general. FJC Biographical Directory, *supra* note 3190; see Katie Benner, *Garland Is Confirmed as Attorney General, Backed by 70 Senators*, N.Y. Times, Mar. 11, 2021.

4259. *Khan*, 655 F.3d at 22–23, 25, 30, 32 & nn.2–3.

4260. *Id.* at 21 n.1.

4261. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010).

4262. Order, *Barhoumi v. Obama*, No. 09-5383 (D.C. Cir. June 11, 2010) [hereinafter *Barhoumi Show-Cause Order*].

The court followed a similar procedure for a 2011 petition. Order, *Latif v. Obama*, No. 10-5319 (D.C. Cir. Nov. 9, 2011), 2011 WL 5508892.

4263. Government Response at 2, *Barhoumi*, No. 09-5383 (D.C. Cir. June 17, 2010).

4264. *Barhoumi Show-Cause Order*, *supra* note 4262.

4265. Government Motion, *Barhoumi*, No. 09-5383 (D.C. Cir. June 22, 2010).

the opinion within a specific time period, but the handling and distribution of the classified opinion will otherwise be controlled by the governing protective order.”⁴²⁶⁶

The panel granted the government’s request as to the case before the panel and referred the general request to the full court.⁴²⁶⁷ The full court decided not to adopt a general policy:

ORDERED that the practices suggested by the government remain in the discretion of the merits panel assigned to each case. The court denies the government’s requests to adopt a court-wide policy against certain restrictions on the government’s use of classified opinions and a court-wide policy regarding classification review and preparation of redacted opinions and judgments in all Guantanamo habeas appeals.⁴²⁶⁸

On November 5, 2013, the court of appeals held that the time it took to prepare an unclassified redacted version of an opinion resolving the writ petition did not toll the time deadline for a notice of appeal.⁴²⁶⁹ The court recognized that “counsel cannot determine until a redacted version is released what may be discussed with the client, who does not have a security clearance to examine classified materials,” but the court observed that that was not the case in the appeal it heard.⁴²⁷⁰ The event triggering the time to notice an appeal was the July 27, 2012, docketing of Judge Lamberth’s denial of a motion to reconsider Judge Kennedy’s August 1, 2011, denial of the writ.⁴²⁷¹ Although a redacted version of Judge Lamberth’s opinion was not docketed until October 8, 2012, a redacted version of Judge Kennedy’s opinion had been available since September 15, 2011.⁴²⁷² The court also observed that the detainee could have sought an extension of time for up to thirty days for good cause or could have filed a protective notice of appeal.⁴²⁷³

Challenge: Interpreters

To communicate with their clients, the detainees’ attorneys typically needed to find interpreters who had or could obtain security clearances.

4266. *Id.* at 4.

4267. Order, *id.* (June 22, 2010).

4268. Order, *id.* (Nov. 17, 2010).

4269. *Hentif v. Obama*, 733 F.3d 1243 (D.C. Cir. 2013).

4270. *Id.* at 1249.

4271. *Id.* at 1245, 1250.

4272. *Id.* at 1245.

4273. *Id.* at 1250.

... The vast majority of prisoners at Guantánamo do not speak English. They speak Pashto, Dari, Russian, Farsi, Arabic, and other languages. Therefore, in order to communicate with clients, lawyers must bring interpreters with them to Guantánamo.

These interpreters are nothing short of courageous. ... They submitted themselves to thorough background checks in order to obtain the necessary security clearances to travel to Guantánamo. They asked employers for permission to take off work, days at a time, for trips to Guantánamo. They explained to loved ones, including small children, why they would be away from home. In fact, because there is such a shortage of security-cleared interpreters, they devote even more time to Guantánamo trips than the attorneys do.⁴²⁷⁴

Interpreters were also needed for court proceedings in which the detainees participated. An effective proceeding required one of the detainee's attorneys to be in Cuba, with an interpreter, and another of the detainee's attorneys to be in court.⁴²⁷⁵ Often, the detainee's attorneys and the government also had interpreters in court.⁴²⁷⁶ Attempting a proceeding with only an interpreter in court worked very badly, because it was difficult for participants to stop talking while the interpreter told the detainee what was said.⁴²⁷⁷

Challenge: Mental and Physical Health During Detention

The court's jurisdiction over detainees' medical conditions depends on the nexus between medical issues and the pursuit of habeas relief.

Detainees' health could become an issue in a variety of ways.⁴²⁷⁸ Some detainees had health issues before they arrived at Guantánamo Bay. Some detainees developed health issues at Guantánamo Bay. Some detainees recovered from health issues at Guantánamo Bay and argued that earlier statements by them were compromised by earlier ill health.⁴²⁷⁹ As the de-

4274. Carolyn M. Welshhans, *Heroes in Any Language*, in *The Guantánamo Lawyers*, *supra* note 3154, at 103, 103–04.

4275. Interview with Judge Gladys Kessler, May 31, 2011.

4276. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

If the proceeding included more than one interpreter, occasionally an interpreter would object to another interpreter's translation. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011 (noting that, in her experience, the interpreters were always able to finally agree on a translation).

4277. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 28, 2011.

4278. *See, e.g.*, Kadidal, *supra* note 3998 (describing the mental illness of an unnamed detainee).

4279. Interview with Judge Rosemary M. Collyer, Sept. 20, 2011.

tainees aged, the military enhanced medical resources, because Congress forbade transfer of the detainees out of Guantánamo Bay, even for medical care.⁴²⁸⁰ A FOIA action by the *New York Times*, which sought legal analyses of how health care that was unavailable at Guantánamo Bay would be given to detainees who could not be transferred for medical care elsewhere, settled with the production of a document and payment of \$1,400 in attorney fees to the *Times*.⁴²⁸¹

Attorneys for Tariq Ali Abdullah Ahmed Ba Odah asked the court to hold petition proceedings in abeyance during the detainee's hunger strike, because the strike interfered with the detainee's ability to communicate with counsel.⁴²⁸² Ba Odah was transferred to Saudi Arabia on April 16, 2016.⁴²⁸³

Medical Evaluation and Treatment

In 2004, Judge Bates denied a motion by the detainee Khadr for an independent medical evaluation.⁴²⁸⁴ Khadr was captured as a juvenile in Kabul in 2002.⁴²⁸⁵ Judge Bates determined that his mental competency was not legally an issue because he did not face criminal charges, and Judge Bates declined to interfere with conditions of detention at Guantánamo Bay.⁴²⁸⁶ Later, Judge Bates denied Khadr a preliminary injunction against torture because Khadr's attorneys could not show that torture was imminent.⁴²⁸⁷

4280. See Carol Rosenberg, *For Aging Captives, Cardiac Healthcare Will Come to Them*, Miami Herald, Sept. 29, 2012, at 1A; Carol Rosenberg, *Southern Command Leasing MRI to Study Brain of Captive*, Miami Herald, July 15, 2015, at 3A; Carol Rosenberg, *Two Years After Judge's Order, Guantánamo Still Has No MRI*, Miami Herald, Apr. 21, 2017, at 11A; Savage, *supra* note 3697.

4281. Stipulated Order, *N.Y. Times Co. v. U.S. Dep't of Def.*, No. 1:14-cv-3593 (S.D.N.Y. Sept. 8, 2014), D.E. 9; see Complaint, *id.* (May 20, 2014), D.E. 2.

4282. Status Report, *Odah v. Obama*, No. 1:06-cv-1668 (D.D.C. Jan. 7, 2013), D.E. 357; see Omar Farah, *Nourishing Resistance*, in *Obama's Guantánamo*, *supra* note 3200, at 119, 120 (according to Ba Odah's attorney, "Tariq has not eaten—not voluntarily at least—since February 2007.").

4283. *Al-Badah* Transfer Notice, *supra* note 3766; see Ehrenfreund, *supra* note 3766; Savage, *supra* note 3766.

4284. *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

4285. *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K.*, 344 F. Supp. 2d at 49.

4286. *O.K.*, 344 F. Supp. 2d at 48, 54; see also Opinion, *Al-Ghizzawi v. Bush*, No. 1:05-cv-2378 (Oct. 2, 2006), D.E. 47, 2006 WL 2844781 (denying a similar medical care motion).

4287. *O.K. v. Bush*, 377 F. Supp. 2d 102, 103, 111–15, 118 (D.D.C. 2005).

From September 19 to September 29, 2005, counsel representing six detainees in four cases before Judge Kessler moved for emergency injunctive relief ordering the government to provide the attorneys with access to their clients, who were being force-fed because of their participation in a hunger strike, and access to their clients' medical records.⁴²⁸⁸ The government argued that it would be infeasible to provide every detainee's attorney with medical updates.⁴²⁸⁹ On October 26, Judge Kessler ordered the government to provide contemporaneous medical information on force-fed detainees to their attorneys.⁴²⁹⁰

In 2009 and 2010, Judge Urbina ordered medical treatment and psychiatric evaluation for Abdul Rahman Shalabi to ensure that Shalabi could meaningfully assist counsel with his petition.⁴²⁹¹ Shalabi began a hunger strike in August 2005.⁴²⁹² To keep him alive, the government force-fed him twice a day through his nose.⁴²⁹³ Shalabi was transferred to Saudi Arabia on September 22, 2015.⁴²⁹⁴

Adil Said al-Haj Obeid al-Busayss's attorneys filed a motion on May 16, 2014, seeking information about al-Busayss's psychiatric treatment and impairment.⁴²⁹⁵

Attorneys for Mustafa Ahmed Adam al-Hawsawi, a military commission defendant in the prosecution for the September 11, 2001, attacks, filed a district court action on August 5, 2015, styled as a habeas petition, to ob-

4288. Motion, *Al-Razak v. Bush*, No. 1:05-cv-1601 (D.D.C. Sept. 29, 2005), D.E. 8; Motion, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. Sept. 20, 2005), D.E. 49; Motion, *Al-Joudi v. Bush*, No. 1:05-cv-301 (D.D.C. Sept. 19, 2005), D.E. 37; Motion, *Al-Marri v. Bush*, No. 1:04-cv-2035 (D.D.C. Sept. 19, 2005), D.E. 40.

4289. *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 15–16 (D.D.C. 2005).

4290. *Id.* at 23; see Neil A. Lewis, *Guantánamo Detainees Gain in Ruling*, N.Y. Times, Oct. 27, 2005, at A22.

Judge Kessler observed that it was very difficult to determine how disruptive the detainees' forced feeding was. Interview with Judge Gladys Kessler, May 31, 2011.

4291. *Al-Oshan v. Obama*, 753 F. Supp. 2d 1 (D.D.C. 2010); Order, *Al-Oshan v. Obama*, No. 1:05-cv-520 (D.D.C. Nov. 13, 2009), D.E. 300; Order, *id.* (July 14, 2009), D.E. 276; Order, *id.* (June 3, 2009), D.E. 262.

4292. *Al-Oshan*, 753 F. Supp. 2d at 2; see Carol Rosenberg, *Guantánamo's 9-Year Hunger Striker Asks to Go Home*, Miami Herald, Apr. 22, 2015, at 3A ("Abdul Rahman Shalabi, 39, has been described as Guantánamo's longest-running hunger striker.").

4293. *Al-Oshan*, 753 F. Supp. 2d at 2.

4294. Shalabi Transfer Notice, *supra* note 3754; see Rosenberg, *20 Lives*, *supra* note 3177 (reporting that after his release in Saudi Arabia from a rehabilitation program Shalabi married and became a father).

4295. Motion, *Abdah v. Obama*, No. 1:04-cv-1254 (D.D.C. May 16, 2014), D.E. 1033.

tain discovery about al-Hawsawi's medical condition and treatment.⁴²⁹⁶ An apparent difficulty was the defendant's time in CIA custody for a few years.⁴²⁹⁷ Judge Leon suggested that the attorneys make further attempts before the military commission judge before seeking relief from the district court.⁴²⁹⁸ On September 10, Judge Leon dismissed the action as outside the bounds of habeas corpus relief.⁴²⁹⁹ A new habeas petition seeking an effective treatment plan and repatriation to Saudi Arabia was filed on November 4, 0221.⁴³⁰⁰

A September 6, 2017, motion by Sharqawi al-Hajj for an independent medical evaluation was denied by Judge Lamberth on September 10, 2019:

If Al Hajj's health issues have left his counsel without access to their client and uninformed as to his condition, relief may be appropriate. This is a high hurdle, and Al Hajj does not clear it. Al Hajj skips meals voluntarily, seeks medical aid inconsistently, and then complains he is exhausted and malnourished.⁴³⁰¹

Guled Hassan Duran achieved a different result on October 15, 2019: Judge Walton granted an ex parte sealed motion for examination by a medical expert.⁴³⁰²

4296. Docket Sheet, *Al-Hawsawi v. Obama*, No. 1:15-cv-1257 (D.D.C. Aug. 5, 2015); Transcript at 4–20, *id.* (Sept. 3, 2015, filed Sept. 29, 2015), D.E. 18 [hereinafter *Al-Hawsawi Transcript*].

4297. *Al-Hawsawi Transcript*, *supra* note 4296, at 11; see Carol Rosenberg, *9/11 Judge: War Court Won't Intervene on Care*, Miami Herald, Mar. 22, 2015, at 3A (“according to his lawyer, [al-Hawsawi] still suffers from wounds inflicted at a CIA ‘black site’ where agents subjected him to rectal rehydration”); Carol Rosenberg, *Lawyer Claims 9/11 Suspect Sodomized*, Miami Herald, Feb. 13, 2015, at 1A (“A defense lawyer . . . said . . . that [al-Hawsawi] had been rectally abused while in CIA custody—and that he continues to bleed now, at least eight years later.”).

4298. *Al-Hawsawi Transcript*, *supra* note 4296, at 21.

4299. Opinion, *Al-Hawsawi*, No. 1:15-cv-1257 (D.D.C. Sept. 10, 2015), D.E. 13, *appeal withdrawn*, Order, *Al-Hawsawi v. Obama*, No. 15-5267 (D.C. Cir. Feb. 4, 2016).

Judge Leon dismissed a September 26, 2008, habeas petition filed on al-Hawsawi's behalf without prejudice on January 28, 2009, noting, “In the event such a petition is re-filed through counsel, the petition must be accompanied by a signed declaration from the petitioner directly authorizing the action” Order, *Al-Hawsawi v. Gates*, No. 1:08-cv-1645 (D.D.C. Jan. 28, 2009), D.E. 12, *appeal dismissed*, Order, *Al-Hawsawi v. Gates*, No. 09-5036 (D.C. Cir. June 3, 2009); see Petition, *id.* (Sept. 26, 2008), D.E. 1.

4300. Petition, *Al-Hawsawi v. Biden*, No. 1:21-cv-2907 (D.D.C. Nov. 4, 2021), D.E. 1; see Order, *id.* (Apr. 8, 2022), D.E. 18 (noting a due date of October 6, 2022, for the completion of briefing).

4301. Opinion, *Al-Hajj v. Trump*, No. 1:09-cv-745 (D.D.C. Sept. 10, 2019), D.E. 1932.

4302. Order, *Duran v. Trump*, No. 1:16-cv-2358 (D.D.C. Oct. 15, 2019), D.E. 75.

In 2012, Mohammed al-Qahtani was declared “incompetent and unable to assist effectively in [his] case.”⁴³⁰³ His interrogation experience during detention had been one of the harshest.⁴³⁰⁴ Six years later, Judge Collyer observed in court, “He’ll never be tried because he’s been treated so harshly. . . . [S]o he just has to wait until the United States decides to let him go, or the end of hostilities, whichever comes first.”⁴³⁰⁵ On March 6, 2020, Judge Collyer granted al-Qahtani’s motion for a medical evaluation

4303. Docket Sheet, *Al-Qahtani v. Bush*, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) [hereinafter *Al-Qahtani* Docket Sheet] (April 20, 2012, minute order).

4304. See Mark Bowden, *The Finish* 113 (2012); Mark Fallon, *American Torquemada*, *Newsweek*, Nov. 10, 2017, at 26, 32 (describing al-Qahtani as the first harsh interrogation guinea pig); Philippe Sands, *Torture Team* (2008); Jane Mayer, *The Experiment*, *New Yorker*, July 11, 2005, at 60, 68–69; Siems, *supra* note 3416, at 219–47; Soufan, *supra* note 3200, at 464–72, 483, 564; Benjamin Wittes, *Law and the Long War* 200–01 (2008) (reporting that al-Qahtani’s resistance to interrogation was the reason for the establishment of harsh interrogation techniques); see also *Al Qahtani Interrogation Log*, attached as ex. 1, David H. Hoffman et al., Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture, July 2, 2015, www.apa.org/independent-review/binder-1.pdf. “As with other detainees, [al-Qahtani’s interrogation] program focused on sexual and excretory humiliations, including forced enemas. . . . [Pentagon] lawyers jokingly referred to Qahtani as an ‘enema combatant.’” Bravin, *supra* note 3145, at 257.

Mohammed al-Qahtani [was] a baby-faced young Saudi who had pledged himself to al Qaeda and had planned to join the 9/11 hijackers as “muscle”—one of the enforcers trained to seize the plane and keep the passengers under control on the way to impact. He had arrived in Orlando about a month before the attacks—Mohammed Atta was waiting there to pick him up—but was turned away by an immigration officer, whose suspicions, even in that relatively unwary time, were aroused by the fact that Qahtani had a one-way ticket and could not speak English. When Qahtani grew indignant, he earned himself a return flight to Afghanistan.

Bowden, *supra*, at 113.

On September 2, 2014, the Second Circuit’s court of appeals affirmed a decision by Southern District of New York Judge Naomi Reice Buchwald that photographs and videos of al-Qahtani’s treatment were properly withheld from a Freedom of Information Act request because they “could logically and plausibly harm national security because these images are uniquely susceptible to use by anti-American extremists as propaganda to incite violence against United States interests domestically and abroad.” *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 163 (2d Cir. 2014), *aff’g* *Ctr. for Constitutional Rights v. Dep’t of Def.*, 968 F. Supp. 2d 623 (S.D.N.Y. 2013), *cert. denied*, 575 U.S. 903 (2015); see Tom Hays, *Court: U.S. Can Withhold Images of Guantánamo Prisoner*, *Miami Herald*, Sept. 3, 2014, at 5A.

4305. Transcript at 66, *Al-Qahtani*, No. 1:05-cv-1971 (D.D.C. Apr. 19, 2018, filed May 7, 2018), D.E. 380.

to determine whether he was entitled to repatriation, as army regulations required for sick or wounded prisoners.⁴³⁰⁶

Prior to entering U.S. custody, Mr. al-Qahtani was diagnosed with schizophrenia, major depression, and a possible neurocognitive disorder due to a traumatic brain injury. . . .

. . .

In addition to his pre-existing psychiatric conditions, [he was diagnosed] with severe Post-Traumatic Stress Disorder (PTSD) as a result of the treatment, interrogation, and imprisonment at Guantanamo Bay.⁴³⁰⁷

In 2021, the government reported to the court that after Judge Collyer's order, the secretary of the army decided that the army regulation underlying Judge Collyer's decision did not apply to Guantánamo Bay detainees.⁴³⁰⁸ Judge Friedman's review of the government's reconsideration motion was mooted by al-Qahtani's transfer to Saudi Arabia in 2022.⁴³⁰⁹

Treatment Preferences

Government attorneys assured the court that a specific cardiac treatment would not be forced upon a detainee.⁴³¹⁰ Judge Friedman ruled against the detainee's request for transfer to the Bethesda Naval Hospital for the procedure.⁴³¹¹ Saifullah Paracha was a Pakistani millionaire arrested in Bang-

4306. *Al-Qahtani v. Trump*, 443 F. Supp. 3d 116 (D.D.C. 2020), *held unappealable*, Order, *Al Qahtani v. Trump*, No. 20-5130 (D.C. Cir. Sept. 29, 2020); see Carol Rosenberg, *Judge Orders Panel Review of Detainee Abused by U.S.*, N.Y. Times, Mar. 9, 2020, at A16.

4307. *Al-Qahtani*, 443 F. Supp. 3d at 120–21.

4308. Reconsideration Motion, *Al-Qahtani*, No. 1:05-cv-1971 (D.D.C. Jan. 15, 2021), D.E. 407; see Carol Rosenberg, *Army Secretary Changes Rules to Halt Health Review of Guantánamo Prisoner*, N.Y. Times, Jan. 16, 2021, at A16.

4309. *Al-Qahtani* Habeas Dismissal, *supra* note 3861; *Al-Qahtani* Transfer Notice, *supra* note 3861; see *Al-Qahtani* Docket Sheet, *supra* note 4303 (noting reassignment from Judge Collyer to Judge Huvelle on May 6, 2020, and reassignment from Judge Huvelle to Judge Friedman on September 30, 2020); Opinion, *Al-Qahtani*, No. 1:05-cv-1971 (D.D.C. Aug. 12, 2020), D.E. 397 (noting reassignment to Judge Huvelle following Judge Collyer's retirement).

4310. Cardiac Catheterization Order, *Paracha v. Bush*, No. 1:04-cv-2022 (D.D.C. Nov. 20, 2006), D.E. 127, 2006 WL 3355177; see Carol Rosenberg, *Captive Seeks Medical Venue*, Miami Herald, Nov. 16, 2006, at 3A (reporting on a government representation that "with the exception of involuntary forced feedings, medical procedures are only carried out with the consent of a detainee").

4311. Cardiac Catheterization Order, *supra* note 4310; see Carol J. Williams, *Detainee Refuses Surgery*, L.A. Times, Nov. 23, 2006, at 22.

kok in July 2003.⁴³¹² He was interrogated at the Bagram Airbase in Afghanistan; in September 2004, he was transferred to Guantánamo Bay.⁴³¹³ He allegedly acted as a financier and weapons-smuggler for Al-Qaeda.⁴³¹⁴ In July 2006, his son Uzair was sentenced in the Southern District of New York to thirty years for providing material support to Al-Qaeda.⁴³¹⁵ The elder Paracha, who had survived two heart attacks, reported chest pains the following fall, so prison physicians prescribed a cardiac catheterization, in which a catheter is snaked through a patient's artery into the heart for diagnostic purposes.⁴³¹⁶ The unsuccessful motion was based on a claim that the procedure could not be performed safely at Guantánamo Bay.⁴³¹⁷

Judge Friedman ruled that Paracha failed to establish irreparable injury.⁴³¹⁸ The court of appeals summarily affirmed the ruling.⁴³¹⁹

In 2018, Southern District of New York Judge Sidney H. Stein granted Uzair Paracha a new trial based on new evidence in declassified statements by Guantánamo Bay detainees.⁴³²⁰ In 2020, the government agreed to deport the younger Paracha to Pakistan.⁴³²¹

4312. See Zarar Khan, *Wife Says Detainee Has Done No Wrong*, Phila. Inquirer, Mar. 6, 2006, at A7.

4313. See Rosenberg, *supra* note 4310.

4314. See *Detainee Wants to Be Relocated for Surgery*, Wash. Post, Nov. 19, 2006, at A10 [hereinafter *Relocated*].

4315. Docket Sheet, *United States v. Paracha*, No. 1:03-cr-1197 (S.D.N.Y. Oct. 8, 2003); see Opinion, *id.* (Jan. 3, 2006), D.E. 82, 2006 WL 12768 (discussing the son's unsuccessful motion to compel the father's testimony at trial). See generally Human Rights Watch, *Illusion of Justice* 6, 196–200 (2014).

4316. See *Relocated*, *supra* note 4314; Rosenberg, *supra* note 4310; Williams, *supra* note 4311.

4317. See Rosenberg, *supra* note 4310; see also Cucullu, *supra* note 3174, at 161–62 (reporting anger by a military officer that so many resources had been wasted on a detainee who ultimately refused the procedure); Williams, *supra* note 4311 (reporting on the government's claim that “nearly \$400,000 was spent flying in a 24-member team of cardiac specialists and equipment to be on hand in case of complications”).

4318. Cardiac Catheterization Order, *supra* note 4310.

4319. Order, *Paracha v. Bush*, No. 06-5379 (D.C. Cir. Dec. 1, 2006).

4320. Opinion, *Paracha*, No. 1:03-cr-1197 (S.D.N.Y. July 3, 2018), D.E. 110, 2018 WL 3238824; see Benjamin Weiser, *New Trial Ordered for Man Convicted of Supporting Al Qaeda*, N.Y. Times, July 26, 2018, at A22.

4321. Nolle Prosequi, *Paracha*, No. 1:03-cr-1197 (S.D.N.Y. Mar. 16, 2020), D.E. 179; see Federal Bureau of Prisons Inmate Locator, www.bop.gov (noting release from prison on March 13, 2020, reg. no. 54896-054); see also Benjamin Weiser, *Once-Accused Al Qaeda Sympathizer Goes Home*, N.Y. Times, Mar. 18, 2020, at A21.

Suicide

Litigation over medical issues occurred against a backdrop of occasional apparent suicides. In addition to the three June 2006 suicides, Abdul Rahman Ma'ath Thafir al-Amri was found dead by apparent suicide in 2007.⁴³²² Mohammad Ahmed Abdullah Saleh al-Hanashi, who had been on a hunger strike, apparently committed suicide in 2009.⁴³²³ Hajji Nassim, a high-value detainee, apparently killed himself in 2011.⁴³²⁴ Adnan Farhan Abdul Latif apparently killed himself by drug overdose in 2012.⁴³²⁵

In 2005, Jumah al-Dosari tried to kill himself during a bathroom break while his attorney was visiting him so that the attorney would be a witness.⁴³²⁶ He made another suicide attempt in 2006,⁴³²⁷ and he was transferred to Saudi Arabia in 2007.⁴³²⁸

Hunger Strikes

On Tuesday, February 26, 2002, a Guantánamo Bay guard ordered a prisoner at prayer to remove a makeshift turban from his head; turbans were forbidden because they could be used to conceal weapons, so guards provided tight-fitting prayer caps on request.⁴³²⁹ On the following day, many

4322. See Cucullu, *supra* note 3174, at 132–33; William Glaberson, *Detainee Found Dead in Guantánamo Cell*, N.Y. Times, May 31, 2007, at A14; William Glaberson & Margot Williams, *Pentagon Files Offer Details on Detainee in Suicide*, N.Y. Times, June 1, 2007, at A22; Gorman, *supra* note 3272, at 16 (reporting that before his death al-Amri suffered from untreated hepatitis B and tuberculosis and was so ill that he could barely walk); Savage, *supra* note 3932.

4323. Al-Hanashi Death Notice, *supra* note 3312; see William Glaberson & Margot Williams, *Officials Report Suicide of Guantánamo Detainee*, N.Y. Times, June 3, 2009, at A17; Savage, *supra* note 3932.

4324. Nassim Death Notice, *supra* note 3312; see *Afghan Detainee Is Found Dead at Guantánamo*, N.Y. Times, May 19, 2011, at A19.

4325. See Rosenberg, *supra* note 3607; Savage, *supra* note 3607; Savage, *supra* note 3312; Tate, *supra* note 3607; see also Autopsy Reports, assets.documentcloud.org/documents/609864/guantanamo-autopsy-reports-of-haji-naseem-and.pdf (redacted autopsy reports for Nassim, Latif, and Awal Gul); Dixon, *supra* note 3500, at 52 (“Latif reportedly killed himself in despair”).

4326. See Joshua Colangelo-Bryan, *Jumah al-Dossari: What Indefinite Detention Without Charge or Trial Looks Like*, 10 N.Y. City L. Rev. 379, 381–83 (2007).

4327. See *id.* at 383.

4328. Transfer Notice, *Almurbati v. Bush*, No. 1:04-cv-1227 (D.D.C. July 16, 2007), D.E. 179.

4329. See James Dao, *Detainees Stage Protest at Base Over a Turban*, N.Y. Times, Mar. 1, 2002, at A12; Greenberg, *supra* note 3174, at 182–83.

prisoners began refusing to take meals, in protest.⁴³³⁰ An announcement on Thursday that prisoners could wear turbans, reserving a right to inspect them, abated the hunger strike somewhat.⁴³³¹ A month later, camp doctors began force-feeding two strikers.⁴³³² Hunger strikes and suicide attempts were a problem at Guantánamo Bay from time to time thereafter.⁴³³³ Some detainees engaged in hunger strikes for several years.⁴³³⁴

On July 21, 2005, the Pentagon reported that fifty Guantánamo Bay detainees were on a hunger strike.⁴³³⁵ Promises to improve conditions abated the strike a week later.⁴³³⁶ In August, however, detainees were striking again.⁴³³⁷ On September 1, habeas attorneys in five cases filed with the classified information security officers motions for a preliminary injunction requiring the government to provide the striking detainees with appropriate medical treatment.⁴³³⁸ The judges assigned to these cases transferred the motions to Judge Oberdorfer for resolution.⁴³³⁹ While the

4330. See Dao, *supra* note 4329; Greenberg, *supra* note 3174, at 185; Margulies, *supra* note 3149, at 138.

4331. See Greenberg, *supra* note 3174, at 190; Eric Schmitt, *A Concession on Turbans Calms Protest in Cuba Camp*, N.Y. Times, Mar. 2, 2002, at A9.

4332. See James Dao, *Navy Doctors Force-Feeding 2 Prisoners*, N.Y. Times, Apr. 2, 2002, at A12.

4333. See Carlotta Gall & Neil A. Lewis, *Tales of Despair from Guantánamo*, N.Y. Times, June 17, 2003, at A1. See generally Adayfi, *supra* note 3704, at 37–41 (describing a hunger strike by several detainees following a soldier's stomping on a detainee's Quran).

4334. *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 117 (D.D.C. 2009); see also *id.* at 114 n.3 (“The Government designates detainees as hunger-strikers after they have missed nine consecutive meals.”).

4335. See *Guantánamo Hunger Strike Is Reported*, N.Y. Times, July 22, 2005, at A16.

4336. See Lewis, *supra* note 3343.

4337. See *Al Odah v. United States*, 406 F. Supp. 2d 37, 39 (D.D.C. 2005) (concerning the hunger strike of Fawzi al-Odah); Neil A. Lewis, *Hunger Strike by Detainees Goes to Court*, N.Y. Times, Sept. 22, 2005, at A29.

4338. Notice of Filing, *Al-Habashi v. Bush*, No. 1:05-cv-765 (D.D.C. Sept. 14, 2005), D.E. 12; Notice of Filing, *Abu Imran v. Bush*, No. 1:05-cv-764 (D.D.C. Sept. 13, 2005), D.E. 13; Notice of Filing, *Abdulaziz v. Bush*, No. 1:05-cv-492 (D.D.C. Sept. 13, 2005), D.E. 21; Notice of Filing, *Deghayes v. Bush*, No. 1:04-cv-2215 (D.D.C. Sept. 13, 2005), D.E. 23; Notice of Filing, *El-Banna v. Bush*, No. 1:04-cv-1144 (D.D.C. Sept. 13, 2005), D.E. 151; see Lewis, *supra* note 4337.

4339. Order, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 27, 2005), D.E. 154 (Roberts); Order, *Deghayes*, No. 1:04-cv-2215 (D.D.C. Sept. 26, 2005), D.E. 27 (Collyer); Order, *Al-Habashi*, No. 1:05-cv-765 (D.D.C. Sept. 23, 2005), D.E. 14 (Sullivan); Order, *Aziz*, No. 1:05-cv-492 (D.D.C. Sept. 23, 2005), D.E. 23 (Robertson); Order, *Abu Imran*, No. 1:05-cv-764 (D.D.C. Sept. 21, 2005), D.E. 15 (Kotelly).

motions were pending, hunger striking became more prevalent.⁴³⁴⁰ Judge Oberdorfer followed Judge Bates's resolution of a medical-care motion and, on September 28, denied the injunction without prejudice.⁴³⁴¹ Judges Kotelly and Urbina denied similar motions in other cases a few days later.⁴³⁴² In 2009, Judge Leon relied on Judge Bates's opinion in denying a motion for an independent medical examination.⁴³⁴³

In early 2013, hunger strikes again became prevalent; news reports suggested that the strikes were sparked by a change in search procedures coinciding with a new personnel rotation and fueled by years of confinement uncertainty for the detainees.⁴³⁴⁴ It was also reported that stricter search protocols were prompted by the September 2012 suicide of Adnan Latif.⁴³⁴⁵ Guards engaged in a forceful crackdown on the strikes and other forms of protest in April 2013.⁴³⁴⁶ The hunger strikes did not abate, and

4340. See Lewis, *supra* note 3343.

4341. *El-Banna v. Bush*, 394 F. Supp. 2d 76, 78–79 (D.D.C. 2005).

4342. Order, *Al-Oshan v. Bush*, No. 1:05-cv-520 (D.D.C. Oct. 5, 2005), D.E. 59 (also applying to Nos. 1:05-cv-1048, 1:05-cv-1429, 1:05-cv-1453, and 1:05-cv-1724); Opinion, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 30, 2005), D.E. 254; see *Al Odah*, 406 F. Supp. 2d 37 (denying a subsequent motion because the detainee's medical situation was caused by his own hunger strike).

4343. Order, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Apr. 28, 2009), D.E. 234.

4344. See Peter Finn & Julie Tate, *Signs of Growing Frustrations at Guantanamo Bay*, Wash. Post, Mar. 17, 2013, at A3; Jonathan Hafetz, *Introduction*, in Obama's Guantánamo, *supra* note 3200, at 1, 4; *Life at Gitmo*, 60 Minutes (CBS television broadcast Nov. 18, 2013), www.cbsnews.com/news/life-at-gitmo/ (featuring an interview with the new warden); Carol Rosenberg, *U.S. Acknowledges Hunger Strike*, Miami Herald, Mar. 16, 2013, at 3A; Carol Rosenberg, *Weapons-in-Quarans Claim at Crux of Strike*, Miami Herald, Apr. 6, 2013, at 1A; Charlie Savage, *Hunger Strike Cases at Guantánamo Rise to at Least 25*, N.Y. Times, Mar. 21, 2013, at A15; see also Samir Naji al-Hasan Moqbel, Opinion Essay, *Gitmo Is Killing Me*, N.Y. Times, Apr. 15, 2013, at A19 (account by a hunger striker); Pradhan, *supra* note 4069, at 112 (reflections by a habeas attorney).

4345. Savage, *Power Wars*, *supra* note 3218, at 502.

4346. See Dixon, *supra* note 3500, at 53; Peter Finn, *Military, Detainees Clash at Guantanamo Bay*, Wash. Post, Apr. 14, 2013, at 1A; Carol Rosenberg, *Details Emerge of Guards' Clash with Captives*, Miami Herald, Apr. 17, 2013, at 3A; Carol Rosenberg, *U.S. Guards Raid Camp, Move Hunger Strikers to Single Cells*, Miami Herald, Apr. 14, 2013, at 4A; Carol Rosenberg, *White House Alerted Ahead of Prison Raid*, Miami Herald, Apr. 16, 2013, at 3A; Charlie Savage, *Mounting Tensions Escalate Into Violence During Raid at Guantánamo Prison*, N.Y. Times, Apr. 14, 2013, at A16; Charlie Savage, *Officials Describe Chaos at Guantánamo in Weeks That Preceded Raid on Prison*, N.Y. Times, Apr. 17, 2013, at A10.

On April 13, 2013, upon order of the Commander, JTF-GTMO, detainees residing in Camp 6 were transitioned from communal to single-cell living to ensure

because the strikes were heavily influenced by what detainees considered disrespectful searches of their Qurans, guards agreed to allow the detainees to forego having Qurans.⁴³⁴⁷ The number of strikers continued to increase until they included a majority of the detainees.⁴³⁴⁸

Some of the strikers were force-fed to keep them alive.⁴³⁴⁹

Twice a day at the military detention center at Guantanamo Bay, Cuba, guards take a group of detainees from their cells, one at a time to a camp clinic or a private room on their block.

The detainees are offered a hot meal or a liquid nutritional supplement, and, if they refuse, they are strapped into a chair. A nurse then passes a tube through their noses and down into their stomachs; for one to two hours, they are fed a drip of Ensure while a Navy corpsman watches.⁴³⁵⁰

The International Committee of the Red Cross⁴³⁵¹ and the World Medical Association,⁴³⁵² among others, have determined it to be an unethical

the health and security of the detainees. This action was taken in response to efforts by detainees to limit the guard force's ability to observe the detainees, including by covering surveillance cameras, windows, sally port fences, and glass partitions.

Government Notice at 2, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. Aug. 8, 2013), D.E. 1997.

4347. See Carol Rosenberg, *Almost a Third of Captives Now Hunger Strikers*, Miami Herald, Apr. 18, 2013, at 3A.

4348. See Carol Rosenberg, *Hunger Strike Tally Rises to 102 at Guantánamo*, Miami Herald, May 17, 2013, at 4A; Carol Rosenberg, *Hunger Strike Toll Keeps Getting Bigger*, Miami Herald, Apr. 21, 2013, at 3A; Carol Rosenberg, *More Terror Captives Begin Hunger Strikes*, Miami Herald, Apr. 19, 2013, at 3A; Charlie Savage, *Despair Drives Guantánamo Detainees to Revolt*, N.Y. Times, Apr. 25, 2013, at A1.

4349. See Carol Rosenberg, *Guards and Staff Outnumber Captives 33 to 1 at Guantánamo*, Miami Herald, Aug. 28, 2016, at 1B (reporting that force-feedings reached a peak of forty-six on a single day); Carol Rosenberg, *Third of Hunger Strikers Being Force Fed by U.S.*, Miami Herald, May 27, 2013, at 3A (reporting on the force-feeding of thirty-five detainees and reporting, "The prison won't identify those on hunger strike but the Justice Department has notified attorneys for at least 16 of the men that their clients are being force-fed."); see also Adayfi, *supra* note 3704, at 193–07 (a detainee's account of his force-feeding).

4350. Peter Finn & Julie Tate, *Protest Spotlights Indefinite Detention*, Wash. Post, May 3, 2013, at A1; see Carol Rosenberg, *Rights Groups: End "Cruel" Force-Feeding*, Miami Herald, May 15, 2013, at 3A.

4351. Hunger Strikes in Prisons: The ICRC's Position, www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm.

4352. World Medical Association Reiterates its Policies on Hunger Strikes, www.wma.net/news-post/world-medical-association-reiterates-its-policies-on-hunger-strikes/.

deprivation of rights to force-feed a mentally competent hunger striker.⁴³⁵³ On June 19, 2013, Senator Dianne Feinstein, then chair of the U.S. Senate Select Committee on Intelligence, expressed to the secretary of defense her opposition to the force-feeding of Guantánamo Bay hunger strikers.⁴³⁵⁴ Four habeas petitioners—Ahmed Belbacha, Habil Hadjarab, Abu Wa’el Jihad Dhiab, and Shaker Aamer—filed motions on June 30 with Judges Kessler and Collyer for relief from force-feeding.⁴³⁵⁵ On July 8, Judge Kessler determined in Dhiab’s case that “force-feeding is a painful, humiliating, and degrading process,” but she denied the motion on the ground that the Military Commissions Act of 2006 (MCA) stripped the courts of jurisdiction over conditions of confinement for enemy combatants.⁴³⁵⁶

4353. See Peter Finn, *Number of Protesting Guantanamo Bay Detainees Being Force-Fed Grows to 41*, Wash. Post, June 7, 2013, at A6; Finn & Tate, *supra* note 4350; Carol Rosenberg, *Medical Ethicists: Stop Prison Force-Feeding*, Miami Herald, June 13, 2013, at 6A; Rosenberg, *supra* note 4350.

The United Nations Committee Against Torture “considers that force-feeding of prisoners on hunger strike constitutes ill-treatment in violation of the Convention [Against Torture].” United Nations Committee Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America at 6 (Dec. 14, 2014), digitallibrary.un.org/record/790513/?ln=en. The committee advised the United States to “[p]ut an end to force-feeding of detainees in hunger strike as long as they are able to take informed decisions.” *Id.*

4354. Senator Feinstein Letter to Secretary Hagel (June 19, 2013), www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=17585d4b-c235-4f32-b957-50648d4e6252; see Feinstein: *End Force-Feeding of Prisoners at Guantánamo*, Miami Herald, June 20, 2013, at 3A.

4355. Dhiab v. Obama, 74 F. Supp. 3d 16, 20 (D.D.C. 2014); Motion, Deghayes v. Bush, No. 1:04-cv-2215 (D.D.C. June 30, 2013), D.E. 212 (also filed in Nos. 1:05-cv-1457, 1:05-cv-1504, and 1:05-cv-2349); see Carol Rosenberg, *Lawyers Ask Judges to Halt Force-Feeding*, Miami Herald, July 2, 2013, at 3A. See generally Pradhan, *supra* note 4069, at 108–18 (reflections by Dhiab’s attorney: “One of the only aspects of their lives over which the detainees have any control is whether they pick up the food off their trays and swallow it.”).

4356. Dhiab v. Obama, 952 F. Supp. 2d 154 (D.D.C. 2013); *Dhiab*, 74 F. Supp. 3d at 20; see Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. Aug. 29, 2013), D.E. 192 (denying reconsideration); see also Michael Doyle, *Judge: I Can’t Stop Force-Feeding, but Obama Can*, Miami Herald, July 9, 2013, at 3A; Charlie Savage, *Judge Urges President to Address Prison Strike*, N.Y. Times, July 9, 2013, at A12.

Even though this Court is obligated to dismiss the Application for lack of jurisdiction, and therefore lacks any authority to rule on Petitioner’s request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2013, President Barack Obama stated “Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. . . . Is [this] who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that.”

Senators Feinstein and Richard Durbin wrote to President Obama on July 10 to ask him to scale back the force-feeding.⁴³⁵⁷

On July 16, Judge Collyer denied the force-feeding motion in her three cases for lack of jurisdiction, but she also observed that the motion was deficient on the merits: “As his custodian, the United States cannot ‘allow’ any person held in custody to starve himself to death. Whatever the medical ethics for a person at liberty, the United States as custodian has additional obligations.”⁴³⁵⁸

Hadjarab was willingly transferred to Algeria in August.⁴³⁵⁹

Appeals on force-feeding were heard on October 18.⁴³⁶⁰ After argument, the government notified the court that none of the appellants was any longer a hunger striker.⁴³⁶¹ Imad Abdullah Hassan, who “has been on hunger strike nearly continuously since 2007,” moved to intervene on November 4 to prevent mootness of the appeals.⁴³⁶² On November 8, the government notified the court that Dhiab was again a hunger striker.⁴³⁶³

On February 11, 2014, a panel of the court of appeals held by a vote of two to one that as a result of the Supreme Court’s 2008 holding in *Boumediene v. Bush*⁴³⁶⁴ that the habeas-stripping provision of the MCA

Dhiab, 952 F. Supp. 2d at 156; see Remarks at National Defense University, May 23, 2013, Comp. Pres. Docs., 2013 DCPD 361.

4357. Senators Feinstein and Durbin Letter to President Obama, July 10, 2013, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=4bdc8dd7-dc7f-48a4-b718-d8fb6fc4294d; see Carol Rosenberg, *2 Senators Ask Obama to Halt Force-Feedings*, Miami Herald, July 11, 2013, at 3A; see also Dianne Feinstein & Dick Durbin Opinion Essay, *How to Close Guantánamo*, L.A. Times, Aug. 14, 2013, at 13; Carol Rosenberg, *Feinstein Wants Changes to Guantánamo Force-Feedings*, Miami Herald, Apr. 8, 2015, at 3A.

4358. *Aamer v. Obama*, 953 F. Supp. 2d 213, 221 (D.D.C. 2013); see Ann E. Marimow, *Judge Rejects Request to Block Force-Feeding of Guantanamo Detainees*, Wash. Post, July 17, 2013, at A5.

4359. *Nabil* Transfer Notice, *supra* note 3562; *Aamer v. Obama*, 742 F.3d 1023, 1027 (D.C. Cir. 2014).

4360. Docket Sheet, *Dhiab v. Obama*, No. 13-5276 (D.C. Cir. Sept. 5, 2013); Docket Sheet, *Belbacha v. Obama*, No. 13-5225 (D.C. Cir. July 22, 2013); Docket Sheet, *Hadjarab v. Obama*, No. 13-5224 (D.C. Cir. July 22, 2013); Docket Sheet, *Aamer v. Obama*, No. 13-5223 (D.C. Cir. July 22, 2013).

4361. Letter, *Aamer*, No. 13-5223 (D.C. Cir. July 22, 2013).

4362. Motion, *id.* (Nov. 4, 2013).

4363. Letter, *id.* (Nov. 8, 2013).

“Diyab had started eating when he was told Uruguay had offered to resettle him, but as time passed and nothing happened, he resumed his hunger strike.” Savage, *Power Wars*, *supra* note 3218, at 517.

4364. 553 U.S. 723 (2008).

was unconstitutional, conditions of confinement properly challenged in petitions for writs of habeas corpus are within the courts' jurisdiction, and the remaining provisions of the MCA only bar *Bivens*⁴³⁶⁵ actions.⁴³⁶⁶ Although the petitioners might be able to prove entitlement to relief after a full trial, however, they had not made a sufficient showing for a preliminary injunction.⁴³⁶⁷ "This is a court of law, not an arbiter of medical ethics" ⁴³⁶⁸ "[T]he overwhelming majority of courts have concluded, as did Judge Collyer and as we do now, that absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death."⁴³⁶⁹

During Ramadan in the summer of 2013, prisoner segregation was relaxed for compliant prisoners and the number of hunger strikers began to decrease.⁴³⁷⁰ The number of strikers reached a low of eleven in November and then increased a bit to fifteen.⁴³⁷¹ In December, the government stopped drawing attention to the strike by releasing daily strike numbers.⁴³⁷² In March 2014, the *Miami Herald* reported that the government

4365. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (authorizing federal tort actions for Fourth Amendment violations).

4366. *Aamer v. Obama*, 742 F.3d 1023, 1026, 1028–38 (D.C. Cir. 2014) (opinion by Judge Tatel, joined by Judge Griffith); see *id.* at 1044–50 (dissenting opinion by Judge Stephen F. Williams); see also *Dhiab v. Trump*, 852 F.3d 1087, 1089 (D.C. Cir. 2017); *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20, 22 (D.D.C. 2014); Frommer, *supra* note 3430; Pradhan, *supra* note 4069, at 108–09; Savage, *supra* note 3430.

4367. *Aamer*, 742 F.3d at 1038–44.

4368. *Id.* at 1039.

4369. *Id.* at 1041.

4370. See Carol Rosenberg, *25 Captives Quit Hunger Strike Since Ramadan*, *Miami Herald*, July 15, 2013, at 2A; Charlie Savage, *15 Held at Guantánamo Are Said to Quit Hunger Strike*, *N.Y. Times*, July 15, 2013, at A3; see also Carol Rosenberg, *Key Guantánamo Detainee Posts Remain Vacant*, *Miami Herald*, Sept. 7, 2013, at 4A ("Captives began quitting the strike in early July once the prison leveraged eating to release from lockdown.").

4371. See Carol Rosenberg, *Daily Hunger-Strike Report Ends*, *Miami Herald*, Dec. 4, 2013, at 3A.

4372. See *id.*; see also Spencer Ackerman, *Reign of Terror* 223–24 (2021); Steve Coll, *Comment, Two More Years*, *New Yorker*, Nov. 17, 2014, at 33, 34.

A *Miami Herald* website displayed daily government counts of strikers through December 2013. Tracking the Hunger Strike, www.miamiherald.com/static/media/projects/gitmo_chart/.

had begun to refer to hunger strikes as “long term non-religious fasting.”⁴³⁷³

Hassan filed a district-court motion to enjoin force-feeding on March 11, 2014.⁴³⁷⁴ Two days later, Belbacha was willingly transferred to Algeria.⁴³⁷⁵ On March 27, Mohammad Ahmad Ghulam Rabbani joined the force-fed petitioners.⁴³⁷⁶

On May 16, Judge Kessler temporarily enjoined the force-feeding of Dhiab until it could be determined at a May 21 status conference how soon the government could produce evidentiary videotapes of his force-feeding.⁴³⁷⁷ On May 22, Judge Kessler declined to extend temporary injunctive restrictions on force-feeding, unwilling to let Dhiab die but disappointed by the government’s intransigence in refusing to mitigate unnecessary pain.⁴³⁷⁸

In the summer of 2014, the *Miami Herald* reported that the navy decided not to court-martial a nurse who refused on ethical grounds to participate in the force-feeding, but the nurse was removed from Guantánamo Bay and his military future remained uncertain.⁴³⁷⁹

As Dhiab’s force-feeding litigation continued, he narrowed his challenge from force-feeding in general to particularly unpleasant methods of

4373. Carol Rosenberg, *U.S. Officially Defines Away Guantánamo “Hunger Strike,”* *Miami Herald*, Mar. 12, 2014, at 1A; see Ackerman, *supra* note 4372, at 224.

4374. Motion, *Anam v. Obama*, No. 1:04-cv-1194 (D.D.C. Mar. 11, 2014), D.E. 1001.

4375. *Belbacha* Transfer Notice, *supra* note 3563.

4376. Motion, *Rabbani v. Obama*, No. 1:05-cv-1607 (D.D.C. Mar. 27, 2014), D.E. 306.

4377. Order, *Dhiab v. Obama*, No. 1:05-cv-1457 (D.D.C. May 16, 2014), D.E. 221; Transcript, *id.* (May 21, 2014, filed June 13, 2014), D.E. 247; *id.* at 4 (“nobody should have the misperception that that TRO represented any kind of ruling on the merits”); see Carol Rosenberg, *Judge Orders Military to Halt Force-Feedings of One Captive*, *Miami Herald*, May 17, 2014, at 1A.

4378. Order, *Dhiab*, No. 1:05-cv-1457 (D.D.C. May 22, 2014), D.E. 224, 2014 WL 2134491; see Michael Doyle, *With Reluctance, Forced-Feeding Ban Lifted*, *Miami Herald*, May 24, 2014, at 1A; Dan Lamothe, *Judge Allows Force-Feeding of Detainee at Guantánamo*, *Wash. Post*, May 24, 2014, at A1; Charlie Savage, *U.S. Judge Decides “Anguishing” Case on Force-Feeding*, *N.Y. Times*, May 24, 2013, at A1.

4379. Carol Rosenberg, *Navy Nurse Refuses to Force-Feed Prisoner*, *Miami Herald*, July 16, 2014, at 1A; Carol Rosenberg, *No Court-Martial for Guantánamo Nurse*, *Miami Herald*, Sept. 16, 2014, at 3A; Carol Rosenberg, *Objections to Force-Feeding Might Lead to Court-Martial*, *Miami Herald*, Aug. 29, 2014, at 3A; see *Guantanamo Nurse Could Be Discharged For Not Force-Feeding Detainees*, *All Things Considered* (NPR radio broadcast Nov. 19, 2014), www.npr.org/2014/11/19/365271597/guantanamo-nurse-could-be-discharged-for-not-force-feeding-detainees; Pradhan, *supra* note 4069, at 113.

force-feeding, and the government modified those methods somewhat.⁴³⁸⁰ On November 7, Judge Kessler ruled that remaining departures from Dhiab's preferred force-feeding methods did not demonstrate deliberate indifference.⁴³⁸¹

Having reached this conclusion, the Court feels constrained to make certain comments about the Government's treatment of Mr. Dhiab. It is very hard to understand why the Government refused to give Mr. Dhiab access to the wheelchair and/or crutches that he needed in order to walk to the room for enteral feedings. Had that simple step been taken, numerous painful and humiliating forced cell extractions could have been avoided. While the Government ultimately—but only a short time before the hearing—allowed Mr. Dhiab to use the wheelchair, thereby inducing him to comply with the force-feeding as he had agreed to do, common sense and compassion should have dictated a much earlier result. By the same token, the Government refused Mr. Dhiab's request to provide him with an additional mattress. What could be more reasonable than providing an additional mattress to a man with back pain so severe that he was given morphine to alleviate it?⁴³⁸²

Dhiab was transferred to Uruguay in December.⁴³⁸³ On March 9, 2015, the court of appeals vacated Judge Kessler's ruling and dismissed an appeal as moot.⁴³⁸⁴ On December 19, 2014, Judge Lamberth denied a preliminary injunction to Rabbani.⁴³⁸⁵ Hassan was transferred to Oman on June 12, 2015.⁴³⁸⁶

On October 16, 2017, Rabbani's attorneys alleged, "Multiple sources within the detention facility have reported that as of September 19, 2017, the [new senior medical officer] has ordered that medical staff forego the long-standing policy and stop force-feeding the hunger strikers and cease

4380. *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20–21 (D.D.C. 2014).

4381. *Id.* at 24–29; see Carol Rosenberg, *Judge Upholds Treatment of Hunger Striker*, Miami Herald, Nov. 9, 2014, at 4A; Matt Zapotosky, *Judge Rejects Detainee's Bid to Revise Force-Feedings at Guantanamo Bay*, Wash. Post, Nov. 8, 2014, at A5.

4382. *Dhiab*, 74 F. Supp. 3d at 29 (footnote omitted).

4383. *Dhiab* Transfer Notice, *supra* note 3702; *Dhiab v. Trump*, 852 F.3d 1087, 1090 (D.C. Cir. 2017); see Goldman, *supra* note 3702; Pradhan, *supra* note 4069, at 118; Rosenberg, *supra* note 3398; Savage, *supra* note 3702; Schwartz & Turner, *supra* note 3697.

4384. Order, *Dhiab v. Obama*, No. 14-5276 (D.C. Cir. Mar. 9, 2015).

4385. *Rabbani v. Obama*, 76 F. Supp. 3d 21 (D.D.C. 2014).

4386. Hassan Transfer Notice, *supra* note 3750; see Lauren Walker, *The Hunger Artist*, Newsweek, Sept. 18, 2015, at 36.

the medical monitoring of their now rapidly declining health.”⁴³⁸⁷ While a motion for feeding and treatment was pending, “the petitioner’s condition deteriorated” and “the Government informed the Court that it had placed the petitioner back on the list of detainees approved for involuntary enteral feedings.”⁴³⁸⁸ Judge Lamberth denied relief on December 29:

While the Court finds that the petitioner has a serious medical condition, the Court also finds that the petitioner is unlikely to be able to show that the medical staff at Guantanamo has been deliberately indifferent to that condition. Therefore, his deliberate-indifference claim does not support preliminary injunctive relief.⁴³⁸⁹

Degenerative Spine Disease

High-value detainee Nashwan al-Ramer Abdulrazzaq, known as Abd al-Hadi al-Iraqi before the military commission, stipulated to dismissal of his 2009 habeas corpus petition in 2013.⁴³⁹⁰ On September 21, 2017, he filed a second petition challenging “callous withholding of medical care” related to “debilitating degenerative disease affecting his spine and nervous system.”⁴³⁹¹

4387. Petitioner Brief at 2, *Rabbani v. Trump*, No. 1:05-cv-1607 (D.D.C. Oct. 16, 2017), D.E. 363. See generally Charlie Savage, *Detainees Accuse Military of Waiting Longer to Force-Feed Hunger Strikers*, N.Y. Times, Oct. 12, 2017, at A16.

4388. Opinion at 6, *Rabbani*, No. 1:05-cv-1607 (D.D.C. Dec. 29, 2017, filed redacted Feb. 27, 2018), D.E. 398.

4389. *Id.* at 2.

Rabbani remains detained. Appendix Table 4, *infra* page 641 (n.24).

4390. *Abdulrazzaq* Stipulated Dismissal, *supra* note 3975; see Petition, *Abdulrazzaq v. Obama*, No. 1:09-cv-1462 (D.D.C. Aug. 3, 2009), D.E. 1; Office of Military Commission Cases, *supra* note 3433.

4391. Petition, *Abdulrazzaq v. Trump*, No. 1:17-cv-1928 (D.D.C. Sept. 21, 2017), D.E. 1 [hereinafter *Abdulrazzaq* Second Habeas Corpus Petition]; see Amended Petition, *id.* (Nov. 1, 2017), D.E. 34; see also Carol Rosenberg, *Captive’s Lawyers Seek Civilian Medical Oversight at Guantánamo*, Miami Herald, Sept. 27, 2017, at 10A; Carol Rosenberg, *Unusual Accommodation at Gitmo War Court: A Hospital Bed for an Al-Qaida Suspect*, Miami Herald, Nov. 11, 2018, at 6A (reporting that the petitioner “underwent five spine surgeries in eight months at Guantánamo, starting in September 2017”).

“His family name—the name he generally uses with friends and family—is Nashwan al-Tamir, which references a family history in trading commodities.” *Abdulrazzaq* Second Habeas Corpus Petition, *supra*, at 5; see Carol Rosenberg, *Alleged Al-Qaida Commander Reveals New Name in Guantánamo Court*, Miami Herald, May 18, 2016, at 10A (reporting also that the petitioner was “accused of running al-Qaida’s army in Afghanistan after the U.S. invaded in 2001”).

Following an October 19 hearing, Abdulrazzaq filed an amended petition on November 1, and Judge Sullivan ordered biweekly status reports and production of medical records to Abdulrazzaq's attorneys.⁴³⁹²

In January 2019, the *Miami Herald* reported, "The Pentagon is shipping a handicapped-accessible cell big enough to accommodate a hospital bed and wheelchair that, in a first, would let a war-crimes suspect live at the court during proceedings as he tries to recover from multiple spinal surgeries."⁴³⁹³

Judge Sullivan decided on October 28, 2019, to hold consideration of Abdulrazzaq's petition in abeyance pending military commission proceedings.⁴³⁹⁴

Too Sick to Harm

On February 12, 2014, Mohammed al-Adahi, whose habeas writ had been reversed by the court of appeals in 2010, moved to reopen his case, arguing that his health had deteriorated so much that he could no longer engage in hostilities against the United States.⁴³⁹⁵ Shaker Aamer filed a similar motion on April 7, based on both his poor physical health and his poor mental health.⁴³⁹⁶ Judges Kessler and Collyer denied the motions.⁴³⁹⁷ Aamer was transferred to the United Kingdom on October 30, 2015,⁴³⁹⁸ and Al-Adahi was transferred to the United Arab Emirates on August 13, 2016.⁴³⁹⁹

Challenge: Religious Accommodation

At the March 6, 2009, hearing that Judge Sullivan held to determine whether al-Sharbi was knowingly and competently withdrawing his habeas petition voluntarily, in which al-Sharbi participated by video conference

4392. Docket Sheet, *Abdulrazzaq*, No. 1:17-cv-1928 (D.D.C. Sept. 21, 2017); Amended Petition, *id.* (Nov. 1, 2017), D.E. 34.

4393. Carol Rosenberg, *Pentagon Shipping Jumbo Cell to Guantánamo so Terror Suspect Can Go on Trial from Hospital Bed*, *Miami Herald*, Jan. 15, 2019, at 6A.

4394. *Abdulrazzaq v. Trump*, 422 F. Supp. 3d 281 (D.D.C. 2019).

4395. Motion, *Al-Adahi v. Obama*, No. 1:05-cv-280 (D.D.C. Feb. 12, 2014), D.E. 640; Transcript, *id.* (July 29, 2014, filed Oct. 29, 2014), D.E. 659 (oral argument); see *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010).

4396. Motion, *Deghayes v. Obama*, No. 1:04-cv-2215 (D.D.C. Apr. 7, 2014), D.E. 255; see Charlie Savage, *Lawyers for a Guantánamo Detainee Cite Failing Health in Seeking His Release*, *N.Y. Times*, Apr. 8, 2014, at A15.

4397. Order, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. Aug. 7, 2014), D.E. 653; *Aamer v. Obama*, 58 F. Supp. 3d 16 (D.D.C. 2014).

4398. Aamer Transfer Notice, *supra* note 3756.

4399. See Bravin, *supra* note 3770.

from Guantánamo Bay, Judge Sullivan recessed the proceeding briefly at al-Sharbi's request so that al-Sharbi could pray.⁴⁴⁰⁰

Challenge: Ordering Testimony from an Ambassador

On June 10, 2010, Judge Kessler ordered Daniel Fried, Special Envoy for the Closure of the Guantánamo Bay Detention Facility, to appear at a hearing on Bin Mohammed's application for an injunction against his transfer to Algeria.⁴⁴⁰¹

In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantánamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009.⁴⁴⁰²

Ambassador Fried submitted declarations assuring the court of Bin Mohammed's safety in Algeria,⁴⁴⁰³ and Judge Kessler determined that "this Court has an obligation to ensure that there is real substance behind the conclusory phrases contained in Special Envoy Fried's declarations."⁴⁴⁰⁴

The government sought reconsideration from Judge Kessler and relief from the court of appeals.⁴⁴⁰⁵ On Friday, June 25, the court of appeals ordered Judge Kessler to put her case in an appealable posture by 4:00 p.m. on Tuesday.⁴⁴⁰⁶ On June 29, Judge Kessler, without hearing testimony from Ambassador Fried, enjoined Bin Mohammed's transfer to Algeria.⁴⁴⁰⁷ The court of appeals dissolved the injunction on July 8.⁴⁴⁰⁸

4400. *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 320 n.3 (D.D.C. 2009).

4401. Order, *Bin Mohammed v. Obama*, No. 1:05-cv-1347 (D.D.C. June 10, 2010), D.E. 295 [hereinafter *Bin Mohammed* Hearing Order].

4402. July 9, 2009, Fried Declaration, *attached as ex. 9*, Government Opposition, *Naji v. Obama*, No. 10-5191 (D.C. Cir. July 15, 2010) [hereinafter D.C. Cir. *Naji* Government Opposition].

4403. Nov. 25, 2009, Fried Declaration, *attached as ex. 10*, D.C. Cir. *Naji* Government Opposition, *supra* note 4402; July 15, 2009, Fried Declaration, *supra* note 4402.

4404. *Bin Mohammed* Hearing Order, *supra* note 4401, at 2.

4405. *Bin Mohammed* Injunction, *supra* note 3537, at 2.

4406. Order, *Bin Mohammed v. Obama*, No. 10-5200 (D.C. Cir. June 25, 2010); *Bin Mohammed* Injunction, *supra* note 3537, at 2–3.

4407. *Bin Mohammed* Injunction, *supra* note 3537.

4408. *Bin Mohammed* Injunction Reversal, *supra* note 3540.

Ambassador Fried's Guantánamo Bay position was eliminated early in 2013.⁴⁴⁰⁹ A new special State Department envoy, Cliff Sloan, worked from July 2013⁴⁴¹⁰ to December 2014.⁴⁴¹¹ Lee S. Wolosky was named as Sloan's replacement on June 30, 2015.⁴⁴¹² A Defense Department counterpart, Paul M. Lewis, was in place from October 2013.⁴⁴¹³ Wolosky and Lewis left office upon the inauguration of President Trump.⁴⁴¹⁴

Appendix

Table 1. Eighty-One Duplicate Habeas Petitions Filed Between Judge Green's January 31, 2005, Decision and the Supreme Court's 2008 Boumediene Decision

There were at least sixty-five detainees named in two cases each:

1. One: Omar Khadr in No. 1:04-cv-1136 was identified as Omar Ahmad in No. 1:05-cv-2386.

4409. See Dixon, *supra* note 3500, at 53–54; Hafetz, *supra* note 4344, at 3–4; Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. Times, Jan. 29, 2013, at A14; see also Savage, *Power Wars*, *supra* note 3218, at 494–95 (reporting that by eliminating Fried's position, Secretary of State Hillary Clinton was "signaling to the world that she thought the closure effort was dead even though the White House was still pretending otherwise").

4410. See Hannah Allam, *New Envoy Tours Guantánamo Prison Camp*, Miami Herald, July 4, 2013, at 3A; Dixon, *supra* note 3500, at 55; Savage, *Power Wars*, *supra* note 3218, at 511.

4411. See Helene Cooper, *Guantánamo Envoy Quits Amid Delays in Releases*, N.Y. Times, Dec. 23, 2014, at A17; Dixon, *supra* note 3500, at 56; Carol Rosenberg, *Guantánamo "Closer" Quitting*, Miami Herald, Dec. 23, 2014, at 3A; see also Cliff Sloan, Opinion Essay, *The Path to Closing Guantánamo*, N.Y. Times, Jan. 6, 2015, at A23.

"While his departure coincided with a high point in Guantánamo issues, he had quietly started planning his exit months earlier, when everything seemed stuck." Savage, *Power Wars*, *supra* note 3218, at 530.

4412. See Carol Rosenberg, *Guantanamo's Newest "Closer" Has No Easy Task*, Miami Herald, July 1, 2015, at 1A; Savage, *Power Wars*, *supra* note 3218, at 553.

4413. See Dixon, *supra* note 3500, at 55; Rosenberg, *supra* note 4411; Carol Rosenberg, *Guantánamo Closure Advocates Defend Releasing Detainees*, Miami Herald, July 8, 2016, at 14A; Carol Rosenberg, *Sources: Hill Lawyer Named Pentagon's "Gitmo Closer"*, Miami Herald, Oct. 8, 2013, at 1A; Craig Whitlock, *Hagel Appoints Envoy to Bolster Efforts to Close Guantanamo*, Wash. Post, Oct. 9, 2013, at A11; see also *Obama Meets Guantánamo Envoys*, Miami Herald, Nov. 5, 2013, at 3A (photo); Savage, *Power Wars*, *supra* note 3218, at 508.

4414. See Carol Rosenberg, *Guantánamo Policy Is in Limbo, Waits for Trump*, Miami Herald, Feb. 19, 2017, at 11A.

2. One: Riyadh Atag Ali Abdoh al-Haj (Atag Ali Abdoh) in No. 1:04-cv-1194 was identified as Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399.
3. One: Mahmood Salim al-Mohammed in No. 1:05-cv-247 was identified as Mahmoud al-Soury in No. 1:05-cv-429.
4. Two: Sherif el-Mashad and Adel Fattouh Aly Ahmed Algazzar in No. 1:05-cv-270 were identified as Ismail al-Mashad and Ahmed Abdul Rahman, respectively, in No. 1:05-cv-833.
5. One: Zahir Omar Khamis Bin Hamdoon in No. 1:05-cv-280 was identified as Zaher Omer Bin Hamdoon in No. 1:05-cv-2223.
6. Two: Majid Abdulla al-Joudi and Yousif Mohammad Mubarak al-Shehri in No. 1:05-cv-301 were identified as Maged and Yusuf Asshihri, respectively, in No. 1:05-cv-2386.
7. One: Ahmed Abdullah al-Wazan in No. 1:05-cv-329 was identified as Younis Shakur in No. 1:05-cv-764.
8. One: Thani Faris al-Anazi in No. 1:05-cv-345 was identified as Abdulal al-Thani in No. 1:05-cv-2386.
9. One: Mohammed Abdul Rahman in No. 1:05-cv-359 was identified as Mohammed Abdur Rahman in No. 1:05-cv-2386.
10. Three: Hassan al-Gassary, Muhammed Sidii, and Adel al-Hakeemy in No. 1:05-cv-429 were identified as Laheen Iksrien in No. 1:05-cv-764, Mohammed al-Amin in No. 1:05-cv-2336, and Adel Ben Ahmad al-Hakeemy in No. 1:05-cv-2386, respectively.
11. One: Adel Turkestani in No. 1:05-cv-429 was identified as A'del Abdu al-Hakim in No. 1:05-cv-497.
12. One: Abu Bakker Qassim in No. 1:05-cv-497 was identified as Abu Baker in No. 1:05-cv-2386.
13. Two: Muhammed Fahad al-Qahtany and Musa al-Madany in No. 1:05-cv-520 were identified as Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265 and Mishal al-Madany in No. 1:05-cv-2386, respectively.
14. One: Ahmed Errachidi in No. 1:05-cv-640 was identified as Ahmed Abu Imran in No. 1:05-cv-764.
15. One: Abdul Salam Zaeef in No. 1:05-cv-660 was identified as Abdul Salam Deiff in No. 1:05-cv-2386.
16. One: Elham Battayav in No. 1:05-cv-714 was identified as Elham Bataif in No. 1:05-cv-2386.
17. One: Salim Muhood Adem in No. 1:05-cv-723 was identified as Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724.
18. One: Najeeb al-Husseini in No. 1:05-cv-764 was identified as Najeeb in No. 1:05-cv-2386.
19. One: Chaman in No. 1:05-cv-887 was identified as Chaman Gul Khialigol in No. 1:05-cv-2367.
20. One: Akhteyar Mohammad in No. 1:05-cv-996 was identified as Mohammad Akhtiar in No. 1:05-cv-1635.
21. One: Adel Hassan Hamad in No. 1:05-cv-1009 was identified as Adel Hassan in No. 1:05-cv-2386.
22. Four: Haji Nasrat, Ali Shah Mousovi, Izaatullah Nusrat, and Sabar Lal in No. 1:05-cv-1124 were identified as Haji Nasrat in No. 1:05-cv-880, Syed Muham-

- mad Ali Shah in No. 1:05-cv-1012, Ezatullah in No. 1:06-cv-1752, and Sabar Lal in No. 1:06-cv-1763, respectively.
23. One: Omar Mohammed Khalifh in No. 1:05-cv-1189 was identified as Omar Mohamad Khalifah in No. 1:05-cv-2386.
 24. One: Ali Adel Motaleb Aweid al-Khaiy in No. 1:05-cv-1239 was identified as Abdul Zahir in No. 1:05-cv-1240.
 25. One: Ghaleb Nassar al-Bihani in No. 1:05-cv-1312 was identified as Ghalib Fahani in No. 1:05-cv-2386.
 26. One: Jawad Jabber Sadkhan in No. 1:05-cv-1487 was identified as Jawad Jabbar Sadkhan in No. 1:05-cv-1679.
 27. One: Faraj Abdl al-Hadi Omar Mahmoud in No. 1:05-cv-1490 was identified as Abdul Hadi Omer Hamoud Faraj in No. 1:05-cv-1590.
 28. One: Mohammed Amon in No. 1:05-cv-1493 was identified as Tooran Mohammad Amannullah in No. 1:05-cv-2367.
 29. One: Shafiq in No. 1:05-cv-1506 was identified as Sofiane Mohammed Berhoumi in No. 1:05-cv-2386.
 30. One: Ibrahim Osman Ibrahim Idris in No. 1:05-cv-1555 was identified as Abraham Othman Abraham Edries in No. 1:05-cv-1725.
 31. One: Hassan Bin Attash in No. 1:05-cv-1592 was identified as Omier Ba Atash in No. 1:05-cv-2386.
 32. One: Hamid al-Razak in No. 1:06-cv-1601 was identified as Qari Hamdullah in No. 1:06-cv-1691.
 33. One: Ahmmed Ghulam Rabbani in No. 1:05-cv-1607 was identified as Ahmmed Ghulam Rabbani in No. 1:05-cv-2386.
 34. One: Hussain Salem Hohammed Almerfed in No. 1:05-cv-1645 was identified as Hussein Salem Mohammad Abdallah el-Marqodi in No. 1:05-cv-1649.
 35. One: Abdannour Sameur in No. 1:05-cv-1806 was identified as Abdurrachman in No. 1:05-cv-2386.
 36. One: Ravil Mingaza Gamil in No. 1:05-cv-2010 was identified as Ravil Mingazov in No. 1:05-cv-2479.
 37. One: Dr. Abu Muhammed, also known as Fethi Boucetta, in No. 1:05-cv-2087 was identified as Abu Mohammed in No. 1:05-cv-2386.
 38. One: Jabbarow Oybek Jamolovich in No. 1:05-cv-2112 was identified as Jabbarov Oybek Jamolovich in No. 1:05-cv-2386.
 39. One: Abdu al-Qader Hussain al-Mudafari in No. 1:05-cv-2185 was identified as Abdualqader Hossin Ali al-Mothafri in No. 1:05-cv-2200.
 40. One: Ahmed Ben Bacha in No. 1:05-cv-2349 was identified as Ahmed Ben Bacha in No. 1:05-cv-2386.
 41. One: Abdullah Ali Saleh Gerab Alsaaei in No. 1:05-cv-2369 was identified as Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452.
 42. One: Abdur Razakah in No. 1:05-cv-2370 was identified as Abdurazzak in No. 1:05-cv-2386.
 43. One: Abdul Hamid Abdul Salam al-Ghizzawi in No. 1:05-cv-2378 was identified as Abin Alhamed Abid Alsallam Alkesawi in No. 1:05-cv-2386.
 44. One: Saad al-Qahtaani in No. 1:05-cv-2384 was identified as Sad al-Gahtani in No. 1:05-cv-2386.
 45. Three: Adel, Abdo Ali al-Haj, and Saif in No. 1:05-cv-2385 were identified as Adel, Shargowi, and Saif Ullah, respectively, in No. 1:05-cv-2386.

46. One: Sultan al-Shareef in No. 1:05-cv-2385 was identified as Fahd Umar Abdulmajid al-Shareef in No. 1:05-cv-2458.
47. Five: Ali, Mohammed Rimi, Zein al-Abedeen, Abdul Rahman Abdo Abulghaith Sulaiman, and Ali in No. 1:05-cv-2386 were identified as Ali in No. 1:05-cv-2398, Mohammad Rimi in No. 1:05-cv-2427, Zainulabidin Merozhev in No. 1:05-cv-2479, Abdullrahman Abdo Abo al-Ghith in No. 1:06-cv-1757, and Elisher in No. 1:06-cv-1759, respectively.
48. Two: Alkhadr Abdullah al-Yafie and Tofiq Nasser Awad al-Bihani in No. 1:05-cv-2399 were also petitioners in No. 1:05-cv-2386.
49. One: Qari Saad Iqbal in No. 1:06-cv-1674 was also the petitioner in No. 1:06-cv-1688.
50. One: Naseer in No. 1:06-cv-1676 was also the petitioner in No. 1:06-cv-1689.

At least eight detainees were named in three cases each:

1. Yousuf al-Karany in No. 1:05-cv-429 was identified as M.C. in No. 1:05-cv-430 and as Mohmad Ahmad al-Kara'any in No. 1:05-cv-2386.
2. Ibrahim Towkah in No. 1:05-cv-429 was identified as Ibrahim Mahdi Ahmed Zaidan in No. 1:05-cv-431 and as Ibraheem Zaidan in No. 1:05-cv-2386.
3. Abdul al-Hadi in No. 1:05-cv-429 was identified as Abdul Hadi Ibn el-Hathily al-Hamamy in No. 1:05-cv-766 and as Abdulhadi al-Hamami in No. 1:05-cv-2386.
4. Abdul Aziz al-Mossary in No. 1:05-cv-429 was identified as Abu Abdul Aziz in No. 1:05-cv-1864 and as Alla al-Mossary in No. 1:05-cv-2386.
5. Mohammedou Ould Salahi in No. 1:05-cv-569 was identified as Mohameduo Ould Slahi in No. 1:05-cv-881 and as Mohamedou Ould Slahi in No. 1:05-cv-995.
6. Ameer Mammam in No. 1:05-cv-573 and No. 1:05-cv-1233 was identified as Amer Mohammon in No. 1:05-cv-2386.
7. Abdulzاهر in No. 1:05-cv-1236 was identified as Abdul Zahir in No. 1:05-cv-1623 and as Abdulkadr Abdulkhalik Dad in No. 1:05-cv-2083.
8. Ahsanullah Pirzai in No. 1:05-cv-1242 was identified as Ihsan Ullah Peerzai in No. 1:05-cv-1243 and as Ehsan Ullah in No. 1:05-cv-1311.

Table 2. 198 Petitioners Transferred by the Time of the 2008 Boumediene Decision

For 161 transfers, the government filed notices in the detainees' habeas cases:

1. Eight: Notices, No. 1:02-cv-828 (D.D.C. Jan. 18, 2005, to Sept. 15, 2006), D.E. 184, 270, 310 (Nasir Najr Nasir Balud al-Mutayri, Abdullah al-Ajmi, Abdulaziz al-Shammari, Mohammed al-Dihani, Adil al-Zamil, Saad al-Azmi, Omar Rajab Amin, and Abdullah Kamal Abdullah Kamal al-Kandari to Kuwait).
2. One: Notice, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006), D.E. 112 (Murat Kurnaz to Germany); *see* Kurnaz, *supra* note 3307; Baher Azmy, *Free at Last, in The Guantánamo Lawyers*, *supra* note 3154, at 346; Bernhard Docke, *Lost and Found, in The Guantánamo Lawyers*, *supra* note 3154, at 297; Craig Whitlock, *U.S. Frees Longtime Detainee*, Wash. Post, Aug. 25, 2006, at A9.

3. Six: Notices, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007), D.E. 192, 206 (Bisher al-Rawi and Jamil el-Banna to the United Kingdom); Notice, No. 1:04-cv-1137 (D.D.C. Jan. 25, 2005), D.E. 93 (Feroz Ali Abbasi, Moazzam Begg, Richard Belmar, and Martin Mubanga to the United Kingdom; also filed in Nos. 1:04-cv-1144 and 1:04-cv-1897); see Begg, *supra* note 3464, at 345–74; *Britain Detains 3 Men Freed by U.S.*, N.Y. Times, Dec. 20, 2007 (reporting on a transfer to Britain of el-Banna and Omar Deghayes, a petitioner in No. 1:04-cv-2215, and one additional detainee, Adbenour Samuer); Glenda Cooper, *Last British Prisoners Leave Guantanamo*, Wash. Post, Jan. 26, 2005, at A14 (reporting on the transfer of Abbasi, Begg, Belmar, and Mubanga); Omonira-Oyekanmi & Finn, *supra* note 3171 (reporting on a British damages settlement paid to Abbasi, el-Banna, Begg, Belmar, Mubanga, and al-Rawi); Craig Whitlock, *Iraqi Resident of Britain to Leave Guantanamo*, Wash. Post, Mar. 30, 2007, at A11 (reporting on the transfer of al-Rawi).
Begg was arrested in Britain on February 25, 2014, because of his activities in Syria. See Karla Adam, *Britain Arrests Ex-Guantanamo Detainee in Syria-Related Case*, Wash. Post, Feb. 26, 2014, at A8; Nicholas Winning & Margaret Coker, *U.K. Police Arrest Muslim Activist*, Wall St. J., Feb. 26, 2014, at A12. Seven months later, he was released without charges. See Alan Cowell, *Terrorism Case Is Dropped*, N.Y. Times, Oct. 2, 2014, at A13; Danica Kirka & Jill Lawless, *U.K. Drops Terror Case Against Former Guantánamo Detainee*, Miami Herald, Oct. 2, 2014, at 10A.
4. One: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006), D.E. 170 (Ali Husayn al-Tays to Yemen).
5. Three: Notices, No. 1:04-cv-1227 (D.D.C. Oct. 26, 2006, to Aug. 10, 2007), D.E. 165, 179, 181 (Salah Abdul Rasool al-Bloushi and Isa Ali Abdulla Almurbati to Bahrain and Juma al-Dosari to Saudi Arabia); see Joshua Colangelo-Bryan, *Habeas on the Gate, Aftermath*, in *The Guantánamo Lawyers*, *supra* note 3154, at 345 (concerning Juma al-Dosari); Mahvish Khan, *supra* note 3309, at 298–97 (same); Josh White, *16 Detainees Transferred from Guantanamo*, Wash. Post, July 17, 2007, at A3 (same).
6. One: Notice, No. 1:04-cv-1254 (D.D.C. June 22, 2007), D.E. 212 (Sadeq Mohammed Said to Yemen).
7. Two: Notices, No. 1:04-cv-2215 (D.D.C. Feb. 9, 2006, and Dec. 21, 2007), D.E. 39, 68 (Jamal Kiyemba to Uganda and Omar Deghayes to the United Kingdom); see *Britain Detains 3 Men Freed by U.S.*, N.Y. Times, Dec. 20, 2007; Omonira-Oyekanmi & Finn, *supra* note 3171 (reporting on a British damages settlement paid to Deghayes); see also Rodney Muhumuza, *Ex-Guantánamo Detainee Is Arrested*, Miami Herald, Apr. 9, 2015, at 7A (reporting on Kiyemba's arrest in Uganda).
8. One: Notice, No. 1:05-cv-23 (D.D.C. Sept. 6, 2007), D.E. 74 (Rami Bin Saad al-Oteibi to Saudi Arabia).
9. Four: Notices, No. 1:05-cv-301 (D.D.C. June 27, 2006, to Dec. 31, 2007), D.E. 67, 90, 106, 111 (Abdulla Mohammad al-Ghanmi; Majid Abdulla al-Joudi, Maged in No. 1:05-cv-2386; Yousif Mohammad Mubarak al-Shehri, Yusuf Asshihri in No. 1:05-cv-2386; and Abdul-Hakim Abdul-Rahman al-Moosa to Saudi Arabia).

10. Five: Notices, No. 1:05-cv-345 (D.D.C. May 23, 2006, to Dec. 31, 2007), D.E. 45, 79, 87, 88 (Adel Eglā Hussan al-Nussairi; Ibrahim Suleiman al-Rubaish; Abdulla Thani Faris al-Anazi, Abdulal al-Thani in No. 1:05-cv-2386; Abdulaziz Sa’ad Oshan; and Naief Fahad Mutlaq al-Otaibi to Saudi Arabia).

On December 18, 2014, the State Department designated Ibrahim al-Rubaish a specially designated global terrorist. See Carol Rosenberg, *Ex-Detainee a “Global Terrorist,”* Miami Herald, Dec. 19, 2014, at 3A.

11. Five: Notices, No. 1:05-cv-429 (D.D.C. Oct. 3, 2005, to May 5, 2008), D.E. 27, 72, 73, 79 (Sami al-Laithi, also known as Abdul Aziz al-Mossary, Abu Abdul Aziz in No. 1:05-cv-1864 and Alla al-Mossary in No. 1:05-cv-2386, to Egypt; Abdullah, later identified as Abdullah Bin Omar al-Hajji, to Tunisia; Muhammed Sidii, Mohammed al-Amin in No. 1:05-cv-2336, to Mauritania; and Sami Muhyideen and Amir Yakub to Sudan); see *Allaithi v. Rumsfeld*, 753 F.3d 1327, 1328–29 (D.C. Cir. 2014) (al-Laithi, also known as Sami Allaithi); Order at 2, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Nov. 18, 2009), D.E. 255, 2009 WL 4251108 (“Al Hajji is in prison in Tunisia, serving a sentence for an earlier conviction in that country.”); Agnieszka Fryszman, *Wrong Side of History*, in *The Guantánamo Lawyers*, *supra* note 3154, at 277, 279 (account by al-Amin’s habeas attorney); William Glaberson, *Cameraman Is Released from Guantánamo*, N.Y. Times, May 2, 2008, at A14 (reporting on the transfer of Al-Jazeera cameraman Sami al-Hajj, identified in his petition as Sami Muhyideen, to Sudan); John Robert Holland & Anna Cayton Holland-Edwards, *Representing the Rightless*, in *The Guantánamo Lawyers*, *supra* note 3154, at 289, 293 (according to al-Amin’s habeas attorneys, “Mohammed Al Amin is now living free.”); Josh White, *6 Detainees Repatriated by Military*, Wash. Post, June 20, 2007, at A6 (concerning Abdullah Bin Omar).
12. Three: Notice, No. 1:05-cv-431 (D.D.C. Nov. 13, 2007), D.E. 42 (Usama Hasan Abu Kabir; Ahmad Hassan Jamil Suleiman; and Ibrahim Mahdi Ahmed Zaidan, Ibrahim Towkah in No. 1:05-cv-429 and Ibraheem Zaidan in No. 1:05-cv-2386, to Jordan).
13. One: Notice, No. 1:05-cv-454 (D.D.C. June 27, 2006), D.E. 17 (Rashid Abdul Mosleh Qayed to Saudi Arabia).
14. One: Notice, No. 1:05-cv-490 (D.D.C. June 27, 2006), D.E. 25 (Abdul-Salam Gaithan Mureef al-Shihry to Saudi Arabia).
15. Five: Notices, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007), D.E. 47, 65, 92, 98, 113 (Saleh Abdulla al-Oshan; Musa al-Madany, Mishal al-Madany in No. 1:05-cv-2386; Muhammed Fahad al-Qahtany, Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265; Zaben Dhaher al-Shammari; and Abdullah Aali al-Otaibi to Saudi Arabia).
16. One: Notice, No. 1:05-cv-533 (D.D.C. Dec. 20, 2006), D.E. 19 (Sulaiman Saad Mohammed al-Oshan to Saudi Arabia).
17. Two: Notice, No. 1:05-cv-583 (D.D.C. Sept. 7, 2007), D.E. 37 (Abdulrazzaq Abdullah al-Sharekh and Abdulhadi Abdullah al-Sharekh to Saudi Arabia).
18. One: Notice, No. 1:05-cv-584 (D.D.C. Nov. 13, 2007), D.E. 38 (Murtadha Ali Magram to Saudi Arabia).
19. One: Notice, No. 1:05-cv-586 (D.D.C. May 23, 2006), D.E. 25 (Abdullah Ibrahim Abdullah al-Rashaidan to Saudi Arabia).

20. One: Notice, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007), D.E. 29 (Wahidof Abdul Mokit to Tajikistan).
21. One: Notice, No. 1:05-cv-640 (D.D.C. May 2, 2007), D.E. 47 (Ahmed Er-rachidi, Ahmed Abu Imran in No. 1:05-cv-764, to Morocco); *see* Apuzzo et al., *supra* note 3515; Christopher Chang, *A Cook, Not a General, in The Guantánamo Lawyers*, *supra* note 3154, at 349.
22. One: Notice, No. 1:05-cv-714 (D.D.C. Dec. 20, 2006), D.E. 43 (Elham Battayav to Kazakhstan; also filed in No. 1:05-cv-2386).
23. One: Notice, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007), D.E. 69 (Salim Muhood Adem, Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724, to Sudan).
24. Two: Notice, No. 1:05-cv-764 (D.D.C. May 5, 2008), D.E. 56 (Said to Morocco); Notice, *id.* (Feb. 9, 2006), D.E. 21 (Najeeb al-Husseini to Morocco; also filed in No. 1:05-cv-2386).
25. One: Notice, No. 1:05-cv-795 (D.D.C. Oct. 5, 2007), D.E. 48 (Sofian Ebrahim Hamad Hamoodah to Libya); *see* Order, *id.* (Nov. 23, 2009), D.E. 64, 2009 WL 4251102 (“Hamoodah [is] apparently being detained by the Libyan government.”); *see also* Adam Goldman, *Ex-Guantanamo Detainee Implicated in Benghazi Attack*, Wash. Post, Jan. 8, 2014, at A3 (reporting that militiamen under the command of Hamoodah, also known as “Abu Suffian Bin Qumu, the leader of Ansar al-Sharia in the Libyan city of Darnah, participated in the attack that killed U.S. Amabassador J. Christopher Stevens and three other Americans” on September 11, 2012).
26. One: Notice, No. 1:05-cv-833 (D.D.C. Nov. 20, 2006), D.E. 33 (Ala Abdel Maqsud Muhammad Salim to Albania); *see* Allaithi v. Rumsfeld, 753 F.3d 1327, 1328–29 (D.C. Cir. 2014).
27. One: Notice, No. 1:05-cv-878 (D.D.C. May 5, 2008), D.E. 38 (Rahmattullah to Afghanistan).
28. One: Notice, No. 1:05-cv-879 (D.D.C. Oct. 24, 2006), D.E. 26 (Taj Mohammad to Afghanistan); *see* Khan, *supra* note 3309, at 296–97.
29. One: Notice, No. 1:05-cv-880 (D.D.C. Aug. 29, 2006), D.E. 14 (Haji Nasrat, also a petitioner in No. 1:05-cv-1124, to Afghanistan).
30. One: Notice, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007), D.E. 40 (Fazil Rahman to Afghanistan).
31. One: Notice, No. 1:05-cv-884 (D.D.C. Oct. 5, 2007), D.E. 33 (Muhibullah to Afghanistan).
32. One: Notice, No. 1:05-cv-885 (D.D.C. Dec. 20, 2006), D.E. 37 (Alif Mohammad to Afghanistan).
33. One: Notice, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007), D.E. 81 (Chaman, Chaman Gul Khialigol in No. 1:05-cv-2367, to Afghanistan).
34. One: Notice, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007), D.E. 65 (Nazul Gul to Afghanistan).
35. One: Notice, No. 1:05-cv-890 (D.D.C. Feb. 9, 2006), D.E. 12 (Sharbat Khan to Afghanistan).
36. One: Notice, No. 1:05-cv-891 (D.D.C. Oct. 5, 2007), D.E. 26 (Nasrullah to Afghanistan).
37. One: Notice, No. 1:05-cv-997 (D.D.C. Feb. 9, 2006), D.E. 14 (Khudaidad to Afghanistan).

38. One: Notice, No. 1:05-cv-1000 (D.D.C. Oct. 24, 2006), D.E. 29 (Abib Sarajuddin to Afghanistan).
39. One: Notice, No. 1:05-cv-1001 (D.D.C. May 5, 2008), D.E. 36 (Abdulla Mohammed Kahn to Afghanistan).
40. One: Notice, No. 1:05-cv-1002 (D.D.C. Aug. 31, 2006), D.E. 10 (Akhtar Mohammad to Afghanistan).
41. One: Notice, No. 1:05-cv-1008 (D.D.C. Oct. 24, 2006), D.E. 36 (Habibullah Mangut to Afghanistan).
42. One: Notice, No. 1:05-cv-1009 (D.D.C. Dec. 14, 2007), D.E. 91 (Adel Hassan Hamad, Adel Hassan in No. 1:05-cv-2386, to Sudan); *see* Wax, *supra* note 3154, at 327–28.
43. One: Notice, No. 1:05-cv-1010 (D.D.C. Oct. 24, 2006), D.E. 51 (Mohabat Khan to Afghanistan); *see* Order, *id.* (Nov. 23, 2009), D.E. 68, 2009 WL 4251091 (“Khan’s current whereabouts is unknown, but his counsel suspects he may be in custody in Afghanistan.”).
44. One: Notice, No. 1:05-cv-1013 (D.D.C. Feb. 9, 2006), D.E. 19 (Abdul Salaam to Afghanistan).
45. Two: Notices, No. 1:05-cv-1124 (D.D.C. Oct. 24, 2006, and May 5, 2008), D.E. 53, 80 (Ali Shah Mousovi, Syed Muhammad Ali Shah in No. 1:05-cv-1012, and Haji Rohullah Wakil to Afghanistan); *see* Khan, *supra* note 3309, at 281–89 (concerning Mousovi).
46. One: Notice, No. 1:05-cv-1235 (D.D.C. Feb. 9, 2006), D.E. 13 (Abdul Baqi to Afghanistan).
47. One: Notice, No. 1:05-cv-1237 (D.D.C. Aug. 10, 2007), D.E. 33 (Aminullah to Afghanistan).
48. One: Notice, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007), D.E. 42 (Haji Ghalib to Afghanistan); *see* Joseph Goldstein, *Freed from Guantánamo, He Fights the Taliban*, N.Y. Times, Nov. 28, 2015, at A1.
49. One: Notice, No. 1:05-cv-1242 (D.D.C. Aug. 29, 2006), D.E. 17 (Ahsanullah Pirzai, Ihsan Ullah Peerzai in No. 1:05-cv-1243 and Ehsan Ullah in No. 1:05-cv-1311, to Afghanistan).
50. One: Notice, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006), D.E. 29 (Abdul Majid Mohammadi to Iran).
51. One: Notice, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007), D.E. 51 (Nasser Mazyad Abdullah al-Subaiy to Saudi Arabia).
52. One: Notice, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006), D.E. 33 (Faizullah to Afghanistan).
53. One: Notice, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006), D.E. 22 (Sawat Khan to Afghanistan).
54. One: Notice, No. 1:05-cv-1492 (D.D.C. Oct. 5, 2007), D.E. 22 (Abdul Ahmad to Afghanistan).
55. One: Notice, No. 1:05-cv-1493 (D.D.C. Oct. 24, 2006), D.E. 26 (Mohammed Amon, Tooran Mohammad Amannullah in No. 1:05-cv-2367, to Afghanistan); Unopposed Motion to Dismiss, No. 1:05-cv-2367 (Jan. 3, 2006), D.E. 7.
56. One: Notice, No. 1:05-cv-1509 (D.D.C. June 27, 2006), D.E. 59 (Saddiq Ahmed Turkistani to Saudi Arabia).
57. One: Notice, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006), D.E. 28 (Mohammad Akhtiar, Akhteyar Mohammad in No. 1:05-cv-996, to Afghanistan).

58. Three: Notices, No. 1:05-cv-1641 (D.D.C. June 27 to Dec. 20, 2006), D.E. 29, 30, 45 (Abdulaziz Abdulrahman al-Badah, Ibrahim Mohammed al-Naser, and Abdulaziz Mohammed al-Naser to Saudi Arabia).
59. One: Notice, No. 1:05-cv-1666 (D.D.C. Dec. 31, 2007), D.E. 53 (Ziyad Bin Salih Bin Muhammad al-Bahooth to Saudi Arabia).
60. One: Notice, No. 1:05-cv-1667 (D.D.C. May 23, 2006), D.E. 24 (Abdul-Hadi Muhammed al-Siba'i to Saudi Arabia).
61. One: Notice, No. 1:05-cv-1668 (D.D.C. May 23, 2006), D.E. 37 (Rashid Awadh Rashid al-Uwaidah to Saudi Arabia).
62. One: Notice, No. 1:05-cv-1669 (D.D.C. May 23, 2006), D.E. 29 (Fahd Bin Salih Bin Sulaiman al-Jutaili to Saudi Arabia).
63. One: Notice, No. 1:05-cv-1697 (D.D.C. Oct. 24, 2006), D.E. 22 (Kadeer Khandan to Afghanistan).
64. One: Notice, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006), D.E. 35 (Yousif Abdullah al-Rubaish to Saudi Arabia).
65. One: Notice, No. 1:05-cv-1779 (D.D.C. Nov. 13, 2007), D.E. 52 (Muhammed Qasim to Afghanistan); *see* Sahr Muhammed Ally, *Speaking Through Holes in Glass*, in *The Guantánamo Lawyers*, *supra* note 3154, at 339, 340.
66. One: Notice, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007), D.E. 53 (Abdannour Sameur, Abdurrachman in No. 1:05-cv-2386, to the United Kingdom).
67. Three: Notice, No. 1:05-cv-1886 (D.D.C. May 5, 2006), D.E. 30 (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe to Albania).
68. One: Notice, No. 1:05-cv-1894 (D.D.C. June 22, 2007), D.E. 37 (Fawaz Naman Hamoud to Yemen).
69. One: Notice, No. 1:05-cv-2029 (D.D.C. July 17, 2007), D.E. 47 (Bender Ayed Hamoud Hezam al-Oteibi al-Shabany to Saudi Arabia).
70. One: Notice, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006), D.E. 76 (Zakirjan to Albania); *see* Allaithi v. Rumsfeld, 753 F.3d 1327, 1328 (D.C. Cir. 2014).
71. One: Notice, No. 1:05-cv-2087 (D.D.C. Nov. 20, 2006), D.E. 46 (Dr. Abu Muhammed, Dr. Abu Mohammed in No. 1:05-cv-2386, and also known as Fethi Boucetta, to Albania); *see* Anne Castle, Trip Mackintosh & Scott Barker, *Stateless*, in *The Guantánamo Lawyers*, *supra* note 3154, at 335.
72. One: Notice, No. 1:05-cv-2104 (D.D.C. Dec. 20, 2006), D.E. 35 (Issam Hamid Ali Bin Ali al-Jayfi to Yemen).
73. One: Notice, No. 1:05-cv-2197 (D.D.C. Dec. 20, 2006), D.E. 43 (Mohammed Ahmed Ali al-Asadi to Yemen).
74. Two: Notices, No. 1:05-cv-2201 (D.D.C. Sept. 7 and Nov. 13, 2007), D.E. 22, 23 (Muhammed Mubarak al-Kurbi and Naif Abdulla al-Nakheelan to Saudi Arabia).
75. Three: Notices, No. 1:05-cv-2216 (D.D.C. May 23 and July 17, 2007), D.E. 30, 31, 55 (Alghamdi Abdulrahman Othman A, Mohammed Bin Jaied Bin Aladi al-Mohammed al-Subaie, and Bijad Defalla Oteibi to Saudi Arabia).
76. One: Notice, No. 1:05-cv-2248 (D.D.C. June 27, 2006), D.E. 25 (Saleh Zaid al-Khatemi to Saudi Arabia).
77. Four: Notice, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007), D.E. 84 (Ghulam Roohani, Abdullah Wazir Zadrán, Dr. Hiyatullah, and Abdullah Mujahid Haq to Afghanistan); *see* Khan, *supra* note 3309, at 245–49 (reporting that Mujahid was informed that his transfer was imminent ten months before it occurred);

- Sahr Muhammed Ally, *Speaking Through Holes in Glass*, in *The Guantánamo Lawyers*, *supra* note 3154, at 339, 340 (concerning Ghulam Roohani and Abdullah Wazir).
78. One: Notice, No. 1:05-cv-2369, (D.D.C. Dec. 20, 2006), D.E. 32 (Abdullah Ali Saleh Gerab Alsaanei, Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452, to Saudi Arabia).
79. One: Notice, No. 1:05-cv-2376 (D.D.C. Oct. 24, 2006), D.E. 30 (Abdul Haleem to Pakistan).
80. Three: Notices, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006, to Sept. 7, 2007), D.E. 61, 73, 75 (Anwar Handan al-Shimmiri, Bandar al-Jaabir, and Salim Said to Saudi Arabia).
81. Sixteen: Notices, No. 1:05-cv-2386 (D.D.C. May 23, 2006, to May 5, 2008), D.E. 39, 40, 251, 256, 257, 259, 385, 387, 395, 403, 405, 434 (Saleh Mohammed Ali Azoba, Abdullah al-Quatany, Slaim Harbi, Seed Farha, Fahd al-Haraazi, Fahd al-Fawzan, Khald al-Barkati, Mohammed Harbi, Jabir al-Quatany, and Sad al-Materi to Saudi Arabia; Abdullah to Kazakhstan; Mohsen and Ali al-Kazmi to Yemen; Omar to Afghanistan; and Waleed to Sudan); Notice, *id.* (D.D.C. Dec. 20, 2006), D.E. 258 (Mohammed Rimi to Libya; also filed in 1:05-cv-2427); *see* Order, Rimi v. Obama, No. 1:05-cv-2427 (D.D.C. Nov. 23, 2009), D.E. 30, 2009 WL 4251097 (Muhammad Abdallah Mansur al-Futuri Rimi is “apparently being detained by the Libyan government.”), *aff’d*, 608 F. App’x 4 (D.C. Cir. 2015).
- On July 23, 2014, Judge Leon denied a motion to reopen Mohammad Rimi’s habeas corpus petition for relief from collateral consequences of his detention. Rimi v. Obama, 60 F. Supp. 3d 52 (D.D.C. 2014), *aff’d*, 608 F. App’x 4; *see id.* at 56 (reciting Rimi’s claim that he was sentenced in Libya to twenty-five years in prison but released when revolutionaries stormed the prison).
82. Two: Notice, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007), D.E. 49 (Fahd Umar Abdulmajid al-Shareef, Sultan al-Shareef in No. 1:05-cv-2385, and Hani Saeed Mohammed Banan al-Kalf al-Gamdi to Saudi Arabia).
83. One: Notice, No. 1:05-cv-2466 (D.D.C. Oct. 24, 2006), D.E. 11 (Anwar Khan to Afghanistan).
84. One: Notice, No. 1:05-cv-2467 (D.D.C. Dec. 20, 2006), D.E. 17 (Mubark Hussein to Bangladesh).
85. One: Notice, No. 1:05-cv-2479 (D.D.C. July 17, 2007), D.E. 76 (Ghanim-Abdulrahman al-Harbi to Saudi Arabia); *see* Lefrak, *supra* note 3229.
86. One: Notice, No. 1:06-cv-1675 (D.D.C. Dec. 29, 2006), D.E. 11 (Wasim to Saudi Arabia).
87. One: Notice, No. 1:06-cv-1679 (D.D.C. Dec. 14, 2007), D.E. 22 (Abdul Matin to Afghanistan).
88. One: Notice, No. 1:06-cv-1681 (D.D.C. May 5, 2008), D.E. 9 (Sangar Yar Mullah Rahmattullah to Afghanistan).
89. One: Notice, No. 1:06-cv-1682 (D.D.C. Dec. 26, 2006), D.E. 8 (Quari Ismatullah to Afghanistan).
90. One: Notice, No. 1:06-cv-1683 (D.D.C. Aug. 10, 2007), D.E. 12 (Mohammed Mosa Yaakoobi to Afghanistan).
91. One: Notice, No. 1:06-cv-1685 (D.D.C. Dec. 14, 2007), D.E. 22 (Abdul Gafoor Akhouzada to Afghanistan).

92. One: Notice, No. 1:06-cv-1686 (D.D.C. May 2, 2007), D.E. 12 (Azeemullah to Afghanistan).
93. One: Notice, No. 1:06-cv-1687 (D.D.C. Dec. 14, 2007), D.E. 15 (Ameenullah Toukh to Afghanistan).
94. One: Notice, No. 1:06-cv-1689 (D.D.C. Nov. 13, 2007), D.E. 22 (Naseer, also the petitioner in No. 1:06-cv-1676, to Afghanistan).
95. One: Notice, No. 1:06-cv-1752 (D.D.C. Nov. 13, 2007), D.E. 21 (Ezatullah, Izaatullah Nusrat in No. 1:05-cv-1124, to Afghanistan); *see* Sahr Muhammed Ally, *Speaking Through Holes in Glass*, in *The Guantánamo Lawyers*, *supra* note 3154, at 339, 340.
96. One: Notice, No. 1:06-cv-1753 (D.D.C. Nov. 13, 2007), D.E. 24 (Abdulah Hakmat to Afghanistan).
97. One: Notice, No. 1:06-cv-1763 (D.D.C. Oct. 5, 2007), D.E. 16 (Sabar Lal, also a petitioner in No. 1:05-cv-1124, to Afghanistan); *see* Ray Rivera, *Mystery and Anger After a Raid*, N.Y. Times, Sept. 5, 2011, at A4 (also reporting that the former detainee was killed by coalition and Afghan forces in a night raid at his home on September 2, 2011).
98. One: Notice, No. 1:06-cv-1769 (D.D.C. Dec. 31, 2007), D.E. 21 (Khaled Mallouh Shaye Algahtani to Saudi Arabia).

There were eleven other transfers noted in voluntary dismissals:

1. Two: Notice, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007), D.E. 229 (Shafiq Rasul and Asif Iqbal to the United Kingdom).
2. Three: Status Report, No. 1:04-cv-1142 (D.D.C. July 18, 2008), D.E. 96 (Ridouane Khalid, also a petitioner in No. 1:04-cv-547); Consent Motion, *id.* (Sept. 21, 2004), D.E. 19 (Mourad Benchellali and Nizar Sassi, also a petitioner in No. 1:04-cv-547); *see* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, N.Y. Times, Feb. 25, 2009, at A5 (discussing transfers to France of Khalid; Benchellali; Sassi; Khaled Ben Mustapha, a petitioner in No. 1:05-cv-22; and one additional detainee, Brahim Yadel); Wesley R. Powell, *Preserving Our Image*, in *The Guantánamo Lawyers*, *supra* note 3154, at 296, 296 (“all the French detainees were released by early 2005”); *see also* Elaine Ganley, *Ex-Guantánamo Detainee Steers Youths Away from Jihad*, Miami Herald, June 8, 2015, at 7A (“Benchellali meets with young audiences at least once a week in France, Belgium and Switzerland to persuade them of the folly of flying off to join the Islamic State or other groups waging holy war in Syria and Iraq.”).
3. Three: Status Report, No. 1:05-cv-429 (D.D.C. July 18, 2008), D.E. 84 (in addition to other detainees otherwise accounted for, Adel Turkestani to Albania; Ibrahim Fauzee to Maldives; and Hassan al-Gassary, Lahcen Ikasiren in No. 1:05-cv-764, to Spain); *see also* Carol Rosenberg, *Probe Into U.S. Torture Reopens*, Miami Herald, Jan. 14, 2012, at 7A (reporting on Spanish probe into treatment of al-Gassary and three other detainees).
4. One: Status Report, No. 1:05-cv-431 (D.D.C. July 18, 2008), D.E. 49 (in addition to other detainees otherwise accounted for, Khalid Mahmood Alasmar to Jordan).
5. One: Notice, No. 1:06-cv-1754 (D.D.C. Jan. 4, 2007), D.E. 11 (al-Hasan Legseirein to Saudi Arabia).

6. One: Motion, No. 1:06-cv-1760 (D.D.C. Aug. 9, 2007), D.E. 20 (Mohammed Gul to Afghanistan).

A July 14, 2008, status report, Status Report, *In re* Petitioners Seeking Habeas Corpus Relief, No. 1:08-mc-444 (D.D.C. July 14, 2008), D.E. 28 (tallying 127 transfers, but counting three detainees twice each and another detainee three times), noted fifteen transfers not otherwise accounted for:

1. One: No. 1:02-cv-299 (David Hicks to Australia).
2. One: No. 1:02-cv-1130 (Mamdouh Habib to Australia); *see* Jeffrey M. Strauss, *Family Photo*, in *The Guantánamo Lawyers*, *supra* note 3154, at 358, 360.
3. Three: No. 1:04-cv-1227 (Adel Kamel Abdulla Hajee, Abdullah Majed Sayyah Hasan Alnoaimi, and Salman Bin Ibrahim Bin Mohammed Bin Ali al-Khalifa to Bahrain).
4. One: No. 1:05-cv-22 (Khaled Ben Mustapha to France); *see* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, N.Y. Times, Feb. 25, 2009, at A5.
5. One: No. 1:05-cv-497 (Abu Bakker Qassim, Abu Baker in No. 1:05-cv-2386, to Albania); *see also* Qassim v. Bush, 466 F.3d 1073 (D.C. Cir. 2006).
6. One: No. 1:05-cv-551 (Majid Radhi al-Toume al-Shamri to Saudi Arabia).
7. One: No. 1:05-cv-660 (Abdul Salam Zaeeef, Abdul Salam Deiff in No. 1:05-cv-2386, to Afghanistan); *see* Khan, *supra* note 3309, at 134–41 (describing Zaeeef as a former Taliban ambassador).
8. One: No. 1:05-cv-665 (Hazi Ahmed to France).
9. One: No. 1:05-cv-1011 (Abdul Zuhoor to Afghanistan).
10. One: No. 1:05-cv-1241 (Abdul Hakim Abdul Karim Amin Bukhari to Saudi Arabia).
11. One: No. 1:06-cv-1677 (Mohammed Naseem to Afghanistan).
12. One: No. 1:06-cv-1678 (Gulbas Khan to Afghanistan).
13. One: No. 1:06-cv-1768 (Saed Farhan al-Maliki to Saudi Arabia).

An April 19, 2007, motion filed simultaneously in several cases, *e.g.*, Motion to Dismiss, *Abu Imran v. Bush*, No. 1:05-cv-764 (D.D.C. Apr. 19, 2007), D.E. 51, noted an additional nine transfers not otherwise accounted for:

1. Four: No. 1:05-cv-764 (Mohammed Mazoz, Moussa, Ridouane Shakur, and Tareq).
2. Three: No. 1:05-cv-2385 (Abd al-Rahman Abdullah al-Halmandy, Inshanullah, and Shamsullah).
3. Two: No. 1:05-cv-2386 (Saalih and Hamad).

A June 24, 2016 status report noted an additional 2007 transfer. Status Report, *Mousovi v. Obama*, No. 1:05-cv-1124 (D.D.C. June 24, 2016), D.E. 442 (Abdul Razak Iktiar Mohammed to Afghanistan on Aug. 7, 2007).

There is one additional transfer reported in the New York Times' online database of Guantánamo Bay detainee information, www.nytimes.com.

com/interactive/projects/guantanamo: Hafizullah, petitioner in No. 1:08-cv-1227, to Afghanistan on December 15, 2006.

Table 3. 224 Petitioners Transferred After the 2008 Boumediene Decision

There were 159 transfers documented by notices of transfer in the detainees' habeas cases:

1. Four: Notices, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009, to Jan. 8, 2016), D.E. 660, 676, 773, 779 (Khalid Bin Abdullah al-Mutairi, Fouad al-Rabia, Fawzi Khalid Abdullah al-Odah, and Fayiz al-Kandari to Kuwait).
2. Two: Notices, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009, and Dec. 5, 2013), D.E. 306, 321 (Saber Lahmar to France and Belkacem Bensayah to Algeria).
3. Nine: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 22, 2009), D.E. 682 (noting Abd al-Hakim Ahmad Alhag's transfer to Yemen, but this appears to be an error and an intended notice concerning Riyadh Atiq Ali Abdu al-Haj al-Radai, Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399); Notices, *id.* (Nov. 20, 2014; June 15 and Nov. 16, 2015; Jan. 14 and 21 and Aug. 16, 2016; and Jan. 18, 2017), D.E. 1072, 1078, 1079, 1082, 1083, 1084, 1087, 1092 (Abdulkhaliq Ahmed al-Baidhani to Georgia; Imad Abdullah Hassan, Jalal Salim Bin Amer, Fahmi Abdullah Ahmed al-Tawlaqi, and Musaab Omar al-Madhwani to Oman; Ali Ahmed Mohammed al-Razehi and Saeed al-Sarim to the United Arab Emirates; and Abdulaziz al-Swidi to Montenegro).
4. Nine: Notices, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2009, July 13, 2010, Nov. 16, 2015, June 24 and Aug. 16 and 17, 2016, and Jan. 18, 2017), D.E. 722, 888, 1052, 1060, 1061, 1062, 1065 (Faruq Ali Ahmed, Jamal Muhammad 'Alawi Mar'I, and Mohamed Mohamed Hassan Odaini to Yemen; Adil el-Haj Obaid to the United Arab Emirates; Abdul Malik Abdul Wahab al-Rahabi to Montenegro; Majid Mahmoud Ahmed and Mahmoad Abdah to the United Arab Emirates; and Salman Yahya Hassan Mohammed Rabeii to Oman); Notice, *Al-Warafi v. Obama*, No. 1:09-cv-2368 (D.D.C. Jan. 14, 2016), D.E. 100 (Mukhtar Yahia Naji al-Warafi, originally a petitioner in No. 1:04-cv-1254, to Oman).
5. One: Notice, No. 1:04-cv-1519 (D.D.C. Jan. 30, 2009), D.E. 110 (noting the release of Salim Hamdan to Yemen to serve the last month of his military-commission sentence).
6. One: Notice, No. 1:04-cv-2035 (D.D.C. July 29, 2008), D.E. 1102 (Jarallah al-Marri to Qatar).
7. One: Notice, No. 1:04-cv-2046 (D.D.C. Jan. 22, 2010), D.E. 223 (Ahcene Zemiri to Algeria).
8. One: Notice, No. 1:04-cv-2215 (D.D.C. Oct. 30, 2015), D.E. 287 (Shaker Aamer to the United Kingdom).
9. One: Notice, No. 1:05-cv-270 (D.D.C. Feb. 24, 2010), D.E. 283 (Sherif el-Mashad, Ismail al-Mashad in No. 1:05-cv-833, to Albania).
10. Two: Notices, No. 1:05-cv-280 (D.D.C. Nov. 16, 2015), D.E. 670, 671 (Suleiman Awadh Bin Aqil al-Nahdi and Fahmi Salem al-Assani to the United Arab Emirates).
11. One: Notice, No. 1:05-cv-329 (D.D.C. Sept. 17, 2015), D.E. 379 (Younous Chekkouri to Morocco).

12. One: Notice, No. 1:05-cv-359 (D.D.C. Dec. 31, 2014), D.E. 279 (Mohammed Abdul Rahman to Kazakhstan).
13. One: Notice, No. 1:05-cv-392 (D.D.C. Dec. 5, 2013), D.E. 345 (Djamel Ameziane to Algeria).
14. One: Notice, No. 1:05-cv-409 (D.D.C. Dec. 22, 2009), D.E. 193 (Ayman Saeed Batarfi to Yemen).
15. Five: Notices, No. 1:05-cv-429 (D.D.C. Oct. 9, 2008, to Dec. 31, 2014), D.E. 121, 137, 242, 317, and 318 (Mustafa Ibrahim to Sudan; Ahmad Abu Abduttawaab to Somaliland; Mohammed el-Gharani, M.C. in No. 1:05-cv-430 and Mohmad Ahmad al-Kara'any in No. 1:05-cv-2386, to Chad; Hisham Sliti to Slovakia; and Adel al-Hakeemy to Kazakhstan).
16. One: Notice, No. 1:05-cv-492 (D.D.C. Oct. 30, 2015), D.E. 265 (Ahmed Ould Abdel Aziz to Mauritania).
17. One: Notice, No. 1:05-cv-520 (D.D.C. Sept. 22, 2015), D.E. 377 (Abdul Rahman Shalabi to Saudi Arabia).
18. Two: Notices, No. 1:05-cv-526 (D.D.C. Aug. 30, 2009, and July 19, 2010), D.E. 230, 291 (Mohammed Khan Tumani to Portugal and Abd al-Nasir Khan Tumani to Cape Verde); *see* Pardis Kebriaei, *Life After Guantánamo*, Harper's, Apr. 2015, at 51; Rosenberg, *supra* note 3773 (reporting in 2016 that the son and the father were still in Portugal and Cape Verde, respectively, and had not been able to see each other, nor had the mother been able to see her husband).
19. One: Notice, No. 1:05-cv-569 (D.D.C. Oct. 17, 2016), D.E. 485 (Mohamedou Old Slahi to Mauritania); *see* Carol Rosenberg, *A Decade Later, Freed Guantánamo Prisoner and Ex-Guard Meet Again*, Miami Herald, June 12, 2018, at 1A.
20. One: Notice, No. 1:05-cv-573 (D.D.C. Oct. 9, 2008), D.E. 88 (Ameur Mammar, also the petitioner in No. 1:05-cv-1233 and Amer Mohammon in No. 1:05-cv-2386, to Algeria).
21. One: Notice, No. 1:05-cv-634 (D.D.C. Jan. 14, 2016), D.E. 207 (Omer Saeed Salem al-Daini to Oman).
22. Three: Notices, No. 1:05-cv-748 (D.D.C. Jan. 14 and Aug. 17, 2016), D.E. 223, 227 (Sameer Najy Hasan Mukbel and Mohammed Saeed Bin Salman to Oman and Mohsen Abdруб Aboassy to the United Arab Emirates).
23. One: Notice, No. 1:05-cv-763 (D.D.C. Jan. 22, 2010), D.E. 328 (Adel Hamlily to Algeria).
24. One: Notice, No. 1:05-cv-764 (July 19, 2021), D.E. 337 (Abdul Latif Nasser to Morocco).
25. One: Notice, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009), D.E. 134 (Benjamin Mohammed al-Habashi to United Kingdom); *see* Yvonne R. Bradley, *A Rigged Process*, in *The Guantánamo Lawyers*, *supra* note 3154, at 173, 176 ("Ironically, he was flown to freedom from Guantánamo to the United Kingdom on the same type of Gulfstream aircraft that the CIA commandeered from Jeppesen Dataplan to fly him across the Middle East for torture and rendition.").
26. One: Notice, Khiali-Gul v. Obama, No. 1:05-cv-877 (D.D.C. Dec. 22, 2014), D.E. 201 (Khiali Gul to Afghanistan).
27. One: Status Report, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008), D.E. 67 (Abdul Wahab to Afghanistan).
28. One: Notice, No. 1:05-cv-892 (D.D.C. Dec. 8, 2014), D.E. 267 (Ali Hussian Mohammad Muety Shaaban to Uruguay).

29. One: Notice, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009), D.E. 100 (Arkan Mohammad Ghafil al-Karim to Iraq).
30. One: Notice, No. 1:05-cv-999 (D.D.C. Dec. 31, 2014), D.E. 269 (Asim Ben Thabit al-Khalaqi to Kazakhstan).
31. One: Notice, No. 1:05-cv-1124 (D.D.C. Jan. 23, 2017), D.E. 454 (Haji Wali Mohammed to the United Arab Emirates).
32. One: Notice, No. 1:05-cv-1189 (D.D.C. Apr. 4, 2016), D.E. 196 (Omar Mohammed Khalifh to Senegal).
33. One: Notice, No. 1:05-cv-1220 (D.D.C. Feb. 24, 2010), D.E. 252 (Abu Abdul Rauf Zalita to Albania).

The detainee was killed by a U.S. drone strike in Afghanistan on February 9, 2015. See Deb Riechmann, *Ex-Detainees' Actions May Stall Prison Closure*, Bos. Globe, Feb. 15, 2015, at A6; Amir Shah & Lolita C. Baldor, *Afghan Officials Say Drone Strike Kills Ex-Guantánamo Detainee*, Miami Herald, Feb. 10, 2015, at 4A; Craig Whitlock, *Former Guantanamo Detainee Killed by U.S. Drone Strike in Afghanistan*, Wash. Post, Feb. 11, 2015, at A11.
34. One: Notice, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008), D.E. 84 (Labeled Ahmed to Algeria).
35. One: Notice, No. 1:05-cv-1239 (D.D.C. Jan. 21, 2009), D.E. 61 (Ali Adel Motalieb Aweid al-Khaiy, Ali Abdulmotalib Aweid Hassan Altaiy in No. 1:05-cv-1240, to Iraq).
36. One: Notice, No. 1:05-cv-1244 (D.D.C. Jan. 21, 2016), D.E. 346 (Tariq Mahmoud Alsawam to Bosnia).
37. One: Notice, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011), D.E. 330 (Farhi Saeed Bin Mohammed to Algeria).
38. One: Notice, No. 1:05-cv-1353 (D.D.C. Aug. 30, 2013), D.E. 334 (Motai Saib to Algeria).
39. Two: Notices, No. 1:05-cv-1429 (D.D.C. Jan. 14 and Aug. 17, 2016), D.E. 457, 462 (Said Muhammed Salih Hatim to Oman and Mohammed Nasser Yahia Abdullah Khussrof to the United Arab Emirates).
40. One: Notice, No. 1:05-cv-1457 (D.D.C. Dec. 8, 2014), D.E. 381 (Abu Wa'el Jihad Dhiab to Uruguay).
41. One: Notice, No. 1:05-cv-1487 (D.D.C. June 11, 2009), D.E. 207 (Jawad Jabbar Sadkhan, also the petitioner in No. 1:05-cv-1679, to Iraq).
42. One: Notice, No. 1:05-cv-1490 (D.D.C. Dec. 8, 2014), D.E. 319 (Abdul Hadi Omar Mahmoud Faraj to Uruguay).
43. One: Notice, No. 1:05-cv-1497 (D.D.C. Dec. 8, 2014), D.E. 218 (Adil Bin Muhammed al-Wirghi to Uruguay).
44. One: Notice, No. 1:05-cv-1504 (D.D.C. Aug. 29, 2013), D.E. 313 (Nabil Hadjarab to Algeria).
45. One: Notice, No. 1:05-cv-1505 (D.D.C. Nov. 10, 2008), D.E. 112 (Abbar Sufian al-Hawary to Algeria).
46. One: Notice, No. 1:05-cv-1506 (D.D.C. Apr. 6, 2022), D.E. 299 (Sufyian Bar-moumi to Algeria).
47. Seven: Notice, No. 1:05-cv-1509 (D.D.C. June 11, 2009, and Dec. 31, 2013), D.E. 232, 264 (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat to Bermuda; and Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper to Slovakia).

48. One: Notice, No. 1:05-cv-1555 (D.D.C. Dec. 20, 2013), D.E. 281 (Ibrahim Osman Ibrahim Idris to Sudan).
49. One: Notice, No. 1:05-cv-1601 (D.D.C. Aug. 18, 2016), D.E. 316 (Haji Hamdullah to the United Arab Emirates).
50. Six: Notice, No. 1:08-mc-442 (D.D.C. Nov. 2, 2009), D.E. 1874 (Ahmad Tourson, Ahmad Doe in No. 1:05-cv-2370; Abdul Ghappar Abdul Rahman, Abdurahman in No. 1:05-cv-2386 and a petitioner in No. 1:08-cv-1310; Edham Mamet, the petitioner in No. 1:05-cv-1602; Anwar Hassan, Ali in No. 1:05-cv-2386 and No. 1:05-cv-2398; Dawut Abdurehim, Thabid in No. 1:05-cv-2398; and Adel Noori, Adel in 1:05-cv-2385 and No. 1:05-cv-2386 and a petitioner in No. 1:08-cv-1310, to Palau).
51. One: Notice, No. 1:05-cv-1623 (D.D.C. Jan. 17, 2017), D.E. 177 (Abdul Zahir, also the petitioner in Nos. 1:05-cv-1236 and 1:05-cv-2083, to Oman).
52. One: Notice, No. 1:05-cv-1645 (D.D.C. Nov. 20, 2014), D.E. 315 (Hussain Salem Mohammed Almerfedi to Slovakia).
53. One: Notice, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009), D.E. 246 (Alla Ali Bin Ali Ahmed to Yemen).
54. One: Notice, No. 1:05-cv-1971 (D.D.C. Mar. 8, 2022), D.E. 429 (Mohammed al-Qahtani to Saudi Arabia).
55. One: Notice, No. 1:05-cv-2088 (D.D.C. Nov. 16, 2015), D.E. 184 (Khalid Abd Elgabar Mohammed Othman to the United Arab Emirates).
56. Two: Notices, No. 1:05-cv-2104 (D.D.C. Nov. 21, 2014, and Jan. 15, 2015), D.E. 419 and 420 (Saleh Mohammed Saleh al-Thabbii to Georgia and Abdul Qader Ahmed Hussein to Estonia).
57. One: Notice, No. 1:05-cv-2223 (D.D.C. Dec. 31, 2014), D.E. 149 (Mohammed Ali Hussain Khanina to Kazakhstan).
58. One: Notice, No. 1:05-cv-2249 (D.D.C. Jan. 11, 2016), D.E. 263 (Mohammad Abdul Rahman al-Shimrani to Saudi Arabia).
59. One: Notice, No. 1:05-cv-2349 (D.D.C. Mar. 13, 2014), D.E. 272 (Ahmed Belbacha to Algeria); *see* Order, *id.* (Mar. 14, 2014), D.E. 273 (dismissing Belbacha's petition as moot).
60. Four: Notices, No. 1:05-cv-2367 (D.D.C. Dec. 22, 2009, to Dec. 22, 2014), D.E. 334, 426, 435 (Mohammad Rahim and Mohammed Zahir to Afghanistan and Abdul Haq and Mohammed Wabi Umari to Qatar).
61. One: Notice, No. 1:05-cv-2371 (D.D.C. May 3, 2018), D.E. 282 (Ahmed Mohammed al-Darbi to Saudi Arabia to serve the remainder of his military commission sentence).
62. One: Notice, No. 1:05-cv-2379 (D.D.C. Jan. 14, 2016), D.E. 217 (Adham Mohammed Ali Awad to Oman).
63. Two: Notice, No. 1:05-cv-2384 (D.D.C. Dec. 16, 2013, and Nov. 24, 2014), D.E. 325, 332 (Saad al-Qahtani and Mohammed Zahrani to Saudi Arabia).
64. Four: Notices, No. 1:05-cv-2385 (D.D.C. Sept. 2, 2008; Dec. 2, 2009; Dec. 31, 2014; and Aug. 17, 2016), D.E. 59, 416, 549, 552 (Muhammed Saad Iqbal Madni to Pakistan, Riad Nargerri to Italy, Sabry Mohammed Ebrahim al-Qurashi to Kazakhstan, and Mohammed Kameen to the United Arab Emirates); *see Court Reverses Conviction of Former Guantánamo Prisoner*, N.Y. Times, Feb. 7, 2012, at A12 (reporting that a conviction of Nargerri, also known as Mohamed Ben Riadh Nasri, in Italy was overturned).

65. Seven: Notices, No. 1:05-cv-2386 (D.D.C. June 15 and Dec. 1, 2009; Feb. 24 and July 19, 2010; Jan. 16 and June 15, 2015; and Aug. 17, 2016), D.E. 1296, 1513, 1580, 1724, 2029, 2039, 2052 (Abdul Aziz al-Noofayae to Saudi Arabia; Adel Bin Mabrouk to Italy; Saif Ullah, Saif in No. 1:05-cv-2385, to Albania; Abdul Aziz Naji to Algeria; Alkhadr Abdullah al-Yafie and Sharaf al-Sanani to Oman; and Jamil Ahmad Saeed to the United Arab Emirates).
66. One: Notice, No. 1:05-cv-2387 (D.D.C. Jan. 23, 2017), D.E. 225 (Jobran Saad al-Quhtani to Saudi Arabia).
67. Two: Notices, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008, and Jan. 23, 2017), D.E. 131, 405 (Zainulabidin Merozhev, Zein al-Abedeen in No. 1:05-cv-2386, to Tajikistan, and Ravil Mingazov, Ravil Mingaza Gamil in No. 1:05-cv-2010, to the United Arab Emirates).
68. One: Notice, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008), D.E. 69 (Abdulli Feghoul to Algeria); *see* Christi Charpentier, *Bittersweet, in The Guantánamo Lawyers*, *supra* note 3154, at 348.
69. One: Notice, No. 1:06-cv-619 (D.D.C. Jan. 21, 2009), D.E. 77 (Abbas Abid Rumi to Iraq).
70. Two: Notice, No. 1:06-cv-1668 (D.D.C. Apr. 18, 2016), D.E. 289 (Tariq Ali Abdullah Ba Odah and Mohammed Abdullah Mohammed Ba Odah, also known as Mohammed Abdullah Mohammed al-Hamiri, to Saudi Arabia).
71. One: Notice, No. 1:06-cv-1684 (D.D.C. Dec. 22, 2009), D.E. 223 (Mohammad Ahmed Taher to Yemen).

The detainee was killed by the U.S. military in an airstrike in Yemen on March 2, 2017. *See* Carol Rosenberg, *Pentagon: U.S. Airstrike in Yemen Killed Ex-Guantánamo Detainee*, Miami Herald, Mar. 7, 2017, at 10A; Eric Schmitt, *U.S. Says Guantánamo Ex-Inmate Died in Airstrikes Pounding Yemen*, N.Y. Times, Mar. 7, 2017, at A4.
72. One: Notice, No. 1:06-cv-1765 (D.D.C. Aug. 16, 2016), D.E. 152 (Iyob Murshad Ali Saleh to the United Arab Emirates).
73. One: Notice, No. 1:06-cv-1766 (D.D.C. Jan. 15, 2015), D.E. 317 (Fadhel Hussein Saleh Hentif to Oman).
74. One: Notice, No. 1:06-cv-1767 (D.D.C. June 15, 2015), D.E. 432 (Mohamed al-Zarnouqi to Oman).
75. One: Notice, No. 1:07-cv-2338 (D.D.C. Jan. 16, 2015), D.E. 281 (Abdurrahman Abdallah Ali Mahmoud al-Shubati to Oman).
76. One: Notice, No. 1:08-cv-987 (D.D.C. Aug. 30, 2009), D.E. 152 (Moammar Badawi Dokhan to Portugal).
77. One: Notice, No. 1:08-cv-1101 (D.D.C. Dec. 22, 2014), D.E. 282 (Shawali Khan to Afghanistan).
78. One: Notice, No. 1:08-cv-1104 (D.D.C. Jan. 21, 2009), D.E. 59 (Bashir Ghalaab to Algeria).
79. One: Notice, No. 1:08-cv-1153 (D.D.C. Dec. 22, 2009), D.E. 161 (Mohammed Sulaymon Barre to Somaliland).
80. One: Notice, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008), D.E. 23 (Mohammed Abd-Al al-Qadir to Algeria).
81. One: Notice, No. 1:08-cv-1222 (D.D.C. Dec. 22, 2009), D.E. 103 (Sharifullah to Afghanistan).

82. One: Notice, No. 1:08-cv-1223 (D.D.C. Sept. 2, 2008), D.E. 18 (Mahbub Rahman to Afghanistan).
83. One: Notice, No. 1:08-cv-1229 (D.D.C. Aug. 1, 2008), D.E. 6 (Yakubi to Afghanistan).
84. One: Notice, No. 1:08-cv-1230 (D.D.C. June 15, 2009), D.E. 117 (Khalid Said Mohammed al-Saif to Saudi Arabia).
85. One: Notice, No. 1:08-cv-1231 (D.D.C. Aug. 1, 2008), D.E. 6 (Abdulah Alhamiri to United Arab Emirates).
86. One: Notice, No. 1:08-cv-1233 (D.D.C. Apr. 18, 2016), D.E. 167 (Monsoor Muhammed Ali Qattaa to Saudi Arabia).
87. One Notice, No. 1:08-cv-1237 (D.D.C. Dec. 16, 2013), D.E. 267 (Hamoud Abdullah Hamoud Hassan al-Wady, Houmad Warzly in No. 1:05-cv-2385, to Saudi Arabia).
88. One: Notice, No. 1:08-cv-1238 (D.D.C. Dec. 6, 2016), D.E. 187 (Shawki Awad Balzuhair to Cape Verde).
89. One: Notice, No. 1:08-cv-1733 (D.D.C. Jan. 21, 2009), D.E. 30 (Hassan Abdul Said to Iraq).
90. One: Notice, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009), D.E. 92 (Ismail Mohamed to Somaliland).
91. One: Notice, No. 1:08-cv-1805 (D.D.C. June 4, 2014), D.E. 225 (Khair Ulla Said Wali Khaikhwa to Qatar).
92. One: Notice, No. 1:08-cv-1828 (D.D.C. June 5, 2014), D.E. 115 (Mullah Norullah Noori to Qatar).
93. One: Notice, No. 1:08-cv-1923 (D.D.C. Mar. 8, 2017), D.E. 243 (Mohammed Ahmad Abdallah al-Ansi to Oman).
94. Two: Notices, No. 1:08-cv-2019 (D.D.C. Apr. 18 and June 15, 2015), D.E. 315, 318 (Abdul Rahman Umil al-Qyati to Saudi Arabia and Masir Mukbl al-Azani to Oman).
95. Five: Notices, No. 1:09-cv-745 (D.D.C. Dec. 8, 2014; Jan. 19, 2015; and Apr. 18 and July 11, 2016), D.E. 1851, 1852, 1853, 1875 (Ahjam and Mohammed Abdullah Taha Mattan to Uruguay, Mohammed Ahmed Salam to Oman, Nadir Omar Abdullah Bin Sa'Adoun Alsa'ary to Saudi Arabia, and Abdul Rahman Ahmed to Serbia); *see* Adayfi, *supra* note 3704, at 360 (reflections by Ahmed, also known as Mansoor Adayfi: "I was shipped out of Guantánamo in the same way I was shipped in: against my will, gagged, blindfolded, hooded, earmuffed, and shackled."); Hauslohner, *supra* note 3347.
96. One: Notice, No. 1:09-cv-904 (D.D.C. Dec. 22, 2014), D.E. 122 (Abdul Ghani to Afghanistan).
97. One: Notice, No. 1:10-cv-1411 (D.D.C. July 13, 2016), D.E. 44 (Fayiz Ahmad Yahia Suleiman, Faiz Ahmed Yahia Suliman in No. 1:06-cv-1758, to Italy).
98. One: Notice, No. 1:15-cv-1959 (D.D.C. July 11, 2016), D.E. 39 (Muhammadi Davliatov, Abdullah Bo Orner Hamza Yoyej in No. 1:05-cv-2386, to Serbia).

One transfer was noted in an order by the court of appeals: Order, No. 09-5254 (D.C. Cir. Aug. 17, 2010) (Ayman Mohammed Ahmed al-Shurfa, petitioner in the district court, No. 1:05-cv-431); *see* Carol Rosenberg, *Camps*

Census Now 174: Germany Takes Two Arab Captives from Guantánamo, Miami Herald, Sept. 16, 2010.

An additional forty-two transfers were noted by news media:

1. One: Austen, *supra* note 3436 (return of Omar Khadr, petitioner in No. 1:04-cv-1136, to Canada to serve the remainder of his military commission sentence); *see also* Londoño, *supra* note 3436; Carol Rosenberg, *supra* note 3436.
2. One: Rosenberg, *supra* note 3765 (Salim Gharebi, petitioner in No. 1:04-cv-1164, to Senegal); Ryan, *supra* note 3765 (same, referring to him as Salem Abdul Salam Ghareby); Savage, *supra* note 3765 (same, referring to him as Salem Abdul Salam Ghareby).
3. One: Finn & Tate, *supra* note 3335 (Lakhdar Boumediene, petitioner in No. 1:04-cv-1166, to France); *see also* Mark. C. Fleming, *A Stunning Reversal*, in *The Guantánamo Lawyers*, *supra* note 3154, at 219, 221 (“the first time a European country accepted a Guantánamo prisoner who was neither its citizen nor its former resident”); Hafetz, *supra* note 3174, at 248; Scott Sayare, *After Guantánamo, Starting Anew*, in *Quiet Anger*, N.Y. Times, May 26, 2012, at A5 (reporting that the French government provided public housing for Boumediene and his family in Nice, and that Boumediene had trouble finding employment there). *See generally* Boumediene & Idir, *supra* note 3268.
4. Three: Glaberson, *supra* note 3335 (Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir, petitioners in No. 1:04-cv-1166, to Bosnia and Herzegovina). *See generally* Boumediene & Idir, *supra* note 3268.
5. Four: Ehrenfreund, *supra* note 3766 (Ali Yahya Mahdi al-Raimi, petitioner in No. 1:04-cv-1194; Mashur Abdullah Muqbil Ahmed al-Sabri, petitioner in No. 1:06-cv-1767; Abdul Rahman Mohammed Saleh Nasir, petitioner in No. 1:07-cv-1710; and Ahmed Yaslam Said Kuman, petitioner in No. 1:08-cv-1235, to Saudi Arabia); Savage, *supra* note 3766 (same).
6. Six: Bravin, *supra* note 3770 (Bashir Nasir Ali al-Marwalah, petitioner in No. 1:04-cv-1194; Mohammed Ahmad Said al-Edah, Mohammed al-Adahi in No. 1:05-cv-280; Zahar Omar Hamis Bin Hamdoun, petitioner in Nos. 1:05-cv-280 and 1:05-cv-2223; Abdel Qadir Hussein al-Mudhaffari, petitioner in Nos. 1:05-cv-2185 and 1:05-cv-2200; Abdul Rahman Abdul Abu Ghityh Sulayman, petitioner in Nos. 1:06-cv-1757 and 1:05-cv-2386; and Obaidullah, petitioner in No. 1:08-cv-1173 to the United Arab Emirates); Lamothe, *supra* note 3770 (same); Rosenberg, *supra* note 3770 (same); Savage, *supra* note 3770 (same).
7. One: Rosenberg, *supra* note 3774 (Yasin Qasem Muhammad Ismail, a petitioner in No. 1:04-cv-1254, to the United Arab Emirates); Savage, *Leaving 41*, *supra* note 3774 (same).
8. One: Savage, *supra* note 3632 (noting the return to Sudan of Ibrahim Ahmed Mahmoud al-Qosi, petitioner in No. 1:04-cv-1937, to Sudan following his serving a two-year sentence on a guilty plea before a military commission and dismissal of his habeas petition); *see also* *Inmate Home*, *supra* note 3632; Osman & Fox, *supra* note 3632; Rosenberg, *supra* note 3632.
9. One: Carol Rosenberg, *Camps Census Now 174: Germany Takes Two Arab Captives from Guantánamo*, Miami Herald, Sept. 16, 2010 (Mahmoud Salim al-Ali, Mahmood Salim al-Mohammed in No. 1:05-cv-247, and Mahmoud al-Soury in 1:05-cv-429, to Germany).

10. One: Rosenberg, *supra* note 3764 (Mohammed Bwazir, a petitioner in No. 1:05-cv-280, to Saudi Arabia).
11. One: Rosenberg, *supra* note 3429 (Bostan Karim, petitioner in No. 1:05-cv-883, to Oman).
12. One: Ceberio Belaza, *supra* note 3507 (transfer to Spain of the petitioner in No. 1:05-cv-889).
13. One: Rosenberg, *supra* note 3429 (Ghaleb al-Bihani, petitioner in No. 1:05-cv-1312 and a petitioner in No. 1:05-cv-2386, to Oman).
14. Two: Rosenberg, *supra* note 3397 (Ahmed Mohamed, petitioner in 1:05-cv-1509, and Abdul Razak, petitioner in 1:05-cv-2370 and 1:05-cv-2386, to El Salvador); *see also* Savage, *supra* note 3369.
15. One: Rosenberg, *supra* note 3776 (Mohammed Abu Ghanem, petitioner in No. 1:05-cv-1638, to Saudi Arabia).
16. One: Rosenberg, *supra* note 3429 (Walid Said Bin Said Zaid, petitioner in No. 1:05-cv-1646, to Oman).
17. Two: Rosenberg, *supra* note 3758 (Khalid al-Dhuby, petitioner in No. 1:05-cv-2104, and Mahmoud Omar Bin Atef, petitioner in No. 1:08-cv-1232, to Ghana); Ryan & Goldman, *supra* note 3758 (same).
18. One: Rosenberg, *supra* note 3757 (Othman Ali Mohammed al-Shamrany, petitioner in No. 1:05-cv-2104, to Oman); Ryan & Goldman, *supra* note 3757 (same); Savage, *supra* note 3757 (same); Schwartz, *supra* note 3757 (same).
19. One: Rosenberg, *supra* note 3429 (Hayl al-Mithali, petitioner in No. 1:05-cv-2186, to Oman).
20. One: Rosenberg, *supra* note 3347 (Abdel Ghalib Hakim, also known as Abdul Hakim Alhag, petitioner in No. 1:05-cv-2199, to Georgia); *see also* Goldman & Tate, *supra* note 3347; Savage, *supra* note 3347.
21. Two: Rosenberg, *supra* note 3757 (Fahd Abdullah Ahmed Ghazy, petitioner in No. 1:05-cv-2223, to Oman); Ryan & Goldman, *supra* note 3757 (same); Savage, *supra* note 3757 (same); Schwartz, *supra* note 3757 (same); Rosenberg, *supra* note 3776 (Abdullah al-Shibli, a petitioner in No. 1:05-cv-2223, to Saudi Arabia).
22. One: *Detainee Released*, *supra* note 3459 (Mohammed Jawad, petitioner in No. 1:05-cv-2385, to Afghanistan).
23. Three: Rosenberg, *supra* note 3683 (Noor Uthman Mohammed, petitioner in No. 1:05-cv-2386, and another detainee to Sudan); Rosenberg, *supra* note 3429 (Mustafa al-Shamiri and Muhammed Ahmad Said Haydar, petitioners in No. 1:05-cv-2386, to Oman).; *see also* Charlie Savage, *Lawyers Press Pentagon to Abide by Detainee Deal*, N.Y. Times, May 15, 2013, at A14 (reporting that repatriation in December 2013 was part of a plea deal).
 Mohammed's military commission conviction was vacated in 2015 in light of rulings that the crime of material support could not be tried by military commission. News Release, *Findings and Sentence Disapproved in US v. Noor Uthman Muhammed*, U.S. Dep't of Def., Jan. 9, 2015, www.defense.gov/releases/release.aspx?releaseid=17107; *see* Carol Rosenberg, *Pentagon Throws Out Foot Soldier's War Court Conviction*, Miami Herald, Jan. 10, 2015, at 5A.
24. One: Rosenberg, *supra* note 3776 (Salem Bin Kanad, petitioner in No. 1:08-cv-1228, to Saudi Arabia).

25. One: Rosenberg, *supra* note 3757 (Abdul al-Razzaq Muhammad Salih, petitioner in No. 1:08-cv-1234, to Oman); Ryan & Goldman, *supra* note 3757 (same); Savage, *supra* note 3757 (same); Schwartz, *supra* note 3757 (same).
26. One: Goldman & Ryan, *supra* note 3750 (Idris Ahmad Abdu Qadir Idris, petitioner in No. 1:09-cv-745, to Oman); Rosenberg, *Six to Oman*, *supra* note 3750 (same); Savage, *supra* note 3750 (same).
27. One: Rosenberg, *supra* note 3859 (Haroon Gul, petitioner in 1:16-cv-1462, to Afghanistan).

There are twenty-two additional transfers reported in the *New York Times's* online database of Guantánamo Bay detainee information, The Guantánamo Docket, www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html:

1. One: Adel Fattough Ali Algazzar, petitioner in Nos. 1:05-cv-270 and 1:05-cv-833, to Slovakia on January 24, 2010.
2. One: Rafiq Bin Bashir Bin Jallul Alhami, petitioner in No. 1:05-cv-359, to Slovakia on January 24, 2010.
3. One: Hedi Hammamy, also known as Abdul Haddi Bin Hadiddi, petitioner in Nos. 1:05-cv-429, 1:05-cv-766, and 1:05-cv-2386, to Georgia on March 23, 2010. *See* Carlotta Gall, *After 8 Years of Detention in Guantánamo, He Yearns to Return as a Prisoner*, Miami Herald, Feb. 18, 2017, at 17A (reporting that Hedi Hammami resettled in his native Tunisia, where police treatment resulted in his longing to be back at Guantánamo Bay).
4. One: Mohammad Mustafa Sohail, petitioner in No. 1:05-cv-993, to Spain on July 22, 2010.
5. One: Kasimbekov Komoliddin Tohirjanovich, petitioner in No. 1:05-cv-994, to Latvia on July 22, 2010.
6. One: Abdul Rahim Abdul Razak al-Janko, petitioner in Nos. 1:05-cv-1310 and 1:10-cv-1702 (damages case), to Belgium on October 9, 2009.
7. Two: Bahtiyar Mahnut, identified as Sadar, and Arkin Mahmud, identified as Arkeen, petitioners in No. 1:05-cv-1704, to Switzerland on March 23, 2010.
8. One: Oybek Jamoldinovich Jabbarov, petitioner in Nos. 1:05-cv-2112 and 1:05-cv-2386, to Ireland on September 27, 2009.
9. One: Abin Alhamed Abid Alsallam Alkesawi, petitioner in Nos. 1:05-cv-2378 and 1:05-cv-2386, to Georgia on March 23, 2010. *See Freed Former Guantanamo Inmate to Arrive Today*, Libya Herald, Sept. 25, 2013 (noting Alkesawi's move to Libya in September 2013, identifying him as Abdulhamid Abdussalam el-Ghazzawi).
10. Two: Maher el-Falesteny and Abd al-Zaher, petitioners in No. 1:05-cv-2386, to Hungary on November 30, 2009, and to Slovakia on January 24, 2010, respectively.
11. Three: Ali, Elisher in 1:06-cv-1759; Mohammed al-Palestini; and Maasoum Abdah Mouhammad, petitioners in No. 1:05-cv-2386, to Switzerland on January 26, 2010, to Spain on February 24, 2010, and to Bulgaria on May 3, 2010, respectively.
12. One: Qari Saad Iqbal, petitioner in Nos. 1:06-cv-1674 and 1:06-cv-1688, to Pakistan on August 31, 2008.

13. One: Achraf Salim Abdessalam, petitioner in No. 1:06-cv-1761, to Georgia on March 23, 2010.
14. One: Ahmed Zaid Salem Zuhair, petitioner in No. 1:08-cv-864, to Saudi Arabia on June 12, 2010.
15. One: Shakhrukh Hamiduva, petitioner in No. 1:08-cv-1221, to Ireland on September 27, 2009.
16. One: Mustafa Ahmed Hamlily, petitioner in No. 1:08-cv-1628, to Algeria on July 2, 2008.
17. One: Mohammed Hashim, petitioner in No. 1:09-cv-1460, to Afghanistan on December 19, 2009.
18. One: Abdul Hafiz, petitioner in No. 1:09-cv-1461, to Afghanistan on December 19, 2009.

Table 4. Thirty-Four Habeas Petitioners Remain Detained as of August 28, 2022

Of the thirty-six remaining detainees, thirty-four are or have been habeas petitioners. The *New York Times* has classified each detainee's detention status, The Guantánamo Docket, www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html. (Until December 5, 2018, the *Miami Herald* maintained a roster of remaining detainees. *Who's Still Held at Guantánamo*, www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html, archived at web.archive.org/web/20210912172407/www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html).

Convicted by Military Commission (Two)

1. Ali Hamza Ahmad Suliman al-Bahlul (ISN 039): petitioner in No. 1:05-cv-2104 and one of the first twenty detainees; see *Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016).
2. Majid Khan (ISN 10020): petitioner in Nos. 1:06-cv-1690 and 1:22-cv-1650; see Carol Rosenberg, *Guantánamo Bay Trial Holds Its First "Zoom Court,"* N.Y. Times, Nov. 19, 2020, at A24; Rosenberg, *supra* note 3660 (reporting that Khan's sentence ended on March 1, 2022, and the government must find a place to send him).

Under Military Commission Prosecution (Ten)

3. Ramzi Bin al-Shibh (ISN 10013): petitioner in No. 1:06-cv-1725; see, e.g., Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial at Cuba Base*, N.Y. Times, Dec. 19, 2020, at A23.
4. Abd al-Rahim al-Nashiri (ISN 10015): petitioner in Nos. 1:08-cv-1085 and 1:08-cv-1207.
5. Mustafa Ahmed al Hawsawi (ISN 10011): petitioner in Nos. 1:08-cv-1645 and 1:15-cv-1257; see Opinion, *Al-Hawsawi v. Obama*, No. 1:15-cv-1257 (D.D.C. Sept. 10, 2015), D.E. 13 (dismissing an action for discovery of the detainee's medical condition and treatment as outside the bounds of habeas relief); see *al-*

- so, e.g., Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial at Cuba Base*, N.Y. Times, Dec. 19, 2020, at A23.
6. Abd al-Aziz Ali (ISN 10018): petitioner in No. 1:08-cv-2083; see, e.g., Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial at Cuba Base*, N.Y. Times, Dec. 19, 2020, at A23.
 7. Mohammed Nazir Bin Lep (ISN 10022): petitioner in Nos. 1:09-cv-31, 1:19-cv-2799, and 1:20-cv-3344; see Opinion at 1, Bin Lep v. Biden, No. 1:20-cv-3344 (D.D.C. Jan. 13, 2022), D.E. 102, 2022 WL 123957 (declining to enjoin military commission proceedings and declining to hold some habeas claims in abeyance), *appeal pending*, Docket Sheet, No. 22-5026 (D.C. Cir. Jan. 27, 2022); Opinion, *id.* (Dec. 14, 2020), D.E. 56, 2020 WL 7340059 (denying a preliminary injunction against a possible military-commission trial), *appeal pending*, Docket Sheet, No. 21-5014 (D.C. Cir. Feb. 9, 2021); see Carol Rosenberg, *Guantánamo Board Affirms That 3 Former CIA Captives Remain “Forever Prisoners,”* Miami Herald, Sept. 22, 2016, at 13A; Carol Rosenberg, *Guantánamo Prosecutor Charges Trio in Southeast Asia Terror Plots*, Miami Herald, Dec. 10, 2017, at 22A; Carol Rosenberg, *Problems Postpone Guantánamo Arraignment*, N.Y. Times, Aug. 31, 2021, at A11.
 8. Abd al-Hadi al-Iraqi (ISN 10026): petitioner in Nos. 1:09-cv-1462 and 1:17-cv-1928; see *Abdulrazzaq v. Trump*, 422 F. Supp. 3d 281 (D.D.C. 2019) (holding consideration of the habeas petition in abeyance pending military commission proceedings); see also Carol Rosenberg, *Captive’s Surgery Recovery Thwarts Judge’s Bid to Hold a Guantánamo Hearing*, Miami Herald, Sept. 29, 2018, at 14A; Carol Rosenberg, *Detainee’s Reported Paralysis Prompts Guantánamo Judge to Order Emergency Report*, N.Y. Times, Sept. 11, 2021, at A15; Carol Rosenberg, *Gitmo North? Judge to Hold Secret War Court Session Near Pentagon*, Miami Herald, Jan. 6, 2018, at 12A; Carol Rosenberg, *Guantánamo Bay Trial Holds Its First “Zoom Court,”* N.Y. Times, Nov. 19, 2020, at A24; Carol Rosenberg, *Iraqi Prisoner Held by U.S. Pleads Guilty*, N.Y. Times, June 15, 2022, at A14; Carol Rosenberg, *Iraqi Prisoner Strikes Deal with the U.S. on War Crimes*, N.Y. Times, June 11, 2022, at A13; Carol Rosenberg, *Judge in Guantánamo Case, Fourth in Seven Years, Quits for Fellowship at F.B.I.*, N.Y. Times, Dec. 24, 2021, at A17; Carol Rosenberg, *Judge Schedules Feb. 2020 for Next War-Crimes Trial at Guantánamo*, Miami Herald, Jan. 25, 2019, at 9A; Carol Rosenberg, *Prosecutors Want Saudi Terrorist to ID Alleged al-Qaida Commander at Guantánamo Court*, Miami Herald, Apr. 25, 2017, at 10A.
 9. Riduan Bin Isomuddin Hambali (ISN 10019): petitioner in No. 1:10-cv-407; see Carol Rosenberg, *Guantánamo Parole Board Decides 2 Former Prisoners Too Dangerous to Go*, Miami Herald, Oct. 26, 2016, at 10A; Carol Rosenberg, *Guantánamo Prosecutor Charges Trio in Southeast Asia Terror Plots*, Miami Herald, Dec. 10, 2017, at 22A; Carol Rosenberg, *Pentagon Seeks New Case Against Indonesia Bombing Suspects*, N.Y. Times, Apr. 11, 2019, at A8; Carol Rosenberg, *Pentagon Won’t Seek Death Penalty in Bali Bombing*, Miami Herald, June 29, 2017, at 10A; Carol Rosenberg, *Problems Postpone Guantánamo Arraignment*, N.Y. Times, Aug. 31, 2021, at A11; Carol Rosenberg, *U.S. Charges “Hambali” with Bombings in Bali, Jakarta*, Miami Herald, June 24, 2017, at 1A.

10. Mohd Farik Bin Amin (ISN 10021): petitioner in No. 1:11-cv-923; see Carol Rosenberg, *Guantánamo Board Affirms That 3 Former CIA Captives Remain “Forever Prisoners,”* Miami Herald, Sept. 22, 2016, at 13A; Carol Rosenberg, *Guantánamo Prosecutor Charges Trio in Southeast Asia Terror Plots,* Miami Herald, Dec. 10, 2017, at 22A; Carol Rosenberg, *Pentagon Seeks New Case Against Indonesia Bombing Suspects,* N.Y. Times, Apr. 11, 2019, at A8; Carol Rosenberg, *Problems Postpone Guantánamo Arraignment,* N.Y. Times, Aug. 31, 2021, at A11.
11. Walid Bin Attash (ISN 10014): never a petitioner; see, e.g., Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial at Cuba Base,* N.Y. Times, Dec. 19, 2020, at A23.
12. Khalid Shaikh Mohammed (ISN 10024): never a petitioner; see, e.g., Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial at Cuba Base,* N.Y. Times, Dec. 19, 2020, at A23.

Not Eligible for Transfer (Four)

13. Ismael Ali Farag al-Bakush (ISN 708): petitioner in No. 1:05-cv-1983; see Voluntary Dismissal Without Prejudice, *Alkhemisi v. Obama*, No. 1:05-cv-1983 (D.D.C. Nov. 2, 2012), D.E. 220; see also Carol Rosenberg, *Parole Panel Declares Libyan Too Dangerous to Leave Guantánamo,* Miami Herald, Aug. 17, 2016, at 12A.
14. Abu Zubaydah (ISN 10016): petitioner in No. 1:08-cv-1360; see Hickman & Kiriakou, *supra* note 3411; James Rosen, *Abu Zubaydah, Waterboarded by CIA, Pleads for His Freedom,* Miami Herald, Aug. 24, 2016, at 14A; Carol Rosenberg, *No “Mini-Trial” for Abu Zubaydah When He Testifies at 9/11 Pretrial Hearing,* Miami Herald, May 17, 2017, at 11A; Carol Rosenberg, *Parole Board Declares Never-Charged Abu Zubaydah a Forever Prisoner,* Miami Herald, Oct. 28, 2016, at 10A; Scott Shane, *Waterboarded, He Now Makes Case to Go Free,* N.Y. Times, Aug. 24, 2016, at A1; Julie Tate, *Terrorism Suspect Appears for First Time Since 2002 Detention,* Wash. Post, Aug. 24, 2016, at A7.
15. Abu Faraj al-Libi (ISN 10017): petitioner in No. 1:09-cv-873; see Carol Rosenberg, *Guantánamo Board Affirms That 3 Former CIA Captives Remain “Forever Prisoners,”* Miami Herald, Sept. 22, 2016, at 13A.
16. Muhammad Rahim al-Afghani (ISN 10029): petitioner in No. 1:09-cv-1385; see Carol Rosenberg, *Guantánamo Parole Board Upholds Detention of Afghan Intrigued by Pop Culture,* Miami Herald, Sept. 21, 2016, at 13A.

Eligible for Transfer (Twenty)

17. Khaled Qassim (ISN 242): petitioner in No. 1:04-cv-1194; see *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019) (remanding the denial of habeas relief and noting that it was error to conclude that binding precedent implied no due-process rights for detainees).
18. Zuhail Abdo Anam Said al-Sharabi (ISN 569): petitioner in No. 1:04-cv-1194.
19. Uthman Abdul Rahim Mohammed Uthman (ISN 027): petitioner in No. 1:04-cv-1254; see *Uthman v. Obama*, 637 F.3d 400, 402, 408 (D.C. Cir. 2011) (reversing habeas relief); see also Abigail Hauslohner, *Five More Guantánamo Detainees Cleared for Transfer,* Wash. Post, Jan. 12, 2022, at A7; Carol Rosenberg, *Panel to Allow 5 More Guantánamo Releases,* N.Y. Times, Jan. 12, 2022, at A16;

- Carol Rosenberg, *U.S. Approves Release for 3 at Guantánamo*, N.Y. Times, May 18, 2021, at A9.
20. Saifullah Paracha (ISN 1094): petitioner in No. 1:04-cv-2022; see Opinion, *Paracha v. Trump*, No. 1:04-cv-2022 (D.D.C. Jan. 23, 2020, filed Mar. 27, 2020), D.E. 555 (redacted) (denying habeas relief), *appeal pending*, Docket Sheet, No. 20-5039 (D.C. Cir. Feb. 25, 2020); see also Adayfi, *supra* note 3704, at 289 (describing Paracha as “one of the most educated men at Guantánamo’s”); Carol Rosenberg, *Guantánamo’s 68-Year-Old Captive Gets Parole Hearing*, Miami Herald, Mar. 9, 2016, at 12A; Carol Rosenberg, *Guantánamo’s Oldest Captive, 68, Too Dangerous to Release, Board Says*, Miami Herald, Apr. 15, 2016, at 14A; Carol Rosenberg, *Guantánamo’s Oldest Captive, 69, Offers to Retire in Pakistan, Gets Parole Board Do-Over*, Miami Herald, Nov. 4, 2016, at 17A; Carol Rosenberg, *Guantánamo’s Oldest “Forever Prisoner” Loses Parole Board Do-Over*, Miami Herald, May 21, 2017, at 20A; Carol Rosenberg, *Happy Birthday? Pakistani Captive at Guantánamo Turns 70, Plans to Write Old Neighbor President Trump*, Miami Herald, Aug. 18, 2017, at 20A; Carol Rosenberg, *U.S. Approves Release for 3 at Guantánamo*, N.Y. Times, May 18, 2021, at A9.
 21. Said Salih Said Nashir (ISN 841): petitioner in No. 1:05-cv-23; see Rosenberg, *supra* note 3777.
 22. Abdulsalam al-Hela (ISN 1463): petitioner in No. 1:05-cv-1048; see *Al Hela v. Trump*, 972 F.3d 120, 150 (D.C. Cir. 2020) (affirming the denial of habeas relief); see also Rosenberg, *supra* note 3656; Carol Rosenberg, *Detainee Won’t Testify in Cole Case*, N.Y. Times, May 7, 2022, at A13.
 23. Hassan Mohammed Ali Bin Attash (ISN 1456): petitioner in Nos. 1:05-cv-1592 and 1:05-cv-2386; see *Stipulated Dismissal Without Prejudice*, *Bin Attash v. Obama*, No. 1:05-cv-1592 (June 14, 2013), D.E. 271; see also Carol Rosenberg, *After 4 years, Guantánamo Captive to Get Parole Hearing*, Miami Herald, Sept. 9, 2016, at 12A; Carol Rosenberg, *Gitmo Prisoner Found Ineligible for Release*, Miami Herald, Oct. 14, 2016, at 13A; Carol Rosenberg, *Youngest in Guantánamo Is Cleared to Be Released*, N.Y. Times, Apr. 27, 2022, at A15.
 24. Abdul Rabbani Abd al-Rahim Abu Rahman (ISN 1460): petitioner in No. 1:05-cv-1607; see Carol Rosenberg, *U.S. Approves Release for 3 at Guantánamo*, N.Y. Times, May 18, 2021, at A9.
 25. Mohammed Ahmad Ghulam Rabbani (ISN 1461): petitioner in Nos. 1:05-cv-1607 and 1:05-cv-2386; see Hauslohner, *supra* note 3858.
 26. Moath Hamza Ahmed al-Alwi (ISN 028): petitioner in Nos. 1:05-cv-2223 and 1:15-cv-681; see *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (affirming the denial of habeas relief); see also Abigail Hauslohner, *Five More Guantánamo Detainees Cleared for Transfer*, Wash. Post, Jan. 12, 2022, at A7; Carol Rosenberg, *Guantanamo Glitch: Guards Took Captive to Cell, Not Hearing*, Miami Herald, Apr. 10, 2016, at 7A; Carol Rosenberg, *Panel to Allow 5 More Guantánamo Releases*, N.Y. Times, Jan. 12, 2022, at A16.
 27. Ghassan Abdullah al-Sharbi (ISN 682): petitioner in No. 1:05-cv-2348; see *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 319 (D.D.C. 2009) (dismissing the petition without prejudice on a finding that the detainee did not want to pursue the petition because of his lack of confidence in the judicial process); see also Ben Fox, *Guantanamo Prisoner Says Saudi “Royal” Recruited Him*, Miami Herald,

- Sept. 18, 2016, at 25A; Carol Rosenberg, *Guantánamo to Transfer Saudi Inmate*, N.Y. Times, Feb. 11, 2022, at A17.
28. Omar Mohammed Ali al-Rammah (ISN 1017): petitioner in No. 1:05-cv-2380.
29. Sanad Yislam al-Kazimi (ISN 1453): petitioner in No. 1:05-cv-2386; see Martha Rayner, *You Love the Law Too Much*, in Obama's Guantánamo 89, 89–107 (Jonathan Hafetz ed., 2016); Abigail Hauslohner, *Five More Guantánamo Detainees Cleared for Transfer*, Wash. Post, Jan. 12, 2022, at A7; Hauslohner, *supra* note 3858; Rosenberg, *Board Clears*, *supra* note 3858; Carol Rosenberg, *Panel to Allow 5 More Guantánamo Releases*, N.Y. Times, Jan. 12, 2022, at A16.
30. Abdu Ali al-Haji Sharqawi (ISN 1457): petitioner in Nos. 1:05-cv-2385, 1:05-cv-2386, and 1:09-cv-745; see Order, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Oct. 28, 2011), D.E. 1595 (dismissal without prejudice); see also Rosenberg, *supra* note 3656.
31. Tolfiq Nassar Ahmed al-Bihani (ISN 893): petitioner in Nos. 1:05-cv-2386 and 1:05-cv-2399; see Al-Bihani Writ Denial, *supra* note 3575, *summarily aff'd*, Order, *Al-Bihani v. Obama*, No. 10-5352 (D.C. Cir. Feb. 10), 2011 WL 611708 (granting the petitioner's request for summary affirmance to enable a petition with the Supreme Court for a writ of certiorari), *cert. denied*, 567 U.S. 905 (2012); see also Carol Rosenberg, *The Battlefield Spans the Globe*, Miami Herald, Jan. 11, 2016, at 1A; Rosenberg, *supra* note 3816.
32. Abdelrazak Ali Abdelrahman (ISN 685): petitioner in Nos. 1:05-cv-2386, 1:09-cv-745, and 1:10-cv-1020; see *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013) (affirming the denial of habeas relief).
33. Ridah Bin Saleh al-Yazidi (ISN 038): petitioner in No. 1:07-cv-2337 and one of the first twenty detainees; see Rosenberg, *supra* note 3911; Rosenberg, *supra* note 3177 (reporting that the detainee “has refused to cooperate with efforts to repatriate or resettle him”); Rosenberg, *supra* note 3816.
34. Muieen A Deen Jamal A Deen Abd al-Fusal Abd al-Sattar (ISN 309): petitioner in No. 1:08-cv-1236; see Rosenberg, *supra* note 3911 (reporting that the Obama administration was unable to transfer al-Sattar because of the detainee's unwillingness to cooperate with attorneys); see also Rosenberg, *supra* note 3816.
35. Mohammed Abdul Malik Bajabu (ISN 10025): petitioner in No. 1:08-cv-1440; see Abigail Hauslohner, *Five More Guantánamo Detainees Cleared for Transfer*, Wash. Post, Jan. 12, 2022, at A7; Carol Rosenberg, *Panel to Allow 5 More Guantánamo Releases*, N.Y. Times, Jan. 12, 2022, at A16; Carol Rosenberg, *U.S. Wants to Send Terror Suspect to Israel for Trial—But There's a Snag*, Miami Herald, Dec. 9, 2016, at 1A.
36. Guled Hassan Duran (ISN 10023): petitioner in No. 1:16-cv-2358; see Abigail Hauslohner, *Five More Guantánamo Detainees Cleared for Transfer*, Wash. Post, Jan. 12, 2022, at A7; Carol Rosenberg, *Guantánamo Parole Board Decides 2 Former Prisoners Too Dangerous to Go*, Miami Herald, Oct. 26, 2016, at 10A; Carol Rosenberg, *Panel to Allow 5 More Guantánamo Releases*, N.Y. Times, Jan. 12, 2022, at A16; Carol Rosenberg, *Somali Captured in 2004 Is Approved for Transfer*, N.Y. Times, Jan. 11, 2022, at A14 (“the first detainee . . . from a C.I.A. black site to be recommended for release”).

V. OTHER CIVIL CASES

In criminal cases, the government is pursuing the litigation, so it has an incentive to help the court and the parties move the case forward while accommodating national security interests. The incentive structure in civil cases is often different, because in civil cases the government is frequently a defendant.

The Classified Information Procedures Act technically applies only to criminal cases, but its principles are often applied to civil cases (“Chapter 29: Burma”). The government may resist this application when it conflicts with the government’s litigation interests (“Chapter 38: Milan”).

Actions under the Freedom of Information Act (FOIA) concerning information that may be related to national security frequently require judges to review information held by the government to determine whether FOIA requires its production (“Chapter 32: Detainee Documents,” “Chapter 39: Section 215”). In a case concerning Muslim surveillance (chapter 36), the judge concluded that the government had improperly misled him about what information the government had that was responsive to the FOIA request.

Tort actions concerning mistaken rendition (chapter 31) and torture flights (chapter 37) were dismissed on state-secrets grounds. In an employment action initially dismissed on state-secrets grounds (“Chapter 29: Burma”), the judge concluded that the dismissal was based on inaccurate representations of secrecy, and the case ultimately settled for \$3 million.

The government is a complex entity, and it is possible for its attorneys in court to not be fully informed about the extent of classified information at issue in a civil case (“Chapter 34: Surveillance Software”) or even about ongoing actions of government clients (“Chapter 33: No-Fly List”).

Sometimes national security concerns arise in a case in which the government is not a party, and the court must decide how to accommodate both the interests of the parties and the interests of the government (“Chapter 34: Surveillance Software,” “Chapter 40: Learned Helplessness”).

The cases described here include two large collections of complex litigation.

Litigation concerning warrantless wiretaps (chapter 35) is complex multidistrict civil litigation over closely guarded yet widely reported national security programs. The government presented as too secret for litigation classified arguments in defense of government actions, submitting them to several district and circuit judges in several jurisdictions. In addition, special security measures were imposed for one secret but inadvert-

ently disclosed document that apparently was direct evidence of the government's subjecting two attorneys to a legally questionable surveillance program that the courts generally concluded was no longer secret. Just when it looked like this litigation was coming to a close, disclosures in 2013 breathed a few additional years of life into remaining cases.

Also described is litigation concerning September 11 damages (chapter 30). Although classified information was not a large factor in this litigation, sensitive unclassified information required special procedures during discovery.

A mix of sensitive unclassified information and classified information was central to litigation over the no-fly list (chapter 33).

Chapter 29

Burma

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

When a district judge—following the death of a colleague—took over a civil action for improper CIA surveillance, the new judge on the case determined that too much of the case record was sealed. There were classified evidence and classified arguments, but some government representations about what was classified turned out to be inaccurate.

Chapter Contents

Challenge: Classified Evidence 652

Challenge: Classified Arguments 653

On August 11, 1994, Richard A. Horn, who had been the country attaché in Burma for the Drug Enforcement Administration (DEA), filed a civil action alleging illegal surveillance of his telephone calls by the Department of State's chief of mission there and by a CIA officer, arising from disagreements over how much credit Burma should have received for addressing drug-enforcement issues.⁴⁴¹⁵ The U.S. District Court for the District of Columbia assigned the case to Judge Harold H. Greene.⁴⁴¹⁶

The complaint alleged that Horn “made substantial progress working in concert with the Burmese government to improve its performances in addressing major drug issues.”⁴⁴¹⁷ Because of a “political and personal agenda to thwart and undermine DEA’s mission in Burma,”⁴⁴¹⁸ however, information that the defendants provided to Congress and the President “was deliberately shaped to conform with [a] political policy [that] in ef-

4415. Redacted Complaint, *Horn v. Huddle*, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994, refiled June 9, 2009), D.E. 233 [hereinafter *Horn v. Huddle* Complaint]; see *In re Sealed Case*, 494 F.3d 139, 141 (D.C. Cir. 2007); *Horn v. Huddle*, 699 F. Supp. 2d 236, 237 (D.D.C. 2010); *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); Docket Sheet, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994); see also Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 172–84 (2010); Mike Scarcella, *DOJ Won’t Open Classified Minds*, *Legal Times*, Sept. 21, 2009, at 21; Tim Weiner, *Suit by Drug Agent Says U.S. Subverted His Burmese Efforts*, *N.Y. Times*, Oct. 27, 1994, at A9.

4416. *Horn v. Huddle* Complaint, *supra* note 4415; see Donohue, *supra* note 4415, at 173.

4417. *Horn v. Huddle* Complaint, *supra* note 4415, at 6.

4418. *Id.* at 3.

fect prevented [Burma] from accruing any credit for its efforts or achievements.”⁴⁴¹⁹

A week after the complaint was filed, the government moved to seal the case in order to protect classified information from public disclosure.⁴⁴²⁰ Judge Greene granted the motion on August 29.⁴⁴²¹

On September 12, 1996, Horn filed a class-action complaint alleging a pattern and practice of illegal surveillance of DEA agents,⁴⁴²² and that case, which remains sealed,⁴⁴²³ was dismissed in 2000.⁴⁴²⁴

Horn’s *Bivens* action⁴⁴²⁵ claimed surveillance, in violation of the Fourth Amendment, conducted to facilitate a transfer of Horn out of Burma.⁴⁴²⁶ On February 10, 1997, Judge Greene denied the government’s motion to dismiss the complaint.⁴⁴²⁷ In 1999, Judge Royce C. Lamberth assumed responsibility for the case because of Judge Greene’s illness and death.⁴⁴²⁸

On July 28, 2004, Judge Lamberth granted the government’s motion to dismiss the case on state-secrets grounds.⁴⁴²⁹ On June 29, 2007, the court of

4419. *Id.* at 6.

4420. Sealing Motion, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 19, 1994, refiled June 9, 2009), D.E. 234 (motion by U.S. Attorney Eric H. Holder, Jr., and Assistant U.S. Attorney John D. Bates).

4421. Order, *id.* (Aug. 29, 1994, refiled June 9, 2009), D.E. 237; *see Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009).

4422. *Horn v. Huddle*, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 15, 2000, refiled June 9, 2009), D.E. 340.

4423. Docket Sheet, *Horn v. Christopher*, No. 1:96-cv-2120 (D.D.C. Sept. 12, 1996) (sealed).

The complaint is filed unsealed in the record of Horn’s earlier action. Class-Action Complaint, *Horn*, No. 1:94-cv-1756 (D.D.C. Sept. 12, 1996, refiled June 9, 2009), D.E. 258.

4424. *In re Sealed Case*, 494 F.3d 139, 141 n.1 (D.C. Cir. 2007).

4425. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (authorizing federal tort actions for Fourth Amendment violations).

4426. *Sealed Case*, 494 F.3d at 141; *see Scarcella, supra* note 4415 (“Horn was moved to a DEA office in New Orleans in 1993”).

4427. Opinion, *Horn*, No. 1:94-cv-1756 (Feb. 10, 1997, refiled June 9, 2009), D.E. 263.

4428. *Sealed Case*, 494 F.3d at 142 n.2; Notice, *Horn*, No. 1:94-cv-1756 (June 27, 1999, refiled June 9, 2009), D.E. 298; Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting Judge Greene’s January 29, 2000, death); *see Donohue, supra* note 4415, at 173; *Scarcella, supra* note 4415.

Tim Reagan interviewed Judge Lamberth for this case study in his chambers on May 13, 2011.

4429. Opinion, *Horn*, No. 1:94-cv-1756 (D.D.C. July 28, 2004, refiled June 9, 2009), D.E. 380; *see Sealed Case*, 494 F.3d at 142; *Horn v. Huddle*, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); *see also Donohue, supra* note 4415, at 175; *Scarcella, supra* note 4415; *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast

appeals reversed his decision in part.⁴⁴³⁰ The appellate court ruled that the case could proceed against Franklin Huddle, Jr., the chief of mission, but not against the CIA officer, whose identity was classified.⁴⁴³¹

A government attorney, who began working on the case after the remand, discovered and informed Judge Lamberth that since 2002 the CIA officer's identity had actually not been classified.⁴⁴³² In light of the remand and finding that "the conduct of an attorney within the CIA's office of general counsel in 2005 escalated this case from one of simple misrepresentation to fraud on the court,"⁴⁴³³ Judge Lamberth decided, on January 15, 2009, to give Horn an opportunity to show how he could proceed using unprivileged material against both Huddle and the CIA agent, Arthur Brown.⁴⁴³⁴

Initially, Judge Lamberth was told that Brown's unclassified status did not come to the attention of CIA attorneys until 2005, at which time it should have been brought to the attention of the court of appeals,⁴⁴³⁵ but after Judge Lamberth ruled that the case against Brown might go forward, Brown told the court that he had informed the CIA's office of general counsel about his change in status within a few months of its occurring.⁴⁴³⁶

Aug. 15, 2011) [hereinafter *Too Secret?*], thekojonnamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification.

4430. *Sealed Case*, 494 F.3d 139; see Scarcella, *supra* note 4415.

4431. *Sealed Case*, 494 F.3d 139; see *Horn*, 636 F. Supp. 2d at 13–14 & n.2; see Donohue, *supra* note 4415, at 175; *Too Secret?*, *supra* note 4429.

4432. *Horn*, 636 F. Supp. 2d at 15; Opinion at 2 & n.2, *Horn*, No. 1:94-cv-1756 (D.D.C. Jan. 15, 2009, refiled June 9, 2009), D.E. 402 [hereinafter Jan. 15, 2009, Opinion]; see Donohue, *supra* note 4415, at 175–76; Scarcella, *supra* note 4415.

"And if you had simply Googled his name, you would have seen that he appeared on 'The Charlie Rose Show' a couple of years before." *Too Secret?*, *supra* note 4429; see *A Conversation with Arthur Brown, Former CIA East Asia Division Chief About the Nuclear Program in North Korea*, Charlie Rose (PBS television broadcast June 17, 2005).

4433. Jan. 15, 2009, Opinion, *supra* note 4432, at 5; see *Horn*, 636 F. Supp. 2d at 15; see also Scarcella, *supra* note 4415.

4434. Jan. 15, 2009, Opinion, *supra* note 4432, at 12–13; see *Horn*, 636 F. Supp. 2d at 15.

4435. *Horn*, 636 F. Supp. 2d at 13 n.2; Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Feb. 6, 2009, refiled June 9, 2009), D.E. 414 [hereinafter Feb. 6, 2009, Opinion]; Jan. 15, 2009, Opinion, *supra* note 4432, at 5–6.

4436. *Horn*, 636 F. Supp. 2d at 13–14 n.2; Feb. 6, 2009, Opinion, *supra* note 4435; see Donohue, *supra* note 4415, at 178.

Although Judge Lamberth had been told that Brown's name would forever be classified, Brown's affiliation with the CIA was declassified so that he could cite his CIA expe-

Judge Lamberth ordered the government to provide the court and the plaintiff with an unclassified redacted version of every document filed so far in the still-sealed case.⁴⁴³⁷ On June 9, 2009, the case was unsealed and public versions of all documents filed before then were added to the case file.⁴⁴³⁸

On October 26, the case settled for \$3 million.⁴⁴³⁹ In cooperation with the attorney general, Judge Lamberth referred the evidence of possible misconduct by CIA lawyers to the House of Representatives Intelligence Committee.⁴⁴⁴⁰

Challenge: Classified Evidence

Judge Lamberth decided to apply to this civil case the principles of the Classified Information Procedures Act (CIPA),⁴⁴⁴¹ which technically only applies to criminal cases.⁴⁴⁴² Using CIPA procedures, the court determines what information must be protected as classified and what unclassified substitutions—redactions, summaries, or admissions—can be used so that the case can proceed.⁴⁴⁴³

The government appealed,⁴⁴⁴⁴ and the case settled while the appeal was pending. As a condition of settlement, Judge Lamberth vacated his order calling for CIPA-like procedures, noting that “a District Court’s opinions are nonprecedential and only persuasive authority” anyway, his opinions on the matter had already been published in the Federal Supplement, and

rience in obtaining post-retirement employment. Interview with Judge Royce C. Lamberth, May 13, 2011; *see* Donohue, *supra* note 4415, at 177.

4437. *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14; *see* Donohue, *supra* note 4415, at 180.

4438. *Horn*, 636 F. Supp. 2d at 21.

4439. *Horn v. Huddle*, 699 F. Supp. 2d 236, 237–38 (D.D.C. 2010); Stipulation, *Horn*, No. 1:94-cv-1756 (D.D.C. Nov. 3, 2009), D.E. 510; *see* Donohue, *supra* note 4415, at 182–83; *U.S. to Pay \$3 Million to Settle CIA Lawsuit*, Wash. Post, Nov. 5, 2009, at A12.

4440. Interview with Judge Royce C. Lamberth, May 13, 2011; *see* Donohue, *supra* note 4415, at 183–84.

4441. 18 U.S.C. app. 3 (2020).

4442. *Horn v. Huddle*, 647 F. Supp. 2d 55, 59–60 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14, 18–19; *see* Donohue, *supra* note 4415, at 179.

4443. *Horn*, 636 F. Supp. 2d at 18–19; *see* Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 9–22 (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

4444. Docket Sheet, *Horn v. Huddle*, No. 09-5311 (D.C. Cir. Sept. 3, 2009).

“[t]he reasoning is unaltered, to the extent it is deemed persuasive by anyone.”⁴⁴⁴⁵

The state secrets privilege is a judicial doctrine, and when the Court evaluates the privilege, its evaluation is not merely an academic exercise. When the privilege is denied, the Court has the ability to order the information disclosed in litigation. Were the rule otherwise, the Executive Branch could immediately ensure that the “state secrets privilege” was successfully invoked simply by classifying information, and the Executive’s actions would be beyond the purview of the judicial branch. This would of course usurp the judicial branch’s obligation “to say what the law is.”⁴⁴⁴⁶

Although the Justice Department’s Litigation Security Group determined that the plaintiffs and defendants’ attorneys were eligible for security clearances, the government determined that the attorneys did not have a “need to know” classified information.⁴⁴⁴⁷ Judge Lamberth overruled that determination.⁴⁴⁴⁸

[T]he Executive must grant counsel for plaintiff and defendants, who have been favorably adjudicated for access to classified information, security clearances commensurate with the level of information known by their clients. . . . It is important to remember that at this juncture, the plaintiff, defendants, and their counsel, only have a need-to-know the classified and/or privileged information already known to them or to their clients for purposes of allowing this lawsuit to proceed. If it is necessary to renew the security clearances of the plaintiff and defendants themselves in order to implement the lawful discussion of the information that will be contained in the filings in preparation of the CIPA-like proceedings, the Executive must do that as well.⁴⁴⁴⁹

Challenge: Classified Arguments

Judge Lamberth ordered all filings made after the case became unsealed that might include classified information to be filed with a classified in-

4445. *Horn v. Huddle*, 699 F. Supp. 2d 236, 238 (D.C. Cir. 2010); see *Donohue*, *supra* note 4415, at 183.

4446. *Horn*, 647 F. Supp. 2d at 62–63.

4447. *Id.* at 63 n.11, 65 n.18; see *Scarcella*, *supra* note 4415.

4448. See *Shirin Sinnar*, *Procedural Experimentation and National Security in the Courts*, 106 Cal. L. Rev. 991, 1016–17 (2018); *Scarcella*, *supra* note 4415.

4449. *Horn*, 647 F. Supp. 2d at 66; see *Scarcella*, *supra* note 4415 (“The twist is that the classified information at issue resides in the memories of the plaintiff and the defendants themselves. (Lamberth’s order does not compel the government to turn over documents.)”).

formation security officer; redacted versions were filed on the public docket after a classification review.⁴⁴⁵⁰

4450. *Horn v. Huddle*, 636 F. Supp. 2d 20, 22–23 (D.D.C. 2009); see Reagan, *supra* note 4443, at 21–22 (providing information about classified information security officers).

Chapter 30

September 11 Damages

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

Actions for damages resulting from the terrorist attacks on September 11, 2001, included a few thousand actions against airlines, airport security companies, and property managers and a few hundred actions against terrorists and their alleged supporters. Many complexities resulted in prolonged litigation. Among the challenges were classified evidence, sensitive unclassified evidence, foreign evidence, and witness security.

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Actions Against Domestic Defendants

The U.S. District Court for the Southern District of New York handled many thousand lawsuits against airlines, airport security companies, and property managers for damages resulting from the September 11, 2001, terrorist attacks and their aftermath.⁴⁴⁵¹

The Victim Compensation Fund

On September 22, 2001, President Bush signed the Air Transportation Safety and System Stabilization Act.⁴⁴⁵² Title IV of the act created a September 11th Victim Compensation Fund of 2001⁴⁴⁵³ to “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁴⁴⁵⁴ The attorney general appointed Kenneth Feinberg as a special master to administer the fund.⁴⁴⁵⁵ The deadline for

4451. Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 Wash. Univ. L. Rev. 653 (2013) [hereinafter *Litigation Database*]; Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 Cornell L. Rev. 127 (2012) [hereinafter *Managerial Judging*].

4452. Pub. L. No. 107-42, 115 Stat. 230 (2001), 49 U.S.C. § 40101 note (2020); see *In re Sept. 11 Litig.*, 236 F.R.D. 164, 166 (S.D.N.Y. 2006); *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 279 (S.D.N.Y. 2003); Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 128–29, 132; see also Jill Schachner Chanen & Margaret Graham Tebo, *Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

4453. Pub. L. No. 107-42, § 401, 115 Stat. at 237, 49 U.S.C. § 40101 note.

4454. *Id.*, § 403; see *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *United States v. Moussaoui*, 483 F.3d 220, 225 n.4 (4th Cir. 2007); *Schneider v. Feinberg*, 345 F.3d 135, 138–39 (2d Cir. 2003); *Sept. 11 Litig.*, 236 F.R.D. at 166; *Colaio*, 262 F. Supp. 2d at 278–79; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 128–29, 132.

4455. *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 4452, at 59; see also Worth (MadRiver Pictures 2020) (dramatization of the fund’s work).

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. *Sept. 11 Litig.*, 236 F.R.D. at 166; see Chanen & Tebo, *supra* note 4452, at 59. “Ultimately, 97% of all potential individual wrongful death claimants presented their claims to the Special Master, Kenneth Feinberg.” *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

Feinberg was later asked to oversee compensation to victims of the 1998 bombings of American embassies in Nairobi and Dar es Salaam. See David M. Herszenhorn, *9/11 Claims Chief to Oversee Fund for Other Terror Victims*, N.Y. Times, Mar. 31, 2016, at A16. See generally Chapter 2: Kenya and Tanzania, *supra* page 38.

filing a claim against the fund was established as two years after the attorney general and the special master promulgated implementing regulations,⁴⁴⁵⁶ and after promulgation of the regulations the deadline became December 22, 2003.⁴⁴⁵⁷ The act required plaintiffs to elect either recovery from the fund or recovery by civil action.⁴⁴⁵⁸ The act also established exclusive jurisdiction in the Southern District of New York for civil actions,⁴⁴⁵⁹ except for actions against the terrorists and their supporters.⁴⁴⁶⁰

Master Dockets

On December 20, 2001, the wife of a passenger aboard United Airlines flight 175, which left Boston for Los Angeles and hit Two World Trade Center, filed a complaint in the Southern District of New York against United Airlines.⁴⁴⁶¹

4456. Pub. L. No. 107-42, § 405(a)(3), 115 Stat. at 238, 49 U.S.C. § 40101 note; see *Schneider*, 345 F.3d at 139.

4457. 28 C.F.R. § 104.62 (2002); see *Colaio*, 262 F. Supp. 2d at 278–79, 281; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 133; see also Pub. L. No. 107-42, § 407, 115 Stat. at 240, 49 U.S.C. § 40101 note (providing for promulgation of implementing regulations no later than ninety days after enactment of the act); Hartocollis, *supra* note 4455.

4458. Pub. L. No. 107-42, § 405(c)(3)(B), 115 Stat. at 239–40, 49 U.S.C. § 40101 note; see *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; *Schneider*, 345 F.3d at 139; *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 614 (S.D.N.Y. 2008); *Colaio*, 262 F. Supp. 2d at 279; see also Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & Soc’y Rev. 645 (2008) (analyzing reasons survivors gave for their choices between the fund and litigation); Hartocollis, *supra* note 4455 (describing parents of an eleven-year-old girl killed when American Airlines 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.”).

4459. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. at 241, 49 U.S.C. § 40101 note; see *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d 477, 478 (S.D.N.Y. 2015); *Sept. 11 Litig.*, 567 F. Supp. 2d at 619; *Moussaoui*, 483 F.3d at 225 n.4; *Sept. 11 Litig.*, 236 F.R.D. at 166; *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004); *Colaio*, 262 F. Supp. 2d at 279; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 134; see also Chanen & Tebo, *supra* note 4452, at 59.

4460. Pub. L. No. 107-42, § 408(c), 115 Stat. at 241, 49 U.S.C. § 40101 note; see also Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 646 (2001), 49 U.S.C. § 40101 note (also exempting from exclusive jurisdiction “civil actions to recover collateral source obligations”).

4461. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) [hereinafter *Mariani* Docket Sheet] (D.E. 1).

The court assigned the case to Judge Alvin K. Hellerstein.⁴⁴⁶²

During the first six months of 2002, twelve additional actions were filed by estates of passengers,⁴⁴⁶³ estates of workers in the World Trade Center,⁴⁴⁶⁴ and operators of businesses in the World Trade Center⁴⁴⁶⁵ against the airlines that operated the four hijacked flights used in the attacks⁴⁴⁶⁶ and the companies providing security for the flights' departures.⁴⁴⁶⁷

4462. *Id.*; see Hartocollis, *supra* note 4455; Benjamin Weiser, *Judge in 9/11 Suits Feels No Regret That None Ever Went to Trial*, N.Y. Times, Sept. 10, 2016, at A15 (noting random assignment of the case).

For this case study, Tim Reagan interviewed Judge Hellerstein and his law clerk Brian Sutherland in the judge's chambers on June 25, 2007, and again interviewed Judge Hellerstein in the judge's chambers on November 5, 2009.

4463. Docket Sheet, *Miller v. Am. Airlines, Inc.*, No. 1:02-cv-3676 (S.D.N.Y. May 14, 2002) (action by the estate of American Airlines 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 Airlines 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 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 and Huntleigh); 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 and Huntleigh); 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 and Argenbright); Docket Sheet, *Doe v. Am. Airlines, Inc.*, No. 1:02-cv-454 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American flight 77 passenger against American and Argenbright); Docket Sheet, *Debeuneure v. Am. Airlines, Inc.*, No. 1:02-cv-452 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American flight 77 passenger against American and Argenbright).

4464. Docket Sheet, *Pitt v. Am. Airlines, Inc.*, No. 1:02-cv-4365 (S.D.N.Y. June 11, 2002) (action by the estate of an employee of Cantor Fitzgerald in One World Trade Center against American and Globe); Docket Sheet, *Smithwick v. Am. Airlines, Inc.*, No. 1:02-cv-2669 (S.D.N.Y. Apr. 8, 2002) (action by the estate of a worker in One World Trade Center against American and Globe).

4465. Docket Sheet, *Tower Computer Servs., Inc. v. Am. Airlines, Inc.*, No. 1:02-cv-3295 (S.D.N.Y. Apr. 30, 2002) (action by the operators of a business in One World Trade Center against American and Globe); 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, American, Globe, and Huntleigh).

4466. 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

On June 20, the government initiated a motion to intervene to ensure that transportation “sensitive security information” would be protected in these lawsuits.⁴⁴⁶⁸ The court granted the government’s motion and ordered the cases consolidated.⁴⁴⁶⁹

During the next four months, 120 additional cases were filed.⁴⁴⁷⁰ On November 1, Judge Hellerstein ordered the consolidation of “all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the [Air Transportation Safety and System Stabilization Act] against any defendant (including defendants airlines and airline security companies), except for alleged hijack-

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).

4467. 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, which affected United flight 175. The 9/11 Commission Report 2 (2004).

Damages for passengers in international travel are specified by the Warsaw Convention, which entitles their survivors to a minimum of 100,000 “special drawing rights” (equivalent to \$153,078 on July 30, 2007) and an opportunity to prove additional damages if the airline cannot prove it took all reasonable measures to prevent the incident. *In re September 11 Litig.*, 500 F. Supp. 2d 356 (S.D.N.Y. 2007).

4468. *Mariani* Docket Sheet, *supra* note 4461 (government letter, June 20, 2002, D.E. 10).

4469. Order, *id* (July 25, 2002), D.E. 20; see Benjamin Weiser, *Ruling Favors Limited Access to 9/11 Data*, N.Y. Times, July 13, 2002, at B1; Benjamin Weiser, *Security Cited in Proposals on Lawsuits from Sept. 11*, N.Y. Times, Sept. 20, 2002, at B5.

4470. 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.

ers or terrorists” and established a master docket case entitled *In re September 11 Litigation*.⁴⁴⁷¹

Judge Hellerstein also established a suspense docket to allow for the filing of civil actions before expiration of the statute of limitation without impairing the ability to seek compensation from the fund instead.⁴⁴⁷² After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.⁴⁴⁷³

The plaintiffs filed five master complaints on December 11—four for personal injuries arising from the crash of each plane and one for property damage and business interruption.⁴⁴⁷⁴ Both the court and the plaintiffs’ executive committee established publicly accessible internet webpages to post information about the litigation and selected court filings.⁴⁴⁷⁵

4471. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002), D.E. 1; see Docket Sheet, *id.* [hereinafter *Sept. 11 Litig. Docket Sheet*]; see also *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167, 168 n.3 (S.D.N.Y. 2006).

The code “21” appears in place of the year in the case number because in the court’s records of miscellaneous cases “21” was the code for multidistrict litigation. Interview by email with S.D.N.Y. Staff, Aug. 20, 2009.

4472. Order, *Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Dec. 2, 2003), D.E. 233; Order, *id.* (Nov. 21, 2003), D.E. 216; Order, *id.* (July 23, 2003), D.E. 160; Order, *Mulligan v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6885 (S.D.N.Y. Sept. 6, 2002), D.E. 2; *Sept. 11 Litig.*, 236 F.R.D. at 166–67; see Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. Times, Sept. 4, 2002, at B3.

“Proceedings [before Judge Hellerstein] began after the Victim Compensation Fund closed, so that the litigation did not compete with the workings of the Fund.” *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

4473. Order, *Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Feb. 20, 2004), D.E. 294.

Subsequently, the court resolved the suspense docket for cleanup and aftermath cases. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Mar. 15, 2004), D.E. 34; Corrective Order, *id.* (Mar. 3, 2004), D.E. 33.

4474. *Sept. 11 Litig. Docket Sheet*, *supra* note 4471; see Fourth Amended Complaint, *id.* (Sept. 14, 2007), D.E. 1212 (concerning United flight 175 from Boston to Los Angeles, which crashed into Two World Trade Center); Fourth Amended Complaint, *id.* (Sept. 14, 2007), D.E. 1211 (concerning American flight 11 from Boston to Los Angeles, which crashed into One World Trade Center); Fourth Amended Complaint *id.* (Aug. 1, 2007), D.E. 1195 (concerning American flight 77 from Dulles to Los Angeles, which crashed into the Pentagon); Third Amended Complaint, *id.* (Aug. 1, 2007), D.E. 1194 (concerning United flight 93 from Newark to San Francisco, which crashed in Pennsylvania); Fourth Amended Complaint, *id.* (Jan. 18, 2005), D.E. 640 (concerning property injuries).

4475. Neither the court’s website (www.nysd.uscourts.gov/sept11, archived at web.archive.org/web/20191029173346/www.nysd.uscourts.gov/sept11) nor the plaintiffs’ web-

By February 11, 2003, an additional thirty-eight cases had been filed.⁴⁴⁷⁶ 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.⁴⁴⁷⁷ Cases in the first group remained part of the original master docket case, and cases in the second group were assigned to a new master docket case entitled *In re World Trade Center Disaster Site Litigation*.⁴⁴⁷⁸

One of the cases filed in early 2003 was an action by an insurance company to determine its obligation to cover injuries and provide defense costs for owners and operators of the World Trade Center.⁴⁴⁷⁹ Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.⁴⁴⁸⁰

site (www.sept11tortlitigation.com, archived at web.archive.org/web/20140803173515/http://www.sept11tortlitigation.com/) remains active.

4476. 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.

4477. Case-Management Order, *World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003), D.E. 1; Interview with Judge Alvin K. Hellerstein, June 25, 2007. See generally Leah McGrath Goodman, *The Hurting Heroes of 9/11*, Newsweek, Sept. 16, 2016, at 24.

4478. See Docket Sheet, *World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 168 n.3 (S.D.N.Y. 2006).

Cases were added to this docket as late as 2017. Docket Sheet, *Torres v. A Russo Wrecking, Inc.*, No. 1:17-cv-787 (S.D.N.Y. Feb. 1, 2017).

Judge Hellerstein denied the government defendants' motions to dismiss cases on immunity grounds, *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006), *aff'd*, 521 F.3d 169 (2d Cir. 2008); see Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. Times, Mar. 30, 2008, at 18.

4479. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

4480. *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004). See generally Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 Tort Trial & Ins. Prac. L.J. 685 (2011) (discussing September 11, 2001, insurance coverage litigation).

Judge Hellerstein ruled that World Trade Center liability insurance policies did not include defense costs, except for one policy that would come into effect once \$265 million in damages had been paid. *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104

By the end of June, another thirteen cases had been filed; eight of these were consolidated in the cleanup master docket,⁴⁴⁸¹ and the other five were consolidated in the attacks master docket.⁴⁴⁸²

Some cleanup cases were filed in state court against the City of New York, the Port Authority of New York and New Jersey, or both, and removed to federal court.⁴⁴⁸³ The Southern District of New York's exclusive jurisdiction applied to suits for damages "resulting from or relating to" the terrorist attacks.⁴⁴⁸⁴ Judge Hellerstein determined that with respect to actions in New York, his court's exclusive jurisdiction applied to injuries at the World Trade Center site from the time of the crashes on September 11 until the search for survivors ceased on September 29.⁴⁴⁸⁵ 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.⁴⁴⁸⁶

(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), D.E. 833; Order, *id.* (Jan. 18, 2007), D.E. 774 (dismissal). Appeals were settled after oral arguments. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-991 (2d Cir. Mar. 12, 2007) (settled January 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-776 (2d Cir. Mar. 1, 2007) (settled October 24, 2008); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-706 (2d Cir. Feb. 26, 2007) (settled January 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-530 (2d Cir. Feb. 14, 2007) (same).

4481. 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.

4482. The cases were assigned the following docket numbers: 1:03-cv-1016, 1:03-cv-1040, 1:03-cv-2004, 1:03-cv-2684, and 1:03-cv-3999.

4483. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003); Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 134.

4484. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001), 49 U.S.C. § 40101 note (2020).

4485. *World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 134–35.

Judge Hellerstein previously remanded two cleanup cases that were never consolidated with the other September 11 damages cases described here. *Spagnuolo v. Port Auth. of N.Y. & N.J.*, 245 F. Supp. 2d 519 (S.D.N.Y. 2003) (remanding *Spagnuolo v. Port Auth. of N.Y. & N.J.*, No. 1:02-cv-6360 (S.D.N.Y. Aug. 9, 2002)); *Graybill v. City of N.Y.*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding *Graybill v. City of N.Y.*, No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); *see World Trade Ctr.*, 270 F. Supp. 2d at 365.

4486. *World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.⁴⁴⁸⁷ Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands of removed cases are not reviewable.⁴⁴⁸⁸ The appellate court reviewed some plaintiffs' cross-appeals of Judge Hellerstein's denials of their remand motions and affirmed the denials.⁴⁴⁸⁹ The court noted that its reasoning implied that the remands were improper, because Judge Hellerstein's temporal and geographic distinctions had no basis in the act.⁴⁴⁹⁰ 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 were within the court's exclusive jurisdiction.⁴⁴⁹¹ So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.⁴⁴⁹²

By March of 2005, more than one thousand 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*

4487. *Id.* at 380–81; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 135.

4488. *In re WTC Disaster Site*, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005).

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 [1442 or] 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d) (2020) (quotation alteration added by amendment, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545); *see id.*, § 1443 (providing for removal of certain civil rights cases).

4489. *WTC Disaster Site*, 414 F.3d at 357, 371–81.

4490. *Id.* at 380–81 (“we have noted our agreement with cross-appellants’ contention that there was no appropriate basis for the district court’s conclusion that their claims should be retained while those of plaintiffs who asserted claims of respiratory injury suffered at sites other than the World Trade Center site or after Sept. 29, 2001, were to be remanded”); *see* Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 135; *see also* Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

4491. *WTC Disaster Site*, 414 F.3d at 381; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 135–36.

4492. *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 dictum of the court of appeals 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).

Property Damage and Business Loss Litigation.⁴⁴⁹³ The court created a fourth master docket case called *In re World Trade Center Lower Manhattan Disaster Site Litigation* on August 9 for claimed injuries outside the immediate World Trade Center area.⁴⁴⁹⁴

In time, many thousand cases were filed in this litigation. After many cases alleging both injuries at the World Trade Center and outside the immediate World Trade Center area were filed, the court created, on March 28, 2007, a fifth master docket case for these “straddlers,” called *In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation (Straddler Plaintiffs)*.⁴⁴⁹⁵

Settling Wrongful Death Claims

By July 2007, of the ninety-five actions included in the original master docket, fifty-three had settled and one was dismissed.⁴⁴⁹⁶ Judge Hellerstein limited attorney fees, at least among those cases settling during early phas-

4493. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 14, 2005), D.E. 3; see Docket Sheet, *id.* (Mar. 21, 2005); see also *In re Sept. 11 Litig.*, 236 F.R.D. 164, 167 n.1, 168 n.3 (S.D.N.Y. 2006).

On March 14, 2007, the U.S. Court of Appeals for the Fourth Circuit ruled that a different district court hearing the case of *United States v. Moussaoui*, see Chapter 6: Twentieth Hijacker, *supra* page 120, did not have the power to grant the plaintiffs in these cases access to discovery produced to a criminal defendant in the other court. *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007).

On December 11, 2008, Judge Hellerstein ruled that insurance recovery for loss of the World Trade Center towers would be fair market value at the time of destruction rather than replacement value. *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535 (S.D.N.Y. 2008).

4494. Case-Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Aug. 8, 2005), D.E. 267; see First Amended Master Complaint, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. Apr. 18, 2008), D.E. 2327; Master Complaint, *id.* (June 11, 2007), D.E. 117; Docket Sheet, *id.* (Aug. 9, 2005); see also *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 205–06 (2d Cir. 2014); *Sept. 11 Litig.*, 236 F.R.D. at 168 n.3.

4495. Case-Management Order, *In re Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-103 (S.D.N.Y. Mar. 28, 2007), D.E. 1; see Docket Sheet, *id.* (Mar. 28, 2007); see also *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 484–85 & n.1 (2d Cir. 2013).

Judge Hellerstein dissolved this master docket case in 2013. Order, *Combined Disaster Site Litig.*, No. 1:21-mc-103 (S.D.N.Y. Oct. 29, 2013), D.E. 1220; Order, *id.* (Sept. 27, 2013), D.E. 1212.

4496. *In re Sept. 11 Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); see Hartocollis, *supra* note 4455.

es, to 15% of settlement.⁴⁴⁹⁷ 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.⁴⁴⁹⁸ Judge Hellerstein believed that this would help the plaintiffs and the defendants in all of the remaining cases assess the values of the claims.⁴⁴⁹⁹ All six cases settled before damages trials were held.⁴⁵⁰⁰

By March 19, 2008, so many of the original actions had settled that Judge Hellerstein closed the original master docket consolidation, *In re September 11 Litigation*, and transferred remaining cases to the master docket consolidation for property damage cases, *In re September 11 Property Damage and Business Loss Litigation*.⁴⁵⁰¹

A law firm representing four of the last remaining plaintiffs among the original wrongful death actions—for modest-wage earners at the Pentagon—negotiated settlements totaling \$28.5 million, averaging much more than previous settlements, and they negotiated a fee with each plaintiff of 25%.⁴⁵⁰² As part of his policy to prevent early settlers from leveraging re-

4497. E.g., Order Concerning Settlement, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Aug. 9, 2007), D.E. 1175, 2007 WL 2298352; Order Concerning Settlement, *id.* (June 29, 2007), D.E. 1108; *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); Interview with Judge Alvin K. Hellerstein, June 25, 2007.

4498. Opinion, *Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), D.E. 1123 [hereinafter Damages Trials Opinion], 2007 WL 1965559; Order, *id.* (July 2, 2007), D.E. 1114; *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 554 (S.D.N.Y. 2009) (“I determined that the problems of discovery delay arose in connection with issues of liability, not damages.”); *Sept. 11 Litig.*, 567 F. Supp. 2d at 616.

4499. Damages Trials Opinion, *supra* note 4498, at 4; Interview with Judge Alvin K. Hellerstein, June 25, 2007; see Hartocollis, *supra* note 4455 (reporting, “The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.”).

4500. *Sept. 11 Litig.*, 600 F. Supp. 2d at 554 (“The experiment was successful. After some discovery, and without the need of any trials, all six cases settled and more followed.”); *Sept. 11 Litig.*, 567 F. Supp. 2d at 617; Settlement Order, *Wilson v. Am. Airlines*, No. 1:03-cv-6968 (S.D.N.Y. Nov. 1, 2007), D.E. 98; Settlement Order, *Shontere v. AMR Corp.*, No. 1:03-cv-6966 (S.D.N.Y. Nov. 1, 2007), D.E. 105; Settlement Order, *Ambrose v. Am. Airlines*, No. 1:02-cv-7150 (S.D.N.Y. Nov. 1, 2007), D.E. 77; Settlement Order, *Driscoll v. Argenbright Sec., Inc.*, No. 1:02-cv-7912 (S.D.N.Y. Sept. 17, 2007), D.E. 50; Settlement Order, *Carstanjen v. UAL Corp.*, No. 1:02-cv-7153 (S.D.N.Y. Sept. 17, 2007), D.E. 71; Settlement Order, *O’Hare v. United Airlines*, No. 1:02-cv-456 (S.D.N.Y. Sept. 17, 2007), D.E. 61.

4501. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Mar. 18, 2008), D.E. 410; Order, *Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Mar. 18, 2008), D.E. 1442.

4502. *Sept. 11 Litig.*, 567 F. Supp. 2d at 618; see *Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

coveries against later settlers and vice versa, Judge Hellerstein disapproved these settlements as excessive.⁴⁵⁰³ The judge also disapproved the firm's fee as out of line with others' in the litigation.⁴⁵⁰⁴ "The litigants then accepted the assistance of the mediator and agreed to settlements that were consistent with previous settlements. They also agreed to a 15% contingency fee."⁴⁵⁰⁵

The one remaining wrongful death action was scheduled to go to trial in November 2011.⁴⁵⁰⁶ On September 16, the plaintiffs filed 127 exhibits in opposition to a motion for summary judgment.⁴⁵⁰⁷ Three days later, the plaintiffs filed a notice that the case had settled.⁴⁵⁰⁸ It was reported that the September 16 filing made the public case that the plaintiffs were seeking to make.⁴⁵⁰⁹

4503. *Sept. 11 Litig.*, 567 F. Supp. 2d at 621; *see Sept. 11 Litig.*, 600 F. Supp. 2d at 554; *see also New Ruling Sought in 9/11 Settlements*, Wash. Post, Aug. 7, 2008, at A5.

4504. *Sept. 11 Litig.*, 567 F. Supp. 2d at 618; *see Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

4505. *Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

4506. *In re Sept. 11 Litig.*, 811 F. Supp. 2d 883, 885 (S.D.N.Y. Sept. 7, 2011) (action against United and Huntleigh by the mother of Mark Bavis, who died on United flight 175, which departed Boston for Los Angeles and struck Two World Trade Center); Order, *Bavis v. UAL Corp.*, No. 1:02-cv-7154 (S.D.N.Y. June 14, 2011), D.E. 157; *see In re Sept. 11 Litig.*, 760 F. Supp. 2d 433, 436 (S.D.N.Y. 2011) ("Ninety-four of the ninety-five cases have settled."); *see also Benjamin Weiser, A 9/11 Judge Sets a Timer for a Month*, N.Y. Times, Apr. 28, 2011, at A1.

On August 11, 2010, two other cases settled. Stipulation, *Low v. U.S. Airways, Inc.*, No. 1:03-cv-7040 (S.D.N.Y. Aug. 11, 2010), D.E. 95; Stipulation, *Keating v. Am. Airlines, Inc.*, No. 1:02-cv-7156 (S.D.N.Y. Aug. 11, 2010), D.E. 2750; *see In re Sept. 11 Litig.*, 723 F. Supp. 2d 534, 539 n.6 (S.D.N.Y. 2010) (noting pending motions for approval of settlements).

4507. Declaration, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 16, 2011), D.E. 240; *see Benjamin Weiser, Filing Details Shortcomings of Airport Screeners on 9/11*, N.Y. Times, Sept. 17, 2011, at A15.

4508. Stipulation, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 19, 2011), D.E. 242; *see Transcript at 2, In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Oct. 18, 2011, filed Jan. 26, 2012), D.E. 2750; *see also Benjamin Weiser, Last 9/11 Wrongful-Death Suit Is Settled, as Family and Airline Reach Terms*, N.Y. Times, Sept. 20, 2011, at A21.

4509. Weiser, *supra* note 4508 (focusing on inadequate airport security as the reason for the disaster, according to the plaintiffs).

Cleanup Plaintiffs

By the end of 2008, only three of the original ninety-five wrongful death and personal injury cases remained unsettled,⁴⁵¹⁰ but there remained approximately ten thousand cases by rescue and cleanup workers for respiratory and other injuries.⁴⁵¹¹ In addition to delays resulting from interlocutory appeals, “[t]he inability of counsel to style useful pleadings, or to proceed with discovery relevant to the immunity defenses without excessive and wasteful disputes, made it necessary to develop an alternative manner of proceeding.”⁴⁵¹²

To help the parties assess the values of the claims arising from the cleanup, Judge Hellerstein again initiated a process for test trials: thirty cases, mostly representing the most severe cases but also representing other cases, would proceed through discovery for trial in May 2010.⁴⁵¹³

To cope with the unprecedented complexity, the Court appointed Special Masters Aaron D. Twerski and James A. Henderson, Jr. to organize the fundamental facts of the case in a manageable way. The Special Masters and the parties developed a set of 360 narrowly-tailored questions seeking case-crucial information. The information received from the plaintiffs was then organized and housed in a “core discovery” database (the “TCDI Databse”).⁴⁵¹⁴

4510. *Sept. 11 Litig.*, 723 F. Supp. 2d at 539; *In re Sept. 11 Litig.*, 621 F. Supp. 2d 131, 140 (S.D.N.Y. 2009); *Sept. 11 Litig.*, 600 F. Supp. 2d at 553–54; *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 504 n.9 (S.D.N.Y. 2009); *In re Sept. 11th Litig.*, 590 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

4511. *World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 499 n.1, 501, 503; see Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 132–33; see also *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 117 (2d Cir. 2014); *In re World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d 477, 478 (S.D.N.Y. 2015).

4512. *World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

4513. *Id.* at 504; *World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 142–55; see Mireya Navarro, *Effort to Settle Sept. 11 Lawsuits*, N.Y. Times, Feb. 5, 2010, at A1 (“Several hundred lawyers are working on the cases, and the court documents run to tens of millions of pages.”).

The case-management order called for division of the cases into five groups, depending upon when the case was filed, and the selection of six cases from each group. *World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–04. From the 200 cases in each group with the most severe injuries, the two sides of the litigation would each select two cases. *Id.* at 504. Special masters would identify an additional twenty-five representative cases, and Judge Hellerstein would select two cases from among the 196 severe cases not selected by the parties and the twenty-five other representative cases. *Id.*

4514. *World Trade Ctr. Disaster Site Litig.*, 66 F. Supp. 3d at 479; Hellerstein et al., *Litigation Databse*, *supra* note 4451.

In March, parties announced a global settlement.⁴⁵¹⁵ Judge Hellerstein determined that the settlement was not a good enough deal for the individual plaintiffs,⁴⁵¹⁶ but he approved a revised settlement that gave more money to workers and less to their lawyers.⁴⁵¹⁷

On November 19, an allocation neutral reported to the court that eight plaintiffs more than a required 95% had accepted the settlement.⁴⁵¹⁸ Judge Hellerstein appointed a special counsel to help the several hundred other plaintiffs decide whether or not to join the settlement at a later time.⁴⁵¹⁹

A month later, Congress passed the James Zadroga 9/11 Health and Compensation Act,⁴⁵²⁰ which provided rescue and cleanup workers additional funds for health monitoring and treatment and which reopened the September 11th Victim Compensation Fund to provide compensation for

4515. *World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011); Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 155–57; see Mireya Navarro, *Deal Is Reached on Health Costs of 9/11 Workers*, N.Y. Times, Mar. 12, 2010, at A1.

4516. *World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188 (“my study of the settlement caused me to reject it, as not fair and adequate, and for providing too much money for the lawyers, for reserving too much money for unlikely claims in the future, and for providing too little money for the settling Plaintiffs, and because its terms were unfair and purported to be judicially unreviewable and unaccountable”); *World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 118; Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 157–59; see Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. Times, May 3, 2010, at A16; Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. Times, Mar. 20, 2010, at A12.

4517. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. June 10, 2010), D.E. 2083; *World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 117–18; *World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188; see *Judge Approves 9/11 Settlement*, Wash. Post, June 11, 2010, at A3.

Appeals were withdrawn. Stipulation, *In re World Trade Ctr.*, No. 10-3172 (2d Cir. Oct. 26, 2010), D.E. 17 (cross-appeal by some plaintiffs); Stipulation, *Quinones v. City of N.Y.*, No. 10-2765 (2d Cir. Oct. 26, 2010), D.E. 49 (defendants’ appeal).

4518. Letter, *World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 19, 2010), D.E. 2256 (reporting agreements by 10,043 out of 10,563 plaintiffs); see Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. Times, Nov. 20, 2010, at A1.

4519. Order, *World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 24, 2010), D.E. 2257 (noting that plaintiffs not accepting the settlement included plaintiffs who could not be reached, plaintiffs who refused communication from their attorneys, plaintiffs who had withdrawn from the litigation but still remained on the docket, and plaintiffs still on the fence); *World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 192–93; see *In re World Trade Ctr. Disaster Site Litig.*, 762 F. Supp. 2d 631 (S.D.N.Y. 2010).

4520. Pub. L. No. 111-347, 124 Stat. 3623 (2011).

employment and other economic losses.⁴⁵²¹ Plaintiffs were given until January 2, 2012, to decide whether to pursue damages from the fund or through litigation.⁴⁵²² The fund began to pay out awards on January 29, 2013.⁴⁵²³

After Judge Hellerstein dismissed some plaintiffs “because they had given up being parties, if, indeed, they had ever been real parties,”⁴⁵²⁴ the fraction of settling plaintiffs rose to 99.4%.⁴⁵²⁵ Judge Hellerstein overruled the insurer’s motion to include involuntarily dismissed plaintiffs in the denominator to reduce its obligation of an additional \$1.25 million in settlement payments for every tenth of a percentage the fraction of settlers surpassed 95%.⁴⁵²⁶ On the question of this bonus payment, the court of appeals remanded the case, on June 9, 2014, for additional findings as to the

4521. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); see Hellerstein et al., *Managerial Judging*, *supra* note 4451, at 129–31; Raymond Hernandez, *Senate Passes 9/11 Health Bill as Republicans Back Down*, N.Y. Times, Dec. 23, 2010, at A1; see also Sheryl Gay Stolberg, *Obama Signs 9/11 Health Care Bill*, N.Y. Times, Jan. 3, 2011, at A17. See generally Julie Isaacson, Note, *Terrorism and Mass Toxic Torts: An Examination of the James Zadroga 9/11 Health and Compensation Act*, 25 Fordham Env’tl. L. Rev. 509 (2014).

4522. *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 206; see David B. Caruso, *For Those With 9/11 Health Lawsuits, A Compensation Dilemma*, Wash. Post, Dec. 26, 2011, at A7.

The fund expired in 2015, see Tina Susman, *Congress Might Renew Benefits Law for Sept. 11 First Responders*, Miami Herald, Nov. 15, 2015, at 23A, but it was reauthorized for seventy-five years on December 18, 2015, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. O, tit. III–IV, 129 Stat. 2242, 2996–3018 (2015); see Cameron Joseph & Larry McShane, *Zadroga Act Lives*, N.Y. Daily News, Dec. 19, 2015, at 4. In 2019, funding of the fund was enhanced. Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act, Pub. L. No. 116-34, 133 Stat. 1040 (2019); see Devlin Barrett, *House Passes Bill to Extend 9/11 Fund*, Wash. Post, July 13, 2019, at A3; Devlin Barrett & Kayla Epstein, *Senate Approves Extension of 9/11 Victims Fund*, Wash. Post, July 24, 2019, at A2; Emily Cochrane, *“They Can Exhale”: Extension for 9/11 Fund Clears Senate*, N.Y. Times, July 24, 2019, at A1; Julie Hirschfeld Davis, *“The Least We Can Do”: House Votes to Extend Fund for 9/11 Workers*, N.Y. Times, July 13, 2019, at A11.

4523. See Anemona Hartocollis, *9/11 Health Compensation Fund Pays Out Its First 15 Awards*, N.Y. Times, Jan. 30, 2013, at A23.

4524. *World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 185.

4525. *Id.* at 190; *In re World Trade Ctr. Disaster Site Litig.*, 124 F. Supp. 3d 281, 284–85 (S.D.N.Y. 2015).

4526. *World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 199; see *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 119 n.2, 120 (2d Cir. 2014).

parties' intent.⁴⁵²⁷ Judge Hellerstein referred the matter to the parties for negotiation⁴⁵²⁸ and approved a \$30 million bonus settlement on August 5, 2015.⁴⁵²⁹

In 2013 and 2014, the court of appeals affirmed dismissals of actions by plaintiffs who did not file certified evidence of injury.⁴⁵³⁰ The court of appeals, however, reversed dismissals based on answers of "none" to an interrogatory on diagnosed injuries.⁴⁵³¹

While we appreciate that the sheer number of cases before the district court made its task of managing this mass tort litigation extraordinarily difficult, the district court was obliged to individually consider each plaintiff's answer of "none" in the context of any other evidence of injury.

The use of the word "diagnosed" in the interrogatory created some ambiguity. It was possible that a plaintiff manifested symptoms of a condition, illness, or disease that had not yet been diagnosed when he answered the interrogatory.⁴⁵³²

Property Damage

On July 1, 2010, Judge Hellerstein approved settlements in property damage actions over the objection of nonsettling plaintiffs affiliated with the long-term lessee of the World Trade Center, Larry Silverstein,⁴⁵³³ and the court of appeals affirmed the decision nine months later.⁴⁵³⁴ In 2011, however, Judge Hellerstein dismissed an action by Consolidated Edison, whose power station was destroyed when Building 7 of the World Trade Center collapsed, apparently as a result of hot debris from the twin towers.⁴⁵³⁵ Judge Hellerstein concluded that Building 7's developer and principal tenant, whose diesel-fueled backup generators contributed to the fires that

4527. *World Trade Ctr. Disaster Site Litig.*, 754 F.3d at 121–24; Transcript at 10, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Dec. 1, 2014, filed Dec. 9, 2014), D.E. 3177.

4528. *In re World Trade Ctr. Disaster Site Litig.*, 89 F. Supp. 3d 519, 524 (S.D.N.Y. 2015); see Status Report Letter, *World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. May 18, 2015), D.E. 3226 (announcing a goal of finishing negotiations within thirty days).

4529. *World Trade Ctr. Disaster Site Litig.*, 124 F. Supp. 3d 281.

4530. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 206 (2d Cir. 2014); *In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483 (2d Cir. 2013).

4531. *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d at 210–13.

4532. *Id.* at 210–11.

4533. *In re Sept. 11 Litig.*, 723 F. Supp. 2d 534 (S.D.N.Y. 2010); see *In re Sept. 11 Litig.*, 760 F. Supp. 2d 433, 437 (S.D.N.Y. 2011).

4534. *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145 (2d Cir. 2011).

4535. *Aegis Ins. Servs., Inc. v. 7 World Trade Co.*, No. 865 F. Supp. 2d 370 (2011).

destroyed Building 7, were not liable for the improbable chain of events that resulted in Building 7's destruction.⁴⁵³⁶

On March 20, 2013, Judge Hellerstein had an opportunity to determine that the September 11, 2001, attack was an act of war.⁴⁵³⁷ The owner of property near the World Trade Center sued the port authority, the airlines, and other defendants for damages pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).⁴⁵³⁸ Judge Hellerstein determined that the action was barred by the statute's time limitation and that the injury was not covered by the statute.⁴⁵³⁹ To avoid difficult statutory interpretation, the court of appeals remanded the case for a determination of whether CERCLA's act-of-war defense applied.⁴⁵⁴⁰ Judge Hellerstein determined that it did.⁴⁵⁴¹ Congress authorized military action against Al-Qaeda in retaliation for the attack and against the Taliban government of Afghanistan for harboring Al-Qaeda.⁴⁵⁴² On May 2, 2014, the court of appeals agreed.⁴⁵⁴³

4536. *Id.*

4537. *In re Sept. 11 Litig.*, 931 F. Supp. 2d 496 (S.D.N.Y. 2013); *In re Sept. 11 Litig.*, 751 F.3d 86, 90 (2d Cir. 2014).

4538. Complaint, *Cedar & Wash. Assocs. v. Port Auth. of N.Y. & N.J.*, No. 1:08-cv-9146 (S.D.N.Y. Oct. 24, 2008), D.E. 1; *Sept. 11 Litig.*, 931 F. Supp. 2d at 498; see 42 U.S.C. §§ 9601–9675 (2020); *Sept. 11 Litig.*, 751 F.3d at 89.

4539. Order, *Cedar & Wash. Assocs.*, No. 1:08-cv-9146 (S.D.N.Y. Sept. 22, 2010), D.E. 96; *Sept. 11 Litig.*, 931 F. Supp. 2d at 498–99; *Sept. 11 Litig.*, 751 F.3d at 89.

4540. *In re Sept. 11 Litig.*, 485 F. App'x 443 (2d Cir. 2012) (retaining jurisdiction); *Sept. 11 Litig.*, 751 F.3d at 89; *Sept. 11 Litig.*, 931 F. Supp. 2d at 499.

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

...

(2) an act of war;

42 U.S.C. § 9607(b).

4541. *Sept. 11 Litig.*, 931 F. Supp. 2d at 499, 512–14; *Sept. 11 Litig.*, 751 F.3d at 89–90.

4542. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C. § 1541 note (2020); *Sept. 11 Litig.*, 931 F. Supp. 2d at 501–02, 510–11; *Sept. 11 Litig.*, 751 F.3d at 90.

4543. *Sept. 11 Litig.*, 751 F.3d at 89 (“Both the President and Congress responded to the September 11 attacks by labeling them acts of war, and this classification warrants notice, and perhaps some deference, in the CERCLA context.”), *cert. denied*, 574 U.S. 1026 (2014).

On January 15, 2014, Judge Hellerstein approved a settlement payment of \$135 million in damages to Cantor Fitzgerald, which lost 658 employees in the attacks.⁴⁵⁴⁴

I look upon this settlement with mixed feelings. It's been a long, long effort, and this settlement is the last case of all the 9/11 cases focused on the airplanes and upon the World Trade Center properties; that is to say, it takes into consideration all lawsuits that claimed wrongful death, personal injury, of those who received the direct impact of the captured airplanes and of their crashes into the World Trade Center buildings. It includes property damage claims and also the claims of the 11,000 approximately first responders which sued for alleged injuries to their respiratory tracts and personal injuries and cancers, and the like, in the eight-month cleanup of the World Trade Center

...

[T]here hasn't been a single trial, and although we've had excellent reports along the way analyzing and describing what happened in September of 2001, how the terrorists got through, what's the right way to stop terrorists like this, how do we preserve our liberties in the effort to do so, was there really some wrongdoing in terms of negligence that allowed this to happen, all of this will remain a mystery.⁴⁵⁴⁵

Judge Hellerstein ruled on August 1, 2013, after a bench trial in July, that operators of the World Trade Center were not owed any damages from the airlines and airport security companies because of their insurance recoveries.⁴⁵⁴⁶ Largely affirming Judge Hellerstein's decision, the court of appeals remanded the matter on September 17, 2015, for a recalculation of damages and prejudgment interest.⁴⁵⁴⁷ Following additional judicial re-

4544. Order, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Jan. 15, 2014), D.E. 1885, 2014 WL 250255 ("only two other sets of plaintiffs—the World Trade Center Properties LLC plaintiffs and the Cedar & Washington Associates, LLC plaintiffs, whose cases remain on appeal—have pending suits against the Aviation Defendants that implicate the liability cap"); Transcript, *id.* (Jan. 13, 2014, filed Jan. 23, 2014), D.E. 1886; see Julie Steinberg, *Companies Settle 9/11 Lawsuit*, Wall St. J., Dec. 18, 2013, at A8; Benjamin Weiser, *Cantor Fitzgerald Says Airline Will Pay \$135 Million to End 9/11 Lawsuit*, N.Y. Times, Dec. 18, 2013, at A20.

4545. Transcript at 3–5, *Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Dec. 17, 2013, filed Dec. 23, 2013), D.E. 1879.

4546. *In re Sept. 11 Litig.*, 957 F. Supp. 2d 501 (S.D.N.Y. 2013); Transcripts, *Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. July 15–18, 2013, filed Aug. 2, 2013), D.E. 1794, 1796, 1798, 1800.

4547. *In re Sept. 11 Litig.*, 802 F.3d 314 (2d Cir. 2015).

view,⁴⁵⁴⁸ Judge Hellerstein approved a settlement agreement in the two property damage cases on December 21, 2017.⁴⁵⁴⁹ Judge Hellerstein disposed of the last property damages dispute on August 2, 2018, ruling against a claim of subrogation.⁴⁵⁵⁰

Jimmy Nolan's Law

Judge Hellerstein dismissed some cleanup injury actions against the Battery Park City Authority for failure to provide the Authority with timely notice of the suits.⁴⁵⁵¹ New York passed Jimmy Nolan's Law to revive the suits and provide an additional one-year limitation period.⁴⁵⁵² But Judge Hellerstein held on December 8, 2014, that Jimmy Nolan's Law violated due process under New York's constitution.⁴⁵⁵³

The court of appeals certified the constitutional question and a standing question to New York's court of appeals.⁴⁵⁵⁴ The New York court's November 21, 2017, answers implied that suits could be revived consistent with due process if a reasonable response to remedy an injustice, but also the Authority was a state entity that could not challenge the constitutionality of a state statute.⁴⁵⁵⁵ So the U.S. Court of Appeals vacated the dismissals on June 6, 2018.⁴⁵⁵⁶ On September 28, 2020, however, the federal court of

4548. Opinion, *Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Apr. 6, 2017), D.E. 1939, 2017 WL 1287141 (evaluating valuation).

4549. Order, *id.* (Dec. 21, 2017), D.E. 1953; see Proposed Settlement Agreement at 5, *id.* (Nov. 21, 2017), D.E. 1950-1 ("The Settlement Amount shall consist of . . . \$97,000,000.00 . . . less the Known Shortfall, which nets to . . . \$95,195,800.00 . . ."); see also Docket Sheet, *World Trade Ctr. Props., L.L.C. v. Am. Airlines, Inc.*, No. 1:08-cv-3722 (S.D.N.Y. Apr. 17, 2008); Docket Sheet, *World Trade Ctr. Props., L.L.C. v. United Airlines, Inc.*, No. 1:08-cv-3719 (S.D.N.Y. Apr. 17, 2008).

4550. *In re Sept. 11 Litig.*, 328 F. Supp. 3d 178 (S.D.N.Y. 2018); see Docket Sheet, *World Trade Ctr. Props. LLC v. Great Lakes Reinsurance (UK) PLC*, No. 1:10-cv-1642 (S.D.N.Y. Mar. 1, 2010).

4551. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466 (S.D.N.Y. 2014).

4552. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 382, 89 N.E.3d 1227, 1230 (2017); *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d at 468–69.

4553. *World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466; see Order, *Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. Apr. 13, 2015), D.E. 5796 (extending dismissal to a total of 179 plaintiffs).

4554. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58 (2d Cir. 2017).

4555. *Disaster Site Litig.*, 30 N.Y.3d 377, 89 N.E.3d 1227.

4556. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 102 (2d Cir. 2018).

appeals affirmed Judge Hellerstein's dismissal again of the actions against the Battery Park City Authority as contractually precluded by awards received from other defendants.⁴⁵⁵⁷

Actions Against Alleged Supporters of Terrorism

On September 4, 2002, 318 survivors of the September 11, 2001, attacks on the United States filed a ninety-one-page civil complaint for damages in the U.S. District Court for the Southern District of New York.⁴⁵⁵⁸ The plaintiffs were forty-four persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.⁴⁵⁵⁹ The 141 defendants were (1) the "Al Qaeda Islamic Army" and thirty-eight affiliated persons and entities, including Osama Bin Laden; (2) the nineteen deceased hijackers and Zacarias Moussaoui; (3) the Taliban and Muhammad Omar; (4) the Republic of Iraq and fifteen affiliated persons and entities, including Saddam Hussein; and (5) sixty-four "entities or individuals who provided financial or other support to Al Qaeda and its terrorist activities."⁴⁵⁶⁰

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 one thousand firefighters, police officers, paramedics, and others against the Al Qaeda Islamic Army.⁴⁵⁶¹ On September 10, the plaintiffs amended their complaint to include 300 estates and fifty-one individuals as plaintiffs.⁴⁵⁶² On the same day, four other actions were filed against similar defendants.⁴⁵⁶³

4557. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 828 F. App'x 734 (2d Cir. 2020), *aff'g* Opinion, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 1:21-mc-102 (S.D.N.Y. Aug. 30, 2019), D.E. 8212, 2019 WL 4168993.

4558. Complaint, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 4, 2002), D.E. 1 [hereinafter *Ashton* Complaint]; see *In re Terrorist Attacks on Sept. 11, 2001*, 689 F. Supp. 2d 552, 555–56 (S.D.N.Y. 2010); see also 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.

4559. *Ashton* Complaint, *supra* note 4558.

4560. *Id.*; *id.* at 29; see Coyle, *supra* note 4558.

4561. Docket Sheet, *Beyer v. Al Qaeda Islamic Army* No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); see Coyle, *supra* note 4558; Kelley, *supra* note 4558.

4562. First Amended Complaint, *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002), D.E. 2.

4563. 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

Consolidation

All six actions were consolidated before Judge Allen G. Schwartz,⁴⁵⁶⁴ and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.⁴⁵⁶⁵ The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.⁴⁵⁶⁶

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.⁴⁵⁶⁷

On December 9, 2003, the Judicial Panel on Multidistrict Litigation centralized for pretrial purposes the consolidated action with three other actions in the Southern District of New York⁴⁵⁶⁸ and two actions in the dis-

(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 six estates).

4564. Consolidation Order, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002), D.E. 5.

4565. Consolidated Master Complaint, *id.* (Mar. 6, 2003), D.E. 11 [hereinafter *Ashton Consolidated Master Complaint*].

4566. Reassignment Notice, *id.* (Apr. 16, 2003), D.E. 14; Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges (noting Judge Schwartz's death on March 22, 2003).

For this case study, 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.

4567. Sixth Amended Consolidated Master Complaint, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1463; Fifth Amended Consolidated Master Complaint, *id.* (Sept. 20, 2004), D.E. 447; Fourth Amended Consolidated Master Complaint, *id.* (Mar. 10, 2004), D.E. 111; Third Amended Consolidated Master Complaint, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 5, 2003), D.E. 111; Second Amended Consolidated Master Complaint, *id.* (Aug. 13, 2003), D.E. 38; First Amended Consolidated Master Complaint, *id.* (Aug. 1, 2003), D.E. 32.

4568. Docket Sheet, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, *Salvo v. Al Qaeda Islamic Army*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003) [hereinafter *Salvo Docket Sheet*]; Docket Sheet, *Tremsky v. Bin Laden*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002).

A pro se action was dismissed for failure to execute service, Docket Sheet, *Iwachiw v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); see Docket Sheet, *Iwachiw v. Al-Baraka Inv. & Dev. Corp.*, No. 03-9028 (2d Cir. Oct. 3, 2002) (noting denial of a motion to appeal in forma pauperis), and another action was dismissed voluntarily, Docket Sheet, *Adone v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002).

trict court for the District of Columbia,⁴⁵⁶⁹ creating *In re Terrorist Attacks on September 11, 2001*⁴⁵⁷⁰ in the Southern District of New York.⁴⁵⁷¹

The first panel-added New York case was a class action filed on September 11, 2002, by three named plaintiffs against Osama Bin Laden, Saddam Hussein, the Taliban, and ninety-eight other defendants.⁴⁵⁷² The second New York case was filed on July 8, 2003, by an estate against the same 399 defendants as were named in the consolidated master complaint in the first consolidated action.⁴⁵⁷³ The third New York case also was filed on July 8—by four estates against 222 defendants similar to the list in the original complaint in the first-filed action of the original consolidation.⁴⁵⁷⁴

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 nine-

4569. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett* Docket Sheet], *refiled as* 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* 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*).

4570. Docket Sheet, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003) [hereinafter S.D.N.Y. *Terrorist Attacks* Docket Sheet].

4571. *In re Terrorist Attacks* on Sept. 11, 2001, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); *In re Terrorist Attacks* on Sept. 11, 2001, 714 F.3d 659, 671–72 (2d Cir. 2013); *see* Consolidation and Transfer Motion, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1570 (J.P.M.L. Aug. 7, 2003, filed Aug. 21, 2003), D.E. 1; *see also In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); *In re Terrorist Attacks* on Sept. 11, 2001, 718 F. Supp. 2d 456, 464 (S.D.N.Y. 2010); *In re Terrorist Attacks* on Sept. 11, 2001, 689 F. Supp. 2d 552, 555 (S.D.N.Y. 2010) (“The plaintiffs in the civil actions comprising this multi-district litigation seek to recover damages arising out of the atrocities committed by terrorists on September 11, 2001.”); John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 Rev. Litig. 315, 329 (2008).

4572. Complaint, *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002), D.E. 1; *see also* Amended Complaint, *id.* (Aug. 22, 2003), D.E. 10 (same parties).

4573. Complaint, *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003), D.E. 1; *see Ashton* Consolidated Master Complaint, *supra* note 4565. The case was designated as related to the original consolidation and assigned to Judge Casey on August 13, 2003. *Salvo* Docket Sheet, *supra* note 4568.

4574. Complaint, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003), D.E. 1; *see Ashton* Complaint, *supra* note 4558. The case was designated as related to the original consolidation and assigned to Judge Casey on August 18, 2003. Assignment Notice, *York*, No. 1:03-cv-5493 (S.D.N.Y. Aug. 18, 2003), D.E. 2; Docket Sheet, *id.* (July 8, 2003). The plaintiffs voluntarily dismissed this action as duplicative of the consolidation on March 22, 2004. Dismissal, *id.* (Mar. 22, 2004), D.E. 8.

teen hijackers and Zacarias Moussaoui; and more than one hundred persons and entities identified by the government as global terrorists.⁴⁵⁷⁵ An amended complaint listed eighty-five plaintiff estates and twenty-seven defendants, omitting the “global terrorists.”⁴⁵⁷⁶

The second District of Columbia case was based on a complaint filed on August 15 against 100 alleged financial supporters of the terrorist attacks.⁴⁵⁷⁷ Listed as plaintiffs were 407 named estates, thirty-seven named individuals, seventy-three “Doe” estates (specific estates given pseudonyms), nine “Doe” individuals (specific individuals given pseudonyms), and 159 additional “Doe” plaintiffs (identified as John and Jane Doe 42 through 200).⁴⁵⁷⁸ The case came to include 4,779 listed plaintiffs and 205 defendants.⁴⁵⁷⁹ By the time this case had been included in the multidistrict

4575. Class-Action Complaint, *Havlish v. Bin-Laden*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), D.E. 1.

4576. Second Amended Complaint, *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Sept. 7, 2006), D.E. 214, *also filed in In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Sept. 7, 2006), D.E. 1894; *see* Amended Complaint, *Havlish*, No. 1:02-cv-305 (D.D.C. May 3, 2002), D.E. 12 (listing fifty-five plaintiff estates and twenty defendants); *see also* Third Amended Complaint, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 23, 2010), D.E. 259.

4577. Complaint, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), D.E. 1 [hereinafter D.D.C. *Burnett* Complaint]; *see In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); *see also* Coyle, *supra* note 4558; Chris Heffelfinger, *Radical Islam in America* 74 (2011).

4578. D.D.C. *Burnett* Complaint, *supra* note 4577.

4579. Addition of Parties, *Burnett*, No. 1:02-cv-1616 (D.D.C. Dec. 30, 2003), D.E. 438 (adding two defendants); Addition and Removal of Parties, *id.* (Dec. 19, 2003), D.E. 432 (adding 224 plaintiffs and removing eight plaintiffs and one defendant); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) (November 14, 2003, dismissal of two defendants); Addition and Removal of Defendants, *Burnett*, No. 1:02-cv-1616 (D.D.C. Oct. 27, 2003), D.E. 367 (removing one defendant); Addition and Removal of Parties, *id.* (Sept. 10, 2003), D.E. 313 (adding 207 plaintiffs and removing three plaintiffs); Addition and Removal of Parties, *id.* (Sept. 5, 2003), D.E. 305 (adding 489 plaintiffs and removing eleven plaintiffs); Addition and Removal of Defendants, *id.* (Aug. 22, 2003), D.E. 261 (removing six defendants); Addition and Removal of Parties, *id.* (Aug. 1, 2003), D.E. 232 (adding 550 plaintiffs and removing one plaintiff); Addition and Removal of Parties, *id.* (May 23, 2003), D.E. 155 (adding 375 plaintiffs and removing three plaintiffs); Addition and Removal of Defendants, *id.* (May 2, 2003), D.E. 139 (adding twenty-seven defendants and removing one defendant); Addition and Removal of Parties, *id.* (Feb. 21, 2003), D.E. 77 (adding 245 plaintiffs and nine defendants and removing seven plaintiffs and eleven defendants); Third Amended Complaint, *id.* (Nov. 22, 2002), D.E. 29 (listing as plaintiffs 1,785 named estates, 799 named individuals, 129 Doe estates, nine Doe individuals, and 5,000 additional Doe plaintiffs, and listing 189 defendants); Amended Com-

litigation, its plaintiffs already had filed a similar complaint in the Southern District of New York,⁴⁵⁸⁰ which was added to the multidistrict litigation as a tag-along case on March 10, 2004,⁴⁵⁸¹ and then voluntarily dismissed as duplicative on February 12, 2008.⁴⁵⁸²

Also centralized as tag-along cases were one case filed in the district court for the District of Columbia and three cases filed in the Southern District of New York: (1) an action filed on August 20, 2003, by the estate and four survivors of the World Trade Center's chief of security against seventy-three defendants, including Iraq, Al-Qaeda, and the nineteen hijackers;⁴⁵⁸³ (2) an action filed on September 10 by twenty-nine insurance companies against Al-Qaeda and 524 alleged supporters;⁴⁵⁸⁴ (3) an action

plaint, *id.* (Sept. 4, 2002), D.E. 3; see Jennifer Senior, *A Nation Unto Himself*, N.Y. Times, Mar. 14, 2004, at 636.

4580. Complaint, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003), D.E. 1; see *id.* at 265 (stating that the action "is commenced in this Court solely as a prophylactic measure to protect 9/11 victims whose rights have been threatened by certain New York workers' compensation insurance carriers and in the event that subject matter jurisdiction is lacking in the District of Columbia action"); see also Amended Complaint, *id.* (Sept. 3, 2003), D.E. 3.

4581. Docket Sheet, *id.* (Aug. 1, 2003).

4582. Notice of Voluntary Dismissal, *id.* (Feb. 12, 2008), D.E. 337.

The New York action was filed as a jurisdictional precaution, but the complaint was never served. Status Conference, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. June 26, 2007) (representation by a plaintiff's attorney).

4583. Complaint, *O'Neill v. Republic of Iraq*, No. 1:03-cv-1766 (D.D.C. Aug. 20, 2003), D.E. 1; see Docket Sheet, *O'Neill v. Republic of Iraq*, No. 1:04-cv-1076 (S.D.N.Y. Feb. 10, 2003) [hereinafter *O'Neill* Docket Sheet] (noting multidistrict centralization on January 27, 2004); see also First Consolidated Complaint, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1568 (naming 109 defendants); Third Amended Complaint, *O'Neill*, No. 1:04-cv-1076 (S.D.N.Y. June 7, 2005), D.E. 67 (naming 108 defendants); Second Amended Complaint, *id.* (Dec. 30, 2004), D.E. 21 (naming 112 defendants); First Amended Complaint, *id.* (Sept. 28, 2004), D.E. 16 (naming eighty defendants); Docket Sheet, *id.* (Feb. 10, 2004) (noting intradistrict consolidation on February 9, 2004).

It was reported that John O'Neill was an FBI expert on the terrorist plans of Osama Bin Laden and Al-Qaeda who was forced out of the FBI a few months before the September 11, 2001, attacks. *Frontline: The Man Who Knew* (PBS television broadcast Oct. 3, 2002), www.pbs.org/wgbh/pages/frontline/shows/knew/view/; see Ali Soufan, *Anatomy of Terror* xiii (2017) ("he died rushing back into the south tower, courageous to the very end, determined to do what he had been doing his whole career: save lives").

4584. Complaint, *Fed. Ins. Co. v. Al Qaida*, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003), D.E. 1; Docket Sheet, *id.* (Sept. 10, 2003) (noting intradistrict consolidation on March 10, 2004). At the time of consolidation, the complaint was amended to include forty-one plaintiffs. First Amended Complaint, *id.* (Mar. 10, 2004), D.E. 104; see also *In re*

filed on September 10 by twenty-eight estates and twenty-seven individuals against the defendants listed in the original consolidation's third amended master complaint;⁴⁵⁸⁵ and (4) an action filed on October 30 by three insurance companies against Saudi Arabia and Syria.⁴⁵⁸⁶

The multidistrict centralization also included nine cases subsequently filed in the Southern District of New York. After their District of Columbia case was transferred to New York, the security chief's survivors filed class actions on March 10, 2004, against Saudi Arabia, Syria, and Sudan,⁴⁵⁸⁷ and thirty-eight alleged financial supporters of the September 11 terrorists.⁴⁵⁸⁸ Another seven cases were filed in August and September of 2004: (1) on August 6, an insurance company filed an action against 495 defendants;⁴⁵⁸⁹ (2) on September 1, six insurance companies filed an action against 426 defendants;⁴⁵⁹⁰ (3) on September 2, Cantor Fitzgerald filed an

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").

4585. Complaint, *Barrera v. Al Qaeda Islamic Army*, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003), D.E. 1; Docket Sheet, *id.* (Sept. 10, 2003) (noting intradistrict consolidation on March 10, 2004).

4586. Docket Sheet, *Vigilant Ins. Co. v. Kingdom of Saudi Arabia*, No. 1:03-cv-8591 (S.D.N.Y. Oct. 30, 2003) (noting intradistrict consolidation on November 12, 2003, which appears to be an error).

4587. Class-Action Complaint, *O'Neill v. Kingdom of Saudi Arabia*, No. 1:04-cv-1922 (S.D.N.Y. Mar. 10, 2004), D.E. 1; *see* Docket Sheet, *id.* (Mar. 10, 2004) (noting intradistrict consolidation on April 7, 2004); *see also* First Consolidated Complaint, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1569.

4588. Class-Action Complaint, *O'Neill v. Al Baraka Inv. & Dev. Corp.*, No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004), D.E. 1; *see* Docket Sheet, *id.* (Mar. 10, 2004) (noting intradistrict consolidation on April 7, 2004); *see also* First Consolidated Complaint, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005), D.E. 1570 (naming ninety-five defendants).

4589. Complaint, *New York Marine and Gen. Ins. Co. v. Al Qaida*, No. 1:04-cv-6105 (S.D.N.Y. Aug. 6, 2004), D.E. 1; *see* Docket Sheet, *id.* (Aug. 6, 2004) (noting intradistrict consolidation on September 21, 2004); *see also* Second Amended Complaint, *id.* (Sept. 30, 2005), D.E. 234 (listing 419 defendants); First Amended Complaint, *id.* (Dec. 23, 2004), D.E. 29 (listing 478 defendants).

4590. Complaint, *Continental Cas. Co. v. Al Qaeda Islamic Army*, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004), D.E. 1; *see* Docket Sheet, *id.* (Sept. 1, 2004) (noting intradistrict consolidation on September 29, 2004); *see also* Second Amended Complaint, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005, filed Oct. 6, 2005), D.E. 1406 (420 defendants); First Amended Complaint, *Continental Cas. Co.*, No. 1:04-cv-5970 (S.D.N.Y. Dec. 8, 2004), D.E. 4 (434 defendants); Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, N.Y. Times, Sept. 9, 2004, at B1.

action against eighty-eight defendants;⁴⁵⁹¹ (4) on September 10, ten insurance companies filed an action against Saudi Arabia and Syria;⁴⁵⁹² (5) on September 10, ten World Trade Center businesses filed an action against 201 defendants;⁴⁵⁹³ (6) on September 10, the World Trade Center property managers filed an action against 201 defendants;⁴⁵⁹⁴ and (7) on September 10, a group of plaintiffs filed a complaint against Riggs Bank for failure to notice suspicious financial transactions that aided the September 11 terrorists, and the plaintiffs amended their complaint on March 24, 2005, to name 1,233 individuals and 1,117 estates as plaintiffs.⁴⁵⁹⁵

Two cases filed in 2011 and 2015 were added later.⁴⁵⁹⁶ Over three hundred additional cases were filed after 2015.⁴⁵⁹⁷

Sovereign Immunity and Personal Jurisdiction

Over time, the district court's rulings on sovereign immunity were complicated by changes in circuit law and an act of Congress.

On January 18, 2005, Judge Casey ruled that claims against Saudi Arabia and members of its royal family should be dismissed, largely because of foreign sovereign immunity and lack of personal jurisdiction.⁴⁵⁹⁸ On Sep-

4591. Complaint, Cantor Fitzgerald & Co. v. Akida Bank Private Ltd., No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004), D.E. 1; see Docket Sheet, *id.* (Sept. 2, 2004) (noting intradistrict consolidation on September 21, 2004); see also Amended Complaint, *id.* (Sept. 10, 2004), D.E. 5.

4592. Complaint, Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia, No. 1:04-cv-7216 (S.D.N.Y. Sept. 10, 2004), D.E. 1; see Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 21, 2004).

4593. Complaint, Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004), D.E. 1; see Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 29, 2004).

4594. Complaint, World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004), D.E. 1; see Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on September 29, 2004).

4595. Amended Complaint, Vadhan v. Riggs Nat'l Corp., No. 1:04-cv-7281 (S.D.N.Y. Mar. 24, 2005), D.E. 17; see Docket Sheet, *id.* (Sept. 10, 2004) (noting intradistrict consolidation on October 15, 2004).

4596. Amended Complaint, Burnett v. Islamic Republic of Iran, No. 1:15-cv-9903 (S.D.N.Y. Dec. 31, 2015), D.E. 20; Complaint, *id.* (Dec. 18, 2015), D.E. 1; Complaint, Hoggan v. Islamic Republic of Iran, No. 1:11-cv-1634 (D.D.C. Sept. 9, 2011), D.E. 1, *refiled as* No. 1:11-cv-7550 (S.D.N.Y. Oct. 25, 2011).

4597. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570.

4598. *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); see Order of Dismissal, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. May 5, 2005), D.E. 883 (applying the January 18, 2005, ruling to dismiss all claims in all cases against the Kingdom of Saudi Arabia, members of its royal family, and

tember 21, Judge Casey dismissed additional Saudi royals and other defendants.⁴⁵⁹⁹ The dismissals became final on January 10, 2006,⁴⁶⁰⁰ and the court of appeals affirmed the dismissals on August 14, 2008.⁴⁶⁰¹

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.⁴⁶⁰² Discovery and other matters were referred to Magistrate Judge Frank Maas.⁴⁶⁰³

On June 16, 2010, Judge Daniels dismissed actions against forty-nine foreign defendants for lack of personal jurisdiction,⁴⁶⁰⁴ but he decided that the plaintiffs had pleaded facts sufficient to confer the court's jurisdiction over Dubai Islamic Bank.⁴⁶⁰⁵ Also for lack of personal jurisdiction, Judge

the Al Rajhi Banking and Investment Corporation); *see also In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78–79 (2d Cir. 2008); *In re Terrorist Attacks* on Sept. 11, 2001, 689 F. Supp. 2d 552, 556–57 (S.D.N.Y. 2010); Murphy, *supra* note 4571, at 329.

4599. *In re Terrorist Attacks* on Sept. 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); *see Terrorist Attacks*, 538 F.3d at 79; *Terrorist Attacks*, 689 F. Supp. 2d at 557; *see also* Mark Hamblett, *Saudi Charity Dropped from Suit Over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

4600. Judgment, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006), D.E. 1594; *In re Terrorist Attacks* on Sept. 11, 2001, 714 F.3d 659, 672 (2d Cir. 2013); *see In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2006 WL 708149 (S.D.N.Y. Mar. 20, 2006) (explaining that Judge Casey decided to certify appeals for defendants dismissed on Rule 12(b)(1) or 12(b)(2) grounds but not defendants dismissed on Rule 12(b)(6) grounds); *see also Terrorist Attacks*, 538 F.3d at 75.

4601. *Terrorist Attacks*, 538 F.3d 71, *cert. denied*, 557 U.S. 935 (2009); *Terrorist Attacks*, 714 F.3d at 672; *see Terrorist Attacks*, 689 F. Supp. 2d at 555–58; *see also* Heffelfinger, *supra* note 4577, at 74; Eric Lichtblau, *Supreme Court Refuses Case by Sept. 11 Victims' Families*, N.Y. Times, June 30, 2009, at A12.

4602. *In re Terrorist Attacks* on Sept. 11, 2001, 718 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); Reassignment Notice, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Apr. 17, 2007); FJC Biographical Directory, *supra* note 4566; *see Richard Conway Casey*, 74, *Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

Tim Reagan attended Judge Daniels's first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

4603. *Terrorist Attacks*, 718 F. Supp. 2d at 487; S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570.

Tim Reagan interviewed Judge Maas for this case study in his chambers on June 26, 2007, and November 6, 2009.

4604. *Terrorist Attacks*, 718 F. Supp. 2d at 469–89, 495 (original opinion dated June 16 and filed on June 17); *Terrorist Attacks*, 714 F.3d at 672.

4605. *Terrorist Attacks*, 718 F. Supp. 2d at 488–95 (“It can be reasonably inferred, from the allegations pled, that DIB personally and intentionally provided material support to al Qaeda in aid of al Qaeda’s plan to commit an aggressive terrorist strike against the United States, with knowledge that the United States and its residents would likely bear the brunt of the resulting injuries.”).

Daniels dismissed an additional seven defendants on September 13,⁴⁶⁰⁶ and he dismissed the Saudi Bin Laden Group on January 11, 2012.⁴⁶⁰⁷ Reviewing on appeal thirty-seven of these dismissals, the court of appeals affirmed twenty-five dismissals on April 16, 2013 (including the Saudi Bin Laden Group), and remanded twelve dismissals for further jurisdictional discovery.⁴⁶⁰⁸ Judge Daniels dismissed a Saudi charity official on August 14, 2015, for common-law sovereign immunity.⁴⁶⁰⁹

The U.S. Court of Appeals for the Second Circuit, on November 7, 2011, contradicted its earlier ruling by a different panel in favor of sovereign immunity for Saudi Arabia⁴⁶¹⁰ by provisionally denying sovereign immunity to Afghanistan.⁴⁶¹¹

The ruling arose in litigation initiated earlier than the other cases included in the multidistrict litigation. On December 4, 2001, Lynn Faulkner filed suit in the district court for the District of Columbia against Osama Bin Laden, Al-Qaeda, the Taliban, Afghanistan, and Iraq for the wrongful death of his wife Wendy, who perished in Two World Trade Center on September 11.⁴⁶¹² Judge Richard W. Roberts granted⁴⁶¹³ Faulkner's request

4606. *In re Terrorist Attacks* on Sept. 11, 2001, 740 F. Supp. 2d 494, 506–11, 524 & n.12 (2d Cir. 2011); *Terrorist Attacks*, 714 F.3d at 672.

4607. *In re Terrorist Attacks* on Sept. 11, 2001, 840 F. Supp. 2d 776 (S.D.N.Y. 2012); *Terrorist Attacks*, 714 F.3d at 672–73.

4608. *Terrorist Attacks*, 714 F.3d 659.

On the same day, the court affirmed the dismissal of five defendants for failure to state a claim, *In re Terrorist Attacks* on Sept. 11, 2011, 714 F.3d 118 (2d Cir. 2013), and the dismissal of two Saudi charities as immune under the Foreign Sovereign Immunities Act, *In re Terrorist Attacks* on Sept. 11, 2011, 714 F.3d 109 (2d Cir. 2013). On June 30, 2014, the Supreme Court denied a petition for writ of certiorari as to all three opinions. *O'Neill v. Al Rajhi Bank*, 573 U.S. 954 (2014).

4609. *In re Terrorist Attacks* on Sept. 11, 122 F. Supp. 3d 181 (S.D.N.Y. 2015) (dismissing the former president of both the Saudi Joint Relief Committee and the Saudi Red Crescent Society).

4610. *Doe v. Bin Laden*, 663 F.3d 64, 70–71 n.10 (2d Cir. 2011); see *In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); see also Lichtblau, *supra* note 4629.

The second panel circulated its opinion to members of the first panel and to all active judges of the court before filing, and no judge objected to the new opinion. *Doe*, 663 F.3d at 70–71 n.10. The court considered this a mini en banc procedure. *Id.*; *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 n.90 (2d Cir. 2009); *United States v. Parkes*, 497 F.3d 220, 230 n.7 (2d Cir. 2007).

4611. *Doe*, 663 F.3d 64; see Lichtblau, *supra* note 4629.

4612. Complaint, *Doe v. Bin Laden*, No. 1:01-cv-2516 (D.D.C. filed Jan. 4, 2002), D.E. 2.

4613. Order, *id.* (Dec. 4, 2001), D.E. 4; *Doe*, 663 F.3d at 65 n.1.

to proceed as John Doe “[i]n order to protect the health, safety, welfare, and privacy interests of Plaintiff and his family, including two teenagers, from both further terrorist attacks and from media harassment.”⁴⁶¹⁴ On February 27, 2004, Afghanistan sought to vacate⁴⁶¹⁵ a default judgment that was issued against it on January 29, 2003,⁴⁶¹⁶ claiming sovereign immunity pursuant to the Foreign Sovereign Immunities Act (FSIA).⁴⁶¹⁷ Judge Roberts determined, on September 30, 2008, that jurisdiction depended upon whether the plaintiff could show an FSIA exception for noncommercial torts⁴⁶¹⁸ and whether the Taliban controlled the government of Afghanistan during the September 11, 2001, conspiracy or it merely had partial military control over Afghanistan’s territory.⁴⁶¹⁹

On November 24, 2009, the District of Columbia Circuit’s court of appeals transferred the appeal to the Second Circuit in light of the multidis-

Judge Roberts assumed senior status because of certified disability on March 16, 2016. FJC Biographical Directory, *supra* note 4566.

4614. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Dec. 4, 2001), D.E. 3.

On October 7, 2002, Faulkner filed a John Doe complaint against banks and charities alleging financial support of the terrorists. Complaint, *Doe v. Al-Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1980 (D.D.C. Oct. 7, 2002), D.E. 1. He moved to intervene instead in a pending action against the same defendants—the second District of Columbia action added to the multidistrict centralization. Motion, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Feb. 5, 2003), D.E. 67. Parties objected to his intervening as a John Doe, and Judge James Robertson denied the motion. Order, *id.* (Feb. 24, 2003), D.E. 82. Faulkner renewed his motion under his own name, Motion, *id.* (Mar. 21, 2003), D.E. 101, and Judge Robertson granted intervention, D.D.C. *Burnett* Docket Sheet, *supra* note 4569 (noting that the motion was granted on August 6, 2003). On the following day, Faulkner dismissed his separate action against the banks and charities. Notice, *Doe*, No. 1:02-cv-1980 (D.D.C. Aug. 7, 2003), D.E. 4.

Judge Robertson retired on June 1, 2010, and died on September 7, 2019. FJC Biographical Directory, *supra* note 4566.

4615. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Feb. 27, 2004), D.E. 26.

4616. Order, *id.* (Jan. 29, 2003), D.E. 16; *see also* Order, *id.* (Jan. 29, 2003), D.E. 15 (default judgment against Iraq).

4617. Pub. L. No. 94-583, 90 Stat. 2891 (1976); *see* 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (2020); *see also* David P. Stewart, *The Foreign Sovereign Immunities Act* (Federal Judicial Center, 2d ed. 2018) (“a practical introduction for those who have little knowledge of or experience with the statutes as interpreted and applied in U.S. courts”).

4618. 28 U.S.C. § 1605(a)(5) (providing an exception of immunity for tort damages because of noncommercial activity that is not discretionary or defamatory).

4619. *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008); *Doe v. Bin Laden*, 663 F.3d 64, 66 (2d Cir. 2011).

trict centralization in the Southern District of New York.⁴⁶²⁰ The Second Circuit's court of appeals agreed with Judge Roberts that the noncommercial tort exception might apply and remanded the case to the district court for the Southern District of New York for jurisdictional discovery.⁴⁶²¹

On December 19, 2013, the Second Circuit's court of appeals issued a remand to Judge Daniels respecting claims against Saudi Arabia.⁴⁶²² As part of discovery following the remand, Zacarias Moussaoui was deposed in prison on October 20 and 21, 2014, in support of the plaintiffs' case.⁴⁶²³ Judge Daniels dismissed Saudi Arabia on September 29, 2015.⁴⁶²⁴ The court of appeals remanded appeals on February 7, 2017, in light of the September 28, 2016, Justice Against Sponsors of Terrorism Act.⁴⁶²⁵ Judge Daniels authorized jurisdictional discovery for claims against Saudi Arabia on March 28, 2018.⁴⁶²⁶

On October 15, 2019, the court of appeals reversed Judge Daniels's dismissal on personal-jurisdiction grounds of claims against Al Rajhi Bank, and the appellate court remanded the case for jurisdictional discov-

4620. Order, *Doe v. Bin-Laden*, No. 08-7117 (D.C. Cir. Nov. 24, 2009); *Doe*, 663 F.3d at 66.

4621. *Doe*, 663 F.3d 64; see Docket Sheet, *Doe v. Bin Laden*, No. 1:09-cv-7055 (S.D.N.Y. Aug. 10, 2009); see also Stewart, *supra* note 4617, at 88; Lichtblau, *supra* note 4629.

4622. *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353 (2d Cir. 2013), *cert. denied*, 573 U.S. 955 (2014); see Dan Christensen, *Saudi Arabia Added to 9/11 Lawsuit*, Miami Herald, Dec. 25, 2013, at 1A.

4623. Affirmation Exs. 5–7, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Feb. 3, 2015), D.E. 2927 (deposition transcripts); see Ben Hubbard & Scott Shane, *Pre-9/11 Ties Haunt Saudis as More Accusations Surface*, N.Y. Times, Feb. 5, 2015, at A10; Larry Neumeister, *Lawyers: Evidence Shows Saudi Arabia Aided Hijackers*, Miami Herald, Feb. 5, 2015, at 3A; James Risen, *Terrorist Claims Return Sept. 11 Suit to Spotlight*, N.Y. Times, Feb. 11, 2015, at A8; Scott Shane, *Terrorist Names Saudis as Patrons*, N.Y. Times, Feb. 4, 2015, at A1; see also Chapter 6: Twentieth Hijacker, *supra* page 120.

4624. *In re Terrorist Attacks on Sept. 11, 2001*, 134 F. Supp. 3d 774 (S.D.N.Y. 2015); see *Judge Dismisses Saudi Arabia in Suit*, Wash. Post, Sept. 30, 2015, at A3.

4625. Docket Sheets, *In re Terrorist Attacks on Sept. 11, 2001*, Nos. 15-3426, 15-3442, 15-3505, 15-3509, 15-3524, 15-3542, 15-3583, and 15-3605 (2d Cir. Oct. 27 to 29, 2015); see Pub. L. No. 114-222, § 3(a), 130 Stat. 852, 853 (2016), 28 U.S.C. § 1605B (2020); see also Juliet Eilperin & Karoun Demirjian, *Congress Thwarts Obama on 9/11 Bill*, Wash. Post, Sept. 29, 2016, at A1; Mark Mazzetti, *New Law Shifts Fight on Claims for 9/11 Victims*, N.Y. Times, Sept. 30, 2016, at A1; Kristina Peterson & Siobhan Hughes, *Veto of Terror Bill Is Overturned*, Wall St. J., Sept. 29, 2016, at A1; Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Allows Saudis to Be Sued Over 9/11 Attacks*, N.Y. Times, Sept. 29, 2016, at A1.

4626. *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d 631 (S.D.N.Y. 2018).

ery because of “allegations related to Al Rajhi Bank’s specific intent to further terrorism in the United States.”⁴⁶²⁷ Jurisdictional discovery is expected to be complete by November 18, 2022.⁴⁶²⁸

Judgments

On December 16, 2011, Judge Daniels approved a calculation by Judge Maas of insurance companies’ default-judgment damages against Al-Qaeda in the amount of \$9,351,247,965.99.⁴⁶²⁹ Judge Daniels extended liability for this amount to Hezbollah on March 27, 2012.⁴⁶³⁰

In 2012, Judge Daniels entered a default judgment of \$6,048,513,805 against Iran in one of the originally centralized actions from the District of Columbia.⁴⁶³¹ Additional default judgments were entered in 2015 against Iraq⁴⁶³²

Default judgments are largely symbolic without enforcement, but when Iranian assets became unfrozen in Europe following a 2015 global arms agreement, the plaintiffs with the 2011 default judgment brought an enforcement action in Luxembourg.⁴⁶³³ The court there ruled that sovereign immunity barred the enforcement action.⁴⁶³⁴

4627. *In re Terrorist Attacks* on Sept. 11, 2001, 779 F. App’x 66, 68–69 (2d Cir. 2019), rev’g 295 F. Supp. 3d 416 (S.D.N.Y. 2018) (also dismissing claims against another bank and a construction company).

4628. Endorsed Letter, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 6, 2022), D.E. 8070; see Opinion, *id.* (Nov. 22, 2021), D.E. 7378, 2021 WL 5449825 (approving and disapproving specific discovery requests); Opinion, *id.* (Mar. 26, 2021), D.E. 6681, 2021 WL 1164087 (denying dismissal of claims against the bank).

4629. Opinion, *id.* (Dec. 16, 2011), D.E. 2502, 2011 WL 6318975; Report and Recommendation, *id.* (Oct. 14, 2011), D.E. 2479, 2011 WL 4903584; see Eric Lichtblau, *Prospects Improve for Sept. 11 Suits Against Nations*, N.Y. Times, Nov. 19, 2011, at A13.

4630. Order, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 27, 2012), D.E. 2582, 2012 WL 1034414.

4631. Opinion, *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Oct. 3, 2012), D.E. 316, 2012 WL 4711407; Findings of Fact and Conclusions of Law, *id.* (Dec. 22, 2011), D.E. 294, 2011 WL 13244047.

4632. Default Judgment, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Aug. 31, 2015), D.E. 3022; see O’Neill Docket Sheet, *supra* note 4583.

4633. See Charlie Savage, *Iran Wins Court Ruling in 9/11 Lawsuit*, N.Y. Times, Mar. 29, 2019, at A10.

4634. See *id.*

The Consolidated Appropriations Act of 2016 included the Justice for United States Victims of State Sponsored Terrorism Act, creating a compensation fund.⁴⁶³⁵

The fund will award payment to victims of acts of international terrorism based on final judgments obtained in U.S. district courts against a state sponsor of terrorism, as well as to hostages held at the United States Embassy in Tehran, Iran, during the period beginning November 4, 1979, and ending January 20, 1981, and their spouses and children.⁴⁶³⁶

In light of Judge Maas's retirement, magistrate judge responsibilities for this litigation were transferred to Magistrate Judge Sarah Netburn.⁴⁶³⁷ In 2017 and 2018, Judge Netburn established procedures for adopting claims against Iran and Saudi Arabia, including the preparation of form complaints.⁴⁶³⁸ Judge Netburn established similar procedures for claims against Sudan in 2020.⁴⁶³⁹

In 2019, Judge Netburn agreed that the plaintiffs who were awarded damages against Iran in 2012 were entitled to a common benefit fund compensating them for the work expended to achieve the award, an award that paved the way for other damages awards against Iran.⁴⁶⁴⁰

Counsel appeared on behalf of Sudan on February 3, 2020.⁴⁶⁴¹ Two years and three months later, Judge Netburn recommended maintaining Sudan as a defendant, finding that

4635. Pub. L. No. 114-113, § 404, 129 Stat. 2242, 3007 (2015), 34 U.S.C. § 20144 (2020).

4636. 81 Fed. Reg. 45,535 (July 14, 2016); see U.S. Victims of State Sponsored Terrorism Fund, www.usvsst.com.

4637. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570; Judicial Milestones, www.uscourts.gov/judicial-milestones/frank-s-maas (noting Judge Maas's retirement on September 29, 2016; see, e.g., Transcript at 4–5, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Oct. 20, 2016, filed Nov. 7, 2016), D.E. 3391).

4638. Amended Order Approving Notices to Conform Short Form Complaints and Notices of Amendment, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Oct. 28, 2019), D.E. 5234, *superseding* Order, *id.* (July 10, 2018), D.E. 4045, *superseding* Order, *id.* (May 25, 2018), D.E. 4010, *superseding* Order, *id.* (Apr. 27, 2018), D.E. 3982, *superseding* Order, *id.* (May 3, 2017), D.E. 3543.

4639. Order, *id.* (Dec. 1, 2020), D.E. 6547, 2020 WL 7043282; see Default Judgment, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:03-cv-9849 (S.D.N.Y. Mar. 15, 2012), D.E. 621; Default Judgment, *Ashton v. Al-Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Dec. 22, 2011), D.E. 651 [hereinafter *Ashton* Default Judgment].

4640. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2019), D.E. 5180, 2019 WL 4744268, *reconsideration denied*, Opinion, *id.* (Sept. 30, 2020), D.E. 6481, 2020 WL 5848990.

4641. Notices of Appearance, *id.* (Feb. 3, 2020), D.E. 5820 to 5822.

the Plaintiffs have adequately alleged that Sudan's sustained campaign of support for al Qaeda was a substantial factor in the September 11 Attacks. It was also reasonably foreseeable that this support would lead to death and injury because al Qaeda would use it to launch terrorist strikes against the United States.⁴⁶⁴²

The 2012 damages judgment against Iran was based on a 2011 default judgment that was issued against the Taliban as well.⁴⁶⁴³ Did that become a judgment against Afghanistan when the Taliban returned to power in 2021?⁴⁶⁴⁴ Judge Netburn recognized in 2021 that "the question of Afghanistan's government both today and from 1996 to 2001 may involve extremely delicate diplomatic considerations."⁴⁶⁴⁵ Early in 2022, the *New York Times* reported, "President Biden will start to clear a legal path for certain relatives of victims of the Sept. 11, 2001, attacks to pursue \$3.5 billion from assets that Afghanistan's central bank had deposited in New York before the Taliban takeover, according to officials familiar with internal deliberations."⁴⁶⁴⁶

For recovery of damages, Judge Netburn authorized service on the Taliban by publication and Twitter, because "Afghanistan currently has no government recognized by the United States that could aid in the methods of service."⁴⁶⁴⁷ But Judge Netburn recognized that a default judgment against a nonsovereign entity, such as the Taliban, requires documentary support different from a default judgment against a sovereign entity, such as Iran.⁴⁶⁴⁸ On August 26, 2022, she issued a report and recommendation concluding that plaintiffs could not satisfy their judgments against the Tal-

4642. Report and Recommendation at 8–9, *id.* (May 3, 2022), D.E. 7942.

4643. Default Judgment, *id.* (Dec. 22, 2011), D.E. 2516.

4644. See, e.g., Charlie Savage, *Groups of 9/11 Families Engage in Legal Tussle Over Frozen Afghan Funds Held in U.S.*, N.Y. Times, Dec. 3, 2021, at A9; Charlie Savage, *Sept. 11 Groups Near Deal to Divide Afghan Assets*, N.Y. Times Mar. 23, 2022, at A16.

4645. Order, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Nov. 15, 2021), D.E. 7354, 2021 WL 5331720.

4646. Charlie Savage, *Biden Will Split Afghan Funds Between 9/11 Families and Relief Effort*, N.Y. Times, Feb. 11, 2022, at A11.

4647. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Apr. 5, 2022), D.E. 7830, 2022 WL 1088567; see Report and Recommendations, *id.* (Mar. 4, 2022), D.E. 7731 ("Afghanistan is not currently participating in this case and will not likely be able to in the near future. The Republic is gone, and its counsel has withdrawn. The United States has not recognized any entity that would be permitted to take its place and assert Afghanistan's interests.").

4648. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Apr. 5, 2022), D.E. 8198, 2022 WL 2666016.

iban with a court-ordered turnover of funds in the Federal Reserve Bank of New York held by Afghanistan's central bank.⁴⁶⁴⁹ "Afghanistan now lies in disarray. It has no internationally recognized government, its people face a humanitarian crisis of catastrophic proportions, and while the Taliban is not the recognized government, it has *de facto* control over the country."⁴⁶⁵⁰ Funds belonging to Afghanistan's central bank are immune from the court's jurisdiction, the court does not have authority to recognize a government that the President has not recognized, and the bank cannot be regarded as an agent of the Taliban, because it was seized by force.⁴⁶⁵¹

Challenge: Service of Process on International Terrorists

Plaintiffs in the actions against terrorists were faced with unusual service difficulties. One process server was murdered trying to serve the complaint in Saudi Arabia.⁴⁶⁵² Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.⁴⁶⁵³

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.⁴⁶⁵⁴ The court agreed.⁴⁶⁵⁵

The plaintiffs proposed that the government serve process on defendants in their custody.⁴⁶⁵⁶ The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.⁴⁶⁵⁷ 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

4649. Report and Recommendation, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Aug. 26, 2022), D.E. 8463 [hereinafter Aug. 26, 2022, Report and Recommendation]; see Charlie Savage, *Judge Backs Denying 9/11 Families' Bid to Seize Frozen Afghan Funds*, N.Y. Times, Aug. 28, 2022, at 23 ("The \$3.5 billion in question is part of about \$7 billion in Afghan central bank funds that had been deposited at the Federal Reserve Bank of New York before the Taliban took control of the country last year.").

4650. Aug. 26, 2022, Report and Recommendation, *supra* note 4649, at 1.

4651. *Id.* at 2.

4652. *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 490 (S.D.N.Y. 2010); Interview with Owen Smith, law clerk to Judge Richard Conway Casey, May 17, 2007.

4653. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 14, 2004), D.E. 231, 2004 WL 1348996.

4654. *Id.* at 1–2.

4655. *Id.* at 2–3.

4656. *Id.* at 1–2.

4657. *Id.* at 4.

that the government need not disclose whether it had in custody those defendants it had not publicly acknowledged holding.⁴⁶⁵⁸ The court ruled that service by publication would be effective for those individuals whom the government did not serve.⁴⁶⁵⁹

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.⁴⁶⁶⁰ The court ruled that this would be effective service, and it agreed to request that the foreign ministries accept service, but it declined to order them to do so.⁴⁶⁶¹

Challenge: Classified Evidence

In the actions against alleged supporters of the terrorists, plaintiffs supported a discovery motion with documents that the plaintiffs knew were sensitive and suspected might be classified.⁴⁶⁶² It was reported that the documents had been anonymously leaked to the plaintiffs' attorneys.⁴⁶⁶³ The attorneys delivered the documents to the court, sent copies to the U.S. Attorney, and provided defendants only with a copy of the transmittal letter.⁴⁶⁶⁴ The government determined that at least some of the documents were classified, so the court's copies were securely stored.⁴⁶⁶⁵ The plaintiffs were required to surrender their copies.⁴⁶⁶⁶ Judge Daniels denied the plaintiffs' request that he review the documents.⁴⁶⁶⁷

During jurisdictional discovery concerning Saudi Arabia, the FBI filed three notices of lodging classified information for Judge Netburn's in cam-

4658. *Id.* at 4. The government acknowledged custody of ten of the twenty-three defendants who the plaintiffs claimed were in the government's custody. *Id.*

4659. *Id.* at 6.

4660. *Id.* at 1–2, 5.

4661. *Id.* at 6 & n.2.

4662. *In re Terrorist Attacks on Sept. 11, 2001*, 689 F. Supp. 2d 552, 563 (S.D.N.Y. 2010).

4663. Eric Lichtblau, *Documents Back Saudi Link to Extremists, But May Never Be Used in 9/11 Suit*, N.Y. Times, June 24, 2009, at A11; *Terrorist Attacks*, 689 F. Supp. 2d at 563.

4664. *Terrorist Attacks*, 689 F. Supp. 2d at 563.

4665. *Id.*

4666. *Id.*

4667. Order, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. July 16, 2009), D.E. 2182; *see Terrorist Attacks*, 689 F. Supp. 2d at 564; *see also* Lichtblau, *supra* note 4663 (“The Justice Department had the lawyers’ copies destroyed and now wants to prevent a judge from even looking at the material.”).

era review in 2019 and 2020.⁴⁶⁶⁸ Judge Netburn noted, “The Court is not inclined to permit the [ex parte] submission of fully classified legal arguments or case citations unless the FBI can demonstrate that even that disclosure could tend to reveal classified information.”⁴⁶⁶⁹

In 2021, Judge Netburn determined that some jurisdictional discovery sought by the plaintiffs against the FBI was protected by the state-secrets privilege.⁴⁶⁷⁰

Challenge: Sensitive Unclassified Information

Classified information is information protected by the government for national security reasons; information protected by the government for other reasons is known as “controlled unclassified information.”⁴⁶⁷¹

Litigation that claimed inadequate security required discovery concerning security procedures. The government decided that the Transportation Security Administration (TSA) should screen discovery for “sensitive security information” (SSI), which is controlled unclassified information related to transportation security.⁴⁶⁷² This slowed the progress of the litigation substantially.⁴⁶⁷³

4668. Notices of Lodging, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 12, 2019, and Feb. 21 and Apr. 13, 2020), D.E. 5143, 6001, 6143.

4669. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570 (Mar. 31, 2020, Order, D.E. 6105).

4670. *In re Terrorist Attacks on September 11, 2001*, 523 F. Supp. 3d 478 (S.D.N.Y. 2021).

4671. Exec. Order No. 13,556, 75 Fed. Reg. 68,675 (Nov. 9, 2010); Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information (Aug. 25, 2009), www.justice.gov/ag/cui_task_force_rpt.pdf; see *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011), thekojoannamdishow.org/shows/2011-08-15/too-secret-rethinking-government-classification.

4672. *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

Regulations provide the following definition:

SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would—

- (1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);
- (2) Reveal trade secrets or privileged or confidential information obtained from any person; or
- (3) Be detrimental to the security of transportation.

49 C.F.R. § 1520.5(a) (2020); see *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); *In re Sept. 11 Litig.*, 236 F.R.D. 164, 169 (S.D.N.Y. 2006); see also Dep’t of Home-

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.⁴⁶⁷⁴ It took the TSA two years to screen the discovery.⁴⁶⁷⁵ The plaintiffs noticed depositions of the defendants for April 2006.⁴⁶⁷⁶ TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.⁴⁶⁷⁷ 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.⁴⁶⁷⁸ Judge Hellerstein was sympathetic to the defendants' position.

Given the uncertainty of what is properly classifiable as SSI, and TSA's own changes of attitudes regarding prior classifications, the task of objecting and instructing is beyond the jurisdictional competence of defense counsel, particularly in light of the client's interests in fully responding to proper questions. Thus, the only lawyers who have the obligation to act as enforcers of TSA's policies are TSA's own lawyers, and it is they, and no one else, who have the responsibility to object and to instruct whenever they, in good faith, believe that SSI may be implicated in a question or an answer. Their attendance at depositions is critical. That is the very reason that they moved to intervene in the case, and the reason that I granted TSA's motion to intervene.⁴⁶⁷⁹

Judge Hellerstein ruled that the depositions be conducted with only cleared counsel and witnesses present, that TSA be granted thirty days to redact the transcript, and that the original be filed under seal.⁴⁶⁸⁰ Judge Hellerstein limited TSA's asserted "right to raise objections during the course of depositions, and instruct witnesses not to answer, where the

land Sec. v. MacLean, 574 U.S. 383, 386 (2015) (describing sensitive security information).

4673. *Sept. 11 Litig.*, 567 F. Supp. 2d at 616; Interview with Judge Alvin K. Hellerstein, June 25, 2007. "The TSA has reviewed over a million pages of documents and 121 deposition transcripts before allowing their release, in original or redacted form. As a result, discovery has become extended, and a number of judicial interventions were necessary to avoid impasse." *In re Sept. 11 Litig.*, 621 F. Supp. 2d 131, 142 (S.D.N.Y. 2009) (citations omitted).

4674. *Sept. 11 Litig.*, 236 F.R.D. at 167.

4675. *Id.*

4676. *Id.* at 169.

4677. *Id.* at 165–66, 169.

4678. *Id.* at 166, 169.

4679. *Id.* at 173.

4680. *Id.* at 173–74.

questions posed to witnesses, and the answers elicited therefrom, might implicate information relevant to the case but potentially or actually SSI.”⁴⁶⁸¹ 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.”⁴⁶⁸² So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.⁴⁶⁸³

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.⁴⁶⁸⁴ So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.⁴⁶⁸⁵ 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 2006.⁴⁶⁸⁶

In October 2007, plaintiffs moved to set aside discovery confidentiality designations so that all discovery other than SSI could be made public.⁴⁶⁸⁷ Plaintiffs subsequently withdrew this motion, but they renewed it on January 14, 2009.⁴⁶⁸⁸ On July 30, Judge Hellerstein denied the motion, ruling that the confidentiality protective order required that objections to confidentiality designations be made within 120 days of the designations.⁴⁶⁸⁹

4681. *In re Sept. 11 Litig.*, 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

4682. *Id.* at 410.

4683. *Id.*

4684. Order at 1, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. June 5, 2006), D.E. 818.

4685. *Id.* at 1–2.

4686. Interview with Judge Alvin K. Hellerstein, June 25, 2007.

4687. Opinion at 1–3, *In re Sept. 11 Prop. Dam. and Bus. Loss Litig.*, No. 1:21-mc-101 (S.D.N.Y. July 30, 2009), D.E. 866.

4688. *Id.* at 1.

4689. *Id.* at 1, 4, 9.

For the last wrongful death action against the airlines to settle, Judge Hellerstein issued a protective order governing the use of SSI at trial.⁴⁶⁹⁰ “TSA has determined, pursuant to its discretionary authority under 49 C.F.R. § 1520.15(e), to grant Plaintiff, Defendants and the members of the jury limited and conditional access to certain SSI, subject to the terms and conditions set forth in this Order.”⁴⁶⁹¹ Judge Hellerstein called for use of the silent-witness rule to present SSI to the jury without presenting it to the public.⁴⁶⁹² With this rule, witnesses testify about secret matters in code so that the jury and the participants know the secrets in the testimony but the public does not.⁴⁶⁹³

In 2013, Judge Hellerstein issued a similar SSI protective order in Cantor Fitzgerald’s action.⁴⁶⁹⁴

Challenge: Confidential Discovery

Discovery litigation during jurisdictional discovery respecting Saudi Arabia resulted in many docket entries marked “***SELECTED PARTIES***,” which means that only selected parties have access to the filed documents.⁴⁶⁹⁵ Judge Netburn issued a confidential-discovery protective order agreed to by the plaintiffs, Saudi Arabia, and the FBI.⁴⁶⁹⁶ On March 12, 2020, Judge Netburn resolved a discovery dispute by ordering Saudi Arabia to respond within thirty days to two specified interrogatories in an opinion containing substantial redactions on thirteen of the opinion’s fourteen pages.⁴⁶⁹⁷ Six months earlier, news media reported that a public filing disclosed that the FBI had produced in confidential discovery the

4690. Protective Order, *Bavis v. UAL Corp.*, No. 1:02-cv-7154 (S.D.N.Y. June 28, 2011), D.E. 176.

4691. *Id.* at 2.

4692. *Id.* at 15.

4693. *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987); *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007); see Chapter 10: A Plot to Kill President Bush, *supra* page 191 (another case study involving the silent-witness rule); Chapter 24: Giving State Secrets to Lobbyists, *supra* page 392 (same).

4694. Protective Order, *Cantor Fitzgerald & Co. v. Am. Airlines, Inc.*, No. 1:04-cv-7318 (S.D.N.Y. May 8, 2013), D.E. 120.

4695. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570.

4696. Protective Order, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Nov. 14, 2018), D.E. 4255. See generally Robert Timothy Reagan, *Confidential Discovery: A Pocket Guide on Protective Orders* (Federal Judicial Center 2012).

4697. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 12, 2020), D.E. 6061, 2020 WL 1181943.

name of someone who tasked two others to help two of the hijackers find housing in California.⁴⁶⁹⁸

On September 23, 2021, Judge Netburn denied a motion by Yahoo! News Service to intervene in Judge Netburn's investigation of a confidential deposition transcript that was leaked to Yahoo! News.⁴⁶⁹⁹ The transcript was leaked by a consultant to one of the plaintiff law firms.⁴⁷⁰⁰

Challenge: Grand-Jury Evidence

For actions against Saudi Arabia, the government responded to discovery requests directed to the FBI by filing "petitions in four jurisdictions seeking disclosure of grand-jury material."⁴⁷⁰¹ Judge Netburn granted the petitions on October 7, 2019, finding that the plaintiffs "have demonstrated a particularized need for the requested documents" and "the need for disclosure outweighs the need for confidentiality."⁴⁷⁰² Judge Netburn granted additional petitions for selected grand-jury material in 2021 and 2022.⁴⁷⁰³

Challenge: Witness Security

Nine years after they filed their original complaint in the District of Columbia, some plaintiffs introduced as evidence supporting a default judgment against Iran⁴⁷⁰⁴ videotaped testimony from three defectors from the Iranian government.⁴⁷⁰⁵ To protect the safety of the witnesses and their families, the court allowed the plaintiffs to file both a public brief and a

4698. Devlin Barrett, *Justice Dept. Offers 9/11 Families New Detail in Case*, Wash. Post, Sept. 13, 2019, at A15; Aruna Viswanatha, Sadie Gurman & Warren P. Strobel, *U.S. Provides a Saudi Name in 9/11 Case*, Wall St. J., Sept. 13, 2019, at A8; see Declaration, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 12, 2019), D.E. 5144.

4699. Opinion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 23, 2021), D.E. 7134, 2021 WL 4319428.

4700. Opinion, *id.* (Jan. 14, 2022), D.E. 7600, 2022 WL 137855 (supervising redactions of the investigation record).

4701. Endorsed Letter, *id.* (Aug. 30, 2019), D.E. 5025.

4702. Opinion, *id.* (Oct. 7, 2019), D.E. 5193.

4703. Endorsed Letter, *id.* (Mar. 16, 2022), D.E. 7788; Endorsed Letter, *id.* (Mar. 2, 2022), D.E. 7718; Opinion, *id.* (June 8, 2021), D.E. 6854, 2021 WL 2340411.

4704. Judgment, *Havlish v. Bin Laden*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 22, 2011), D.E. 295; Findings of Fact and Conclusions of Law, *id.* (Dec. 22, 2011), D.E. 294; see also *Ashton Default Judgment*, *supra* note 4639 (default judgment against Iran on behalf of plaintiffs in another action).

4705. Default Judgment Brief at 12, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. May 19, 2011), D.E. 273; see Benjamin Weiser & Scott Shane, *Court Filings Assert Iran Had Link to 9/11 Attacks*, N.Y. Times, May 20, 2011, at A6.

sealed supplemental brief, with the defectors' testimony as sealed exhibits.⁴⁷⁰⁶ A few months later, the plaintiffs notified the court that one of the witnesses "has obtained satisfactory protections as to his identity and location such that he has given his permission to unseal his identity and the majority of his testimony."⁴⁷⁰⁷ Judge Daniels reduced the scope of sealing accordingly on the next day.⁴⁷⁰⁸

Challenge: Detainee Depositions

On July 2, 2019, plaintiffs sought writs of habeas corpus ad testificandum to depose three detainees held at Guantánamo Bay, including Khalid Shaikh Mohammed; two prisoners held in the supermax prison in Florence, Colorado; and Osama Bin Laden's former payroll manager, who was in the witness protection program.⁴⁷⁰⁹ Judge Netburn granted the writs, except for the person in the witness protection program, subject to procedures including obtaining the proposed deponents' consent.⁴⁷¹⁰ The two Guantánamo Bay detainees declined consent.⁴⁷¹¹

Challenge: Foreign Evidence

Judge Maas agreed on April 9, 2013, to issue letters rogatory to the government of Iran to obtain discovery from Iranian defendants.⁴⁷¹² The let-

4706. Order, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. July 5, 2011), D.E. 278; see Weiser & Shane, *supra* note 4705.

4707. Motion, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 14, 2011), D.E. 289.

4708. Order, *id.* (Dec. 15, 2011), D.E. 291.

4709. Petition, *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. July 2, 2019), D.E. 4657 (Mamdouh Mahmud Salim in Florence); Petition, *id.* (July 2, 2019), D.E. 4653 (Khalid Shaikh Mohammed at Guantánamo Bay); Petition, *id.* (July 2, 2019), D.E. 4649 (Mustafa Ahmed al-Hwsawi at Guantánamo Bay); Petition, *id.* (July 2, 2019), D.E. 4645 (Wadih el-Hage in Florence); Petition, *id.* (July 2, 2019), D.E. 4641 (Jamal al-Fadl in the witness protection program); Petition, *id.* (July 2, 2019), D.E. 4637 (Abd al-Aziz Ali at Guantánamo Bay); see Chapter 2: Kenya and Tanzania, *supra* page 38 (regarding el-Hage, Salim, and al-Fadl); Chapter 28: Guantánamo Bay, *supra* page 434 (regarding Guantánamo Bay detainees).

4710. Writ, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 24, 2019), D.E. 5175 (el-Hage on November 6, 2019); Writ, *id.* (Sept. 24, 2019), D.E. 5174 (Salim on November 5, 2019); Writ, *id.* (July 15, 2019), D.E. 4682 (Salim on October 8, 2019); Writ, *id.* (July 15, 2019), D.E. 4681 (el-Hage on October 7, 2019); Order, *id.* (July 11, 2019), D.E. 4678.

4711. Order, *id.* (Jan. 9, 2020), D.E. 5477.

4712. Order, *id.* (Apr. 11, 2013), D.E. 2714. See generally T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory (Federal Judicial Center 2014).

ters came back from Switzerland in July unexecuted.⁴⁷¹³ In another case, Judge Maas again agreed to issue letters rogatory to Iran on November 26.⁴⁷¹⁴

For actions against Saudi Arabia, Judge Netburn authorized remote depositions so that deponents would not have to travel to the United States during a time of COVID-19 quarantine requirements.⁴⁷¹⁵

Judge Netburn issued letters rogatory to Sweden on May 21, 2019, for testimony of a witness found there.⁴⁷¹⁶ A deposition scheduled for March 1, 2021, was adjourned because the witness stayed home, claiming a COVID-19 infection.⁴⁷¹⁷

Judge Netburn also issued letters rogatory to Canada on July 25, 2019, to obtain information about Canada's investigation of a defendant organization.⁴⁷¹⁸

4713. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570.

4714. Order, *Hoglan v. Iran*, No. 1:11-cv-7550 (S.D.N.Y. Nov. 27, 2013), D.E. 66.

4715. *In re Terrorist Attacks* on Sept. 11, 2001, 337 F.R.D. 575 (S.D.N.Y. 2020).

4716. S.D.N.Y. *Terrorist Attacks* Docket Sheet, *supra* note 4570; *see* Motion, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. May 9, 2019), D.E. 4521.

4717. Letter, *Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 2, 2021), D.E. 6631.

4718. Letters Rogatory, *id.* (July 25, 2019), D.E. 4703; *see* Order, *id.* (July 11, 2019), D.E. 4679 (narrowing the scope of proposed letters rogatory).

Chapter 31

Mistaken Rendition

*El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)*⁴⁷¹⁹

Because the circumstances of an apparent tort by the government were classified, some arguments also were classified, and the case was dismissed.

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Challenge: Classified Arguments 701

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claimed that the CIA 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 released him in Albania near the Macedonia border after realizing that it had apprehended the wrong person.⁴⁷²⁰ The CIA apparently thought that

4719. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

For this case study, Tim Reagan interviewed Judge Duncan by telephone on November 8, 2007; Judge King in his Richmond chambers on March 19, 2008; and Judge Shedd by telephone on September 3, 2009. Judge Duncan retired on July 31, 2019, and Judge Shedd retired on May 2, 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4720. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006); see Complaint at 1–2, 7–17, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005), D.E. 1, www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; see also Jonathan Hafetz, *Habeas Corpus After 9/11* 58–59 (2011); Michael V. Hayden, *Playing to the Edge* 279–81 (2016) (a CIA director’s explaining why he did not discipline the agent who made the mistake); International Commission of Jurists, *Transnational Injustices: National Security Transfers and International Law* 134–36 (2017), www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf; David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. Times, Apr. 23, 2005, at A3; Bob Kemper, *A Privilege or a Free Pass?*, Wash. Lawyer, Nov. 2009, at 24, 24 (reporting that “German investigators and a fellow detainee in the Afghan prison have confirmed El-Masri’s story and the identities of his captors”); Neil A. Lewis, *Federal Judge Dismisses Lawsuit by Man Held in Terror Program*, N.Y. Times, May 19, 2006, at A22 [hereinafter *Man Held*]; Neil A. Lewis, *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*, N.Y. Times, Nov. 29, 2006, at A15 [hereinafter *Mistakenly Abducted*]; Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 Rev. Litig. 479, 480 (2008); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 192 (2006) (“On New Year’s Eve 2003, Khaled Masri traveled by bus

el-Masri was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.⁴⁷²¹

The CIA's inspector general concluded in 2007 "that there was an insufficient basis to render and detain al-Masri [*sic*] and the Agency's prolonged detention of al-Masri was unjustified."⁴⁷²² The Senate Select Committee on Intelligence determined in 2014 that not only may el-Masri have been apprehended as a result of mistaken identity, but the capture might not have been legally justified had he been the actual target.⁴⁷²³ Apparently it took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.⁴⁷²⁴ He was released with his belongings, provided €14,500, and steered toward a fake border crossing.⁴⁷²⁵

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.⁴⁷²⁶ The Supreme Court denied certiorari.⁴⁷²⁷

from his home in Ulm, Germany, to Macedonia, after he and his wife got into an argument."); Souad Mekhennet, *I Was Told to Come Alone: My Journey Behind the Lines of Jihad* 84–100, 318 (2017); *The Passionate Eye: CIA's Secret War* (CBC television broadcast Oct. 15, 2006); Dana Priest, *The Wronged Man*, Wash. Post, Nov. 29, 2006, at C1; Anthony D. Romero & Dina Temple-Raston, *In Defense of Our America* 66–69 (2007); Don Van Natta, Jr., & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11; Steven M. Watt & Ben Wizner, *The Not-So-Secret Man*, in *The Guantánamo Lawyers* 387 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (reflections by el-Masri's attorneys).

4721. CIA Inspector General, *The Rendition and Detention of German Citizen Khalid Al-Masri* (July 16, 2007) (redacted version released June 2016), www.cia.gov/readingroom/docs/0006541725.pdf; see Souad, *supra* note 4720, at 91; Van Natta & Mekhennet, *supra* note 4720; see also International Commission of Jurists, *supra* note 4720, at 134 (describing al-Masri as "mistaken for Khaled al-Masri, a suspected Al-Qaeda operative").

4722. CIA Inspector General, *supra* note 4721, at 5; see Matthew Schofield, *CIA Knew It Had the Wrong Man but Kept Him Anyway*, Miami Herald, July 1, 2016, at 16A.

4723. Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, at 128–29 (Dec. 3, 2014) [hereinafter SSCI Executive Summary], www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

4724. See Johnston, *supra* note 4720; Lewis, *Man Held*, *supra* note 4720; see also CIA Inspector General, *supra* note 4721, at 4 ("As a result of Agency inaction, for over two months after the Agency had determined that there was no justification for his detention, al-Masri continued to be held.").

4725. SSCI Executive Summary, *supra* note 4723, at 129.

4726. 479 F.3d 296 (4th Cir. 2007); see *id.* at 310 ("virtually any conceivable response to El-Masri's allegations would disclose privileged information"); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006) (district court's dismissal); see also T.S. Ellis III, *National Security Trials: A Judge's Perspective*, 99 Va. L. Rev. 1607, 1627–28 (2013) (remarks

El-Masri's complaint, which he filed on December 6, 2005, alleged that he was beaten, stripped, sodomized with a foreign object, and then flown to Kabul, Afghanistan, where he was imprisoned in the "Salt Pit" for another four months.⁴⁷²⁸ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.⁴⁷²⁹ 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

from Judge Ellis: "But I was not at all pleased with this result, although I felt it was compelled by well-established law."); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 185 (2010); Kemper, *supra* note 4720, at 24; Lewis, *Man Held*, *supra* note 4720; Lewis, *Mistakenly Abducted*, *supra* note 4720; Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. Times, Mar. 3, 2007, at A6; Priest, *supra* note 4720.

4727. *El-Masri v. United States*, 552 U.S. 947 (2007); see Robert Barnes, *Supreme Court Won't Review Alleged CIA Abduction*, Wash. Post, Oct. 10, 2007, at A4; Linda Greenhouse, *Justices Turn Aside Case of Man Accusing C.I.A. of Torture*, N.Y. Times, Oct. 10, 2007, at A16; Kemper, *supra* note 4720, at 24.

4728. *El-Masri*, 437 F. Supp. 2d at 533; Complaint, *supra* note 4720, at 8–14; see Jane Mayer, *The Black Sites*, New Yorker, Aug. 13, 2007, at 46, 54–55 (describing the conditions of el-Masri's detention); Romero & Temple-Raston, *supra* note 4720, at 69 (describing the Salt Pit as "a secret U.S.-run prison just north of Kabul" and noting that the suit was filed on a day that Rice, who had become secretary of state, arrived in Berlin for a visit with Chancellor Angela Merkel); see also James Risen, *State of War* 30 (2006) ("CIA sources say that Salt Pit is in Afghanistan and is used to house low-level prisoners."); Jeremy Scahill, *Dirty Wars* 27 (2013) (reporting on "an old brick factory north of Kabul. Doubling as a CIA substation, the factory became known as the 'Salt Pit' and would be used to house prisoners, including those who had been snatched in other countries and brought to Afghanistan.").

4729. Docket Sheet, *El-Masri v. Tenet*, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005) [hereinafter E.D. Va. Docket Sheet]; see Ellis, *supra* note 4726, at 1627–28; see Kemper, *supra* note 4720, at 24.

Tim Reagan interviewed Judge Ellis for this case study in his chambers on September 5, 2007.

his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon.⁴⁷³⁰

It took four days for el-Masri to find his wife and children.⁴⁷³¹

It was reported that el-Masri received very little psychiatric treatment for the trauma he experienced until he was committed to a psychiatric institution following his setting fire to a supermarket in Ulm, Germany, on May 17, 2007.⁴⁷³² On March 30, 2010, he was sentenced to two years in prison for attacking the mayor of his home town.⁴⁷³³

In 2007, a German court issued arrest warrants for thirteen CIA operatives who participated in el-Masri's abduction.⁴⁷³⁴ The German government, however, did not seek the operatives' extradition,⁴⁷³⁵ and a German court rejected a suit by el-Masri to compel prosecution.⁴⁷³⁶ On allegations that the plane that transported el-Masri stopped in La Palma, Spain, prosecutors asked a Spanish court to also issue arrest warrants for the operatives.⁴⁷³⁷

4730. *El-Masri*, 437 F. Supp. 2d at 532–34; see Complaint, *supra* note 4720, at 7, 14–16; see also Johnston, *supra* note 4720; Van Natta & Mekhennet, *supra* note 4720.

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.

4731. See Van Natta & Mekhennet, *supra* note 4720.

4732. See Souad Mekhennet, *Ex-C.I.A. Detainee Held in Arson Attack*, N.Y. Times, May 18, 2007, at A8; Mekhennet, *supra* note 4720, at 99; Tony Paterson, *CIA Torture Victim Committed After Supermarket Arson Attack*, Independent (London), May 19, 2007, at 3; see also Dana Priest & William M. Arkin, *Top Secret America* xxiii (2011) (concluding that “the CIA’s bungled operation” cost el-Masri his sanity).

4733. See *Ex-CIA Torture Victim Convicted of Assault*, Toronto Star, Mar. 31, 2010, at 17.

4734. See Jeffrey Fleishman & John Goetz, *Germany May Indict U.S. Agents in Abduction*, N.Y. Times, Jan. 31, 2007, at 1; Mark Landler, *German Court Challenges CIA Over Abduction*, N.Y. Times, Feb. 1, 2007, at A1 (“They include the four pilots of the Boeing 737 that picked up Mr. Masri, a mechanic and several CIA operatives, people familiar with the case said.”); Lobel, *supra* note 4720, at 480; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, at A1.

4735. See Michael Slackman, *Officials Pressed Germans on Kidnapping by C.I.A.*, N.Y. Times, Dec. 9, 2010, at A13.

4736. See *Court Rejects Lawsuit Related to a C.I.A. Kidnapping*, N.Y. Times, Dec. 11, 2010, at A10.

4737. See Manuel Altozano, *High Court Seeks Arrest of CIA Agents for 2004 Kidnap*, El País, May 12, 2010, at 1.

On December 13, 2012, the European Court of Human Rights granted el-Masri a €60,000 judgment against Macedonia for its complicity in el-Masri's mistreatment.⁴⁷³⁸

On March 5, 2020, the International Criminal Court ruled that its chief prosecutor could open an investigation into war crimes in Afghanistan, including the alleged torture of el-Masri.⁴⁷³⁹

Challenge: Classified Arguments

The government asserted the state-secrets privilege

by submitting an *ex parte* classified declaration labeled "JUDGE'S EYES ONLY," and also an unclassified declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege.⁴⁷⁴⁰

The classified declaration was delivered to the judge by a classified information security officer, who took responsibility for its storage when the judge was not privately reviewing it.⁴⁷⁴¹

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

4738. Judgment, *El-Masri v. Former Yugoslav Republic of Macedonia*, No. 39630/09 (Eur. Ct. H.R. Dec. 13, 2012), hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621; see Nicholas Kulish, *Court Finds Rights Violation in C.I.A. Rendition Case*, N.Y. Times, Dec. 14, 2012, at A13; Souad, *supra* note 4720, at 99 (reporting that the money reached el-Masri several years later); Marta A. Orpizewska, Note, *El-Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program*, 39 N.C. J. Int'l L. & Com. Reg. 1165 (2014); see also International Commission of Jurists, *supra* note 4720, at 144–45.

4739. See Elian Peltier & Fatima Faizi, *International Court Allows Afghanistan War Crimes Case to Proceed, Angering U.S.*, N.Y. Times, Mar. 6, 2020, at A4.

4740. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006); see E.D. Va. Docket Sheet, *supra* note 4729 (notice of a submission in camera, Mar. 23, 2006, D.E. 40).

4741. Interview with Judge T.S. Ellis III, Sept. 5, 2007; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

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.⁴⁷⁴²

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.”⁴⁷⁴³ The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.⁴⁷⁴⁴ 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.⁴⁷⁴⁵ 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.⁴⁷⁴⁶ Judges Shedd and Duncan reviewed the declaration in their Richmond chambers when they were in town for a sitting.⁴⁷⁴⁷

Two Supreme Court justices reviewed the classified declaration to consider el-Masri's petition for certiorari,⁴⁷⁴⁸ which the court denied.⁴⁷⁴⁹

4742. *El-Masri*, 437 F. Supp. 2d at 537.

4743. *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

4744. Docket Sheet, *El-Masri v. Tenet*, No. 06-1667 (4th Cir. June 14, 2006).

4745. Interview with Judge Robert B. King, March 19, 2008. The drive was approximately 320 miles.

4746. *Id.*; see Reagan, *supra* note 4741, at 22–23 (describing SCIFs).

The court created the SCIF for the Zacarias Moussaoui case. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; see Chapter 6: Twentieth Hijacker, *supra* page 120.

4747. Interview with Judge Dennis W. Shedd, Sept. 3, 2009; Interview with Judge Allyson Kay Duncan, Nov. 8, 2007.

4748. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 6, 2007.

4749. *El-Masri v. United States*, 552 U.S. 947 (2007).

Chapter 32

Detainee Documents

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

An action for access to documents related to terrorism suspects detained after September 11, 2001, required the court to review classified information.

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Several civil rights organizations—the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace—sought injunctive relief in aid of Freedom of Information Act (FOIA) requests to the government—specifically the Departments of Defense, Homeland Security, Justice, and State, and the CIA—by filing an action in the Southern District of New York on June 2, 2004.⁴⁷⁵⁰ The court assigned the case to Judge Alvin K. Hellerstein.⁴⁷⁵¹

The FOIA requests were presented to the various government agencies from October 2003 to May 2004.⁴⁷⁵² They sought records concerning three topics pertaining to terrorism suspects detained by the government at extraterritorial military facilities since September 11, 2001: (1) records of treatment, (2) records of deaths, and (3) records of rendition to countries

4750. Complaint, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004), D.E. 1; *ACLU v. U.S. Dep't of Def.*, 901 F.3d 125, 127 (2d Cir. 2018); *ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377, 380 (S.D.N.Y. 2014); see Amended Complaint, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. July 6, 2004), D.E. 5; see also David Cole, *Engines of Liberty* 202 (2016); Larry Siems, *The Torture Report* 15 (2011). See generally Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Cal. L. Rev. 991, 1007, 1013, 1033 (2018) (reporting that the case “prompted the extraordinary release of government records shedding light on the abuse and torture of detainees”).

4751. Docket Sheet, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004).

Tim Reagan interviewed Judge Hellerstein for this case study in his chambers on November 5, 2009.

4752. *ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); Amended Complaint, *supra* note 4750, at 2–3; see *ACLU*, 40 F. Supp. 3d at 380; see also Amrit Singh, *Freedom of Information*, in *The Guantánamo Lawyers* 246, 246 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

known to use torture.⁴⁷⁵³ The only document produced before the lawsuit was filed was a set of State Department talking points.⁴⁷⁵⁴

A little over three months after the case was filed, Judge Hellerstein ordered the government agencies to “produce or identify all responsive documents” within one month.⁴⁷⁵⁵ Judge Hellerstein scheduled a status conference for ten days following that deadline.⁴⁷⁵⁶

It is the duty of the court to uphold FOIA by striking a proper balance between plaintiffs’ right to receive information on government activity in a timely manner and the government’s contention that national security concerns prevent timely disclosure or identification. . . .

. . . Documents that have been classified as matters of national defense or foreign policy may be exempt from FOIA. However, before it can be determined if documents requested by plaintiffs fall under such exemptions, the documents must first be identified, by some form of log, to enable a specific claim of exemption to be asserted and justified. As to documents the existence of which the government contends it may be unable to confirm or deny, procedures can be established to identify such documents in camera or to a special master with proper clearance. . . .

. . .
I order that by October 15, 2004 defendants must produce or identify all responsive documents. . . . Documents that cannot be identified to plaintiffs because of their classified status shall be identified in camera on a log produced to the court, providing the document’s classification status and justification thereof.⁴⁷⁵⁷

4753. *ACLU v. Dep’t of Def.*, 723 F. Supp. 2d 621, 623 (S.D.N.Y. 2010); *ACLU*, 339 F. Supp. 2d at 502; Amended Complaint, *supra* note 4750, at 2.

Amnesty International, the Center for Constitutional Rights, and Washington Square Legal Services pursued a separate FOIA action before Judge Loretta A. Preska against the same defendants for documents pertaining to extraordinary rendition. *Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010) (largely approving the CIA’s response to the FOIA requests); Stipulated Dismissal, No. 1:07-cv-5435 (S.D.N.Y. Nov. 21, 2018), D.E. 203; Opinion at 12, *id.* (Dec. 21, 2010), D.E. 182, 2010 WL 5421928 (“There being no other outstanding issues, the case is now closed and all pending motions are denied as moot.”); see *CIA Sustained in Shielding Interrogation Documents*, Nat’l L.J., Aug. 16, 2010, at 8.

4754. See Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 31, 2009, at A4.

4755. *ACLU*, 339 F. Supp. 2d at 505; *ACLU*, 901 F.3d at 127; *ACLU*, 40 F. Supp. 3d at 380.

4756. *ACLU*, 339 F. Supp. 2d at 505.

4757. *Id.* at 504–05 (citation omitted).

The CIA moved to stay Judge Hellerstein's order as to CIA files on the ground that the CIA Information Act exempts CIA operational files from FOIA.⁴⁷⁵⁸ Judge Hellerstein denied the stay, ruling that the CIA failed to satisfy the statutory requirement that the director of the CIA explicitly claim the exemption with respect to specifically categorized files.⁴⁷⁵⁹ Moreover, the statute excepts from the exemption files relating to government investigations of illegal conduct.⁴⁷⁶⁰ The documents sought by the plaintiffs related to an investigation by the CIA's inspector general of the CIA's treatment of detainees.⁴⁷⁶¹

The CIA cured the procedural defect, and Judge Hellerstein ruled that to comply with the FOIA request, the CIA needed only to search and review relevant documents already identified and produced to or collected by the inspector general.⁴⁷⁶² Determinations by the CIA director that the illegality exception does not apply are not subject to district court review.⁴⁷⁶³

By September 2005, "The government, after being inattentive for many months to the obligations imposed on it by FOIA, [had] made large, but not complete, production, reviewing and turning over thousands of documents from various of its agencies."⁴⁷⁶⁴ Judge Hellerstein resolved some pending disputes concerning document production, including by reviewing some documents in camera.⁴⁷⁶⁵

Judge Hellerstein's June 2006 rulings on twenty-nine "photographs taken by individuals serving in Iraq and Afghanistan"⁴⁷⁶⁶ received Supreme Court action. On September 22, 2008, the court of appeals affirmed Judge Hellerstein's order that the government release twenty-one of these photo-

4758. *ACLU v. Dep't of Def.*, 351 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

4759. *Id.* at 268, 272, 278.

4760. *Id.* at 271.

4761. *Id.* at 268, 271–73.

4762. Order, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. April 18, 2005), D.E. 86.

4763. *ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010).

4764. *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005) (citation omitted).

4765. *Id.*, 389 F. Supp. 2d 547; *ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377, 379 (S.D.N.Y. 2014).

4766. Supplemental Order, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 21, 2006), D.E. 196, 2006 WL 1722574; Order, *id.* (June 9, 2006), D.E. 193, 2006 WL 1638025; *see ACLU*, 40 F. Supp. 3d at 379–80.

graphs, with redactions to protect the subjects' privacy.⁴⁷⁶⁷ On October 28, 2009, the President signed an appropriations bill for the Department of Homeland Security, which included the Protected National Security Documents Act of 2009.⁴⁷⁶⁸ This act allows the secretary of defense to protect from disclosure any detainee photograph taken from September 11, 2001, through January 22, 2009, if disclosure would endanger American citizens, military personnel, or employees abroad.⁴⁷⁶⁹ The Supreme Court remanded the case back to the court of appeals for reconsideration in light of the act,⁴⁷⁷⁰ and the court of appeals vacated Judge Hellerstein's June 2006 rulings.⁴⁷⁷¹

On December 7, 2007, news media reported that in 2005 the CIA destroyed videotapes of detainee interrogations.⁴⁷⁷² Five days later, plaintiffs moved for contempt and sanctions.⁴⁷⁷³ On January 2, 2008, Attorney General Michael Mukasey announced a criminal investigation into the destruction of the tapes.⁴⁷⁷⁴ Judge Hellerstein stayed consideration of the contempt motion until February 2009 so as not to interfere with the criminal

4767. *ACLU v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009); *ACLU*, 40 F. Supp. 3d at 379–80.

4768. Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184 (2009); *ACLU*, 40 F. Supp. 3d at 379 (noting that the statute was enacted in the context of Iraq's President Nouri al-Maliki's request that the photographs not be released).

4769. *Id.*; *ACLU v. U.S. Dep't of Def.*, 901 F.3d 125, 128 (2d Cir. 2018); *see* Adam Liptak, *Supreme Court Overturns Decision on Detainee Photos*, N.Y. Times, Dec. 1, 2009, at A18.

4770. *ACLU*, 558 U.S. 1042; *ACLU*, 40 F. Supp. 3d at 381; *see* Liptak, *supra* note 4769.

4771. Order, *ACLU v. Dep't of Def.*, No. 06-3140 (2d Cir. May 6, 2010); *see* *ACLU*, 40 F. Supp. 3d at 381.

4772. Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1; *see* Michael V. Hayden, *Playing to the Edge* 239–42 (2016) (reporting that the tapes were destroyed to protect officers who were visible on the tapes).

4773. Opinion at 1, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. July 30, 2009), D.E. 369 [hereinafter July 30, 2009, Opinion], 2009 WL 9095653; *see* Siems, *supra* note 4750, at 15.

4774. *See* Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal Inquiry Into C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, at A1.

During prior service as a federal district judge, Judge Mukasey presided over the prosecution of conspirators related to the 1993 bombing of the World Trade Center. Chapter 1: First World Trade Center Bombing, *supra* page 5.

investigation.⁴⁷⁷⁵ On July 30, 2009, Judge Hellerstein, finding that the investigation continued, ordered the government to prepare an index of documents relevant to the contempt motion.⁴⁷⁷⁶ On November 9, 2010, the government announced that the tape destruction would result in no criminal charges.⁴⁷⁷⁷ Judge Hellerstein, on October 5, 2011, denied the contempt motion, because a finding of contempt would not cure any present impropriety, but he did agree to award the plaintiffs attorney fees for the motion.⁴⁷⁷⁸

By the end of August 2009, the plaintiffs had obtained 2,814 documents from the Defense Department, 998 from the State Department, 872 from the FBI, 145 from other Justice Department units, and forty-nine from the CIA.⁴⁷⁷⁹ Information based in part on this FOIA action was presented by the ACLU in an online *Torture Report*,⁴⁷⁸⁰ later incorporated into an online *Torture Database*.⁴⁷⁸¹

On May 21, 2012, the court of appeals reversed some of Judge Hellerstein's disclosure orders and affirmed denials of disclosure in a companion case concerning legal memoranda prepared by the Justice Department's Office of Legal Counsel.⁴⁷⁸²

4775. July 30, 2009, Opinion, *supra* note 4773, at 1.

4776. July 30, 2009, Opinion, *id.*

4777. See Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12.

Judge J. Paul Oetken denied a FOIA claim by the *New York Times* for a copy of the criminal investigation's report. N.Y. Times Co. v. U.S. Dep't of Just., 138 F. Supp. 3d 462, 476 (S.D.N.Y. 2015); see N.Y. Times Co. v. U.S. Dep't of Just., 235 F. Supp. 3d 522 (S.D.N.Y. 2017) (requiring disclosure with redactions of five memoranda on overseas CIA interrogations), *aff'd in part and rev'd in part*, 939 F.3d 479, 498 (2d Cir. 2019) (narrowing the disclosure obligation: "portions of [the] memoranda and associated exhibits that relate to the conclusion that some of the detainees were not in CIA custody"); Complaint, N.Y. Times Co. v. U.S. Dep't of Just., No. 1:14-cv-3777 (S.D.N.Y. May 28, 2014), D.E. 2.

4778. ACLU v. Dep't of Def., 827 F. Supp. 2d 217 (S.D.N.Y. 2011); Transcript at 49–51, ACLU, No. 1:04-cv-4151 (S.D.N.Y. Aug. 1, 2011, filed Oct. 28, 2011).

4779. See Shane, *supra* note 4754; see also Singh, *supra* note 4752, at 251 (more than one hundred thousand pages).

4780. The Torture Report, www.thetorturereport.org, archived at web.archive.org/web/20180820145122/https://www.thetorturereport.org/; see Siems, *supra* note 4750 (book version).

4781. The Torture Database, www.thetorturedatabase.org/search/apachesolr_search.

4782. ACLU v. Dep't of Just., 681 F.3d 61 (2d Cir. 2012); see Complaint, ACLU v. Dep't of Just., No. 1:05-cv-9620 (S.D.N.Y. Nov. 15, 2005), D.E. 1.

Judge Hellerstein ruled on August 27, 2014, that the government's recertification that the photographs should not be released, an action required by the protected documents statute to preserve the documents' protection, was too conclusory.⁴⁷⁸³ Judge Hellerstein observed that the number of photographs withheld had not been disclosed, but there may be hundreds or thousands.⁴⁷⁸⁴ The court of appeals stayed Judge Hellerstein's ruling pending an appeal⁴⁷⁸⁵ and then remanded the case for reconsideration in light of a 2015 recertification.⁴⁷⁸⁶

Judge Hellerstein determined on January 18, 2017, that the 2015 recertification was inadequate.⁴⁷⁸⁷ The recertification review identified 198 photographs that could be released, and an undisclosed number of photographs that the government was not willing to disclose.⁴⁷⁸⁸ Judge Hellerstein concluded that he had not been shown the withheld photographs or given enough information about the method of review for certification to afford the court a sufficient opportunity for judicial review.⁴⁷⁸⁹

On August 21, 2018, the court of appeals ordered judgment for the government.⁴⁷⁹⁰

The Government provided ample information for us to conclude that the Secretary's decision to certify the withheld photographs was logical and plausible, and the information is reasonably specific to confirm that the withholding decision was supported as to each individual photograph.⁴⁷⁹¹

4783. *ACLU v. Dep't of Def.*, 40 F. Supp. 3d 377, 380 (S.D.N.Y. 2014); see Judgment, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Mar. 20, 2015), D.E. 549; see also Jennifer Peltz, *US Judge Orders Release of Detainee Abuse Photos*, Bos. Globe, Mar. 22, 2015, at A14.

4784. *ACLU*, 40 F. Supp. 3d at 380 & n.2; see Transcript at 10, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Feb. 4, 2015, filed Feb. 25, 2015), D.E. 544 (representation by government counsel that the number has never been revealed); see also Cora Currier, "A Line in the Sand" in *Fight to Release Thousands of Prisoner Abuse Photos*, The Intercept, Feb. 5, 2015, firstlook.org/theintercept/2015/02/05/line-sand-fight-release-thousands-photos-prisoner-abuse/.

4785. Order, *ACLU v. Dep't of Def.*, No. 15-1606 (2d Cir. June 2, 2015), D.E. 47.

4786. Order, *id.* (Jan. 6, 2016), D.E. 137; *ACLU v. U.S. Dep't of Def.*, 901 F.3d 125, 131 (2d Cir. 2018).

4787. *ACLU v. Dep't of Def.*, 229 F. Supp. 3d 193 (S.D.N.Y. 2017); *ACLU*, 901 F.3d at 132.

4788. *ACLU*, 229 F. Supp. 3d at 203; *ACLU*, 901 F.3d at 131, 135.

4789. *ACLU*, 229 F. Supp. 3d at 208–12.

4790. *ACLU*, 901 F.3d 125.

4791. *Id.* at 136.

With respect to documents other than the photographs remaining in dispute, the parties agreed in 2014 to a payment to plaintiffs of \$1.25 million in attorney fees and costs.⁴⁷⁹²

Challenge: Classified Evidence

All of Judge Hellerstein's law clerks obtained security clearances.⁴⁷⁹³ They began the process of getting cleared at hiring, before they started work.⁴⁷⁹⁴ However, the government did not extend the law clerks' need to know to all classified materials that Judge Hellerstein had to review.⁴⁷⁹⁵ As a result, Judge Hellerstein developed a procedure where he could examine documents on the record by being the only one looking at them.⁴⁷⁹⁶ A court reporter without a clearance could record the proceeding and law clerks, who had clearances but still were not cleared to see the documents, could attend.⁴⁷⁹⁷ Judge Hellerstein did not retain the documents after he examined them and ruled on whether or not they had to be produced either redacted or unredacted.⁴⁷⁹⁸

Judge Hellerstein described one occasion in a published opinion:

On September 30, 2009, I conducted an *in camera*, *ex parte* review of the documents at issue in the fourth and fifth motions for summary judgment. Government attorneys and a court reporter were present. I reviewed the documents and expressed preliminary rulings, and at times, posed questions to the Government attorneys about the documents. The transcript of this proceeding was classified but was released, in redacted form, several weeks later. After the *ex parte* session ended, I heard oral argument in open court on various of the legal issues at hand, and expressed initial rulings ⁴⁷⁹⁹

4792. Stipulation and Order, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. Aug. 27, 2014), D.E. 514; *id.*, *ACLU v. Dep't of Just.*, No. 1:05-cv-9620 (S.D.N.Y. Aug. 27, 2014), D.E. 49.

4793. Interview with Judge Alvin K. Hellerstein, Nov. 5, 2009.

4794. *Id.*

4795. *Id.*

4796. *Id.*

4797. *Id.*; see Sinnar, *supra* note 4750, at 1007, 1014.

4798. Interview with Judge Alvin K. Hellerstein, Nov. 5, 2009.

4799. *ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621, 624 (S.D.N.Y. 2010); see Transcript, *ACLU v. Dep't of Def.*, No. 1:04-cv-4151 (S.D.N.Y. Sept. 30, 2009, filed Oct. 16, 2009), D.E. 392 [hereinafter Sept. 30, 2009, Transcript], also filed as ex. B, Government Security Motion, *ACLU v. Dep't of Def.*, No. 10-4290 (2d Cir. Feb. 2, 2012), D.E. 132.

The ACLU posted online redacted opinions by the Office of Legal Counsel that were at issue in this proceeding. The Torture Database, *supra* note 4781; see Scott Shane, David

The court reporter for this proceeding had a security clearance, as did Judge Hellerstein's law clerk, but the law clerk was asked to step out three times during the proceeding.⁴⁸⁰⁰

Challenge: Classified Arguments

For the government's appeal of Judge Hellerstein's ordered disclosure of redacted information at issue in his September 30, 2009, ex parte proceeding, the government asked the court of appeals to permit ex parte oral argument.⁴⁸⁰¹ The court declined the request.⁴⁸⁰²

Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1 (reporting on the opinions at issue).

4800. Sept. 30, 2009, Transcript, *supra* note 4799, at 8, 19, 34.

4801. Government Security Motion, *supra* note 4799.

4802. Docket Sheet, *ACLU*, No. 10-4290 (2d Cir. Oct. 26, 2010); Order, *id.* (June 27, 2012), D.E. 162.

Chapter 33

No-Fly List

Ibrahim v. Department of Homeland Security
(*William Alsup, N.D. Cal.*); *Latif v. Holder, Tarhuni v.*
Barr, and Related Actions (*Anna J. Brown, D. Or.*); *Kovac*
v. Wray (*Brantley Starr, N.D. Tex.*); and *Related Actions*

A foreign student ended up on the no-fly list because a form asked an agent to check all the boxes that did not apply and the agent checked boxes that did apply. The student was granted relief, including attorney fees, but denied readmission to the United States for other reasons. The litigation required the U.S. District Court for the Northern District of California to handle both classified information and sensitive but not classified information. No-fly litigation in other courts also required judges to consider how to handle classified and other sensitive information.

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How the No-Fly List Works

In a 2022 opinion, Ninth Circuit Judge Marsha S. Berzon clearly explained how the no-fly list works:

In 2003, President George W. Bush executed Homeland Security Presidential Directive 6, which instructed the Attorney General to establish an organization to consolidate the Government’s approach to terrorism screening. Pursuant to that directive, the Attorney General created the Terrorist Screening Center (“the Screening Center”), a multi-agency entity administered by the FBI that consolidates the United States government’s terrorist watchlists into a single database—the Terrorist Screening Database (“TSDB” or “Database”). The TSDB is maintained by the Screening Center, which places an individual in the Database when there is reasonable suspicion that he or she is a known or suspected terrorist. After a United States government agency or a foreign partner with whom the United States shares terrorist screening information nominates an individual for inclusion in the Database, the Screening Center reviews the nomination and determines whether to add the individual to the Database. . . .

Once individuals have been placed in the Database, the Screening Center sorts them into constituent lists, used by a different government agency—the Transportation Security Administration (“TSA”)—for screening purposes. The No Fly List, the most restrictive of these lists, is reserved for individuals in the Database whom the Screening Center has determined pose a threat of committing an act of international or domestic terrorism, including acts of terrorism using aircraft or against U.S. government facilities. . . . After the Screening Center decides to place someone on the No Fly List, TSA prohibits those individuals from boarding commercial aircraft that fly over United States airspace.⁴⁸⁰³

The Northern District of California

Dr. Rahinah Ibrahim filed a federal complaint in the Northern District of California on January 27, 2006, alleging injuries arising from her mistakenly being placed on the no-fly list.⁴⁸⁰⁴ “Government counsel conceded at

4803. *Fikre v. FBI*, ___ F.4th ___, ___, 2022 WL 1698999 (9th Cir. 2022) (pp.6–7 of opinion filed at 9th Cir. No. 20-35904, D.E. 48) (citations and quotation marks omitted); see also *Long v. Pekoske*, 38 F.4th 417, 420 (4th Cir. 2022).

4804. Complaint, *Ibrahim v. Dep’t of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Jan. 27, 2006), D.E. 1 [hereinafter *Ibrahim* Complaint]; *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1160 (9th Cir. 2019); *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 991 (9th Cir. 2012); Findings of Fact and Conclusions of Law at 2, 18, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Jan. 14, 2014), D.E. 682 [hereinafter *Ibrahim* Findings of Fact and Conclusions of Law]; see *Ibrahim v. Dep’t of Homeland Sec.*, 538 F.3d 1250, 1253–54 (9th

trial that Dr. Ibrahim was not a threat to the national security of the United States and that she never has been.”⁴⁸⁰⁵

Ibrahim was finishing a Ph.D. program at Stanford University in construction engineering and management on a student visa, and she was traveling on January 2, 2005, with her fourteen-year-old daughter to speak at a conference in Hawaii and then continue on to Kuala Lumpur, Malaysia.⁴⁸⁰⁶ When she presented her ticket at the airport, she was detained, arrested, handcuffed, and held for two hours.⁴⁸⁰⁷ She missed her flight.⁴⁸⁰⁸ There was substantial confusion during her travel to the conference on the next day about whether she was or was not on the no-fly list.⁴⁸⁰⁹ While in Malaysia, her visa was revoked.⁴⁸¹⁰ She has never been permitted to return to the United States.⁴⁸¹¹

The complaint named twenty-five defendants, including federal and local government agencies and personnel, United Airlines, and one hundred Does.⁴⁸¹² An amended complaint filed on August 4, 2006, substituted three organizations for three of the Does.⁴⁸¹³

The government’s May 22, 2006, motion to dismiss all claims against federal defendants explained that TSA security directives included two

Cir. 2008); *see also* Dan Reed, *Woman Sues Government Over No-Fly List*, San Jose Mercury News, Feb. 5, 2006, at B1.

4805. *Ibrahim*, 912 F.3d at 1160.

4806. *Id.* at 1152, 1154, 1158; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 1, 8, 10, 16; *see Ibrahim* Complaint, *supra* note 4804, at 7–8.

4807. *Ibrahim*, 912 F.3d at 1152–54; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 1, 10–11; *see Ibrahim* Complaint, *supra* note 4804, at 9.

4808. *Ibrahim*, 912 F.3d at 1154; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 10; *see Ibrahim* Complaint, *supra* note 4804, at 8–9.

4809. *Ibrahim*, 912 F.3d at 1154, 1158; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 1, 11, 17; *see Ibrahim* Complaint, *supra* note 4804, at 9.

4810. *Ibrahim*, 912 F.3d at 1155, 1158–59; *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 988 (9th Cir. 2012); *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 1; *see* Second Amended Complaint at 11, *Ibrahim v. Dep’t of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Apr. 2, 2009), D.E. 161 [hereinafter *Ibrahim* Second Amended Complaint]; *see also* Reed, *supra* note 4804.

4811. *Ibrahim*, 912 F.3d at 1153–55, 1160; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 11, 24.

4812. *Ibrahim* Complaint, *supra* note 4804, at 1, 3–5; *Ibrahim*, 912 F.3d at 1160.

4813. Amended Complaint at 2, 5–6, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Aug. 4, 2006), D.E. 96.

watch lists: a selectee list of fliers that must undergo extra screening before they fly and a no-fly list of persons that must not be permitted to fly.⁴⁸¹⁴

On August 16, Judge William Alsup determined that the no-fly list constituted a TSA order that had to be reviewed by a court of appeals rather than by a district court.⁴⁸¹⁵ In fact, Ibrahim filed an action with the Ninth Circuit's court of appeals on January 30, and that court transferred the case on June 13 to the District of Columbia Circuit because Ibrahim was a resident of Malaysia rather than California.⁴⁸¹⁶

Judge Alsup determined that United Airlines and its employee were only alleged to have done what they were required to do, so they were dismissed as defendants.⁴⁸¹⁷ Another individual defendant, a TSA employee in Washington, DC, was dismissed for lack of personal jurisdiction.⁴⁸¹⁸ At Ibrahim's request, Judge Alsup stayed the case pending Ibrahim's appeal.⁴⁸¹⁹

On August 18, 2008, the Ninth Circuit's court of appeals determined, by a vote of two to one, that the agency that put Ibrahim's name on the no-fly list was the Terrorist Screening Center (TSC),⁴⁸²⁰ which was part of the FBI, not a transportation agency, so the jurisdiction statute for transportation agencies did not apply and the district court did have jurisdiction over Ibrahim's claims against federal defendants.⁴⁸²¹ The court of appeals de-

4814. Government Brief at 4, *id.* (May 22, 2006), D.E. 63; *see* 49 U.S.C. § 114(h)(3)(B) (2020) (requiring the development of procedures to prevent dangerous travelers from boarding airplanes).

4815. Opinion at 2, 8–13, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Aug. 16, 2006), D.E. 101 [hereinafter Aug. 16, 2006, *Ibrahim* Opinion], 2006 WL 2374645; *see Ibrahim*, 912 F.3d at 1160–61; 49 U.S.C. § 46110(a).

For this case study, Tim Reagan interviewed Judge Alsup and his law clerk Dena Chen in the judge's chambers on August 21, 2014.

4816. Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 06-70574 (9th Cir. Jan. 30, 2006); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1253–54 n.2 (9th Cir. 2008); *see* Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 06-1218 (D.C. Cir. June 21, 2006).

4817. Aug. 16, 2006, *Ibrahim* Opinion, *supra* note 4815, at 18–20; *Ibrahim*, 912 F.3d at 1161.

4818. Aug. 16, 2006, *Ibrahim* Opinion, *supra* note 4815, at 13–18; *Ibrahim*, 912 F.3d at 1161.

4819. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 2, 2006), D.E. 133, 2006 WL 3190670; *see* Notice of Appeal, *id.* (Sept. 15, 2006), D.E. 114.

4820. *See generally* Opinion at 10–11, *Latif v. Holder*, No. 3:10-cv-750 (D. Or. Mar. 28, 2016), D.E. 321 [hereinafter Mar. 28, 2016, *Latif* Opinion], 2016 WL 1239925.

4821. *Ibrahim*, 538 F.3d at 1254–56 (opinion by Chief Circuit Judge Alex Kozinski, joined by Central District of California District Judge S. James Otero, sitting by designa-

terminated that the district court had specific personal jurisdiction over the TSA employee, and the court of appeals affirmed dismissal of United and its employee.⁴⁸²²

The District of Columbia Circuit case was held in abeyance pending decisions by the Ninth Circuit's court of appeals and Judge Alsup,⁴⁸²³ and then voluntarily dismissed in 2021.⁴⁸²⁴

Ibrahim filed a second amended complaint in the Northern District of California on April 2, 2009.⁴⁸²⁵ On July 27, Judge Alsup dismissed some claims, including those against the federal defendants, finding that because Ibrahim was an alien living abroad she had no constitutional rights for the future relief she sought—removal from the no-fly list.⁴⁸²⁶

Without waiving claims against the federal defendants, Ibrahim and the other defendants reached a settlement of \$225,000 on March 11, 2010.⁴⁸²⁷ On February 8, 2012, the court of appeals—again by a vote of two to one, although the panel was different from the panel that issued the 2008 decision—decided that Ibrahim could pursue her constitutional claims, noting, “The purpose of her trip was to further, not to sever, her connection to the United States, and she intended her stay abroad to be brief.”⁴⁸²⁸

tion); *see id.* at 1259–61 (dissenting opinion by Circuit Judge N. Randy Smith); *accord* Mokdad v. Lynch, 804 F.3d 807 (6th Cir. 2015) (vote of two to one); *see also* Ibrahim, 912 F.3d at 1161; Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983, 991 (9th Cir. 2012); Bob Egelko, *Court Rules Those on No-Fly List Should Get to Take Case to Court*, S.F. Chron., Aug. 19, 2008, at B1.

4822. Ibrahim, 538 F.3d at 1258–59; Ibrahim, 912 F.3d at 1161 & n.9.

4823. Order, Ibrahim v. U.S. Dep’t of Homeland Sec., No. 06-1218 (D.C. Cir. June 17, 2014); Order, *id.* (Nov. 1, 2012); *id.* (Apr. 9, 2012); Order, *id.* (Nov. 4, 2010); Order, *id.* (Dec. 15, 2006).

4824. Order, *id.* (Jan. 12, 2021).

4825. Ibrahim Second Amended Complaint, *supra* note 4810; Ibrahim, 912 F.3d at 1161.

4826. Opinion at 1, 10–12, Ibrahim v. Dep’t of Homeland Sec., No. 3:06-cv-545 (N.D. Cal. July 27, 2009), D.E. 197, 2009 WL 2246194; Ibrahim, 912 F.3d at 1161–62.

4827. Settlement, Ibrahim, No. 3:06-cv-545 (N.D. Cal. Mar. 11, 2010), D.E. 325; *see Ibrahim*, 912 F.3d at 1161–62; Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983, 992 (9th Cir. 2012); *see also* Bob Egelko, *Ex-Stanford Student’s No-Fly Suit Reinstated*, S.F. Chron., Feb. 9, 2012, at C3; Howard Mintz, *Stanford Grad Takes “No-Fly” Battle to Trial*, San Jose Mercury News, Dec. 2, 2013, at 1A.

4828. Ibrahim, 669 F.3d at 997 (opinion by Judge William A. Fletcher, joined by Judge Dorothy W. Nelson); *see id.* at 999–1005 (dissenting opinion by Southern District of New York District Judge Kevin Thomas Duffy); *see also* Ibrahim, 912 F.3d at 1162; Egelko,

On November 1, 2013, Judge Alsup denied the government's motion for summary judgment on state-secrets grounds:

At this juncture, it is not clear to the undersigned judge whether plaintiff's claims can be resolved without recourse to information protected by the state secrets privilege. The government's contentions on this point are highly conclusory. Going forward with the trial to see how the evidence develops charts a better course than a speculative ruling on a paper record. This is particularly true given that the parties have stipulated to a bench trial, which will reduce somewhat the risk of inappropriate disclosure.⁴⁸²⁹

In the first no-fly-list trial ever conducted,⁴⁸³⁰ Judge Alsup conducted a bench trial from December 2 to 6, 2013.⁴⁸³¹ Evidence from Dr. Ibrahim was presented by playing a recording of and reading from her deposition.⁴⁸³²

One of Ibrahim's daughters, a United States citizen and not the one with Dr. Ibrahim when she was arrested, was on the plaintiff's witness list; on the first day of trial, a plaintiff's attorney informed Judge Alsup that on the previous day the defendant prevented the daughter from boarding an airplane in Malaysia as the daughter attempted to fly to the United States to attend the trial.⁴⁸³³ The government's attorney said that he knew nothing

supra note 4827; Matt O'Brien, *Ex-Stanford Grad Student Gets Reprieve*, San Jose Mercury News, Feb. 10, 2012, at 2B.

The solicitor general decided that the government should not seek Supreme Court review. Transcript at 2–3, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Oct. 11, 2012, filed Jan. 31, 2013), D.E. 404; *Ibrahim*, 912 F.3d at 1162.

4829. Opinion, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 1, 2013) [hereinafter Nov. 1, 2013, *Ibrahim* Opinion], *filed as attach.*, Notice of Compliance, *id.* (Nov. 8, 2013), D.E. 593; *Ibrahim*, 912 F.3d at 1162–64.

4830. *Ibrahim*, 912 F.3d at 1165.

4831. Transcript, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 6, 2013, filed Dec. 30, 2013), D.E. 676 [hereinafter Dec. 6, 2013, *Ibrahim* Transcript]; Transcript, *id.* (Dec. 5, 2013, filed Dec. 30, 2013), D.E. 675 [hereinafter Dec. 5, 2013, *Ibrahim* Transcript]; Transcript, *id.* (Dec. 4, 2013, filed Dec. 30, 2013), D.E. 673 [hereinafter Dec. 4, 2013, *Ibrahim* Transcript]; Transcript, *id.* (Dec. 3, 2013, filed Dec. 30, 2013), D.E. 672 [hereinafter Dec. 3, 2013, *Ibrahim* Transcript]; Transcript, *id.* (Dec. 2, 2013, filed Dec. 30, 2013), D.E. 671 [hereinafter Dec. 2, 2013, *Ibrahim* Transcript]; Minutes, *id.* (Dec. 2, 3, and 6, 2013), D.E. 653, 654, 660; *Ibrahim*, 912 F.3d at 1155; *see* Mintz, *supra* note 4827.

4832. Dec. 3, 2013, *Ibrahim* Transcript, *supra* note 4831, at 208–46; Dec. 2, 2013, *Ibrahim* Transcript, *supra* note 4831, at 159–61.

4833. Dec. 2, 2013, *Ibrahim* Transcript, *supra* note 4831, at 3–4, 167; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 6–7, 24; *see Ibrahim*, 912 F.3d at 1164; *see also* Bob Egelko, *Ex-Stanford Student Sues Over No-Fly List*, S.F. Chron., Dec. 4, 2013, at D2 (reporting also that the daughter was a lawyer in Malaysia).

about the matter, but he would look into it; late in the day, the government attorney reported that the daughter had simply missed her flight.⁴⁸³⁴

On the second day of trial, Ibrahim's attorney offered email correspondence rebutting the government's claim.⁴⁸³⁵ The plaintiff's attorney also acknowledged, "She is not going to book another ticket until she's assured she will be allowed to enter this country."⁴⁸³⁶ Judge Alsup scolded the government for making representations so easily rebutted, and Judge Alsup scolded the plaintiff's side for a less-than-vigorous-and-sincere effort to get the daughter to the trial.⁴⁸³⁷

On the fourth day of trial, the government presented an official who promised that the government would provide on the following day a witness who could speak about the daughter's travel difficulties; a declaration from the witness was presented to Judge Alsup at the end of the fourth trial day.⁴⁸³⁸ After closing arguments on the fifth and last day of trial, Judge Alsup heard closed testimony on the daughter's travel difficulties.⁴⁸³⁹ After the closed proceeding, the plaintiff declined to seek re-opening of evidence so that the daughter could testify.⁴⁸⁴⁰

Judge Alsup issued findings of fact and conclusions of law on January 14, 2014.⁴⁸⁴¹ "At long last, the government has conceded that plaintiff poses no threat to air safety or national security and should never have been placed on the no-fly list."⁴⁸⁴² An FBI agent checked the wrong boxes on a form nominating Ibrahim to a watch list.⁴⁸⁴³ The form instructed the agent

"Dr. Ibrahim is a Muslim woman, scholar, wife, and mother of four children." *Ibrahim*, 912 F.3d at 1154.

4834. Dec. 2, 2013, *Ibrahim* Transcript, *supra* note 4831, at 5, 45–46, 166–67.

4835. Dec. 3, 2013, *Ibrahim* Transcript, *supra* note 4831, at 173–74.

4836. *Id.* at 175.

4837. *Id.* at 175–78.

4838. Dec. 5, 2013, *Ibrahim* Transcript, *supra* note 4831, at 499–501, 716–18.

A heavily redacted version of the declaration was filed in the public record. Notice, *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Jan. 28, 2014), D.E. 692.

4839. Dec. 6, 2013, *Ibrahim* Transcript, *supra* note 4831, at 800–53; *see Ibrahim v. U.S. Dep't of Homeland Sec.*, 865 F.3d 1048, 1060 (9th Cir. 2016) ("the district court's determination that the government's initial refusal to allow her into the country was . . . a mistake, and a quickly corrected one at that"); *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1164 (9th Cir. 2019) (similar).

4840. Notice, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 9, 2013), D.E. 658; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 7.

4841. *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804.

4842. *Id.* at 26.

4843. *Ibrahim*, 912 F.3d at 1153, 1157–58, 1162–63; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804 at 9, 16, 26.

to check the boxes that do not apply, but the agent checked the boxes that did apply, so by not checking the box for the no-fly list, the agent mistakenly put Ibrahim on that list.⁴⁸⁴⁴

As a post-deprivation remedy, therefore, due process requires, and this order requires, that the government remediate its wrong by cleansing and/or correcting all of its lists and records of the mistaken 2004 derogatory designation and by certifying that such cleansing and/or correction has been accurately done as to every single government watchlist and database. This will not implicate classified information in any way but will give plaintiff assurance that, going forward, her troubles in returning to the United States, if they continue, are unaffected by the original wrong.⁴⁸⁴⁵

On April 15, the Department of Justice issued to Dr. Ibrahim an official notice that she had not been on the no-fly list since January 2, 2005.⁴⁸⁴⁶ On April 14, 2014, however, Dr. Ibrahim was again denied a visa to return to the United States.⁴⁸⁴⁷

Litigation over fees began in January 2014: “On January 28, plaintiff’s counsel filed a motion for an award of attorney’s fees and expenses, seeking a whopping \$3.67 million in fees and \$294,000 in expenses.”⁴⁸⁴⁸ Judge Alsup specified procedures for the use of a special master to determine a smaller award.⁴⁸⁴⁹

Even after [the agent] learned of his mistake, [he] never reviewed his old files to see if he had accidentally nominated others to the No Fly list in the hope it was a one-time mistake. But [his] hope was not grounded in reality. If [he] nominated Dr. Ibrahim because he misread the form, this may well not have been a one-time event—he likely would have made the same mistake other times he used the same form.

Ibrahim, 912 F.3d at 1182 n.34.

4844. *Ibrahim*, 912 F.3d at 1157–58; *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 9, 26.

4845. *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 26; *see Ibrahim*, 912 F.3d at 1164.

4846. Freeborne Declaration, *Ibrahim v. Dep’t of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Apr. 15, 2014), D.E. 737; *Ibrahim*, 912 F.3d at 1153.

4847. McNeil Declaration, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 15, 2014), D.E. 737-6; *see* Bob Egelko, *Terrorist Allegation Bars Woman from U.S.*, S.F. Chron., Apr. 17, 2014, at D1.

4848. Opinion at 5, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 16, 2014), D.E. 739 [hereinafter *Ibrahim* Fees Opinion], 2014 WL 1493561; *see Ibrahim*, 912 F.3d at 1153, 1165.

4849. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 16, 2014), D.E. 740.

All of us who practice or serve in this district should be proud that we still have counsel willing and able to undertake pro bono representation of someone like our plaintiff here, especially when it requires standing up to our national government and its large litigation resources. Not so long ago, this spirit flourished within our district. More recently, however, pro bono representation seems to have taken second seat to money bono. . . . The Court hereby extends its compliments.

This, however, does not translate to approving the massive award they seek under the Equal Access to Justice Act. . . .

. . . The essence of this order is that counsel are entitled to recover for their work and expenses on procedural due process, substantive due process, Administrative Procedure Act claims and post-2012 remand standing issues, and no more.⁴⁸⁵⁰

Judge Alsup approved awards of \$419,987.36 for fees,⁴⁸⁵¹ \$34,768.71 for expenses,⁴⁸⁵² and \$20,640.67 for costs,⁴⁸⁵³ totaling \$475,396.74.⁴⁸⁵⁴

On January 2, 2019, an en banc panel of the court of appeals reversed what it characterized as Judge Alsup's drastic reductions resulting from an improperly piecemeal approach.⁴⁸⁵⁵ The court of appeals clarified that a plaintiff should not be regarded as not prevailing on alternative arguments just because the court did not need to address some arguments when the

4850. *Ibrahim* Fees Opinion, *supra* note 4848, at 1–2; see Transcript at 35, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Mar. 25, 2014, filed Mar. 28, 2014), D.E. 735 [hereinafter Mar. 25, 2014, *Ibrahim* Transcript] (“When I was a lawyer, we took plenty of cases like this, and never expected a penny. We did it for the public good.”).

In his 2019 memoir, Judge Alsup said that President Kennedy's call for pro bono representation of civil rights workers was a significant reason that Judge Alsup became a lawyer. William Alsup, *Won Over 122* (2019).

4851. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Oct. 9, 2014), D.E. 803 [hereinafter *Ibrahim* Fees Order], 2014 WL 5073582; see Report and Recommendation, *id.* (Sept. 18, 2014), D.E. 787; *Ibrahim*, 912 F.3d at 1165.

4852. *Ibrahim* Fees Order, *supra* note 4851; see Report and Recommendation, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Sept. 23, 2014), D.E. 789; *Ibrahim*, 912 F.3d at 1165.

4853. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. May 1, 2014), D.E. 755; see Order, *id.* (Apr. 16, 2014), D.E. 741, 2014 WL 1493541.

4854. Judge Alsup approved a payment of \$427,481.50 to the special master, assessing 100% of the payment for work on a fees-on-fees-on-fees demand and 75% of the payment for the rest of the special master's work to the plaintiff. *Ibrahim* Fees Order, *supra* note 4851.

4855. *Ibrahim*, 912 F.3d at 1153, 1185–86, *cert. denied*, 589 U.S. ___, 140 S. Ct. 424 (2019); see Bob Egelko, *Federal Court Rebukes U.S. for No-Fly Error*, S.F. Chron., Jan. 3, 2019, at C1; Maura Dolan, *9th Circuit Faults U.S. in “No-Fly” Case*, L.A. Times, Jan. 3, 2019, at B1; see also Bob Egelko, *Woman on No-Fly List Wins Court Ruling*, S.F. Chron., Oct. 16, 2019, at C8 (reporting on the denial of a writ of certiorari).

plaintiff prevailed on another.⁴⁸⁵⁶ Moreover, to determine whether the government acted in bad faith, which would relieve the plaintiff from fee limits imposed by the Equal Access to Justice Act, the court should consider the government's actions both as an actor—wrongfully putting the plaintiff on the no-fly list—and as a litigator.⁴⁸⁵⁷

Judge Alsup dismissed the case as settled on December 16, 2020.⁴⁸⁵⁸

The District of Oregon

In no-fly litigation in the District of Oregon, Judge Anna J. Brown determined on June 24, 2014, that due process requires notice to persons denied travel for being on the no-fly list and an opportunity to rebut the reasons for their being on the list.⁴⁸⁵⁹ The government withdrew an appeal on December 31.⁴⁸⁶⁰ On March 28, 2016, Judge Brown refined due-process requirements.⁴⁸⁶¹

Judge Brown determined on April 21, 2017, that litigation-inspired changes to no-fly list procedures resulted in challenges' now falling within

4856. *Ibrahim*, 912 F.3d at 1153, 1166–80; see *id.* at 1180 (“we find that Dr. Ibrahim achieved excellent results and is therefore entitled to reasonable fees consistent with that outcome”); *id.* at 1185 (“Dr. Ibrahim and her lawyers, facing overwhelming odds, won a groundbreaking victory, and . . . they are entitled to the fees they’ve earned and the vast majority of fees they requested.”).

4857. *Id.* at 1153, 1166, 1180–85; see 28 U.S.C. § 2412 (2020); see also *Ibrahim*, 912 F.3d at 1180 (noting the act’s capping fees at \$125 per hour).

4858. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 16, 2020), D.E. 881; see Order, *Ibrahim v. Dep’t of Homeland Sec.*, No. 14-16161 (9th Cir. Dec. 17, 2020), D.E. 125 (accepting withdrawal of an appellate attorney fees motion as settled).

4859. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014); see *Kashem v. Barr*, 941 F.3d 358, 367 (9th Cir. 2019); see also Steve Chapman, *The No-Fly List Hits Turbulence*, Chi. Trib., Jan. 30, 2014, at 21; Joel Millman, *Judge Rules No-Fly List Is Violation of Rights*, Wall St. J., June 25, 2014, at A2; Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15; Eileen Sullivan, *US Changing Rules for No-Fly List of Terrorism Suspects*, Bos. Globe, Aug. 20, 2014, at A7. See generally Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Cal. L. Rev. 991, 1015, 1007, 1015–16, 1023–26, 1036–38, 1042 (2018).

4860. Order, *Latif v. Holder*, No. 14-36027 (9th Cir. Dec. 31, 2014), D.E. 4.

4861. Mar. 28, 2016, *Latif* Opinion, *supra* note 4820; see *Kashem*, 941 F.3d at 368–69.

Following an ex parte in camera review of the government’s reasons for keeping plaintiffs on the no-fly list, Judge Brown determined that the reasons and the information withheld from the plaintiffs satisfied due process. Opinion, *Latif v. Holder*, No. 3:10-cv-750 (D. Or. Oct. 6, 2016), D.E. 337, *aff’d*, 941 F.3d 358.

the original jurisdiction of the courts of appeals.⁴⁸⁶² The Ninth Circuit's court of appeals agreed in 2019.⁴⁸⁶³

Judge Brown also presided over (1) an action by an American citizen put on the no-fly list while he was trying to return to the United States after conducting humanitarian work in Libya⁴⁸⁶⁴ and (2) an action by an American citizen "imprisoned and tortured for 106 days" overseas,⁴⁸⁶⁵ after the plaintiff declined to work as an informant.⁴⁸⁶⁶ Judge Brown assumed senior status in 2017, and the court reassigned these cases to Judge Michael W. Mosman in 2019.⁴⁸⁶⁷ The parties settled the first case.⁴⁸⁶⁸ Judge Mosman dismissed the second case, finding that the plaintiff's continuing to experience extra security screenings at airports was not redressable as a

4862. Opinion, *Latif v. Sessions*, No. 3:10-cv-750 (D. Or. Apr. 21, 2017), D.E. 356, 2017 WL 1434648; *accord* Opinion at 11–13, *Kadura v. Holder*, No. 4:14-cv-13128 (E.D. Mich. Mar. 8, 2017), D.E. 55 [hereinafter *Kadura* Opinion], 2017 WL 914249; *see Kashem*, 941 F.3d at 366–67 (describing changes to redress procedures resulting from the case before Judge Brown).

4863. *Kashem*, 941 F.3d at 365, 390–92; *see* Maxine Bernstein, *Appeals Court Upholds No-fly List Designation*, *Oregonian*, Oct. 23, 2019, at A6.

4864. Opinion, *Tarhuni v. Sessions*, No. 3:13-cv-1 (D. Or. July 27, 2018), D.E. 157, 2018 WL 3614192 (narrowing the plaintiff's claims); *Tarhuni v. Lyncy*, 129 F. Supp. 3d 1052 (D. Or. 2015) (dismissing the action as moot following removal of the plaintiff from the no-fly list), *rev'd*, 692 F. App'x 477 (9th Cir. 2017) (reversing dismissal with prejudice and remanding for possible leave to amend the complaint); *Tarhuni v. Holder*, 8 F. Supp. 3d 1253 (D. Or. 2014) (dismissing some claims); Fourth Amended Complaint, *Tarhuni*, No. 3:13-cv-1 (D. Or. Feb. 12, 2018), D.E. 141.

4865. *Fikre v. FBI*, 904 F.3d 1033, 1035 (9th Cir. 2018).

4866. Opinion, *Fikre v. FBI*, No. 3:13-cv-899 (D. Or. Sept. 28, 2016), D.E. 105, 2016 WL 5539591 (dismissing claims as moot in light of the plaintiff's removal from the no-fly list), *rev'd*, 904 F.3d 1033 (determining that removal from the no-fly list could be temporary and having been on the list could have lasting consequences); *Fikre v. FBI*, 142 F. Supp. 3d 1152 (D. Or. 2015) (dismissing some claims and declining to dismiss claims relating to surveillance and international travel); *Fikre v. FBI*, 23 F. Supp. 3d 1268 (D. Or. 2014) (dismissing some claims); Seventh Amended Complaint, *Fikre v. Wray*, No. 3:13-cv-899 (D. Or. Dec. 18, 2019), D.E. 145; *see also* Judgment, *United States v. Fikre*, No. 3:12-cr-1689 (S.D. Cal. Oct. 7, 2013), D.E. 88 (dismissing an indictment against the plaintiff on the government's motion).

4867. Reassignment Notice, *Fikre*, No. 3:13-cv-899 (D. Or. July 15, 2019), D.E. 134; Reassignment Notice, *Tarhuni*, No. 3:13-cv-1 (D. Or. June 17, 2019), D.E. 177; Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges (noting Judge Brown's assuming senior status on July 27, 2017).

4868. Dismissal Stipulation, *Tarhuni*, No. 3:13-cv-1 (D. Or. Apr. 29, 2021), D.E. 233.

due-process injury.⁴⁸⁶⁹ On May 27, 2022, the court of appeals disagreed and further held that the plaintiff's removal from the no-fly list without an acknowledgment that his original placement on the list was improper did not moot his no-fly-list claims.⁴⁸⁷⁰

Watchlist Guidance: The Eastern District of Michigan and the Eastern District of Virginia

On July 23, 2014, the online magazine *The Intercept* published an apparently leaked March 2013 "Watchlisting Guidance" document describing how the no-fly list was maintained.⁴⁸⁷¹ *The Intercept* reported on August 5, 2014, that the no-fly list contained 47,000 names.⁴⁸⁷² On August 14, five Muslims filed in the Eastern District of Michigan a copy of the guidance document to support a federal complaint challenging the watchlists.⁴⁸⁷³ The plaintiff in a similar action filed in the Eastern District of Virginia also brought the guidance document to the court's attention.⁴⁸⁷⁴

4869. Opinion, *Fikre*, No. 3:13-cv-899 (D. Or. Aug. 12, 2020), D.E. 164, 2020 WL 4677516.

4870. *Fikre v. FBI*, ___ F.4th ___, 2022 WL 1698999 (9th Cir. 2022) (opinion filed at 9th Cir. No. 20-35904, D.E. 48); see Oral Argument, *Fikre v. FBI*, No. 20-35904 (9th Cir. Nov. 15, 2021), www.ca9.uscourts.gov/media/video/?20211115/20-35904/ (video recording).

4871. Jeremy Scahill & Ryan Devereaux, *The Secret Government Rulebook for Labeling You a Terrorist*, *The Intercept*, July 23, 2014, firstlook.org/theintercept/article/2014/07/23/blacklisted/; see Adam Goldman, *Document Details Watch-List Procedure*, *Wash. Post*, July 24, 2014, at A4; *Why I Leaked the Watchlist Documents*, in Jeremy Scahill & the Staff of *The Intercept*, *The Assassination Complex* 36 (2016); see also *Citizenfour* (Praxis Films 2014); Andres Rice, *The Pierre Omidyar Insurgency*, *New York*, Nov. 3–9, 2014, at 52 (reporting on the founding of *The Intercept*).

4872. Jeremy Scahill & Ryan Devereaux, *Barack Obama's Secret Terrorist-Tracking System, by the Numbers*, *The Intercept*, Aug. 5, 2014, firstlook.org/theintercept/article/2014/08/05/watch-commander/; see Charlie Savage, *Secret Papers Describe Size of Terror Lists Kept by U.S.*, *N.Y. Times*, Aug. 6, 2014, at A10.

4873. Complaint, *Kadura v. Holder*, No. 4:14-cv-13128 (E.D. Mich. Aug. 14, 2014), D.E. 1; see Amended Complaint, *id.* (Mar. 10, 2016), D.E. 40.

4874. Status Report, *Mohamed v. Holder*, No. 1:11-cv-50 (E.D. Va. Aug. 15, 2014), D.E. 126; see *Mohamed v. Holder*, 995 F. Supp. 2d 520, 539 (E.D. Va. 2014) (concluding that resolution of due-process requirements for the no-fly list required fact-intensive considerations); Opinion, *Mohamed*, No. 1:11-cv-50 (E.D. Va. Sept. 15, 2014), D.E. 139, as amended, Order, *id.* (Nov. 7, 2014), D.E. 145 (affirming the judge's own order requiring presentation to the court ex parte and in camera documents purportedly subject to the state-secrets privilege and observing that the secret but unclassified guidance document had apparently been publicly disseminated); see also Order, *id.* (Jan. 8, 2015), D.E. 165 (ordering ex parte in camera review of all documents that the government claimed were

On August 23, 2014, Judge Alsup denied Ibrahim's request to reopen her case in light of the *Intercept* posting.⁴⁸⁷⁵

Revisions to No-Fly List Procedures

On April 13, 2015, in the Oregon and Virginia cases, the government filed notices that it was revising its no-fly procedures so that the government would no longer keep secret from passengers their no-fly status if they are denied travel for being on the list.⁴⁸⁷⁶

On July 16, Judge Anthony J. Trenga ruled in the Virginia case that previous no-fly procedures were constitutionally defective and the constitutionality of the revised procedures depended upon a review of facts in a specific case under the new procedures.⁴⁸⁷⁷ The state-secrets privilege did not prevent the court from reviewing the constitutionality of a no-fly list reconsideration, because although procedures for getting on the list might be secret, procedures for a due-process review were not.⁴⁸⁷⁸ Judge Trenga decided on July 20, 2017, that having a no-fly list was not itself unlawful.⁴⁸⁷⁹

Supreme Court Recognition of Possible Damages: The Southern District of New York

An action filed on October 1, 2013, in the Southern District of New York accused the government of putting the Muslim plaintiffs on the no-fly list

required for a defense and subject to the state-secrets privilege); Matthew Barakat, *No-Fly List Might Be Unlawful, Judge Says*, Bos. Globe, Jan. 31, 2015, at A7.

4875. Opinion, Ibrahim v. Dep't of Homeland Sec., No. 3:06-cv-545 (N.D. Cal. Aug. 23, 2014), D.E. 786 ("The need for repose and the need for the parties to be able to rely on finality counsel in favor of respect for a judgment and letting it be.").

4876. Notice, Fikre v. FBI, No. 3:13-cv-899 (D. Or. Apr. 13, 2015), D.E. 63; Notice, Tarhuni v. Holder, No. 3:13-cv-1 (D. Or. Apr. 13, 2015), D.E. 93; Notice, Latif v. Holder, No. 3:10-cv-750 (D. Or. Apr. 13, 2015), D.E. 197; Notice, Mohamed, No. 1:11-cv-50 (E.D. Va. Apr. 13, 2015), D.E. 188; see Adam Goldman, *U.S. Lifts Secrecy on List of Banned Flyers*, Wash. Post, Apr. 15, 2015, at A3.

4877. Opinion, Mohamed, No. 1:11-cv-50 (E.D. Va. July 16, 2015), D.E. 189, 2015 WL 4394958.

4878. *Id.* at 24; see Matthew Barakat, *Judge Rejects Government Argument About No Fly List*, Miami Herald, July 17, 2015, at 3A.

In 2018, Judge Trenga published an extensive analysis of how other judges handled state-secrets issues in both published opinions and personal interviews. Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 Harv. Nat'l Sec. J. 1 (2018).

4879. Mohamed v. Holder, 266 F. Supp. 3d 868 (E.D. Va. 2017), *appeal dismissed voluntarily*, Order, No. 17-7235 (4th Cir. Dec. 21, 2017), D.E. 17.

in retaliation for their not agreeing to become informants.⁴⁸⁸⁰ Following this filing, the government assured the plaintiffs that the no-fly list would not impede the plaintiffs' future flights, and Judge Ronnie Abrams determined on September 3, 2015, that damages were not available against agents allegedly responsible for previously putting the plaintiffs on the no-fly list.⁴⁸⁸¹ The Supreme Court, however, agreed on December 10, 2020, with the court of appeals that damages were available in appropriate cases.⁴⁸⁸²

Eastern District of Michigan Case Resolutions

In the Eastern District of Michigan, on August 10, 2016, Judge Victoria A. Roberts dismissed a second no-fly-list complaint filed on May 8, 2013, because "Plaintiff's claims regarding his alleged inclusion on the No Fly List are moot as a result of Defendants' issuance of a letter stating that Mokdad is not on such a list."⁴⁸⁸³ The court of appeals affirmed the dismissal on November 13, 2017.⁴⁸⁸⁴ In the earlier Michigan case, Eastern District of Michigan Judge Linda V. Parker ruled that a federal cause of action does

4880. Amended Complaint, *Tanvir v. Holder*, No. 1:13-cv-6951 (S.D.N.Y. Apr. 22, 2014), D.E. 15; see Complaint, *Tanvir v. Comey*, *id.* (Oct. 1, 2013), D.E. 1; see also Adam Goldman, *Lawsuit: FBI Uses No-Fly List in Bid to Recruit Muslim Informants*, Wash. Post, Apr. 23, 2014, at A4; Joseph Goldstein, *New York Police Recruit Muslims to Be Informers*, N.Y. Times, May 11, 2014, at A1; Carrie Johnson, *4 Muslim Men to Sue Feds Over No-Fly List*, Morning Edition (NPR radio broadcast Apr. 23, 2014), www.npr.org/2014/04/23/306102446/4-men-suing-feds-over-no-fly-list.

4881. *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015).

4882. *Tanzin v. Tanvir*, 592 U.S. ___, 141 S. Ct. 486 (2020), *aff'g* 894 F.3d 449 (2d Cir. 2018); see Robert Barnes, *Justices Rule for Men Put on No-Fly List*, Wash. Post, Dec. 11, 2020, at A3; Jess Bravin, *Justices Allow FBI Agents to Be Sued*, Wall St. J., Dec. 11, 2020, at A3; Adam Liptak, *3 Muslim Men Put on No-Fly List May Sue F.B.I. Agents, Supreme Court Rules*, N.Y. Times, Dec. 11, 2020, at A17.

4883. Order, *Mokdad v. Lynch*, No. 2:13-cv-12038 (E.D. Mich. Aug. 10, 2016), D.E. 57, 2016 WL 4205909; see Transcript at 42, *id.* (Aug. 9, 2016, filed Dec. 13, 2016), D.E. 61 ("[The plaintiff] wants a judicial determination or declaration there was never a reasonable basis for placing him on the No-Fly List. The Court believes that it lacks jurisdiction to issue that sort of advisory Opinion about past conduct."); Complaint, *id.* (May 8, 2013), D.E. 1; *Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015) (holding that district courts have jurisdiction over no-fly list inclusions and ruling the TSA to be a necessary defendant), *rev'g* Opinion, *Mokdad*, No. 2:13-cv-12038 (E.D. Mich. Dec. 5, 2013), D.E. 34, 2013 WL 8840322.

4884. *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017); *id.* at 168 ("Mokdad is not on the No Fly List and will not be placed on that list based on currently available information").

not result from placement on a watchlist for additional screening.⁴⁸⁸⁵ Judges Judith E. Levy⁴⁸⁸⁶ and Sean F. Cox⁴⁸⁸⁷ also dismissed challenges to placement on a selectee list that does not prevent flying but does result in additional screening, finding that the travel delays did not infringe on constitutionally protected interests. On September 12, 2017, the court of appeals agreed.⁴⁸⁸⁸ The Fourth Circuit's court of appeals reached a similar conclusion on March 30, 2021.⁴⁸⁸⁹

Other Actions

Judge Carl J. Nichols, in the district court for the District of Columbia, dismissed an action challenging a no-fly status on October 11, 2019, because the Pakistani plaintiff's visa had been revoked, and the complaint did not challenge that.⁴⁸⁹⁰ On April 10, 2020, Judge Randolph D. Moss, in the same court, declined to dismiss a no-fly action because it was not yet clear whether the facts of the case put it within the court of appeals' jurisdiction instead.⁴⁸⁹¹ In August, the plaintiff voluntarily dismissed the action.⁴⁸⁹² A related action by the plaintiff and his wife remains pending be-

4885. *Kadura* Opinion, *supra* note 4862.

4886. Opinion, *Beydoun v. Lynch*, No. 5:14-cv-13812 (E.D. Mich. July 14, 2016), D.E. 27.

4887. Opinion, *Bazzi v. Lynch*, No. 2:16-cv-10123 (E.D. Mich. Aug. 30, 2016), D.E. 14, 2016 WL 4525240.

4888. *Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017).

4889. *Elhady v. Kable*, 993 F.3d 208 (4th Cir. 2021) ("Individual applications of the program may run afoul of recognized legal prohibitions and thus remain subject to judicial review. But any wholesale reworking or significant modification of the program rests within the purview of the democratic branches."), *rev'g* 391 F. Supp. 3d 562 (E.D. Va. 2019) (Judge Trenga's concluding that the broader Terrorist Screening Database watchlist, of which the no-fly list was a part, did not afford persons in the database constitutionally adequate protections); *see* Order, *Elhady v. Kable*, No. 1:16-cv-375 (E.D. Va. May 31, 2022), D.E. 402 (dismissing the action); Second Amended Complaint, *id.* (Mar. 7, 2022), D.E. 388 (narrowing the claims); *see also* Charlie Savage, *Ruling Finds Watchlist Violates U.S. Rights*, N.Y. Times, Sept. 5, 2019, at A20; Rachel Weiner, *Judges Rule That Terror Watch List Is Legal*, Wash. Post, Mar. 31, 2021, at B8.

4890. Opinion, *Baz v. U.S. Dep't of Homeland Sec.*, No. 1:18-cv-1013 (D.D.C. Oct. 11, 2019), D.E. 37, 2019 WL 5102827; *see* Amended Complaint, *id.* (Aug. 20, 2018), D.E. 21; Complaint, *id.* (May 1, 2018), D.E. 1.

4891. Opinion, *Maniar v. Wolf*, No. 1:18-cv-1362 (D.D.C. Apr. 10, 2020), D.E. 29, 2020 WL 1821113; *see* Amended Mandamus Petition and Complaint, *id.* (Apr. 18, 2019), D.E. 23; Mandamus Petition, *id.* (June 7, 2018), D.E. 1.

4892. Voluntary Dismissal, *id.* (Aug. 19, 2020), D.E. 35.

fore Judge Emmet G. Sullivan.⁴⁸⁹³ A 2021 no-fly suit was dismissed voluntarily.⁴⁸⁹⁴

Eastern District of Virginia Judge Liam O’Grady transferred a no-fly case to the Fourth Circuit’s court of appeals on April 2, 2020.⁴⁸⁹⁵ That court ruled on June 29, 2022, that it was the wrong court; the case should have been transferred to a court of appeals for either the District of Columbia Circuit or the Tenth Circuit, where the plaintiff resides, although his removal from the no-fly list made the case at least partially moot.⁴⁸⁹⁶

Northern District of Texas Judges Sam A. Lindsay and Brantley Starr narrowed claims but declined to dismiss a watchlist lawsuit in 2019⁴⁸⁹⁷ and 2020,⁴⁸⁹⁸ respectively. On July 20, 2020, District of Maryland Judge Paula Xinis declined to dismiss an August 8, 2018, lawsuit challenging terrorist watchlists’ restrictions on travel.⁴⁸⁹⁹

On the other hand, the U.S. Court of Appeals for the Tenth Circuit, on November 12, 2019, affirmed dismissal of a District of Utah watchlist case,

4893. Second Amended Complaint, *Maniar v. Wolf*, No. 1:19-cv-3826 (D.D.C. Sept. 9, 2020), D.E. 22; Amended Complaint, *id.* (Aug. 12, 2020), D.E. 19; Complaint, *id.* (Dec. 26, 2019), D.E. 1.

4894. Voluntary Dismissal Notice, *Chebli v. Kable*, No. 1:21-cv-937 (D.D.C. May 12, 2021), D.E. 4 (“Ten days after Mr. Chebli filed this lawsuit, the government finally responded to his years-old petition for redress.”); *see* Complaint, *id.* (Apr. 6, 2021), D.E. 1; *see also* Charlie Savage, *Government’s “No-Fly List” Is Challenged in New Suit*, N.Y. Times, Apr. 7, 2021, at A14.

4895. *Long v. Barr*, 451 F. Supp. 3d 507 (E.D. Va. 2020); *Long v. Pekoske*, 38 F.4th 417, 419 (4th Cir. 2022); Amended Complaint, *Long v. Barr*, No. 1:15-cv-1642 (E.D. Va. Aug. 13, 2019), D.E. 35; Complaint, *id.* (Dec. 11, 2015), D.E. 1 (“Venue is proper because a substantial part of the events or omissions giving rise to [the] claims occurred within this district which is where the federal watchlist is compiled.”).

4896. *Long*, 38 F.4th 417

4897. *Kovac v. Wray*, 363 F. Supp. 3d 721 (N.D. Tex. 2019); *see* Complaint, *Kovac v. Wray*, No. 3:18-cv-110 (N.D. Tex. Jan. 17, 2018), D.E. 1.

4898. Opinion, *Kovac*, No. 3:18-cv-110 (N.D. Tex. Nov. 6, 2020), D.E. 57, 2020 WL 6545913; *Kovac v. Wray*, 449 F. Supp. 3d 649 (N.D. Tex. 2020).

The case was reassigned to Judge Starr on September 3, 2019, Order, *Kovac*, No. 3:18-cv-110 (N.D. Tex. Sept. 3, 2019), D.E. 34, about a month after he joined the bench, FJC Biographical Directory, *supra* note 4867.

4899. *El Ali v. Barr*, 473 F. Supp. 3d 479 (D. Md. 2020); *see* Amended Complaint, *El Ali v. Barr*, No. 8:18-cv-2415 (D. Md. Mar. 22, 2019), D.E. 48; Complaint, *id.* (Aug. 8, 2018), D.E. 1.

noting that the plaintiff had not adequately pleaded an injury resulting from his brief placement on the no-fly list.⁴⁹⁰⁰

Challenge: Sensitive Unclassified Information

To support its motion to dismiss all claims against federal defendants, the government sought permission on May 22, 2006, to file under seal the government's no-fly list security directives.⁴⁹⁰¹

Judge Alsup provisionally granted permission to file the directives under seal, subject to a final decision on sealing after the judge reviewed the directives, and Judge Alsup ordered the government to file a public statement “describing with as much detail as practicable the contents of the purported security information being provided to the Court.”⁴⁹⁰² The government responded, “The documents that were submitted to the Court for filing under seal consist of two Security Directives which direct air carriers to implement specific security procedures and to take specific security measures with respect to individuals who are identified on one of two TSA watch lists: the ‘No Fly List’ and the ‘Selectee List.’”⁴⁹⁰³

Although the government had been dismissed as a party, Ibrahim continued to seek discovery from the government.⁴⁹⁰⁴ The government informed the court that it would only produce to the plaintiff information it designated as “sensitive security information” (SSI) if the government found that the plaintiff needed it.⁴⁹⁰⁵ SSI is controlled unclassified information related to transportation security.⁴⁹⁰⁶ Other defendants also sought

4900. *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019), *aff'g* Opinion, *Abdi v. Wray*, No. 2:17-cv-622 (D. Utah Apr. 23, 2018), D.E. 35, 2018 WL 1940411; *see* Docket Sheet, *Abdi*, No. 2:17-cv-622 (D. Utah June 16, 2017).

4901. Motion, *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. May 22, 2006), D.E. 62.

4902. Order, *id.* (May 23, 2006), D.E. 66; *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 991 (9th Cir. 2012); *see* Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* (Federal Judicial Center 2010).

4903. Government Notice at 2, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. May 26, 2006), D.E. 67.

4904. *E.g.*, Motion to Compel Discovery, *id.* (Nov. 5, 2009), D.E. 231.

4905. Government Brief at 3–4, *id.* (Nov. 12, 2009), D.E. 243.

4906. Regulations provide the following definition:

SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

the ability to use SSI in the case.⁴⁹⁰⁷ At a December 7, 2009, discovery hearing, Judge Alsup expressed frustration with the government's limited cooperation with the parties' development of their evidence:

THE COURT: . . . [T]he San Francisco police officers who tried to protect the good citizens of our city. They're about to get hit with millions of dollars in damages because they are not allowed to explain to the jury that they were told to do this by the federal government.

[GOVERNMENT ATTORNEY]: But your Honor, discovery could go into whether or not they received any instructions to detain or arrest from the federal government.

THE COURT: Well, that's not enough. They ought to be told what it was that they were told, so that the jury can say, "Yeah, that was reasonable. We would want the police to do what they did."⁴⁹⁰⁸

After consultation with the parties, Judge Alsup issued a protective order on January 13, 2010, specifying how SSI would be handled.⁴⁹⁰⁹ Access to SSI was granted to defendants, the plaintiff's attorneys subject to a background check, and court personnel without a background check, but not to the plaintiff herself.⁴⁹¹⁰ Both Ibrahim and the government appealed.⁴⁹¹¹ The court of appeals affirmed Judge Alsup's denial of Ibrahim's request to share SSI with nontestifying experts.⁴⁹¹² Judge Alsup again issued an SSI protective order on February 25, 2013.⁴⁹¹³

Having lost two appeals in this case, the government moved again on November 7, 2012, to dismiss the case, filing a redacted brief on the public

(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) (2020); *see, e.g.*, *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 913, 386 (2015) (describing sensitive security information).

4907. *E.g.*, Motion, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 9, 2009), D.E. 238.

4908. Transcript at 18–19, *id.* (Dec. 7, 2009, filed Dec. 14, 2009), D.E. 284; *see* Opinion at 1, *id.* (Dec. 17, 2009), D.E. 285, 2009 WL 5069133 ("important evidence at the heart of the case is still under lock and key by TSA").

4909. Protective Order, *id.* (Jan. 13, 2010), D.E. 312.

4910. *Id.* at 5–6; *see* Sinnar, *supra* note 4859, at 1015 (report by an expert in the case that "[a]lthough Ibrahim's counsel passed the background check required to access SSI [footnote omitted], it took the court's repeated intervention to compel the government to provide the privileged documents").

4911. Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 10-15352 (9th Cir. Feb. 17, 2010) (Ibrahim's appeal); Docket Sheet, *Ibrahim v. U.S. Dep't of Homeland Sec.*, No. 10-15342 (9th Cir. Feb. 16, 2010) (the government's appeal).

4912. *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 998–99 (9th Cir. 2012).

4913. Protective Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 25, 2013), D.E. 421.

record.⁴⁹¹⁴ With its brief, the government filed a notice that it was lodging with a classified information security officer an unredacted brief and redacted declarations that contained “law enforcement sensitive” information.⁴⁹¹⁵

Aware in advance that the government intended this filing, the classified information security officer initiated contact with Judge Alsup to explain procedures for presenting protected information to the court.⁴⁹¹⁶ Surprised by the contact⁴⁹¹⁷ and somewhat unfamiliar with the government’s presenting classified information to the court in civil cases, Judge Alsup ordered briefing on the matter:

A “Court Information Officer” from Washington D.C. has contacted the clerk’s office of this district court concerning this case and wishes to travel to San Francisco to show certain documents to the undersigned judge. Afterward, the officer intends to take the documents back to Washington, apparently without disclosure of the documents to plaintiff or plaintiff’s counsel, and without leaving copies for the record.

The Court is unfamiliar with such a procedure and requests a memorandum from each side concerning the purpose of any such in-camera disclosure as well as the extent to which counsel (on both sides) should be permitted to view the documents. The memoranda should quote from applicable statutes, regulations, and other legal authority. Be specific.⁴⁹¹⁸

The Justice Department’s Litigation Security Group, which provides the courts with classified information security officers—formerly known ambiguously as court security officers—now realizes that it was a mistake for the classified information security officer in this case to initiate contact with the court before the court had formal notice that such contact would

4914. Motion, *id.* (Nov. 7, 2012), D.E. 373.

4915. Notice of Lodging, *id.* (Nov. 7, 2012), D.E. 374 [hereinafter Nov. 7, 2012, *Ibrahim* Notice of Lodging].

4916. Opinion at 4, *id.* (Dec. 20, 2012), D.E. 399 [hereinafter Dec. 20, 2012, *Ibrahim* Opinion], 2012 WL 6652362; Order, *id.* (Nov. 7, 2012), D.E. 372 [hereinafter Nov. 7, 2012, *Ibrahim* Order]; Briefing Order, *id.* (Nov. 8, 2012), D.E. 377.

Because of its unfamiliarity with customary procedures for protecting classified information presented to federal courts, the *San Francisco Chronicle* misleadingly reported, “President Obama’s Justice Department privately contacted Alsup last fall and said an agent would arrive shortly carrying evidence for dismissal of the suit.” Bob Egelko, *Judge Won’t Allow Secret Evidence in No-Fly Suit*, S.F. Chron., Jan. 10, 2013, at D2.

4917. Judge Alsup was quite averse to ex parte communications. Interview with Judge William Alsup, Aug. 21, 2014.

4918. Nov. 7, 2012, *Ibrahim* Order, *supra* note 4916; see Sinnar, *supra* note 4859, at 1007, 1014.

be necessary. The officer was trying to coordinate his visit to Judge Alsup with other west coast travel. At a conference on November 8, Judge Alsup admonished the government that it should have received his permission before it attempted to present protected information to the court *ex parte* and *in camera*.⁴⁹¹⁹

The November 7 filing apparently included SSI, but not classified information.⁴⁹²⁰ In particular, the government regarded as protected information whether Ibrahim was on any terrorist screening list, including the no-fly list.⁴⁹²¹ The government instructed, “should the Court grant access to [the plaintiff’s] counsel, the Court’s order may not extend such access to Plaintiff or grant counsel access to classified information in these proceedings.”⁴⁹²² At the November 8 conference, the government’s attorney explained that the government was concerned that the plaintiff’s attorneys’ “obligation to zealously defend their client” would put the sensitive information at risk.⁴⁹²³

Judge Alsup decided not to review the *ex parte* submission:

I am not going to look at your *in camera* submissions. That is so at odds with the way we do things in America. It’s not justified.

I’m not going to receive your materials *ex parte*. I am not going to review them. . . . I’m going to rule on the record I have, that both sides have access to.⁴⁹²⁴

Judge Alsup denied the government’s motion to dismiss the case and rejected “the government’s argument that Ibrahim’s counsel cannot be trusted to handle sensitive information in this case. They are reputable lawyers in a reputable firm with no history of infractions.”⁴⁹²⁵

Judge Alsup issued his thirty-eight-page findings of fact and conclusions of law under temporary seal.⁴⁹²⁶ On the public record, Judge Alsup

4919. Transcript at 3, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 8, 2012, filed Nov. 9, 2012) [hereinafter Nov. 8, 2012, *Ibrahim* Transcript].

4920. Nov. 7, 2012, *Ibrahim* Notice of Lodging, *supra* note 4915.

4921. Government Brief, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 20, 2012), D.E. 380.

4922. *Id.* at 8.

4923. Nov. 8, 2012, *Ibrahim* Transcript, *supra* note 4919, at 6.

4924. Transcript at 7–8, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 20, 2012, filed Jan. 14, 2013), D.E. 403; *see* Dec. 20, 2012, *Ibrahim* Opinion, *supra* note 4916, at 3–9.

4925. Dec. 20, 2012, *Ibrahim* Opinion, *supra* note 4916, at 11.

4926. *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 35–38.

filed a three-page summary.⁴⁹²⁷ In compliance with Judge Alsup's order, the government filed on February 6, 2014, a redacted version of Judge Alsup's findings and conclusions.⁴⁹²⁸ The government filed a slightly less redacted version on the following day.⁴⁹²⁹ Upon notice by the government that it would not seek relief from the court of appeals preventing Judge Alsup from completely unsealing his findings and conclusions, Judge Alsup unsealed them on April 16.⁴⁹³⁰

To protect SSI on appeal, some of the briefing was under seal.⁴⁹³¹

One of the no-fly cases in the District of Oregon accommodated special protections for discovery material designated as law-enforcement-sensitive.⁴⁹³² In the Northern District of Texas, Judge Starr agreed to review the administrative record ex parte and under seal because it contained SSI and sensitive law-enforcement information.⁴⁹³³

Challenge: Classified Evidence

The National Counterterrorism Center and the FBI submit nominations of known and suspected terrorists, and TSC then decides who to include on the List based on classified intelligence. TSC subsequently provides the List—which contains only sensitive, unclassified identity information, *not* the underlying classified intelligence information—to TSA, which in turn implements the List at the airport.⁴⁹³⁴

Judge Alsup

On February 5, 2013, the government informed Judge Alsup that Ibrahim's discovery requests called for information that the government re-

4927. Findings of Fact and Conclusions of Law Summary, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Jan. 14, 2014), D.E. 683; see Howard Mintz, *Judge: Name on "No-Fly" List a Violation*, San Jose Mercury News, Jan. 15, 2014, at 1B.

4928. Notice, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 6, 2014), D.E. 701.

4929. Notice, *id.* (Feb. 7, 2014), D.E. 703.

4930. Order, *id.* (Apr. 16, 2014), D.E. 738; Mar. 25, 2014, *Ibrahim* Transcript, *supra* note 4850, at 39–40; see Egelko, *supra* note 4847.

4931. Docket Sheet, *Ibrahim v. Dep't of Homeland Sec.*, No. 14-17272 (9th Cir. Nov. 17, 2014) (fees appeal); Docket Sheet, *Ibrahim v. Dep't of Homeland Sec.*, No. 14-16161 (9th Cir. June 17, 2014) (costs appeal).

4932. Stipulated Protective Orders, *Tarhuni v. Barr*, No. 3:13-cv-1 (D. Or. July 10 and 12, 2019, and Mar. 2, 2020), D.E. 181, 183, 210.

4933. Opinion, *Kovac v. Wray*, No. 3:18-cv-110 (N.D. Tex. Mar. 10, 2022), D.E. 81, 2022 WL 717260.

4934. *Latif v. Holder*, 686 F.3d 1122, 1125 (9th Cir. 2012) (footnotes omitted); see also *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1156–56 (9th Cir. 2019).

garded as classified.⁴⁹³⁵ The government said that it would be willing to inform Ibrahim's attorneys, but not Ibrahim herself, whether Ibrahim was currently on a no-fly list subject to a protective order excluding classified information from the case.⁴⁹³⁶ Judge Alsup ordered the government to provide a privilege log.⁴⁹³⁷

The government argued that an ordinary privilege log for classified information could itself reveal classified information,⁴⁹³⁸ so Judge Alsup ordered the government to submit responsive classified documents to him for review.⁴⁹³⁹ On March 5, the government filed a notice that it had lodged the classified documents and a classified privilege log with the classified information security officer, who would provide the documents to Judge Alsup for the court's review and then ensure that the documents were securely stored.⁴⁹⁴⁰

When Judge Alsup first started receiving classified material in this case, he had an extern who had previously received a security clearance, and the extern was cleared to assist Judge Alsup with classified materials.⁴⁹⁴¹ By the end of the case, Judge Alsup had a law clerk who received a security clearance.⁴⁹⁴² Judge Alsup decided to always ask potential clerks if they would be willing to seek a security clearance if necessary.⁴⁹⁴³

Judge Alsup made sure that the record reflected each time he reviewed classified information.⁴⁹⁴⁴ Reviewing the ostensibly classified documents, Judge Alsup asked for clarification of the status of documents not clearly marked as classified:

4935. Government Letter Brief, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Feb. 5, 2013), D.E. 406.

4936. *Id.*

4937. Order, *id.* (Feb. 7, 2013), D.E. 407.

4938. Request for Clarification, *id.* (Feb. 12, 2013), D.E. 408.

4939. Order, *id.* (Feb. 15, 2013), D.E. 414.

4940. Notice of Lodging, *id.* (Mar. 5, 2013), D.E. 431.

4941. Interview with Judge William Alsup, Aug. 21, 2014.

The classified information security officer facilitated a recognition of the extern's "need to know." Interview with Dep't of Just. Litig. Sec. Grp. Staff, Aug. 26, 2014; *see* Revised Security Procedures Established Pursuant to Pub. L. No. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 4 (2020) (noting that access to classified information requires both a security clearance and a need to know the classified information).

4942. Interview with Judge William Alsup, Aug. 21, 2014.

4943. *Id.*

4944. *Id.*

With respect to the recent lodging of classified documents, the Court has found at least one that is marked “Sensitive But Unclassified.” Government counsel shall please submit (*ex parte* and *in camera*) a list specifying all such documents in the submission and, as to each, explain why it should not be turned over to plaintiff’s counsel on an attorney’s eyes only basis. Further, as to each document in the submission that bears no legend at all, meaning no classified or other stamp, identify each and explain why it should not be turned over to plaintiff’s counsel.⁴⁹⁴⁵

The government lodged its responses with the classified information security officer.⁴⁹⁴⁶ On March 20, Judge Alsup ordered the government to file under seal and produce to the plaintiff’s attorneys, for their eyes only, all unclassified documents and paragraphs among the lodged submissions.⁴⁹⁴⁷

As the discovery dispute proceeded, the government invoked the state-secrets privilege.⁴⁹⁴⁸ Reasoning that “the extension of the state secrets privilege is not a given, nor an absolute,” Judge Alsup concluded,

After a careful review of the classified materials by the Court, this order concludes that a few documents could potentially be produced with little or no modifications to them. *First*, any correspondence directly from plaintiff to defendants (and vice versa) cannot be classified and should be produced without restriction. *Second*, some classified documents appear to contain mostly *unclassified* material, save one or two classified paragraphs.⁴⁹⁴⁹

4945. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Mar. 8, 2013), D.E. 436.

4946. Notice of Lodging, *id.* (Mar. 18, 2013), D.E. 439.

4947. Order, *id.* (Mar. 20, 2013), D.E. 441.

4948. Notice of Lodging, *id.* (Mar. 15, 2013), D.E. 438; Attorney General Declaration, *id.* (Mar. 14, 2013, filed Apr. 23, 2013), D.E. 472 [hereinafter *Ibrahim* Attorney General Declaration]; Director of National Intelligence Declaration, *id.* (Mar. 13, 2013, filed Apr. 23, 2013), D.E. 471 [hereinafter *Ibrahim* Director of National Intelligence Declaration]; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 3–9 (Federal Judicial Center, 2d ed. 2013) (discussing the state-secrets privilege).

4949. Order to Show Cause at 2, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Apr. 19, 2013), D.E. 462 [hereinafter *Ibrahim* Order to Show Cause]; see Transcript at 9, *id.* (Apr. 18, 2013, filed Apr. 22, 2013), D.E. 468 (“I think the invocation in most cases—not all cases—the invocation of the State Secrets Privilege was proper by the United States and these defendants on the classified material; not a hundred percent, but most of it.”).

Judge Alsup noticed some information among the classified material presented to him in this case to be identical to some unclassified information. Interview with Judge William Alsup, Aug. 21, 2014.

Judge Alsup also issued an order to show cause why two internal training documents could not be produced to Ibrahim's attorneys, who were not cleared for classified information but were cleared for sensitive material.⁴⁹⁵⁰ The government responded by producing to the plaintiff's attorneys documents with limited redactions.⁴⁹⁵¹

Judge Alsup agreed with the government that neither party would be able to rely on classified information at trial.⁴⁹⁵² At the final pretrial conference, Judge Alsup overruled the government's argument that Judge Alsup should rely on classified information presented by the government to dismiss the case.⁴⁹⁵³ By conducting a trial without classified information and reviewing the government's classified submissions later on paper, Judge Alsup was able to rule without the confusion that might arise if the unclassified material and the classified material were comingled.⁴⁹⁵⁴ Judge Alsup reviewed the government's final classified submissions to determine whether a ruling in favor of the plaintiff would be unfair to the government.⁴⁹⁵⁵

Because the government's proposed findings of fact and conclusions of law included classified information not available to the plaintiff's attorneys, Judge Alsup asked the parties to brief him on the possibility of the plaintiff's attorneys obtaining security clearances.⁴⁹⁵⁶ The government opposed the idea,⁴⁹⁵⁷ and the plaintiff's attorneys agreed to seek security clearances subject to conditions⁴⁹⁵⁸ that Judge Alsup found to be unreasonable.⁴⁹⁵⁹

Experience of members of the clerk of court's staff with classified materials greatly facilitated Judge Alsup's ability to work with the materials efficiently.⁴⁹⁶⁰

4950. *Ibrahim* Order to Show Cause, *supra* note 4949.

4951. Notice, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. May 15, 2013), D.E. 476; *see* Notice, *id.* (Aug. 8, 2013), D.E. 524 (concerning subsequent discovery).

4952. Transcript at 4, *id.* (Nov. 15, 2013, filed Nov. 18, 2013), D.E. 619.

4953. *Id.* at 23–26; *see* Bob Egelko, *Ex-Stanford Student to Get Trial on No-Fly*, S.F. Chron., Nov. 16, 2013, at C2; *see also* Chapter 2: Kenya and Tanzania, *supra* page 38 (Judge Krieger's doubt about a requested second bite at the apple).

4954. Interview with Judge William Alsup, Aug. 21, 2014 (noting that the segregation also helped to avoid confusion between classified information and SSI).

4955. *Id.*

4956. Order, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Dec. 18, 2013), D.E. 666.

4957. Government Brief, *id.* (Dec. 23, 2013), D.E. 670.

4958. Plaintiff's Brief, *id.* (Dec. 23, 2013), D.E. 669.

4959. Order, *id.* (Dec. 30, 2013), D.E. 674.

4960. Interview with Judge William Alsup, Aug. 21, 2014.

Judge Brown

Due-process requirements specified by Judge Brown for no-fly challenges included the consideration of providing cleared counsel with classified information about their clients.

... Defendants must provide to each Plaintiff (1) a statement of reasons for that Plaintiff's placement on the No-Fly List that is sufficient to permit such Plaintiff to respond meaningfully to those reasons and (2) any material exculpatory or inculpatory information in Defendants' possession that is necessary for such a meaningful response. Defendants may limit or withhold disclosures altogether in the event such disclosures would create an undue risk to national security. In such instances Defendants, nevertheless, must implement procedures to minimize the amount of material withheld. When possible, Defendants must determine whether the information can be summarized in an unclassified summary and/or whether additional disclosures can be made to Plaintiffs' counsel who have the appropriate security clearances. When possible, Defendants must do so. When it is not possible, Defendants must so certify through a competent witness with personal knowledge.

When a Plaintiff seeks substantive judicial review of Defendants' determination that the Plaintiff must remain on the No-Fly List, Defendants must include with the administrative record submitted to the appropriate court an affidavit or declaration from a competent witness with personal knowledge of the No-Fly List determination that identifies for the court the information that was withheld, provides justification for withholding that information, and explains why Defendants could not make additional disclosures.⁴⁹⁶¹

The Ninth Circuit's Court of Appeals

In court—but before the beginning of oral argument—in an appeal in Judge Brown's first no-fly case, the court of appeals had a conversation with the attorneys about the nonpublic parts of the record: some was classified as secret and some other material also was sealed.⁴⁹⁶² The court and the parties decided that there was a good chance that the entire proceeding could be conducted in public.⁴⁹⁶³

4961. Mar. 28, 2016, *Latif* Opinion, *supra* note 4820, at 56–57.

4962. Oral Argument, *Kariye v. Sessions*, No. 17-35634 (9th Cir. Oct. 9, 2018), www.ca9.uscourts.gov/media/video/?20181009/17-35634/ (video recording).

4963. *Id.*; see *Kashem v. Barr*, 941 F.3d 358, 390 (9th Cir. 2019) (noting that in an appropriate civil case courts should not hesitate to use procedures like those specified for criminal cases in the Classified Information Procedures Act to allow litigation to proceed while protecting classified information).

Judge Starr

In the Northern District of Texas, Judge Starr agreed to review the administrative record ex parte and under seal because it contained classified information.⁴⁹⁶⁴

Challenge: Closed Proceedings

On October 31, 2013, Judge Alsup ascended the bench to preside over the government's summary-judgment motion.⁴⁹⁶⁵ The government asked Judge Alsup to close the proceeding, arguing, "Sensitive security information permeates the arguments."⁴⁹⁶⁶ Ibrahim's attorneys argued that the hearing should be open, at which time a law school class arrived at the proceeding.⁴⁹⁶⁷ After approximately two hours of argument about whether to close the hearing, Judge Alsup decided, "I'm going to take under submission the motion for summary judgment without further argument and decide it on the papers."⁴⁹⁶⁸

With an initially sealed opinion, Judge Alsup mostly denied the government's summary-judgment motion.⁴⁹⁶⁹ One week later, the government complied with Judge Alsup's order within the opinion and filed a redacted version.⁴⁹⁷⁰

Parts of the bench trial were conducted in closed session by temporarily clearing the court of spectators.⁴⁹⁷¹ There were approximately ten clos-

4964. Opinion, *Kovac v. Wray*, No. 3:18-cv-110 (N.D. Tex. Mar. 10, 2022), D.E. 81, 2022 WL 717260.

4965. Transcript, *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. Oct. 31, 2013, filed Nov. 1, 2013), D.E. 591.

4966. *Id.* at 4.

4967. *Id.* at 5–6.

4968. *Id.* at 71; see *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1163 (9th Cir. 2019).

4969. Opinion, *Ibrahim*, No. 3:06-cv-545 (N.D. Cal. Nov. 4, 2013), D.E. 592 (sealed); *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 5.

4970. Nov. 1, 2013, *Ibrahim* Opinion, *supra* note 4829; see *id.* at 5 ("this order contains certain sensitive (though non-classified) information").

4971. *Ibrahim* Findings of Fact and Conclusions of Law, *supra* note 4804, at 7 ("at least ten times, the Court reluctantly asked the press and the public to leave the courtroom"); Dec. 6, 2013, *Ibrahim* Transcript, *supra* note 4831, at 770–93, 800–53; Dec. 5, 2013, Transcript, *supra* note 4831, at 571–83, 595–622, 703–05; Dec. 4, 2013, *Ibrahim* Transcript, *supra* note 4831, at 295–383, 469–94; Dec. 3, 2013, *Ibrahim* Transcript, *supra* note 4831, at 251–62; Dec. 2, 2013, *Ibrahim* Transcript, *supra* note 4831, at 108–10; see *Sinnar*, *supra* note 4859, at 1041.

ings of the courtroom.⁴⁹⁷² Judge Alsup tried to schedule the presentation of SSI evidence so as to minimize the public's coming and going.⁴⁹⁷³

In 2019, the court of appeals noted the government's "interference with the public's right of access to trial by making at least ten motions to close the courtroom" as relevant to an analysis of bad faith.⁴⁹⁷⁴

Challenge: Subpoenaing Senior Government Officials

On May 13 and 14, 2013, respectively, James Clapper, the Director of National Intelligence, and Attorney General Eric Holder signed declarations supporting the government's invocation of the state-secrets privilege.⁴⁹⁷⁵ On May 15, Ibrahim sought their depositions.⁴⁹⁷⁶ By letter two days later, the government informed Judge Alsup that it would seek to quash the deposition notices.⁴⁹⁷⁷ In the interest of time, Judge Alsup regarded the government's letter as a motion to quash,⁴⁹⁷⁸ which he granted⁴⁹⁷⁹ after Ibrahim responded.⁴⁹⁸⁰

The Attorney General and the Director of National Intelligence are very occupied with protecting national security and the proper administration of justice. The nation has a strong interest in shielding them from the burdens of sitting for deposition discovery. Invocation of the state secrets privilege should not result in high-ranking officials being required to sit for deposition absent extraordinary circumstances.⁴⁹⁸¹

4972. Interview with Judge William Alsup, Aug. 21, 2014; *see Ibrahim*, 912 F.3d at 1184.

4973. Interview with Judge William Alsup, Aug. 21, 2014.

4974. *Ibrahim*, 912 F.3d at 1184.

4975. *Ibrahim* Attorney General Declaration, *supra* note 4948; *Ibrahim* Director of National Intelligence Declaration, *supra* note 4948.

4976. Government Letter Exs., *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-545 (N.D. Cal. May 17, 2013), D.E. 477.

4977. Government Letter, *id.*

4978. Order, *id.* (May 20, 2013), D.E. 478.

4979. Quash Opinion, *id.* (May 23, 2013), D.E. 481 [hereinafter *Ibrahim* Quash Opinion].

4980. Plaintiff Letter Brief, *id.* (May 21, 2013), D.E. 480 (redacted).

4981. *Ibrahim* Quash Opinion, *supra* note 4979, at 2.

Chapter 34

Surveillance Software⁴⁹⁸²

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

Civil litigation between business partners became a national security case, because the business included classified government contracts.

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Challenge: Classified Evidence 744

Warren Trepp and Dennis Montgomery founded eTreppid in 1998 in Reno, Nevada, to develop facial-recognition surveillance software for casinos.⁴⁹⁸³ The U.S. government entered into multimillion-dollar contracts with eTreppid to develop terrorist surveillance software.⁴⁹⁸⁴

Montgomery was eTreppid's chief software developer until he separated in January 2006.⁴⁹⁸⁵ On January 19, eTreppid sued Montgomery in Nevada's state court for Washoe County, claiming that Montgomery had wrongfully removed source code when he separated.⁴⁹⁸⁶ Montgomery re-

4982. Margaret S. Williams collaborated on the research for this case study.

4983. See Martha Bellisle, *Company's Pattern Recognition Technology Could Be Useful to Military, Casino Industry*, Reno Gazette-J., Apr. 29, 2007, at A1; David Kihara, *True Believers*, L.V. Rev.-J., June 7, 2009, at 1A; Ryan Randazzo, *Gibbons' Ties to Tech Firm Scrutinized*, Reno Gazette-J., Nov. 2, 2006, at 1A.

4984. See Sheigh Crabtree, *Small eTreppid Eyes Big Time with DCI Invite*, Hollywood Reporter, Apr. 20, 2004, at 8; Jeff German & J. Patrick Coolican, *Trepp May Have Had More Contracts*, L.V. Sun, Mar. 7, 2007, at A1; Kihara, *supra* note 4983; Randazzo, *supra* note 4983.

4985. See Kihara, *supra* note 4983.

4986. Complaint, eTreppid Techs., Inc. v. Montgomery, No. CV06-114 (Nev. 2d Dist. Ct. Washoe Cty. Jan. 19, 2006), *attached to* Notice of Removal, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 25, 2006), D.E. 3 [hereinafter First Notice of Removal]; Opinion at 2, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 31, 2009), D.E. 985 [hereinafter Cooke Sanction Opinion], 2009 WL 910739; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 202 (2010).

moved the action to federal court in Reno on January 25.⁴⁹⁸⁷ Judge Howard D. McKibben remanded the action on January 31.⁴⁹⁸⁸ On that day, Montgomery filed his own federal action against Trepp and eTreppid, also in the nature of unfair competition, and including a claim of copyright infringement.⁴⁹⁸⁹ An amended complaint on February 21 added the Department of Defense as a defendant.⁴⁹⁹⁰ The court assigned this case to Judge Brian E. Sandoval.⁴⁹⁹¹ (On May 24, 2007, the court dismissed copyright claims against the Defense Department, because they could only be brought in the Court of Federal Claims.⁴⁹⁹²)

Trepp reported to the FBI that Montgomery had stolen trade secrets and was unlawfully retaining national defense information,⁴⁹⁹³ so from February 28 through March 3, 2006, the FBI sought and obtained from Magistrate Judge Valerie P. Cooke search warrants for Montgomery's home and five storage units.⁴⁹⁹⁴ On March 10, Montgomery sued for the return of his property and for other relief.⁴⁹⁹⁵ The government responded that before return of Montgomery's property could be contemplated it

4987. First Notice of Removal, *supra* note 4986; Opinion at 2, *Montgomery*, No. 3:06-cv-56 (D. Nev. Apr. 5, 2010), D.E. 1150 [hereinafter Pro Sanction Opinion], 2010 WL 1416771.

4988. Judgment, *eTreppid Techs., Inc.*, No. 3:06-cv-41 (D. Nev. Jan. 31, 2006), D.E. 13; Minutes, *id.* (Jan. 31, 2006), D.E. 12.

4989. Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Jan. 31, 2006), D.E. 1; Pro Sanction Opinion, *supra* note 4987, at 2–3; Cooke Sanction Opinion, *supra* note 4986, at 4.

4990. Amended Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Feb. 21, 2006), D.E. 7.

4991. Docket Sheet, *id.* (Jan. 31, 2006) [hereinafter *Montgomery v. eTreppid Techs., Inc.* Docket Sheet].

4992. Order, *id.* (May 24, 2007), D.E. 177, 2007 WL 1560338.

4993. Order at 2, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Nov. 28, 2006), D.E. 88 [hereinafter Return of Property Order]; Search Warrant Application, *id.* (Feb. 28, 2006), D.E. 1.

4994. Docket Sheet, *id.* (May 10, 2006) [hereinafter *Search Warrant* Docket Sheet]; Pro Sanction Opinion, *supra* note 4987, at 3; Cooke Sanction Opinion, *supra* note 4986, at 4; *see* Kihara, *supra* note 4983.

Tim Reagan interviewed Judge Cooke for this case study in her chambers on September 25, 2012. Judge Cooke retired on July 31, 2018. Judicial Milestones, www.uscourts.gov/judicial-milestones/valerie-p-cooke; *see* David Ferrara, *3 US Magistrate Judges in Las Vegas to Retire in 2019*, *Las Vegas Rev.-J.*, Sept. 13, 2018.

4995. Motion, *Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 10, 2006), D.E. 21; Pro Sanction Opinion, *supra* note 4987, at 3; Cooke Sanction Opinion, *supra* note 4986, at 5.

must first be reviewed to make sure classified information was not improperly returned.⁴⁹⁹⁶

On March 20, the government removed again the Washoe County District Court action by eTreppid against Montgomery, because the Department of Defense was named as a defendant in a counterclaim by Montgomery.⁴⁹⁹⁷

Judge Sandoval recused himself from the litigation on November 2; the court reassigned the case to Judge Larry R. Hicks.⁴⁹⁹⁸

After evidentiary hearings held on June 29, July 31, and August 17, Judge Cooke determined on November 28 that she had been misled about pertinent facts by the FBI in the government's application for search warrants against Montgomery.⁴⁹⁹⁹ The search warrants were not, in fact, based on probable cause, and the searches obtained no classified information.⁵⁰⁰⁰ So she ordered the property returned and the search warrant affidavits unsealed.⁵⁰⁰¹

4996. Government Response, *Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 27, 2006), D.E. 23; see Government Motion, *id.* (May 8, 2006), D.E. 34 (expressing concern that the litigation may have released confidential classified information, which is the level of classification below secret).

4997. Notice of Removal, *eTreppid Techs., LLC v. Montgomery*, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006), D.E. 1; Pro Sanction Opinion, *supra* note 4987, at 3; Cooke Sanction Opinion, *supra* note 4986, at 2–3; see Third Amended Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Dec. 17, 2007), D.E. 370; Second Amended Complaint, *id.* (June 11, 2007), D.E. 186.

4998. *Search Warrant* Docket Sheet, *supra* note 4994 (D.E. 121); Docket Sheet, *eTreppid Techs., LLC*, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006) (D.E. 61); *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4991; see J. Patrick Coolican, *Lawsuits Promise Headaches for Gibbons*, L.V. Sun, Nov. 18, 2006, at A1 (“The case was further complicated earlier this month when U.S. District Judge Brian Sandoval, formerly a prominent Nevada Republican and the state’s attorney general, recused himself the day after Montgomery gave Sandoval a secret, detailed declaration about the case.”).

Judge Sandoval resigned on September 15, 2009, Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges, and was elected governor of Nevada on November 2, 2010, see Benjamin Spillman, *Sandoval’s Victory a First*, L.V. Rev.-J., Nov. 3, 2010, at 1B.

4999. Return of Property Order, *supra* note 4993, at 1, 13, 17–32.

5000. *Id.* at 13, 17–32.

5001. *Id.* at 1, 32, *aff’d*, Opinion, *Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 19, 2007), D.E. 122 [hereinafter Return of Property Affirmance].

Montgomery filed a qui tam false-claims action against Trepp on December 14.⁵⁰⁰² The complaint alleged a plot by Trepp to take control of Montgomery's surveillance software that was part and parcel of efforts to defraud the government.⁵⁰⁰³ As provided by the False Claims Act, the whistleblower complaint was sealed until the government decided whether or not to take the lead in pursuing the civil case.⁵⁰⁰⁴

On February 21, 2007, Judge Hicks recused himself from the litigation,⁵⁰⁰⁵ and the cases were reassigned to Chief Judge Philip M. Pro in Las Vegas, who had substantial experience handling national security information in both criminal and civil cases.⁵⁰⁰⁶

Montgomery's principal attorney was Michael Flynn, a California attorney licensed to practice in Massachusetts and appearing in the Nevada litigation pro hac vice.⁵⁰⁰⁷ As a result of a fee dispute, the attorney sought permission to withdraw on July 9, 2007.⁵⁰⁰⁸ On August 21, he sought a fee order from the Nevada federal court.⁵⁰⁰⁹ His supporting brief alleged that fees owed were improperly caught up in divorce proceedings involving Montgomery's new business partner Edra Blixseth and suggested that the

5002. Complaint, United States *ex rel.* Montgomery v. Trepp, No. 3:06-cv-691 (D. Nev. Dec. 14, 2006), D.E. 2.

5003. *Id.* at 2.

5004. See 31 U.S.C. § 3730(b) (2020).

5005. Minutes, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Feb. 23, 2007), D.E. 116; Minutes, *Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007), D.E. 111; see Jeff German & J. Patrick Coolican, *Claims of "Judicial Tampering" Emerge After Judge's Recusal*, L.V. Sun, Feb. 22, 2007, at A1.

5006. Minutes, *Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007), D.E. 112; *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4991 (D.E. 23); Interview with Judge Philip M. Pro, Sept. 26, 2012.

Tim Reagan interviewed Judge Pro for this case study in his chambers. Judge Pro retired on January 23, 2015. FJC Biographical Directory, *supra* note 4998.

5007. Pro Sanction Opinion, *supra* note 4987, at 3; Cooke Sanction Opinion, *supra* note 4986, at 2–8; see Flynn Declaration, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007), D.E. 205.

5008. Withdrawal Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007), D.E. 204; Pro Sanction Opinion, *supra* note 4987, at 6; Cooke Sanction Opinion, *supra* note 4986, at 9; see Martha Bellisle, *2 Lawyers for Former eTreppid Employee Want to Quit*, Reno Gazette-J., July 11, 2007, at A3; Donohue, *supra* note 4986, at 203; David Kihara & Molly Ball, *Attorneys Seek to Withdraw*, L.V. Rev.-J., July 10, 2007, at 1B.

5009. Attorney Fee Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 21, 2007), D.E. 248; Pro Sanction Opinion, *supra* note 4987, at 9; Cooke Sanction Opinion, *supra* note 4986, at 13.

software at issue in the litigation was ineffective.⁵⁰¹⁰ Judge Pro granted Flynn's motion to withdraw on September 4.⁵⁰¹¹ Flynn's demand for fees and Montgomery's new attorneys' demand for Flynn's files remained unresolved.⁵⁰¹²

Discovery litigation continued until August 2008, at which time the parties filed a notice that they were amenable to settlement negotiations.⁵⁰¹³ On December 11, the parties filed confessed judgments of \$20 million in favor of eTreppid and \$5 million in favor of Trepp, secured by Blixseth.⁵⁰¹⁴

The settlement was not perfected. As a result of a real estate bubble's bursting, Blixseth declared bankruptcy in March 2009.⁵⁰¹⁵ In July, Montgomery was arrested in California on a Nevada indictment for writing bad checks in connection with gambling debts.⁵⁰¹⁶ Montgomery also launched

5010. Attorney Fee Motion, *supra* note 5009.

5011. Withdrawal Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 4, 2007), D.E. 256; Pro Sanction Opinion, *supra* note 4987, at 10; Cooke Sanction Opinion, *supra* note 4986, at 14.

5012. Withdrawal Order, *supra* note 5011; Cooke Sanction Opinion, *supra* note 4986, at 10; Docket Sheet, *Montgomery v. Flynn*, No. 2:07-cv-5078 (C.D. Cal. Aug. 6, 2007) (action for return of files removed from California's state court and then remanded back to the state court for lack of federal jurisdiction).

5013. Joint Proposal, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2008), D.E. 830; Transcript at 7, *id.* (Nov. 19, 2008, filed Jan. 6, 2009), D.E. 928; *see* Proposed Stipulation, *id.* (Sept. 26, 2008), D.E. 866; *see also Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 4991 (listing docket entries 257 to 829 between Judge Pro's granting Flynn's withdrawal and the parties' notice of settlement amenability).

5014. Confessions of Judgment, *Montgomery*, No. 3:06-cv-56 (D. Nev. Dec. 11, 2008), D.E. 897, 898; Pro Sanction Opinion, *supra* note 4987, at 16; *Montgomery v. Risen*, 875 F.3d 709, 712 (D.C. Cir. 2017).

5015. Docket Sheet, *In re Blixseth*, No. 2:09-bk-60452 (Bankr. D. Mont. Mar. 26, 2009) [hereinafter *Blixseth* Docket Sheet]; *In re Blixseth*, 684 F.3d 865 (9th Cir. 2012); *In re Blixseth*, 459 B.R. 444 (Bankr. D. Mont. 2011); *see* Amy Wallace, *Checkmate at the Yellowstone Club*, N.Y. Times, June 14, 2009, at 1.

Blixseth's bankruptcy was discharged on February 8, 2011. Discharge, *Blixseth*, No. 2:09-bk-60452 (Bankr. D. Mont. Feb. 8, 2011), D.E. 876. The trustee issued his final report on December 17, 2021, *id.* (Dec. 17, 2021), D.E. 1497, and his final account on March 14, 2022, *id.* (Mar. 14, 2022), D.E. 1503. The final decree was issued on April 25. *Blixseth* Docket Sheet, *supra*.

5016. *See* David Kihara, *Gibbons Accuser Arrested in California*, L.V. Rev.-J., July 23, 2009, at 1B; Francis McCabe, *Man Who Triggered Gibbons Probe Faces Bad Check Charges*, L.V. Rev.-J., Nov. 13, 2010, at 2B.

bankruptcy proceedings.⁵⁰¹⁷ In December, *Playboy* reported that Montgomery's false representations of his software's ability to detect secret codes in Al-Jazeera broadcasts resulted in the unnecessary cancelation of international flights and elevation of the nation's security level to orange in December 2003.⁵⁰¹⁸

On March 31, 2009, Judge Cooke sanctioned Montgomery and his new attorneys \$204,411 for their vexatious litigation strategy in their fee-and-file dispute with Flynn: half of the sanction was assessed against Montgomery and half was assessed against his new attorneys, but they were held jointly and severally liable.⁵⁰¹⁹ Judge Pro affirmed the sanction against Montgomery,⁵⁰²⁰ but Judge Pro determined that the sanctions against the lawyers were flawed.⁵⁰²¹ The individual attorneys did not receive sufficient notice, and their law firm could not be sanctioned under section 1927, which applies only to individual lawyers.⁵⁰²² An appeal was resolved by confidential settlement.⁵⁰²³

On July 15, 2016, Judge Rudolph Contreras, in the district court for the District of Columbia, granted summary judgment to the author and publisher of James Risen's 2014 *Pay Any Price: Greed, Power, and Endless War*, which suggested that Montgomery was a con artist, in a defamation action originally filed by Montgomery in the Southern District of Florida.⁵⁰²⁴ On November 17, 2017, the court of appeals agreed that "Risen was entitled to summary judgment because Montgomery failed to marshal evidence from

5017. Docket Sheet, *In re Montgomery*, No. 2:10-bk-18510 (Bankr. C.D. Cal. June 26, 2009); Discharge Report, *id.* (Aug. 1, 2014, D.E. 248); Docket Sheet, *In re Montgomery*, No. 6:09-bk-24322 (Bankr. C.D. Cal. June 26, 2009) (noting a March 8, 2010, transfer from the Riverside Division to the Los Angeles Division).

5018. See Eric Lichtblau & James Risen, *Hiding Details of Dubious Deal, U.S. Invokes National Security*, N.Y. Times, Feb. 20, 2011, at A1; *The Man Who Conned the Pentagon*, All Things Considered (NPR radio broadcast Dec. 19, 2009), www.npr.org/templates/story/story.php?storyId=121667905; Steve Tetreault, *Report: Nevadan's Bogus Data Sparked Terror Alert*, L.V. Rev.-J., Dec. 24, 2009, at 1B.

5019. Cooke Sanction Opinion, *supra* note 4986, at 52.

5020. Pro Sanction Opinion, *supra* note 4987, at 24–32, 38.

5021. *Id.* at 21–24, 33–38.

5022. *Id.*; see 28 U.S.C. § 1927 (2020).

5023. Order, *Montgomery v. eTrepid Techs.*, No. 10-15960 (9th Cir. July 16, 2012), D.E. 51.

5024. *Montgomery v. Risen*, 197 F. Supp. 3d 219 (D.D.C. 2016); see Docket Sheet, *Montgomery v. Risen*, No. 1:16-cv-126 (D.D.C. Jan. 27, 2016); Transfer Order, *Montgomery v. Risen*, No. 1:15-cv-20782 (S.D. Fla. Jan. 26, 2016), D.E. 247; Docket Sheet, *id.* (Feb. 24, 2015).

which a reasonable jury could conclude that Risen's reporting [on a matter of public concern] was untrue."⁵⁰²⁵

Challenge: Classified Evidence

What began as a dispute between business partners became a matter of national security for the court because the business included government contracts with one or more intelligence agencies. The parties initiating the litigation did not take sufficient precautions to prevent disclosures of classified information, but once the Justice Department's civil division became aware of the security risks posed by the litigation, civil division attorneys brought in the Justice Management Division's Litigation Security Group, which provides the courts with classified information security officers.⁵⁰²⁶

Judge Cooke was granted a security clearance.⁵⁰²⁷ District judges are automatically cleared to see classified information necessary for their work, but magistrate judges require the granting of a clearance.⁵⁰²⁸ The background checks performed when they become judges typically facilitate their clearances.⁵⁰²⁹ Members of Judge Cooke's staff, including a court reporter, also received security clearances.⁵⁰³⁰

Once classified information has been disclosed, it is difficult to undisclosed it. It is difficult to claw back secrets once they have been released, and efforts to do so might draw additional attention to the secrets.

When eTrepid's action against Montgomery was removed from state court to federal court in 2006, eTrepid sought in federal court a protec-

5025. *Montgomery v. Risen*, 875 F.3d 709, 712 (D.C. Cir. 2017); *id.* at 711 (Montgomery "produced virtually no evidence of the software's functionality").

5026. Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 7, 2012; see Transcript at 3, *Montgomery v. eTrepid Techs., Inc.*, No. 3:06-cv-56 (D. Nev. Sept. 10, 2007, filed Apr. 7, 2009), D.E. 1014 (hearing on a trade-secrets-discovery protective order); see also Martha Bellisle, *ETrepid Case Gets Special Treatment*, *Reno Gazette-J.*, Apr. 19, 2007, at A1 (reporting that the Justice Department's decision not to ask that the case be dismissed for national security reasons benefitted Trepp); see also Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

5027. Interview with Judge Valerie P. Cooke, Sept. 25, 2012.

5028. See Reagan, *supra* note 5026, at 2.

5029. See *id.* n.9.

5030. Interview with Judge Valerie P. Cooke, Sept. 25, 2012; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Nov. 7, 2012.

tive order to protect its trade secrets.⁵⁰³¹ The brief supporting this motion stated that the state-court action was sealed to protect both trade secrets and national security.⁵⁰³² When Montgomery filed his own action in federal court, eTreppid again sought sealing of court records to protect trade secrets.⁵⁰³³ Montgomery opposed the motion as overbroad.⁵⁰³⁴

Approximately eight months after Montgomery filed his civil action against eTreppid in federal court, the government sought a protective order preserving a situation in which the government neither confirmed nor denied any relationship between the parties and an intelligence agency.⁵⁰³⁵ Judge Pro issued such a protective order on August 29, 2007.⁵⁰³⁶

The case file created for the Montgomery search warrants remains sealed.⁵⁰³⁷ Judge Cooke was concerned that because the case included participants inexperienced in dealing with classified information, the case file might include classified material, and she conveyed her concern to Judge Pro.⁵⁰³⁸ When Judge Pro affirmed—on March 19, 2007—Judge Cooke’s order that property be returned to Montgomery, Judge Pro unsealed warrant records in the property-return case file.⁵⁰³⁹ Judge Pro gave the parties twenty-one days to show cause why any part of the case file should remain sealed.⁵⁰⁴⁰ On March 23, Judge Pro granted a motion by the Defense Department to perform a classification review of the case file and present redaction requests to Judge Pro in camera.⁵⁰⁴¹ He also ordered the parties to

5031. Protective Order Motion, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 27, 2006), D.E. 6.

5032. *Id.* at 2.

5033. Protective Order Motion, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 17, 2006), D.E. 33.

5034. Protective Order Opposition, *id.* (Apr. 5, 2006), D.E. 39.

5035. Protective Order Motion, eTreppid Techs., LLC v. Montgomery, No. 3:06-cv-145 (D. Nev. Sept. 25, 2006), D.E. 51; Protective Order Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 25, 2006), D.E. 83.

5036. Protective Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2007), D.E. 253; see Donohue, *supra* note 4986, at 101.

5037. Docket Sheet, Application and Affidavit for Search Warrant, No. 3:06-mj-23 (D. Nev. Feb. 28, 2006) (sealed).

5038. Interview with Judge Valerie P. Cooke, Sept. 25, 2012.

5039. Return of Property Affirmance, *supra* note 5001, at 16; see Martha Bellisle, *Judge Says FBI Raid in eTreppid Case Went Too Far*, Reno Gazette-J., Mar. 20, 2007, at A1; J. Patrick Coolican, *Why Did Feds Intervene in Civil Dispute?*, L.V. Sun, Mar. 21, 2007, at A1; David Kihara, *Judge Orders FBI to Return Property*, L.V. Rev.-J., Mar. 20, 2007, at 1B.

5040. Return of Property Affirmance, *supra* note 5001, at 16.

5041. Minutes, *Montgomery*, No. 3:06-cv-56 (D. Nev. Mar. 23, 2007), D.E. 143 [hereinafter Mar. 23, 2007, *Montgomery* Minutes]; Reconsideration Order, *id.* (Apr. 2, 2007),

cease reviewing the sealed records until this classification review was complete.⁵⁰⁴² On March 30, Judge Pro approved redactions and ordered that the unredacted documents be retained by the classified information security officer for subsequent review by the courts as needed.⁵⁰⁴³ The deadline for the parties to request additional redactions was extended until April 20.⁵⁰⁴⁴ In time, the deadline was extended to May 15.⁵⁰⁴⁵

Judge Pro admonished the parties not to put the court in the position of having to put the genie back in the bottle.⁵⁰⁴⁶

From the *in camera* review of the Search Warrant case file conducted by the Court on March 30, 2007, it has become apparent that the parties to the Search Warrant case, both Montgomery and the United States, have not guarded against the disclosure of classified information as carefully as they should. To the extent Montgomery or any other party to these proceedings possess classified information it is incumbent upon them strictly to avoid disclosure of such information in any filing with the Court be it an unsealed, sealed or *in camera* submission. This is not an onerous requirement. Any party to this litigation who thinks it is necessary to raise a classified matter with the Court can do so with a proper filing of a Motion to Permit the Disclosure of Classified Information to the Court. In doing so, however, the party making the motion must be careful not to disclose the classified content of the very information they seek to bring to the Court's attention unless and until the Court has given them specific permission to do so.

...

The United States of America is a party to each of these cases. Unfortunately, because many executive branch entities which comprise the United States are involved, as well as an equally diverse aggregation of government counsel, it is imperative that the various components of the United States which make up the parties involved in these related cases exert greater effort to communicate and cooperate amongst themselves prior to making filings with the Court which are later determined to have been improvident. To date, the United States has failed to do so. The result has been the inadvertent release of classified information which

D.E. 147; Transcript at 6, *id.* (Nov. 9, 2007, filed Apr. 7, 2009), D.E. 1015 ("Judge Pro gave the Department of Justice an opportunity . . . to go to Las Vegas, review all of the papers in Judge Pro's chambers personally, and redact them.").

5042. Mar. 23, 2007, *Montgomery* Minutes, *supra* note 5041, at 2.

5043. Reconsideration Order, *supra* note 5041, at 3–4; see Martha Bellisle, *Judge: Some eTreppid Case Data to Remain Classified*, Reno Gazette-J., Apr. 3, 2007, at A4.

5044. Reconsideration Order, *supra* note 5041, at 4.

5045. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. May 11, 2007), D.E. 165.

5046. Reconsideration Order, *supra* note 5041, at 6.

could have been avoided had the various representatives of the United States in these cases taken the care and the time necessary to communicate more effectively. . . . [T]he Court, as well as every other party to these related cases and the public is entitled to have the United States as a party speak with “one voice” at least insofar as it relates to representations as to what is or is not subject to a claim of the military and state secrets privilege.⁵⁰⁴⁷

On March 23, Judge Pro also ordered the parties to show cause why any other document in the related cases should remain sealed.⁵⁰⁴⁸

To the extent the basis for sealing a particular filing relates to the pendency of state secrets or trade secrets, counsel of the parties have only to identify the pertinent sealed filing at issue. Otherwise, the parties shall articulate the alternative basis which warrants continued sealing of the particular sealed filings they have made.⁵⁰⁴⁹

When Flynn withdrew as Montgomery’s attorney, Judge Pro agreed to include in his withdrawal order a reminder that both new and old attorneys were bound by obligations to protect state secrets.⁵⁰⁵⁰ Judge Pro declined to condition Flynn’s withdrawal on his surrender to the government of all documents containing state secrets.⁵⁰⁵¹

The court did not store any classified documents for this case; classified information security officers brought classified documents to the court as necessary.⁵⁰⁵²

5047. *Id.* at 5–6.

5048. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Mar. 23, 2007), D.E. 142.

5049. *Id.* at 2.

5050. Withdrawal Order, *supra* note 5011, at 4.

5051. *Id.*; Pro Sanction Opinion, *supra* note 4987, at 10.

5052. Interview with Judge Valerie P. Cooke, Sept. 25, 2012; Interview with Dep’t of Just. Litig. Sec. Grp. Staff, Nov. 7, 2012.

Chapter 35

Warrantless Wiretaps

Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and Related Actions (Vaughn R. Walker and Jeffrey S. White, N.D. Cal.) and *Al-Haramain Islamic Foundation v. Bush* (Garr M. King, D. Or.),⁵⁰⁵³ *ACLU v. NSA* (Anna Diggs Taylor, E.D. Mich.),⁵⁰⁵⁴ *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.); *Electronic Frontier Foundation v. Department of Justice* (Thomas F. Hogan, D.D.C.)

Civil challenges to secret government surveillance programs begun following September 11, 2001, terrorist attacks resulted in classified court rulings and required courts to review classified evidence and classified arguments. The programs were substantially protected from judicial scrutiny by congressional action, standing doctrines, and sovereign immunity.

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5053. Appeals were heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown; later, an appeal was heard by Ninth Circuit Judges McKeown, Ronald M. Gould, and Carlos T. Bea.

For this case study, Tim Reagan interviewed Judge McKeown and her law clerk Kathy Tran in the judge's home chambers on January 9, 2008; interviewed Judge Hawkins in his San Francisco chambers on September 30, 2008; and interviewed Judge Pregerson in his home chambers on October 1, 2008. Judge Pregerson died on November 25, 2017. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges; see Emily Langer, *Federal Judge Who Placed Conscience Before Law*, Wash. Post, Dec. 1, 2017, at B5; Sam Roberts, *Harry Pregerson, 94, a Judge Guided by Conscience*, N.Y. Times, Nov. 30, 2017, at B14.

5054. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

For this case study, Tim Reagan interviewed Judge Batchelder in her Cincinnati chambers on October 30, 2007; interviewed Judge Gilman in his home chambers on October 29, 2007; and interviewed Judge Gibbons in her home chambers on October 29, 2007, and by telephone on November 1, 2007.

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News Reports

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.⁵⁰⁵⁵

5055. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1; see *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 669 F.3d 933, 930–31 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 671 F.3d 881, 890–91 (9th Cir. 2011); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); Dismissal Order at 3, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Jan. 21, 2010), D.E. 57 [hereinafter *Jewel Dismissal Order*], 2010 WL 235075; Offices of Inspectors General, Redacted Classified Report on the President’s Surveillance Program 49–50, 54–55, 68 (July 10, 2009) [hereinafter Redacted PSP Report], oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf; Offices of Inspectors General, Unclassified Report on the President’s Surveillance Program 1, 36 (July 10, 2009) [hereinafter Unclassified PSP Report], www.oversight.gov/sites/default/files/oig-reports/s0907.pdf; see also Matthew M. Aid, *The Secret Sentry* 287 (2009); Luke Harding, *The Snowden Files* 90–94 (2014). See generally Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (2010) (providing a historical analysis of news media reports of government secrets).

“After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.” Risen & Lichtblau, *supra*. The newspaper posted the story to the internet the night before the story appeared in the paper to avoid the possibility of the government’s enjoining publication. Eric Lichtblau, *Bush’s Law* 210–11 (2008). In 2013, the *Times*’s public editor reported that publication of the story was triggered by the imminent publication of the book, *The State of War*, by James Risen, one of the article’s authors. Margaret Sullivan, *Lessons in a Surveillance Drama Redux*, N.Y. Times, Nov. 10, 2013, Sun. Rev., at 12; see Sarah Ellison, *The Man Who Kept the Secret*, Vanity Fair, Apr. 2015, at 106, 112; Michael V. Hayden, *Playing to the Edge* 99–109 (2016).

The story appeared eighteen months after the newspaper received a tip from Thomas M. Tamm, a Justice Department lawyer. See Michael Isikoff, *The Fed Who Blew the Whistle*, Newsweek, Dec. 22, 2008, at 40, 42; see also Hayden, *supra*, at 93. In the summer of 2007, FBI agents executed a classified search warrant in a raid of Tamm’s home as part of an investigation into the leak. See Michael Isikoff, *Looking for a Leaker*, Newsweek, Aug. 13, 2007, at 8. Nearly four years later, the government dropped its case against Tamm. See Dana Priest & William M. Arkin, *Top Secret America* xxi (2011); Charlie Savage, *No Prosecution Seen for Official in N.S.A. Leak Case*, N.Y. Times, Apr. 27, 2011, at A17; Thomas A. Drake, a retired NSA employee, “was cleared of any wrongdoing, but the investigation derailed his career and changed his life.” Ethan Bronner, Charlie Savage & Scott Shane, *Leak Inquiries Show How Wide a Net U.S. Cast*, N.Y. Times, May 26, 2013, at A1. He lost his security clearance and therefore had to close his security business. See *id.* No one was ever prosecuted for the warrantless wiretaps leak. See Charlie Savage, *Power*

President Bush acknowledged the existence of the program on the following day.⁵⁰⁵⁶ On May 11, 2006, another newspaper 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*.”⁵⁰⁵⁷ According to the *USA Today* report, the telephone com-

Wars 408 (2015). The District of Columbia bar, however, censured Tamm. See Charlie Savage, *Deal Allows Whistle-Blower on N.S.A. Wiretaps to Keep Law License*, N.Y. Times, July 13, 2016, at A12 (describing censure for revealing confidential client information); Charlie Savage, *Lawyer Facing Sanctions in Leak of N.S.A. Program*, N.Y. Times, Jan. 28, 2016, at A19 (describing an investigation of both failure to properly report wrongdoing and telling a reporter secrets protected by the attorney–client privilege).

Part of the Department of Defense, the NSA was established in 1952 to conduct communication surveillance. See Priest & Arkin, *supra*, at 5 n.1. According to the 9/11 Commission, “The law requires the NSA to not deliberately collect data on U.S. citizens or on persons in the United States without a warrant based on foreign intelligence requirements.” The 9/11 Commission Report 87 (2004).

5056. President’s Radio Address, Dec. 17, 2005, Comp. Pres. Docs., 41 WCPD 1880.

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

Id.; see *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (it is undisputed that “the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties”); Unclassified PSP Report, *supra* note 5055, at 5–6 (“beginning in December 2005 the President and other Administration officials acknowledged that these activities included the interception without a court order of certain international communications”).

For a discussion of the *New York Times*’s and the government’s disclosures, see *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1192–94, 1198–200 (9th Cir. 2007); *ACLU*, 493 F.3d at 648 & n.1; *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218, 1221–22 (D. Or. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986–87 (N.D. Cal. 2006).

5057. Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, *USA Today*, May 11, 2006, at 1A; see Redacted PSP Report, *supra* note 5055, at 55.

panies were providing the government with records of who was calling whom, not information about the contents of the calls.⁵⁰⁵⁸ Dozens of lawsuits followed these revelations.⁵⁰⁵⁹ The Judicial Panel on Multidistrict Litigation (JPML) centralized most of the cases in the U.S. District Court for the Northern District of California before Judge Vaughn R. Walker.⁵⁰⁶⁰

BellSouth and Verizon denied participation in this program, but MCI, which Verizon acquired, may have participated. See Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006, at 2A; see also *Al-Haramain Islamic Found.*, 507 F.3d at 1193 n.1; *Hepting*, 439 F. Supp. 2d at 988–89.

5058. Cauley, *supra* note 5057; see *Hepting*, 439 F. Supp. 2d at 988; see also Laura K. Donohue, *FISA Reform*, 10 I/S: A J. of L. & Pol’y 599, 604 (2014) (describing the subject of USA Today reporting as “domestic telephony metadata”); Scott Shane & David Johnston, *Mining of Data Prompted Fight Over U.S. Spying*, N.Y. Times, July 29, 2007, at A1 (reporting that the government acknowledged warrantless wiretaps but did not acknowledge data mining in calling records, although the latter was widely reported).

In 2013, *The New Yorker* reported, “Over the weekend of October 6, 2001, the three major telephone companies—A.T. & T., Verizon, and BellSouth, which for decades have had classified relationships with the N.S.A.—began providing wiretap recordings of N.S.A. targets. The content of e-mails followed shortly afterward.” Ryan Lizza, *State of Deception*, New Yorker, Dec. 16, 2013, at 48, 52.

5059. NSA, 671 F.3d at 890; NSA, 633 F. Supp. 2d at 955; *Jewel Dismissal Order*, *supra* note 5055, at 3–4; see Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, San Jose Mercury News, Aug. 11, 2006, at A12; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 139–40 (2010); Jason McLure, *DOJ Losing Ground in Wiretap Fight*, Legal Times, Sept. 4, 2006, at 1. See generally Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stanford L. Rev. 1173, 1176, 1210–16 (2015).

5060. Conditional Transfer Order 6, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007), D.E. 137 (transferring one action against a telephone company); *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007) (transferring actions by the federal government against states); Transfer Order, NSA, No. 1791 (J.P.M.L. issued Dec. 15, 2006), D.E. 128 [hereinafter Dec. 15, 2006, J.P.M.L. Transfer Order] (transferring three actions against the government and one action against telephone companies); Conditional Transfer Order 5, *id.* (issued Nov. 3, 2006, final Nov. 21, 2006), D.E. 103 (transferring one action against a telephone company); Conditional Transfer Order 2, *id.* (issued Sept. 11, 2006, final Sept. 27, 2006), D.E. 63 (transferring one action against a telephone company); Conditional Transfer Order 1, *id.* (issued Aug. 31, 2006, final Sept. 18, 2006), D.E. 62 (transferring one action against the government and fifteen actions against telephone companies); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial August 9, 2006, transfer order transferring seventeen actions against telephone companies, one transfer of which was later vacated because the case already was dismissed); see Consolidation Order, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Aug. 31, 2006), D.E. 15 [hereinafter Aug. 31, 2006 N.D. Cal. Consolidation Order] (consolidating for pretrial purposes

Stellar Wind

President Bush launched a secret electronic surveillance program called Stellar Wind on October 4, 2001.⁵⁰⁶¹ The program had three components: (1) targeted content surveillance of international telephone calls and bulk metadata surveillance of domestic (2) telephone calls and (3) emails.⁵⁰⁶² The program arose from an invitation from Vice President Dick Cheney to the intelligence community to specify a wish list of surveillance authorities.⁵⁰⁶³

From January 2002 until just after publication of the *New York Times* report, the only judge on the Foreign Intelligence Surveillance Act (FISA) court read into the Stellar Wind program was the court's presiding judge: Judge Royce C. Lamberth until May 2002 and Judge Colleen Kollar-

all cases already before Judge Walker); Docket Sheet, *id.* (Aug. 14, 2006); *see also* NSA, 671 F.3d at 891; NSA, 633 F. Supp. 2d at 956; *Jewel* Dismissal Order, *supra* note 5055, at 5; Carey, *supra* note 5059; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. Chron., Aug. 11, 2006, at B1; McLure, *supra* note 5059. *See generally* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Cal. L. Rev. 991, 1009–10 (2018).

Tim Reagan interviewed Judge Walker for this case study in his chambers on February 15, 2007, September 29, 2008, and February 23, 2011. Judge Walker retired on February 28, 2011. FJC Biographical Directory, *supra* note 5053.

5061. Redacted PSP Report, *supra* note 5055, at 1 & n.1, 7, 16; *see* Laura K. Donohue, *The Future of Foreign Intelligence* 18 (2016) (reporting that the program was initially called “Starburst”); Savage, *supra* note 5055, at 46 (reporting that with Vice President Cheney’s encouragement, the Bush administration “wiretapped without warrants—not by asking Congress to amend the Foreign Intelligence Surveillance Act to permit such eavesdropping, but by relying on secret memos asserting that [the Foreign Intelligence Surveillance Act] could not bind a president’s hands in wartime.”); *id.* at 163–64, 183–84. *See generally* Hayden, *supra* note 5055, at 64–91.

In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization

Clapper v. Amnesty Int’l USA, 568 U.S. 398, 403 (2013) (quotation marks omitted).

5062. Redacted PSP Report, *supra* note 5055, at 1; *see* Savage, *supra* note 5055, at 164.

5063. Redacted PSP Report, *supra* note 5055, at 6–7; *see* Hayden, *supra* note 5055, at 66–68; *Frontline: United States of Secrets (Part One)* (PBS television broadcast May 13, 2014) [hereinafter *United States of Secrets (Part One)*], www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/; *see also* Savage, *supra* note 5055, at 182–87.

Kotelly thereafter.⁵⁰⁶⁴ The rest of the FISA court was read in in January 2006.⁵⁰⁶⁵

An Injunction

On January 19, 2006, Attorney General Alberto Gonzales provided to Congress “Legal Authorities Supporting the Activities of the National Security Agency Described by the President.”⁵⁰⁶⁶

The NSA activities are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. . . .

...
... Indeed, were FISA and Title III interpreted to impede the President’s ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt.⁵⁰⁶⁷

The government argued for dismissal of the civil cases, claiming that they could not be litigated without revealing state secrets.⁵⁰⁶⁸ This argu-

5064. Redacted PSP Report, *supra* note 5055, at 27; *see* Hayden, *supra* note 5055, at 81–82, 89–90.

5065. Redacted PSP Report, *supra* note 5055, at 27; *see* Hayden, *supra* note 5055, at 109.

5066. Legal Authorities, www.justice.gov/olc/opinion/legal-authorities-supporting-activities-national-security-agency-described-president, www.justice.gov/sites/default/files/opa/legacy/2006/02/02/whitepaperonnsalegalauthorities.pdf (white paper); *see* Redacted PSP Report, *supra* note 5055, at 49–50, 54.

5067. Legal Authorities, *supra* note 5066, at 1, 3.

5068. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 650 & nn.2–3 (6th Cir. 2007); Government Brief, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Apr. 20, 2007), D.E. 254; Government Brief, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006), D.E. 53; Government Brief, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. June 21, 2006), D.E. 59; Government Brief, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006), D.E. 34; Government Brief, *Ctr. for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006), D.E. 28; Government Brief, *Hepting v. AT&T Corp.*, No. 4:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 124; *see Jewel v. NSA*, 673 F.3d 902, 905, 913–14 (9th Cir. 2011); U.S. Statement of Interest, *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex., July 17, 2006), D.E. 38 (announcing an intent to seek dismissal on state-secrets grounds). *See generally* 1 David S. Kris & J. Douglas Wilson, *National Security*

ment was successful with respect to alleged transfers of communication records by the telephone companies to the government,⁵⁰⁶⁹ but less successful with respect to the warrantless monitoring of the contents of communications, because the government acknowledged that it did that.⁵⁰⁷⁰

Investigations and Prosecutions 545–79 (3d ed. 2019) (analyzing the legality of the surveillance).

5069. *ACLU v. NSA*, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing data-mining claims); *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing the complaint with leave to amend); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995–98 (N.D. Cal. 2006) (provisionally denying discovery on transfers of communication records); see *ACLU*, 493 F.3d at 650 n.2 (“The alleged data mining, which has not been publicly acknowledged, might fall within [the state-secrets rule of nonjusticiability].”); *id.* at 719 (Judge Ronald Lee Gilman, dissenting: “After a careful review of the record, I conclude that the district court’s analysis of this issue and of the preclusive effect of the state-secrets privilege is persuasive.”); see also Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps*, Wash. Post, Aug. 18, 2006, at A1; Adam Liptak, *Judge Rejects Customer Suit Over Records from AT&T*, N.Y. Times, July 26, 2006, at A13; McLure, *supra* note 5059; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6. See generally Savage, *supra* note 5055, at 196–97 (reporting that President Bush never declassified the bulk phone and email records surveillance programs even after the *USA Today* reports).

5070. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1197–201; *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1220–24 (D. Or. 2006); *ACLU*, 438 F. Supp. 2d at 759, 764–66; *Hepting*, 439 F. Supp. 2d at 980, 991–94; see Egelko, *supra* note 5060; 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 5059; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9; see also *Jewel*, 673 F.3d at 912 (“It is no secret that in the weeks after the attacks of September 11, 2001, President Bush authorized the NSA to engage in warrantless wiretapping.”).

The New York University School of Law’s Center on Law and Security described two types of “electronic surveillance,” which is a more formal term for wiretaps, and which implicitly acknowledges that not all electronic communications pass through wires: “We define ‘trawling surveillance’ as NSA interception of entire streams of communications, which are then subjected to computer analysis for particular names, internet addresses, and trigger words. ‘Targeted surveillance’ refers to intercepts focused on one person or phone number.” *The NSA Wiretapping Program*, 1 For the Record 7 (Jan. 2007), www.lawandsecurity.org/Portals/0/Documents/NSA_jan_07.pdf; see also Aid, *supra* note 5055, at 287–88 (“It would appear that there are between ten and twelve programs being run by NSA dealing directly in some fashion with the agency’s warrantless SIGINT efforts, including at least a half-dozen strictly compartmentalized SIGINT collection, processing, analytic, and reporting projects handling different operational aspects of the problem.”); *id.* at 188 (“The only one of these NSA programs that the Bush administration has public-

U.S. District Court for the Eastern District of Michigan Judge Anna Diggs Taylor declared the warrantless wiretap program unconstitutional and a violation of the Foreign Intelligence Surveillance Act (FISA).⁵⁰⁷¹ She issued a permanent injunction against the program,⁵⁰⁷² but a divided panel of the court of appeals reversed her injunction and ordered the challenge to the program dismissed.⁵⁰⁷³ Sixth Circuit Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,⁵⁰⁷⁴ but Judge Ronald Lee Gilman would have affirmed the injunction.⁵⁰⁷⁵ The Supreme Court denied certiorari.⁵⁰⁷⁶

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveilled, but the U.S. Court of Appeals for the Ninth Circuit held that the proffered

ly acknowledged is the warrantless eavesdropping program, which the White House labeled in 2005 as the Terrorist Surveillance Program (TSP). All other aspects of NSA's SIGINT collection work that touch on the domestic front have remained unacknowledged.").

5071. *ACLU*, 438 F. Supp. 2d at 775–76, 778–80, 782; *ACLU*, 493 F.3d at 650; see Eggen & Linzer, *supra* note 5069; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcheson & Margaret Talev, *Wiretap Program Is Ruled Illegal*, San Jose Mercury News, Aug. 18, 2006, at A1; Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. Times, Aug. 18, 2006, at A1; McLure, *supra* note 5059; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 149, 195 (2007).

Tim Reagan interviewed Judge Taylor for this case study in her chambers on December 7, 2006. Judge Taylor died on November 4, 2017. FJC Biographical Directory, *supra* note 5053.

5072. *ACLU*, 438 F. Supp. 2d at 782; Judgment and Permanent Injunction Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006), D.E. 71 [hereinafter E.D. Mich. *ACLU* Judgment and Permanent Injunction Order].

5073. *ACLU*, 493 F.3d at 648, 687–88; see *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (staying the injunction pending appeal); Dismissal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Nov. 28, 2007), D.E. 100; see also Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, Wash. Post, July 7, 2007, at A1; Adam Liptak, *Panel Dismissed Suit Challenging Secret Wiretaps*, N.Y. Times, July 7, 2007, at A1; Charlie Savage, *Court Gives Bush Win on Surveillance*, Bos. Globe, July 7, 2007, at 1A.

5074. *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 (Judge Gibbons, concurring in the judgment: "Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.").

5075. *Id.* at 693, 720 (Judge Gilman, dissenting).

5076. *ACLU v. NSA*, 552 U.S. 1179 (2008); see Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

evidence was too secret to afford them standing.⁵⁰⁷⁷ On remand, Judge Walker ruled that an amended complaint alleged sufficient public information to create inferences supporting the plaintiffs' claims,⁵⁰⁷⁸ and the plaintiffs were entitled to summary judgment because the government did not rebut those inferences.⁵⁰⁷⁹ The court of appeals subsequently determined that the government was entitled to sovereign immunity.⁵⁰⁸⁰

Judge Walker dismissed other consolidated suits against the government as generalized grievances insufficient to afford the plaintiffs standing,⁵⁰⁸¹ but the court of appeals determined that the plaintiffs did have standing.⁵⁰⁸²

The litigation included six civil suits challenging the government directly, and dozens more challenging 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

In one of the first two actions filed, the ACLU, other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's program of warrantless wiretaps on January 17, 2006, in federal court in Detroit.⁵⁰⁸³ The court assigned the case to Judge Taylor,⁵⁰⁸⁴ who

5077. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95, 1205 (9th Cir. 2007); *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 849 (9th Cir. 2012); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1110–15, (N.D. Cal. 2008); see Lichtblau, *supra* note 5070.

5078. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009).

5079. *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); see Order, *Al-Haramain Islamic Found. v. Bush*, No. 4:07-cv-109 (N.D. Cal. Dec. 21, 2010), D.E. 134 [hereinafter *Al-Haramain Remedies Order*], 2010 WL 11475732 (awarding damages and attorney fees).

5080. *Al-Haramain Islamic Found.*, 705 F.3d 845; see Human Rights Watch, *Illusion of Justice* 106 (2014).

5081. Order, *Ctr. for Constitutional Rights v. Obama*, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51 [hereinafter *Manhattan Action Dismissal Order*]; *Jewel Dismissal Order*, *supra* note 5055.

5082. *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011); see *Court Upholds Law That Protects Companies Aiding U.S. Surveillance*, N.Y. Times, Dec. 30, 2011, at B4 [hereinafter *Court Upholds Law*]; Carol J. Williams, *Court Revives Suit Against Wiretapping*, L.A. Times, Dec. 30, 2011, at 13.

5083. *ACLU v. NSA*, 493 F.3d 644, 648–50 (6th Cir. 2007); Complaint, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); see David Ashenfelter & Niraj Wari, *Suits Filed to Stop Domestic Spying*, Detroit Free Press, Jan. 18, 2006, at 1; Donohue, *supra* note

enjoined the program on August 17.⁵⁰⁸⁵ The government immediately appealed,⁵⁰⁸⁶ and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication records claims.⁵⁰⁸⁷ The divided court of appeals vacated the injunction and ordered the case dismissed on July 6, 2007.⁵⁰⁸⁸

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.⁵⁰⁸⁹ Judge Lynch

5059, at 164; Greenberg, *supra* note 5193, at 133; Eric Lichtblau, *Two Groups Planning to Sue Over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14; Romero & Temple-Raston, *supra* note 5071, at 71–72. See generally Jameel Jaffer, *Balancing Power in the U.S. Response to External Threats: NSA Surveillance and Guantánamo Detention*, 10 N.Y. City L. Rev. 361 (2007) (outlining the ACLU's legal analysis).

5084. 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 5083.

5085. *ACLU*, 493 F.3d at 650; *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006); E.D. Mich. *ACLU* Judgment and Permanent Injunction Order, *supra* note 5072; see Eggen & Linzer, *supra* note 5069; Gibson, *supra* note 5071; Hutcheson & Talev, *supra* note 5071; Liptak & Lichtblau, *supra* note 5071; McLure, *supra* note 5059; Romero & Temple-Raston, *supra* note 5071, 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.

5086. Docket Sheet, *ACLU v. NSA*, No. 06-2095 (6th Cir. Aug. 17, 2006) [hereinafter 6th Cir. *ACLU* Docket Sheet]; Defendants' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006), D.E. 72; see Gibson, *supra* note 5071; Hutcheson & Talev, *supra* note 5071; Liptak & Lichtblau, *supra* note 5071.

5087. *ACLU*, 493 F.3d at 648, 650; Docket Sheet, *ACLU v. NSA*, No. 06-2140 (6th Cir. Aug. 30, 2006); Plaintiffs' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006), D.E. 76.

In the appeal, eleven amicus curiae briefs were filed. Docket Sheets, *ACLU*, Nos. 06-2095 and 06-2140 (6th Cir. Aug. 17 and 30, 2006).

5088. *ACLU*, 493 F.3d at 648, 687–88; *id.* at 693–720 (Judge Gilman, dissenting); see Goldstein, *supra* note 5073; Liptak, *supra* note 5073; Savage, *supra* note 5073.

5089. Complaint, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *id.*; Manhattan Action Dismissal Order, *supra* note 5081, at 2; see Ashenfelter & Wari, *supra* note 5083; Lichtblau, *supra* note 5083.

Tim Reagan interviewed Judge Lynch for this case study by email on May 16, 2007. Judge Lynch was elevated to the U.S. Court of Appeals for the Second Circuit on September 18, 2009, FJC Biographical Directory, *supra* note 5053, and he authored the opinion—ultimately reversed—recognizing standing in a constitutional challenge to the 2008 FISA

heard arguments on the plaintiffs' motion for partial summary judgment⁵⁰⁹⁰ and the government's motion for dismissal on state-secrets grounds⁵⁰⁹¹ on September 5,⁵⁰⁹² but he did not rule before the case was transferred to Judge Walker.⁵⁰⁹³

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.⁵⁰⁹⁴

The Al-Haramain Islamic Foundation—a charity that the government accused of aiding terrorists—and two of its attorneys filed a federal suit in Portland, Oregon, on February 28, 2006, claiming not that the plaintiffs' communications *might* be tapped, but that their communications actually were tapped, according to inadvertently disclosed top-secret evidence.⁵⁰⁹⁵

amendments, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011), *rev'd*, 568 U.S. 398 (2013).

5090. Plaintiffs' Partial Summary-Judgment Brief, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

5091. Government's Brief, *id.* (May 27, 2006).

5092. Transcript, *id.* (Sept. 5, 2006, filed Nov. 2, 2006) [hereinafter Sept. 5, 2006, *Ctr. for Constitutional Rights* Transcript]; Order, *id.* (Aug. 8, 2006); see Adam Liptak, *Judge Hears Arguments on Federal Spying Program*, N.Y. Times, Sept. 6, 2006, at A14.

5093. Manhattan Action Dismissal Order, *supra* note 5081, at 5; Interview with Judge Gerard E. Lynch, May 16, 2007.

5094. Brief by Members of Congress, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. May 31, 2006); Brief by Members of Congress, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. May 10, 2006).

5095. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95 (9th Cir. 2007); *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182, 1185 (N.D. Cal. 2010); *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Complaint, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 1 [hereinafter *Al-Haramain* Complaint] (describing the document as “United States Treasury Office of Foreign Assets Control logs of . . . conversations”); see *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (“In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted.”); *Al-Haramain* Remedies Order, *supra* note 5079, at 2; see also Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, *Oregonian*, Apr. 15, 2006, at B1 [hereinafter *U.S. Attacks Lawsuit*]; Patrick Radden Keefe, *State Secrets*, *New Yorker*, Apr. 28, 2008, at 28, 28, 31; Lichtblau, *supra* note 5070; Liptak, *supra* note 5070; Liptak, *supra* note 5073; McLure, *supra* note 5059; Justin Scheck, *NSA's Wiretaps Face Scrutiny in S.F. Courtroom*, *S.F. Recorder*, Apr. 10, 2006, at 1.

“Al Haramain was established, with help from the Saudi royal family, in 1991.” Keefe, *supra*, at 29. “Al Haramain Oregon was incorporated in 1991.” *Id.* at 30; see also The 9/11 Commission Report 170 (2004) (describing the charity as a suitable source for Al-Qaeda

The secret evidence was improperly included in materials submitted to the foundation's attorneys in August 2004 in an action to freeze the foundation's assets because of its alleged support of terrorism.⁵⁰⁹⁶ The U.S. District Court for the District of Oregon assigned the case against the government to Judge Garr M. King,⁵⁰⁹⁷ who denied a motion by the

funds from sympathetic employees because of its "lax external oversight and ineffective internal controls").

"The document's value to plaintiffs is in its confirmation that plaintiffs were targets of the President's warrantless electronic surveillance program—which establishes their standing to prosecute this lawsuit." Plaintiffs' Reply Brief at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 22, 2006), D.E. 37 (italics omitted). The document apparently reported clandestinely monitored telephone calls between the charity's director in Saudi Arabia and its lawyers in Washington, D.C. *Al-Haramain* Complaint, *supra*, at 3–4; see Ashbel S. Green, *Lawsuits Challenge Feds' Stance on Secrets*, *Oregonian*, June 7, 2006, at A1 [hereinafter *Feds' Stance*]; Keefe, *supra*, at 28 (the four-page document "appears to have been a summary of intercepted telephone conversations between two of Al Haramain's American lawyers, in Washington, and one of the charity's officers, in Saudi Arabia"); *id.* at 30–31 ("The document was dated May 24, 2004; the conversations took place in March and April—just as the Treasury Department was investigating the charity."); Pamela A. MacLean, *Critical Juncture for Spying Cases*, *Nat'l L.J.*, July 16, 2007, at 5 (describing the document as "a 2004 phone log from the spy program").

5096. *Al-Haramain Islamic Found.*, 705 F.3d at 848; *Al-Haramain Islamic Found.*, 507 F.3d at 1193–95; *NSA*, 700 F. Supp. 2d at 1185; *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218–19; Defendants' Response to the *Oregonian's* Motion to Intervene and to Unseal Records at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006), D.E. 24; Acting Office of Foreign Assets Control Director's Declaration, attach. A, *id.*; see Donohue, *supra* note 5061, at 114 ("a log of the telephone calls between [lawyers] and their clients"); Keefe, *supra* note 5095, at 28; Lichtblau, *supra* note 5070; Liptak, *supra* note 5070; Liptak, *supra* note 5073; MacLean, *supra* note 5095 ("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 5095 ("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."). See generally Chapter 13: Ashland and Moscow, *supra* page 227.

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.

5097. Docket Sheet, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter D. Or. *Al-Haramain Islamic Found.* Docket Sheet]; see Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Cases*, *Oregonian*, Apr. 25, 2006, at A1.

government to dismiss the case on state-secrets grounds and certified an immediate appeal.⁵⁰⁹⁸ The court of appeals affirmed Judge King's ruling in an opinion authored by Circuit Judge M. Margaret McKeown and joined by Judges Harry Pregerson and Michael Daly Hawkins, but the court ruled that the plaintiffs could not rely on the secret evidence.⁵⁰⁹⁹

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.⁵¹⁰⁰ The state-secrets privilege did apply, however, to the evidence that the charity and its attorneys proffered to establish standing.⁵¹⁰¹ The court remanded the case for a determination of whether FISA afforded the plaintiffs a statutory mechanism for challenging the legality of the alleged surveillance that preempted the privilege.⁵¹⁰² Judge Walker, to whom the case was transferred, determined that FISA did preempt the state-secrets privilege, but the plaintiffs would still have to establish stand-

For this case study, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on February 14, 2007. Judge King died on February 5, 2019. FJC Biographical Directory, *supra* note 5053.

5098. *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 5070.

The court of appeals agreed to hear the appeal. Order, *Al-Haramain Islamic Found. v. Bush*, No. 06-80134 (9th Cir. Dec. 22, 2006), D.E. 1 (granting permission to appeal); *see* Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Dec. 22, 2006) [hereinafter 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet]; *see also* Donohue, *supra* note 5059, at 163–64; Sinnar, *supra* note 5060, at 1022.

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* (stay order, Apr. 4, 2007, D.E. 12).

5099. *Al-Haramain Islamic Found.*, 507 F.3d 1190; *see id.* at 1193 (describing the privilege as “an evidentiary privilege that protects national security and military information in appropriate circumstances”); *Al-Haramain Islamic Found.*, 705 F.3d at 849; *see* Keefe, *supra* note 5095, at 33; Lichtblau, *supra* note 5070.

5100. *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 5070.

5101. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; *see* Lichtblau, *supra* note 5070.

5102. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; *see* Lichtblau, *supra* note 5070.

ing without access to the secret evidence.⁵¹⁰³ Judge Walker ruled on January 5, 2009, that an amended complaint did that.⁵¹⁰⁴ He granted the plaintiffs summary judgment on March 31, 2010, because the plaintiffs submitted public evidence that they were surveilled and the government presented no evidence that it had a warrant for the surveillance.⁵¹⁰⁵

Judge Walker awarded the two Al-Haramain attorneys \$20,400 each in liquidated FISA damages, as requested by the plaintiffs, representing \$100 per day for the 204 days between the freezing of Al-Haramain's assets and a designation of Al-Haramain as a Specially Designated Global Terrorist.⁵¹⁰⁶ Judge Walker also awarded the attorneys \$2,537,399.45 in attorney fees and costs.⁵¹⁰⁷ He ruled against burdening the taxpayers with punitive damages,⁵¹⁰⁸ and he ruled that as a Specially Designated Global Terrorist Al-Haramain was ineligible for damages.⁵¹⁰⁹ The court of appeals determined that sovereign immunity precluded the awarding of damages, including the awards to the attorneys.⁵¹¹⁰

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn⁵¹¹¹ and Atlanta.⁵¹¹² The government moved on July 18, 2006, to dismiss the Atlanta case for lack of standing,⁵¹¹³ and the govern-

5103. *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008); see Eric Lichtblau, *Judge Rejects Bush's View on Wiretaps*, N.Y. Times, July 3, 2008, at A15.

5104. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009); see Carrie Johnson, *Handling of "State Secrets" at Issue*, Wash. Post, Mar. 25, 2009, at A1.

5105. *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); see Donohue, *supra* note 5059, at 162; Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Were Illegal*, N.Y. Times, Apr. 1, 2010, at A1.

5106. *Al-Haramain Remedies Order*, *supra* note 5079, at 2, 9, 11, 13–14, 46; *id.* at 12 ("Plaintiffs' estimate of the duration of unlawful surveillance appears conservative."); *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848, 850 (9th Cir. 2012); see 50 U.S.C. § 1810(a) (2020) (providing for "actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of [FISA] violation, whichever is greater"); see also Eric Lichtblau, *U.S. Ordered to Pay Group of Muslims*, N.Y. Times, Dec. 22, 2010, at A23.

5107. *Al-Haramain Remedies Order*, *supra* note 5079, at 3, 28–46; *Al-Haramain Islamic Found.*, 705 F.3d at 848, 850.

5108. *Al-Haramain Remedies Order*, *supra* note 5079, at 2; *Al-Haramain Islamic Found.*, 705 F.3d at 849.

5109. *Al-Haramain Remedies Order*, *supra* note 5079, at 2–3, 14–16, 29, 46.

5110. *Al-Haramain Islamic Found.*, 705 F.3d 845.

5111. Complaint, *Shubert v. Bush*, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006), D.E. 1; see *Jewel Dismissal Order*, *supra* note 5055, at 4.

5112. Complaint, *Guzzi v. Bush*, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006), D.E. 1.

5113. Government Motion, *id.* (July 18, 2006), D.E. 8.

ment moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.⁵¹¹⁴

The JPML centralized all of these cases with the cases before Judge Walker, except for the Detroit action by the ACLU, which already was on appeal.⁵¹¹⁵ Nearly two years later, an action was filed against the government by plaintiffs who filed the first action against a telephone company,⁵¹¹⁶ and Judge Walker accepted assignment of the case as related to the others before him.⁵¹¹⁷

Suits Against Telephone Companies

In 2006 and 2007, forty-five suits were filed against telephone companies for their assistance with the warrantless wiretaps. Five were voluntarily dismissed, one was a pro se prisoner suit dismissed by the court, and one was dismissed on state-secrets grounds with leave to amend the complaint. The latter case and thirty-eight other active cases were centralized in the Northern District of California before Judge Walker.

One suit filed against a telephone company predated the May 2006 *USA Today* article.⁵¹¹⁸ The Electronic Frontier Foundation filed a federal class-action complaint on behalf of telephone customers against AT&T on January 31, 2006, in San Francisco.⁵¹¹⁹ To support their case, the plaintiffs

5114. Government Motion, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 295.

5115. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 5060; Conditional Transfer Order 2, *supra* note 5060; Conditional Transfer Order 1, *supra* note 5060; *see* Docket Sheet, Ctr. for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) (action transferred from the Southern District of New York); Docket Sheet, Shubert v. Bush, No. 4:07-cv-693 (N.D. Cal. Feb. 2, 2007) (action transferred from the Eastern District of New York); Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 4:07-cv-109 (N.D. Cal. Jan. 9, 2007) (action transferred from the District of Oregon); Docket Sheet, Guzzi v. Bush, No. 4:06-cv-6225 (N.D. Cal. Oct. 3, 2006) (action transferred from the Northern District of Georgia).

5116. Complaint, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Sept. 18, 2008), D.E. 1.

5117. Order, *id.* (Oct. 28, 2008), D.E. 9.

5118. *See* Cauley, *supra* note 5057.

5119. Docket Sheet, *Hepting v. AT&T Corp.*, No. 4:06-cv-672 (N.D. Cal. Jan. 31, 2006), D.E. 8 [hereinafter N.D. Cal. *Hepting* Docket Sheet]; *see* Amended Complaint, *id.* (Feb. 22, 2006); *see also Jewel* Dismissal Order, *supra* note 5055, at 3–4; *Frontline: Spying on the Home Front* (PBS television broadcast May 15, 2007) [hereinafter *Spying on the Home Front*], www.pbs.org/wgbh/pages/frontline/homefront/; 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.

filed under seal evidence provided by a former AT&T employee.⁵¹²⁰ The court assigned the case to Judge Walker.⁵¹²¹

On May 30, another federal class action against AT&T was filed in San Francisco,⁵¹²² and the court assigned the case to Judge Walker as related to the first case against AT&T.⁵¹²³

On June 5 and 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.⁵¹²⁴

The lead plaintiff was motivated to sue by the experiences of his father, whose international correspondence was monitored for years because of correspondence with communist China arising from his picking up a shortwave Chinese broadcast at age thirteen. See *Key Figure in Wiretapping Suit Goes Public*, Morning Edition (NPR radio broadcast Mar. 6, 2008), www.npr.org/templates/story/story.php?storyId=87938069.

5120. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); see McLure, *supra* note 5059; Scheck, *supra* note 5095; see also *Meet the Whistleblower Who Exposed the Secret Room AT&T Used to Help the NSA Spy on the Internet*, Democracy Now! (webcast Aug. 18, 2015), www.democracynow.org/2015/8/18/meet_the_whistleblower_who_exposed_the. See generally Mark Klein, *Wiring Up the Big Brother Machine . . . and Fighting It* (2009).

Judge Walker denied motions by news media to unseal the declarations, Order, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Feb. 20, 2007), D.E. 171, but they and portions of their exhibits were later unsealed by stipulation, Order, *id.* (Oct. 1, 2007), D.E. 382; Stipulation, *id.* (Sept. 25, 2007), D.E. 376.

“*Los Angeles Times*[] editor Dean Bacquet killed a story in 2006 by his reporters about a secret collaboration between AT&T and the NSA, based on information given by whistle-blower Mark Klein.” Glenn Greenwald, *No Place to Hide* 233 (2014). In a 2014 television program, the NSA’s general counsel from 1998 to 2006, Robert Dietz, acknowledged that Klein, the AT&T employee, had witnessed evidence of a surveillance program. *Frontline: United States of Secrets (Part Two)* (PBS television broadcast May 20, 2014), www.pbs.org/wgbh/pages/frontline/united-states-of-secrets/.

5121. N.D. Cal. *Hepting* Docket Sheet, *supra* note 5119; see Scheck, *supra* note 5095.

5122. Complaint, *Roe v. AT&T Corp.*, No. 4:06-cv-3467 (N.D. Cal. May 30, 2006), D.E. 1.

5123. Related Case Order, *id.* (June 9, 2006), D.E. 4.

5124. Notice of Removal, *Campbell v. AT&T Commc’ns of Cal.*, No. 4:06-cv-3596 (N.D. Cal. June 6, 2006), D.E. 1 [hereinafter *Campbell* Notice of Removal]; Docket Sheet, *Riordan v. Verizon Commc’ns, Inc.*, No. 4:06-cv-3574 (N.D. Cal. June 5, 2006).

The government moved to intervene as a defendant in these cases in order to defeat remand motions, U.S. Motion to Intervene, *Campbell*, No. 4:06-cv-3596 (N.D. Cal. Aug. 4, 2006), D.E. 47; U.S. Motion to Intervene, *Riordan*, No. 4:06-cv-3574 (N.D. Cal. Aug. 4, 2006), D.E. 45, and Judge Walker denied the remand motions, *In re NSA Telecomm. Records Litig.*, 483 F. Supp. 2d 934 (N.D. Cal. 2007) (finding three grounds for federal jurisdiction: (1) the state-secrets privilege as an embedded federal issue, (2) the telephone companies’ allegedly acting on government instructions as satisfying the federal officer

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.”⁵¹²⁵ 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 was alleged to have acted at the direction of the federal government.⁵¹²⁶ This case was randomly assigned to Judge Walker,⁵¹²⁷ who reassigned it to himself as related to the first case against AT&T.⁵¹²⁸

The earlier removed action also was 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.⁵¹²⁹ The case was assigned to Judge Walker as related to the removed case against AT&T.⁵¹³⁰

On July 7, yet another class action was filed in San Francisco’s federal court—this one against MCI.⁵¹³¹ Judge Walker took assignment of this case as related to the first case filed against AT&T.⁵¹³²

In the first San Francisco case against AT&T, Judge Walker denied the government’s motion to dismiss the case on state-secrets grounds.⁵¹³³ He certified an appeal of his order,⁵¹³⁴ and the court of appeals granted peti-

removal statute, and (3) the futility of remands given that the state would permit the government to intervene as a defendant).

5125. Complaint at 1, *Campbell v. AT&T Commc’ns of Cal.*, No. 06-452626 (Cal. Sup. Ct. S.F. May 26, 2006), *attached as ex. A, Campbell Notice of Removal*, *supra* note 5124.

5126. *Campbell Notice of Removal*, *supra* note 5124.

5127. Docket Sheet, *Campbell*, No. 4:06-cv-3596 (N.D. Cal. June 6, 2006); *see* Administrative Motion at 1, *Riordan*, No. 4:06-cv-3574 (N.D. Cal. June 12, 2006), D.E. 3 [hereinafter *Riordan* Administrative Motion].

5128. Related Case Order, *Campbell*, No. 4:06-cv-3596 (N.D. Cal. June 20, 2006), D.E. 8.

5129. *See Riordan* Administrative Motion, *supra* note 5127.

5130. Related Case Order, *Riordan*, No. 4:06-cv-3574 (N.D. Cal. July 5, 2006), D.E. 19.

5131. Class-Action Complaint, *Spielfogel-Landis v. MCI, LLC*, No. 4:06-cv-4221 (N.D. Cal. July 7, 2006), D.E. 1.

5132. Related Case Order, *id.* (July 17, 2006), D.E. 4.

5133. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *see Jewel* Dismissal Order, *supra* note 5055, at 5; Markoff, *supra* note 5070; *see also* McLure, *supra* note 5059; Mohammed, *supra* note 5070; Sinnar, *supra* note 5060, at 1008.

5134. *Hepting*, 439 F. Supp. 2d at 1011; *see Jewel* Dismissal Order, *supra* note 5055, at 5; *see also* McLure, *supra* note 5059; Sinnar, *supra* note 5060, at 1022.

tions for interlocutory appeal by both the government and AT&T.⁵¹³⁵ The appeal was heard on August 15, 2007,⁵¹³⁶ but the court remanded the case to the district court on August 21, 2008, in light of July 10 amendments to FISA.⁵¹³⁷

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in twenty-six other districts.⁵¹³⁸ The JPML transferred those cases not voluntarily dismissed to Judge Walker.⁵¹³⁹

A Chicago attorney filed a class action against telephone companies on May 15, 2006.⁵¹⁴⁰ The U.S. District Court for the Northern District of Illi-

5135. Order, *United States v. AT&T Corp.*, Nos. 06-80109 and 06-80110 (9th Cir. Nov. 7, 2006), D.E. 7, 5, respectively, attached, *e.g.*, as attach. B, Joint Case Management Statement, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Nov. 7, 2006), D.E. 61; *see* Docket Sheets, *Hepting v. AT&T Corp.*, Nos. 06-17132 and 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 2006 9th Cir. *Hepting* Docket Sheets] (appeals by AT&T and the government, respectively).

Twelve amicus curiae briefs were filed. 2006 9th Cir. *Hepting* Docket Sheets, *supra*.

5136. 2006 9th Cir. *Hepting* Docket Sheets, *supra* note 5135; *see* Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. Times, Aug. 16, 2007, at A13; Karl Vick, *Judges Skeptical of State-Secrets Claim*, Wash. Post, Aug. 16, 2007, at A4.

5137. *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); *see Jewel* Dismissal Order, *supra* note 5055, at 7.

5138. *Jewel* Dismissal Order, *supra* note 5055, at 4.

5139. *Supra* note 5060; *see Carey*, *supra* note 5059; Egelko, *supra* note 5060.

Among the cases filed in the Northern District of California, only the first action against AT&T was part of the multidistrict centralization order. *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006). But the others were consolidated before Judge Walker. Aug. 31, 2006 N.D. Cal. Consolidation Order, *supra* note 5060; *see also* August 14, 2006, docket sheet notations in Docket Sheet, *Spielfogel-Landis v. MCI, LLC*, No. 4:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, *Campbell v. AT&T Commc'ns of Cal.*, No. 4:06-cv-3596 (N.D. Cal. June 6, 2006); Docket Sheet, *Riordan v. Verizon Commc'ns, Inc.*, No. 4:06-cv-3574 (N.D. Cal. June 5, 2006); and Docket Sheet, *Roe v. AT&T Corp.*, No. 4:06-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).

5140. Complaint, *Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006), D.E. 1 (class action on behalf of the attorney and others against AT&T); *see* Amended Complaint, *id.* (May 22, 2006), D.E. 10 (adding other telephone companies and the government as defendants); Second Amended Complaint, *Joll v. AT&T Corp.*, *id.* (July 7, 2006), D.E. 31 (removing the attorney as a plaintiff, which caused the case name to change, and removing the government as a defendant).

nois assigned the case to Judge Matthew F. Kennelly.⁵¹⁴¹ 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.⁵¹⁴² Judge Kennelly took assignment of this case as related to the first case.⁵¹⁴³ He dismissed the second case on state-secrets grounds, but he granted the plaintiffs leave to amend the complaint,⁵¹⁴⁴ which they did.⁵¹⁴⁵ A third class action against AT&T in Chicago's federal court was filed on May 24⁵¹⁴⁶ and assigned to Judge Kennelly as related to the first two.⁵¹⁴⁷ All of these cases were transferred to Judge Walker.⁵¹⁴⁸

Also transferred to Judge Walker were thirty-one cases⁵¹⁴⁹ originally filed in the following districts:

5141. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this case study in his chambers on May 24, 2007.

5142. Complaint, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006), D.E. 1; *see* Amended Complaint, *id.* (June 5, 2006), D.E. 14.

Studs Terkel died while his action was pending, on October 31, 2008, at age ninety-six. *See* Bart Barnes & Patricia Sullivan, *Celebrated Author Elevated Listening to an Art*, Wash. Post, Nov. 1, 2008, at A1; William Grimes, *Studs Terkel, Listener to Americans, Is Dead at 96*, N.Y. Times, Nov. 1, 2008, at B9.

5143. Executive Committee Order, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. June 2, 2006), D.E. 22.

5144. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 5069; McLure, *supra* note 5059; Robinson, *supra* note 5069.

Judge Kennelly, however, denied AT&T's motion to dismiss the case on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903–04, 920.

5145. Second Amended Class-Action Complaint, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006), D.E. 73.

5146. Complaint, *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006), D.E. 1.

5147. Executive Committee Order, *id.* (June 12, 2006), D.E. 14.

5148. The first two cases were part of the original multidistrict centralization. *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. 4:06-cv-5485 (N.D. Cal. Sept. 7, 2006); Docket Sheet, *Terkel v. AT&T Corp.*, No. 4:06-cv-5340 (N.D. Cal. Aug. 30, 2006).

The third case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 5060; *see* Docket Sheet, *Waxman v. AT&T Corp.*, No. 4:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

5149. In addition to the cases listed here, Verizon stated that it intended to remove one case filed against it in Nebraska's state court. Defendant's Administrative Motion, *Riordan v. Verizon Commc'ns, Inc.*, No. 4:06-cv-3574 (N.D. Cal. Aug. 14, 2006), D.E. 46 (expressing an intention to remove *Davis v. AT&T*, No. 1063569 (Neb. Dis. Ct. Douglas County)).

- the Eastern District of California (one case);⁵¹⁵⁰
- the Southern District of California (one case);⁵¹⁵¹
- the Southern District of Florida (two cases);⁵¹⁵²
- the Northern District of Georgia (one case);⁵¹⁵³
- the District of Hawaii (one case);⁵¹⁵⁴
- the Southern District of Indiana (two cases);⁵¹⁵⁵
- the Western District of Kentucky (one case);⁵¹⁵⁶
- the Eastern District of Louisiana (two cases);⁵¹⁵⁷

5150. Notice of Removal, *Conner v. AT&T*, No. 1:06-cv-632 (E.D. Cal. May 23, 2006), D.E. 2, *transferred*, No. 4:06-cv-5576 (N.D. Cal. Sept. 12, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332).

5151. Complaint, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 12, 2006), D.E. 1, *transferred*, No. 4:06-cv-5067 (N.D. Cal. Aug. 22, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332).

5152. Two cases were transferred from the Southern District of Florida:

1. Complaint, *Fortnash v. AT&T Corp.*, No. 0:06-cv-60828 (S.D. Fla. June 12, 2006), D.E. 1, *transferred*, No. 4:06-cv-6385 (N.D. Cal. Oct. 12, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060); see John Holland, *Hollywood Conservative Files Suit Over NSA Wiretaps*, S. Fla. Sun-Sentinel, June 28, 2006, at 1B.
2. Notice of Removal, *Jacobs v. AT&T Corp.*, No. 0:07-cv-60365 (S.D. Fla. Mar. 14, 2007), D.E. 1, *transferred*, No. 4:07-cv-2538 (N.D. Cal. May 14, 2007) (transferred as a tag-along case, Conditional Transfer Order 6, *supra* note 5060).

5153. Complaint, *Lebow v. BellSouth Corp.*, No. 1:06-cv-1289 (N.D. Ga. May 25, 2006), D.E. 1, *transferred*, No. 4:07-cv-464 (N.D. Cal. Jan. 24, 2007) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5154. Class-Action Complaint, *Crockett v. Verizon Wireless LLC*, No. 1:06-cv-345 (D. Haw. June 26, 2006), D.E. 1, *transferred*, No. 4:06-cv-6254 (N.D. Cal. Oct. 4, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5155. Two cases were transferred from the Southern District of Indiana (transferred as tag-along cases, Conditional Transfer Order 1, *supra* note 5060):

1. Complaint, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-847 (S.D. Ind. May 25, 2006), D.E. 1, *transferred*, No. 4:06-cv-6222 (N.D. Cal. Oct. 3, 2006).
2. Notice of Removal, *Cross v. AT&T Commc'ns, Inc.*, No. 1:06-cv-932 (S.D. Ind. June 14, 2006), D.E. 1, *transferred*, No. 4:06-cv-6224 (N.D. Cal. Oct. 3, 2006).

5156. Complaint, *Suchanek v. Sprint Nextel Corp.*, No. 1:06-cv-71 (W.D. Ky. May 18, 2006), D.E. 1, *transferred*, No. 4:06-cv-6295 (N.D. Cal. Oct. 6, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5157. Two cases were transferred from the Eastern District of Louisiana:

1. Complaint, *Herron v. Verizon Global Networks, Inc.*, No. 2:06-cv-2491 (E.D. La. May 12, 2006), D.E. 1, *transferred*, No. 4:06-cv-5343 (N.D. Cal. Aug. 30, 2006) (transferred as part of the original multidistrict centralization, *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006)).

- the District of Maryland (one case);⁵¹⁵⁸
- the Western District of Michigan (one case);⁵¹⁵⁹
- the District of Minnesota (one case);⁵¹⁶⁰
- the Eastern District of Missouri (one case);⁵¹⁶¹
- the District of Montana (two cases);⁵¹⁶²
- the District of New Jersey (one case);⁵¹⁶³
- the Eastern District of New York (one case);⁵¹⁶⁴
- the Southern District of New York (four cases);⁵¹⁶⁵

2. Complaint, Hardy v. AT&T Corp., No. 2:06-cv-2853 (E.D. La. May 30, 2006), D.E. 1, *transferred*, No. 4:06-cv-6924 (N.D. Cal. Nov. 7, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5158. Notice of Removal, Bready v. Verizon Md. Inc., No. 1:06-cv-2185 (D. Md. Aug. 23, 2006), D.E. 1, *transferred*, No. 4:06-cv-6313 (N.D. Cal. Oct. 10, 2006) (transferred as a tag-along case, Conditional Transfer Order 2, *supra* note 5060); *see* Order, *id.* (Oct. 4, 2006), D.E. 19 (administratively closing the action while the case was pending in the transferee court); Plaintiffs' Motion for Remand, *id.* (Sept. 6, 2006), D.E. 15.

5159. Amended Complaint, Dubois v. AT&T Corp., No. 5:06-cv-85 (W.D. Mich. June 12, 2006), D.E. 3, *transferred*, No. 4:06-cv-6387 (N.D. Cal. Oct. 12, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060); Complaint, *id.* (May 30, 2006), D.E. 1.

5160. Notice of Removal, Roche v. AT&T Corp., No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006), D.E. 1, *transferred*, No. 4:07-cv-1243 (N.D. Cal. Mar. 2, 2007) (transferred as a tag-along case, Conditional Transfer Order 5, *supra* note 5060).

5161. Notice of Removal, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 4:06-cv-1113 (E.D. Mo. July 20, 2006), *transferred*, No. 4:06-cv-7934 (N.D. Cal. Dec. 29, 2006) (transferred as a tag-along case, Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 5060); *see* Conditional Transfer Order 1, *supra* note 5060 (noting objection to the transfer by the plaintiff).

5162. Two cases were transferred from the District of Montana (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332):

1. Complaint, Fuller v. Verizon Commc'ns, Inc., No. 9:06-cv-77 (D. Mont. May 12, 2006), D.E. 1, *transferred*, No. 4:06-cv-5267 (N.D. Cal. Aug. 28, 2006).
2. Complaint, Dolberg v. AT&T Corp., No. 9:06-cv-78 (D. Mont. May 15, 2006), D.E. 1, *transferred*, No. 4:06-cv-5269 (N.D. Cal. Aug. 28, 2006).

5163. Amended Notice of Removal, Chulsky v. Cellco P'ship, No. 2:06-cv-2530 (D.N.J. June 16, 2006), D.E. 5, *transferred*, No. 4:06-cv-6570 (N.D. Cal. Oct. 20, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5164. Complaint, Marck v. Verizon Commc'ns, Inc., No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006), D.E. 1, *transferred*, No. 3:06-cv-5063 (N.D. Cal. Aug. 22, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332).

5165. Four cases were transferred from the Southern District of New York:

1. Amended Complaint, Mayer v. Verizon Commc'ns Inc., No. 1:06-cv-3650 (S.D.N.Y. June 23, 2006), D.E. 16, *transferred*, No. 4:07-cv-2029 (N.D. Cal.

- the District of Oregon (one case);⁵¹⁶⁶
- the Eastern District of Pennsylvania (one case);⁵¹⁶⁷
- the District of Rhode Island (three cases);⁵¹⁶⁸
- the Southern District of Texas (one case);⁵¹⁶⁹
- the Western District of Texas (one case);⁵¹⁷⁰ and
- the Western District of Washington (one case).⁵¹⁷¹

Apr. 10, 2007) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332); Complaint, *id.* (May 12, 2006), D.E. 1.

2. Complaint, Electron Tubes Inc. v. Verizon Commc'ns, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), D.E. 1, *transferred*, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

3. Complaint, Basinski v. Verizon Commc'ns Inc., No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006), D.E. 1, *transferred*, No. 4:06-cv-6434 (N.D. Cal. Oct. 16, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

4. Complaint, Payne v. Verizon Commc'ns, Inc., No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006), D.E. 1, *transferred*, No. 3:06-cv-6435 (N.D. Cal. Oct. 16, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5166. Amended Complaint, Hines v. Verizon Northwest, Inc., No. 3:06-cv-694 (D. Or. June 2, 2006), D.E. 8, *transferred*, No. 4:06-cv-5341 (N.D. Cal. Aug. 30, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332); Complaint, *id.* (May 12, 2006), D.E. 1.

5167. Complaint, Solomon v. Verizon Commc'ns, Inc., No. 2:06-cv-2193 (E.D. Pa. May 24, 2006), D.E. 1, *transferred*, No. 4:06-cv-6388 (N.D. Cal. Oct. 12, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5168. Three cases were transferred from the District of Rhode Island (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332):

1. Complaint, Bissitt v. Verizon Commc'ns, Inc., No. 1:06-cv-220 (D.R.I. May 15, 2006), D.E. 1, *transferred*, No. 4:06-cv-5066 (N.D. Cal. Aug. 22, 2006).

2. Complaint, Mahoney v. AT&T Commc'ns, Inc., No. 1:06-cv-223 (D.R.I. May 15, 2006), D.E. 1, *transferred*, No. 4:06-cv-5065 (N.D. Cal. Aug. 22, 2006).

3. Complaint, Mahoney v. Verizon Commc'ns, Inc., No. 1:06-cv-224 (D.R.I. May 15, 2006), D.E. 1, *transferred*, No. 4:06-cv-5064 (N.D. Cal. Aug. 22, 2006).

5169. Amended Complaint, Trevino v. AT&T Corp., No. 2:06-cv-209 (S.D. Tex. May 19, 2006), D.E. 3, *transferred*, No. 3:06-cv-5268 (N.D. Cal. Aug. 28, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332).

5170. Third Amended Complaint, Harrington v. AT&T, Inc., No. 1:06-cv-374 (W.D. Tex. Aug. 14, 2006), D.E. 50, *transferred*, No. 4:06-cv-5452 (N.D. Cal. Sept. 6, 2006) (transferred as part of the original multidistrict centralization, NSA, 444 F. Supp. 2d 1332); Second Amended Complaint, *id.* (June 12, 2006), D.E. 15; First Amended Complaint, *id.* (June 5, 2006), D.E. 4; Complaint, *id.* (May 18, 2006), D.E. 1.

Two of these actions subsequently were dismissed voluntarily.⁵¹⁷²

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.⁵¹⁷³

A few additional 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.⁵¹⁷⁴ Plaintiffs voluntarily dismissed actions filed in the district courts for the District of Columbia (three cases),⁵¹⁷⁵ the Eastern District of Missouri (one case),⁵¹⁷⁶ and the Middle District of Tennessee (one case).⁵¹⁷⁷

5171. Complaint, *Derosier v. Cingular Wireless LLC*, No. 2:06-cv-917 (W.D. Wash. June 28, 2006), D.E. 1, *transferred*, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006) (transferred as a tag-along case, Conditional Transfer Order 1, *supra* note 5060).

5172. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008), D.E. 22 (dismissing *Trevino*, No. 2:06-cv-209 (S.D. Tex. May 17 2006)); Voluntary Dismissal Order, *Electron Tubes Inc. v. Verizon Commc'ns*, No. 3:06-cv-6433 (N.D. Cal. Feb. 22, 2007), D.E. 3 (dismissing *Electron Tubes Inc. v. Verizon Commc'ns*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006)); *see Donohue*, *supra* note 5059, at 160.

5173. *See In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 956 (N.D. Cal. 2009). Plaintiffs filed consolidated master complaints against

1. defendants affiliated with Cingular, Master Consolidated Cingular Complaint, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Jan. 16, 2007), D.E. 121;
2. defendants affiliated with Comcast, Master Comcast Consolidated Complaint, *id.* (Jan. 16, 2007), D.E. 123;
3. defendants affiliated with Sprint, Master Consolidated Sprint Complaint, *id.* (Jan. 16, 2007), D.E. 124;
4. defendants affiliated with Verizon, Master Consolidated Verizon Complaint, *id.* (Jan. 16, 2007), D.E. 125; and
5. defendants affiliated with BellSouth, Master Consolidated BellSouth Complaint, *id.* (Jan. 16, 2007), D.E. 126.

5174. Opinion, *Tyler v. AT&T*, No. 8:06-cv-523 (D. Neb. Aug. 30, 2006), D.E. 18 (finding that the complaint stated no facts and claimed no relief), *sum. aff'd*, Judgment, *Tyler v. AT&T*, No. 06-4174 (8th Cir. Feb. 28, 2007); *see Amended Complaint*, *id.* (Aug. 4, 2006), D.E. 3; Notice of Removal, *id.* (July 31, 2006), D.E. 1.

Upon learning of the dismissal, the JPML vacated its conditional transfer order. Order Vacating Conditional Transfer Order, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. Sept. 7, 2006), D.E. 56.

5175. Notice of Voluntary Dismissal, *Phillips v. BellSouth Corp.*, No. 1:06-cv-918 (D.D.C. May 25, 2006), D.E. 3; Notice of Voluntary Dismissal, *Ludman v. AT&T Inc.*, No. 1:06-cv-917 (D.D.C. May 25, 2006), D.E. 3; Notice of Voluntary Dismissal, *Driscoll v. Verizon Commc'ns, Inc.*, No. 1:06-cv-916 (D.D.C. May 25, 2006), D.E. 2; *see Complaint*, *Phillips*, No. 1:06-cv-918 (D.D.C. May 15, 2006), D.E. 1; Complaint, *Ludman*, No. 1:06-cv-917 (D.D.C. May 15, 2006), D.E. 1; Complaint, *Driscoll*, No. 1:06-cv-916 (D.D.C. May 15, 2006), D.E. 1.

In 2008, another action was filed in the Southern District of New York⁵¹⁷⁸ and transferred to Judge Walker.⁵¹⁷⁹

Suits by the Federal Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.⁵¹⁸⁰ The federal government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,⁵¹⁸¹ Missouri,⁵¹⁸² Maine,⁵¹⁸³ Connecticut,⁵¹⁸⁴ and Vermont.⁵¹⁸⁵ Also

These cases were included in Verizon's original multidistrict centralization motion. Verizon Transfer Brief at 4–7, NSA, No. 1791 (J.P.M.L. May 30, 2006), D.E. 1.

5176. Notice of Dismissal, *Mink v. AT&T Corp.*, No. 4:06-cv-831 (E.D. Mo. June 22, 2006), D.E. 11; Docket Sheet, *id.* (May 26, 2006) (noting dismissal on July 5, 2006); *see* Amended Notice of Removal, *id.* (June 12, 2006), D.E. 10; Notice of Removal, *id.* (May 26, 2006), D.E. 1. The plaintiff refiled in state court, the action was removed again, it was conditionally transferred as part of the multidistrict centralization, and the plaintiff unsuccessfully challenged the transfer. *See supra* note 5161.

5177. Order, *Potter v. BellSouth Corp.*, No. 3:06-cv-469 (M.D. Tenn. July 17, 2006), D.E. 16; Notice of Dismissal, *id.* (July 13, 2006), D.E. 15; *see* Complaint, *id.* (May 15, 2006), D.E. 1. This case was listed in the multidistrict centralization 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, NSA, No. 1791 (J.P.M.L. Aug. 17, 2006), D.E. 53.

5178. Complaint, *McMurray v. Verizon Commc'ns Inc.*, No. 1:08-cv-6264 (S.D.N.Y. July 10, 2008), D.E. 1.

5179. Transfer Order, NSA, No. 1791 (J.P.M.L. issued Dec. 19, 2008), D.E. 144; *see* Docket Sheet, *McMurray v. Verizon Commc'ns Inc.*, No. 3:09-cv-131 (N.D. Cal. Jan. 12, 2009).

5180. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093 (N.D. Cal. 2009); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 895–96 (N.D. Cal. 2007) (denying summary judgment in the state cases); *see* Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, Portland Press Herald, Aug. 22, 2006, at A1 (reporting that Maine was the third state sued, following suits against Missouri and New Jersey); Judy Harrison, *Wiretaps Lawsuit Moved to California*, Bangor Daily News, Feb. 17, 2007, at 1 (reporting similar suits filed in Maine, Missouri, New Jersey, Connecticut, and Vermont).

5181. Complaint, *United States v. Farber*, No. 3:06-cv-2683 (D.N.J. June 14, 2006), D.E. 1, *transferred*, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007); *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.

5182. Complaint, *United States v. Gaw*, No. 4:06-cv-1132 (E.D. Mo. July 25, 2006), D.E. 1, *transferred*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007); *see* Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006.

filed in Missouri, and transferred to Judge Walker, was an action by the state against the telephone companies.⁵¹⁸⁶

District of Maine Judge John A. Woodcock, Jr., granted the government a preliminary injunction against the state of Maine's investigation.⁵¹⁸⁷

The JPML centralized all of these actions before Judge Walker,⁵¹⁸⁸ who denied the government's motions for summary judgment on supremacy and foreign-affairs grounds.⁵¹⁸⁹ 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."⁵¹⁹⁰ Judge Walker decided to await further guidance from the court of appeals in pending appeals before deciding the matter more precisely.⁵¹⁹¹

Termination of the Program

On February 1, 2007, because of orders obtained from the Foreign Intelligence Surveillance Court (FISC), the government abandoned the warrant-

5183. *United States v. Adams*, 473 F. Supp. 2d 108, 112 (D. Me. 2007); Complaint, *United States v. Adams*, No. 1:06-cv-97 (D. Me. Aug. 21, 2006), D.E. 1, *transferred*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007); *see* Aull, *supra* note 5180; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

5184. Complaint, *United States v. Palermino*, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006), D.E. 1, *transferred*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007).

5185. Complaint, *United States v. Volz*, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006), D.E. 1, *transferred*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007).

5186. Notice of Removal, *Gaw v. AT&T Commc'ns of the Southwest Inc.*, No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006), D.E. 1, *transferred*, *Clayton v. AT&T Commc'ns of the Southwest Inc.*, No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007); *see In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092, 1093–94 (N.D. Cal. 2009); *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 896–97 (N.D. Cal. 2007).

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).

5187. *Adams*, 473 F. Supp. 2d 108.

5188. *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *see NSA*, 633 F. Supp. 2d at 896; *see also* Harrison, *supra* note 5180.

5189. *NSA*, 633 F. Supp. 2d at 902–11.

5190. *Id.* at 912.

5191. *Id.*

less feature of the surveillance program.⁵¹⁹² According to the government, the FISA court issued classified negotiated orders, and the government decided that it no longer had to conduct its surveillance without warrants.⁵¹⁹³ Redacted versions of the two helpful FISA-court orders were released in 2014.⁵¹⁹⁴

5192. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 651 n.4 (6th Cir. 2007); *Al-Haramain Remedies Order*, *supra* note 5079, at 8; Unclassified PSP Report, *supra* note 5055, at 30; Notice of Attorney General's Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Jan. 17, 2007); *see* Dan Eggen, *Court Will Oversee Wiretap Program*, Wash. Post, Jan. 18, 2007, at A1 (reporting "a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people"); *Spying on the Home Front*, *supra* note 5119; Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. Times, Jan. 18, 2007, at A1; Adam Liptak, *Secrecy at Issue in Suits Opposing Domestic Spying*, N.Y. Times, Jan. 26, 2007, at A1; Romero & Temple-Raston, *supra* note 5071, 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 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).

5193. Ex. 2, Notice of Filing, *NSA*, No. 4:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175 (also stating that "the number, nature, and contents of the specific orders described herein are highly classified"); *see* NSA Director's Declaration, *ACLU v. NSA*, Nos. 06-2095 and 06-2140 (6th Cir. Jan. 25, 2007), D.E. 152, 141, respectively ("The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court."), *also filed as* ex. 1, Notice of Filing, *supra*; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 403–04 (2013) ("After a FISC Judge subsequently narrowed the FISC's authorization of . . . surveillance . . . , the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism."). *See generally* Donohue, *supra* note 5058, at 606–07; Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 131–34 (2014) [hereinafter *Section 702*]; Karen J. Greenberg, *Rogue Justice* 145–46, 153 (2016).

5194. Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 12, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001; *see* Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12; *see also* Chapter 41: Foreign Intelligence Surveillance Act Litigation, *infra* page 860.

FISA Amendments Act of 2008

On July 10, 2008, President Bush signed amendments to FISA expanding the government's statutory surveillance power and providing telephone companies with immunity for their assistance with pre-amendment surveillance.⁵¹⁹⁵

On the day that President Bush signed the amendments, the ACLU filed an action in the Southern District of New York challenging the amendments' constitutionality,⁵¹⁹⁶ and it filed a motion before the FISA court seeking participation in that court's review of the amendments.⁵¹⁹⁷

In the district court, Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications

News reporting through the summer of 2013 provided outlines of what the orders did. "In January 2007, a judge on the FISA court issued two orders, one covering the collection of foreign communications and another dealing with domestic ones." Charlie Savage & James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, N.Y. Times, June 28, 2013, at A6; see 1 Kris & Wilson, *supra* note 5068, at 623 ("the government found a judicial solution to the problem of FISA modernization, advancing a new and expansive interpretation of the statute that one FISA Court judge accepted"). It was also reported that another judge on the FISA court subsequently nullified some or all of the enabling orders. Charlie Savage, *Bush Urges Congress to Pass Wiretap Bill*, Bos. Globe, Aug. 3, 2007, at 2A; see also 1 Kris & Wilson, *supra* note 5068, at 623–38 (discussing what the orders did).

According to a leaked working draft of the NSA's Inspector General report, in order to move the content collection involved in the President's Surveillance Program to a more secure legal footing, from mid-2005 to January 2007, [the Department of Justice] worked with NSA to redefine facility. Instead of understanding the word in the traditional sense, (as a specific telephone number or email address), [the department] argued that it should be understood as a "general gateway" or "cable head."

Donohue, *Section 702*, *supra* note 5193, at 132 (footnotes omitted).

5195. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; see *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845, 848 (9th Cir. 2012); *Jewel Dismissal Order*, *supra* note 5055, at 6; 1 Kris & Wilson, *supra* note 5068, at 653–768; Donohue, *Section 702*, *supra* note 5193, at 137–39; Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008, at A1; Lizza, *supra* note 5058, at 56; see also Ellen Nakashima, *Senate Votes to Renew Contentious Surveillance Law*, Wash. Post, Dec. 29, 2012, at A3 (reporting that the amendments were extended for another five years at the end of 2012); Robert Pear, *Federal Power to Intercept Messages Is Extended*, N.Y. Times, Dec. 29, 2012, at A12 (same).

5196. Complaint, *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

5197. Motion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. July 10, 2008), www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

might be monitored as a result of the amendments,⁵¹⁹⁸ but the court of appeals determined that the plaintiffs did have standing, and it remanded the action for a determination of constitutionality.⁵¹⁹⁹ In *Clapper v. Amnesty International USA*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.⁵²⁰⁰

The FISA court denied the ACLU's motion.⁵²⁰¹

On August 12, 2012, the Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) for release of a FISA-court opinion expressing constitutional concerns about the 2008 amendments.⁵²⁰² The government released a redacted opinion on August 21, 2013.⁵²⁰³ The opinion by Judge John D. Bates held that aspects of some NSA surveillance violated the Fourth Amendment's reasonableness requirement.⁵²⁰⁴

5198. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

5199. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir.), *rehearing en banc denied*, 667 F.3d 163 (2d Cir. 2011) (rehearing denied on a vote of six to six), *rev'd*, 568 U.S. 398 (2013); see Eric Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 22, 2011, at A17; Eric Lichtblau, *Split Decision and Barbed Comments Show a Court Deeply Divided on Wiretapping*, N.Y. Times, Sept. 22, 2011, at A15; Larry Neumeister, *Federal Appellate Court Reinstates Eavesdropping Suit*, Wash. Post, Mar. 22, 2011, at A2.

5200. 568 U.S. 398; see Robert Barnes, *Challenge to Foreign-Surveillance Law Rejected*, 5–4, Wash. Post, Feb. 27, 2013, at A2; Adam Liptak, *Justices Reject Legal Challenge to Surveillance*, N.Y. Times, Feb. 27, 2013, at A1.

5201. Opinion, *Proceedings Required*, No. Misc. 08-1 (FISA Ct. Aug. 27, 2008), 2008 WL 9487946.

5202. Complaint, *Electronic Frontier Found. v. Dep't of Just.*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; see Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

On June 12, 2013, the FISA court determined that its rules did not prohibit disclosure of the opinion. Order, *In re Motion for Consent to Disclosure of Court Records*, No. Misc. 13-1 (FISA Ct. June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf.

5203. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011) [hereinafter Oct. 3, 2011, FISA Ct. Opinion], www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional; see Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans' Emails*, Miami Herald, Aug. 22, 2013, at 3A; Ellen Nakashima, *NSA Collected Thousands of Domestic E-mails*, Wash. Post, Aug. 22, 2013, at A1; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

5204. Oct. 3, 2011, FISA Ct. Opinion, *supra* note 5203, at 78–80.

Judge Bates served as Director of the Administrative Office of the U.S. Courts from 2013 to 2015. FJC Biographical Directory, *supra* note 5053; see *New Administrative Office*

On June 3, 2009, Judge Walker determined that the FISA amendments required dismissal of all actions against telephone companies⁵²⁰⁵ and summary judgment for the federal government in all actions against states.⁵²⁰⁶ The states did not appeal.⁵²⁰⁷ On December 29, 2011, in thirty-three consolidated appeals, the court of appeals affirmed the dismissals in favor of telephone companies.⁵²⁰⁸ Finding that the complaints also included claims against the government, the court remanded a case originating in the Northern District of Georgia and a case originating in the Southern District of New York.⁵²⁰⁹

On January 21, 2010, Judge Walker dismissed the last-filed action against the government and the action originally filed in Brooklyn for lack of standing.⁵²¹⁰ Thereafter, plaintiffs voluntarily dismissed the Atlanta action,⁵²¹¹ and Judge Walker dismissed the Manhattan action for lack of standing.⁵²¹² The court of appeals reversed Judge Walker's standing ruling, remanding for a determination by the district court whether suit was barred by the state-secrets privilege.⁵²¹³ On June 10, 2013, however, the

Director Named, Third Branch, June 11, 2013, news.uscourts.gov/new-administrative-office-director-named.

5205. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009); see *id.* at 956 ("On July 7, 2008, after months of election-year legislative exertion that received considerable press coverage, Congress enacted [the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436]."); see also *Jewel Dismissal Order*, *supra* note 5055, at 7; Donohue, *supra* note 5059, at 160–61.

5206. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009); see Donohue, *supra* note 5059, at 160–61.

5207. See Donohue, *supra* note 5059, at 161.

5208. *In re NSA Telecomm. Records Litig.*, 671 F.3d 881 (9th Cir. 2011), *cert. denied*, 568 U.S. 958 (2013); see *In re NSA Telecomm. Records Litig.*, 669 F.3d 933 (9th Cir. 2012) (also rejecting an argument that the statutory amendment was an unconstitutional taking); see also *Court Upholds Law*, *supra* note 5082; Williams, *supra* note 5082.

5209. NSA, 671 F.3d at 904; Docket Sheet, *Mayer v. Verizon Commc'ns Inc.*, No. 4:07-cv-2029 (N.D. Cal. Apr. 10, 2007) (action transferred from the Southern District of New York); Docket Sheet, *Lebow v. BellSouth Corp.*, No. 4:07-cv-464 (N.D. Cal. Jan. 24, 2007) (action transferred from the Northern District of Georgia).

5210. *Jewel Dismissal Order*, *supra* note 5055, at 16–17.

5211. Order, *Guzzi v. Bush*, No. 4:06-cv-6225 (N.D. Cal. Mar. 5, 2010), D.E. 27; see Donohue, *supra* note 5059, at 162.

5212. Manhattan Action Dismissal Order, *supra* note 5081.

5213. *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011); see *Court Upholds Law*, *supra* note 5082; Williams, *supra* note 5082.

court of appeals affirmed dismissal of the Manhattan action, relying on the Supreme Court's February 26 denial of standing in *Clapper*.⁵²¹⁴

Following Judge Walker's retirement, the litigation was assigned to Judge Jeffrey S. White, who ruled on July 8 that FISA displaced the state-secrets privilege in the remaining cases—the last-filed action and the Brooklyn action—and that potentially valid constitutional claims remained.⁵²¹⁵ On July 24, Judge White accepted as related to the cases already before him a new case challenging dragnet electronic surveillance.⁵²¹⁶

New Disclosures

In 2013, as this complex multijurisdictional litigation appeared to be drawing to a close, Edward Snowden, who worked for a government contractor in national security matters, disclosed to selected journalists top-secret details about extensive FISA court-approved surveillance of telecommunication patterns.⁵²¹⁷ In October, the *New York Times* reported that Snowden was motivated to do this when he came across what appeared to be a clas-

5214. *Ctr. for Constitutional Rights v. Obama*, 522 F. App'x 383 (9th Cir. 2013), *cert. denied*, 571 U.S. 1238 (2014); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *see also Schmidt et al.*, *supra* note 5220.

5215. *Jewel v. NSA*, 965 F. Supp. 2d 1090 (N.D. Cal. 2013); *see Jerry Markon*, *Classified Programs Challenged in Court*, *Wash. Post*, July 16, 2013, at A1.

For this case study, Tim Reagan interviewed Judge White in his chambers on August 21, 2014, and interviewed Judge White and his law clerk Daisy Salzman in the judge's chambers on May 23, 2018.

5216. *Order, First Unitarian Church of L.A. v. NSA*, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7; *see Complaint, id.* (July 16, 2013), D.E. 1; *see Second Amended Complaint, id.* (Aug. 20, 2014), D.E. 119; *Amended Complaint, id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations).

5217. *See Ken Auletta*, *Freedom of Information*, *New Yorker*, Oct. 7, 2013, at 46, 52; *Citizenfour* (Praxis Films 2014); *Barton Gellman*, *Man Who Leaked NSA Secrets Steps Forward*, *Wash. Post*, June 10, 2013, at A1; *Glenn Greenwald*, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, *Guardian* (London), June 6, 2013, at 1; *Glenn Greenwald & Ewen MacAskill*, *The Whistleblower*, *Guardian* (London), June 10, 2013, at 1; *Mark Mazzetti & Michael S. Schmidt*, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, *N.Y. Times*, June 10, 2013, at A1; *Ellen Nakashima*, *Report: Verizon Giving Call Data to NSA*, *Wash. Post*, June 6, 2013, at A1; *Charlie Savage & Mark Mazzetti*, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story*, *N.Y. Times*, June 11, 2013, at A13; *Charlie Savage*, *Edward Wyatt & Peter Baker*, *U.S. Says It Gathers Online Data Abroad*, *N.Y. Times*, June 7, 2013, at A1.

A substantial amount of additional litigation followed Snowden's disclosures. *See Chapter 41: Foreign Intelligence Surveillance Act Litigation, infra* page 860.

sified version of a July 2009 inspectors general report.⁵²¹⁸ Snowden was fired on June 11, 2013,⁵²¹⁹ as the government pursued charges against him.⁵²²⁰ A sealed criminal complaint was filed in the Eastern District of Virginia on June 14 and temporarily unsealed on June 21.⁵²²¹

On June 28, 2013, the *Washington Post* reported that the surveillance program authorized on October 4, 2001, was called Stellar Wind.⁵²²² On May 13, 2014, *Frontline* reported that the program was created by David Addington, the Vice President's counsel, and only disclosed to a small hand-selected group.⁵²²³

Suits to Discover Secret Documents

On the day that the *New York Times* first reported on the warrantless wiretap program, the Electronic Privacy Information Center submitted FOIA requests to four government agencies to obtain documents concerning the program.⁵²²⁴ The ACLU and the National Security Archive Fund submit-

5218. James Risen, *Snowden Says He Took No Secret Files to Russia*, N.Y. Times, Oct. 18, 2013, at A1; see Unclassified PSP Report, *supra* note 5055.

5219. See Thomas Heath & Marjorie Censer, *NSA Leak Puts Focus on Area Firm Owned by the Carlyle Group*, Wash. Post, June 12, 2013, at A6.

The employer apparently was not disadvantaged in its contracting with the intelligence community. See Michael Gurnow, *The Edward Snowden Affair* 279–80 (2014).

5220. See Michael S. Schmidt, Eric Schmitt & Keith Bradsher, *U.S. Preparing Charges Against Leaker of Data*, N.Y. Times, June 11, 2013, at A12.

5221. Complaint, *United States v. Snowden*, No. 1:13-cr-265 (E.D. Va. June 14, 2013) (now again sealed); see Peter Finn & Sari Horwitz, *U.S. Files Charges Against Snowden*, Wash. Post, June 22, 2013, at A1; Greenberg, *supra* note 5193, at 234; Savage, *supra* note 5055, at 402; Scott Shane, *Leaker Charged with Violating Espionage Act*, N.Y. Times, June 22, 2013, at A1; see also Barton Gellman, *Dark Mirror* 242 (2020) (reporting that Snowden was charged with theft of government property and two counts of espionage).

5222. Robert O'Harrow, Jr. & Ellen Nakashima, *NSA Collected Data with Private Sector After 9/11*, Wash. Post, June 28, 2013, at A6; see also Gurnow, *supra* note 5219, at 122–26; Harding, *supra* note 5055, at 53, 90–95, 117; Lizza, *supra* note 5058, at 52. See generally Donohue, *Section 702*, *supra* note 5193, at 119–22, 125–28.

5223. *United States of Secrets (Part One)*, *supra* note 5063; see also Lizza, *supra* note 5058, at 52.

5224. *Elec. Privacy Info. Ctr. v. Dep't of Just.*, 511 F. Supp. 2d 56, 62–63 (D.D.C. 2007); *Elec. Privacy Info. Ctr. v. Dep't of Just.*, 416 F. Supp. 2d 30, 33–34 (D.D.C. 2006); Complaint at 3, *Elec. Privacy Info. Ctr. v. Dep't of Just.*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006), D.E. 1 [hereinafter *Elec. Privacy Info. Ctr. Complaint*].

ted similar requests four days later.⁵²²⁵ 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.⁵²²⁶ On September 5, 2007, Judge Kennedy ruled that some of the withheld documents were properly withheld and some needed further justification to withhold.⁵²²⁷ On October 31, 2008, Judge Kennedy ruled additional documents properly withheld, but he also ruled that he needed to review in camera ten documents containing opinions by the Justice Department's Office of Legal Counsel (OLC) to determine whether they, or parts of them, should be disclosed.⁵²²⁸ Seventeen days later, the government lodged the documents for Judge Kennedy's review.⁵²²⁹ Because of Judge Kennedy's disability retirement late in 2011,⁵²³⁰ the cases were reassigned to Judge Lamberth.⁵²³¹

On July 10, 2009, inspectors general for the Departments of Defense and Justice, the CIA, the NSA, and the Director of National Intelligence released a report on the "President's Surveillance Program."⁵²³² In response to arguments by plaintiffs concerning public disclosures in the report,⁵²³³ the government agreed to review again four of the withheld OLC opin-

5225. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 63; Complaint at 6, *ACLU v. Dep't of Just.*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006), D.E. 1 [hereinafter *D.D.C. ACLU Complaint*]; see Romero & Temple-Raston, *supra* note 5071, at 71.

5226. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; D.D.C. *ACLU Complaint*, *supra* note 5225; Docket Sheet, *ACLU*, No. 1:06-cv-214 (Feb. 7, 2006); *Elec. Privacy Info. Ctr. Complaint*, *supra* note 5224; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Jan. 19, 2006); see Dan Eggen, *A Judge Finds Administration's Secrecy "Baffling,"* Wash. Post, Sept. 7, 2007, at A19.

Tim Reagan interviewed Judge Kennedy for this case study in his chambers on November 12, 2008.

5227. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56.

5228. *Elec. Privacy Info. Ctr. v. Dep't of Just.*, 584 F. Supp. 2d 65 (D.D.C. 2008); see *Judge Seeks Wiretapping Documents*, N.Y. Times, Nov. 2, 2008, at 18.

5229. Notice of Lodging, *ACLU*, No. 1:06-cv-214 (D.D.C. Nov. 17, 2008), D.E. 42.

5230. FJC Biographical Directory, *supra* note 5053 (noting that Judge Kennedy "[a]ssumed senior status due to certified disability on November 18, 2011.").

5231. Reassignment, *ACLU*, No. 1:06-cv-214 (Dec. 15, 2011), D.E. 57; Reassignment, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Dec. 15, 2011), D.E. 84.

5232. Unclassified PSP Report, *supra* note 5055; see Carrie Johnson & Ellen Nakashima, "Inappropriate" Secrecy Hurt Surveillance Effort, Report Says, Wash. Post, July 11, 2009, at A3; Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. Times, July 11, 2009, at A1.

5233. Plaintiffs' Supplemental Memorandum, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (Sept. 15, 2009), D.E. 70.

ions.⁵²³⁴ The government determined that two should remain withheld and, on March 21, 2011, filed redacted versions of the other two.⁵²³⁵ The filing included a substantially redacted version of a 108-page May 6, 2004, opinion by Assistant Attorney General Jack Goldsmith concluding that the warrantless wiretap program was legal.⁵²³⁶ Among the redactions was the program's name,⁵²³⁷ but in 2014 a less redacted version was released disclosing the name, "Stellar Wind."⁵²³⁸

Goldsmith's opinion advised that the September 18, 2001, Authorization for the Use of Military Force exempted the program from FISA restrictions, and if it did not then FISA was to that extent an unconstitutional infringement on the President's powers.⁵²³⁹

The March 21, 2011, filing also included a redacted November 2, 2001, opinion of at least twenty-one pages by Deputy Assistant Attorney General John Yoo from which the only portions not redacted were a handful of statements referring to the inapplicability of FISA to the program.⁵²⁴⁰

In light of declassifications following Snowden's 2013 disclosures, the government agreed to complete by July 21, 2014, another review of the documents for additional disclosures.⁵²⁴¹ On March 31, however, Judge Lamberth held that the ten documents were properly withheld.⁵²⁴²

The Electronic Frontier Foundation, who filed the first action against telephone companies, filed a FOIA action against the Justice Department for release of the secret FISA-court orders that the government claimed

5234. Stipulation, *id.* (Jan. 18, 2011), D.E. 79.

5235. Notice of Filing, *id.* (Mar. 21, 2011), D.E. 81 [hereinafter Mar. 21, 2011, *Elec. Privacy Info. Ctr. Notice of Filing*].

5236. *Id.*

5237. *Id.*

5238. Memorandum for the Attorney General, www.justice.gov/sites/default/files/pages/attachments/2014/09/19/may_6_2004_goldsmith_opinion.pdf; see Charlie Savage, *Redactions in U.S. Memo Leave Doubts on Data Plan*, N.Y. Times, Sept. 7, 2014, at A17.

Eight pages of the report covering a section called "Criminal Division Examines Discovery Issues" are attached to a May 4, 2005, legal memo to the assistant attorney general for the Justice Department's criminal division on "Discovery Issues Raised by Stellar Wind," which was produced to *New York Times* reporter Charlie Savage in response to a FOIA request. Here's a Previously Top Secret 2005 Bush Justice Department Memo on Stellarwind Surveillance and Prosecutors' Discovery Obligations, charliesavage.com/?p=1579.

5239. Mar. 21, 2011, *Elec. Privacy Info. Ctr. Notice of Filing*, *supra* note 5235.

5240. *Id.*

5241. Status Report, *Elec. Privacy Info. Ctr. v. Dep't of Just.*, No. 1:06-cv-96 (Feb. 24, 2014), D.E. 88.

5242. Opinion, *id.* (Mar. 31, 2014), D.E. 90, 2014 WL 1279280.

obviated the need for surveillance without warrants.⁵²⁴³ The U.S. District Court for the District of Columbia assigned the case to Judge Thomas F. Hogan,⁵²⁴⁴ who on August 14, 2007, granted the government's motion for summary judgment, finding that the orders met FOIA's national-defense, statutory, and law-enforcement exemptions.⁵²⁴⁵

On August 9, 2007, the ACLU filed a motion directly with the FISA court asking the court to make public its orders on warrantless wiretapping.⁵²⁴⁶ On August 16, the court's Presiding Judge Kotelly ordered the government to respond to the motion.⁵²⁴⁷ Judge Bates issued a public opin-

5243. Complaint, *Elec. Frontier Found. v. Dep't of Just.*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

5244. Docket Sheet, *id.*

Tim Reagan interviewed Judge Hogan for this case study in his chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the U.S. Courts from October 2011 through June 2013. FJC Biographical Directory, *supra* note 5053; see *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary.

5245. Opinion at 14–18, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Aug. 14, 2007), D.E. 17 [hereinafter D.D.C. *Elec. Frontier Found.* Summary-Judgment Opinion]; see *Elec. Frontier Found. v. Dep't of Just.*, 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a motion for reconsideration based on new revelations in news media).

[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) (2020).

5246. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007); see Dan Eggen, *Secret Court Asks for White House View on Inquiry*, Wash. Post, Aug. 18, 2007, at A3; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. Times, Aug. 18, 2007, at A10.

5247. Scheduling Order, *In re Motion for Release of Court Records*, No. Misc. 07-1 (FISA Ct. Aug. 16, 2007); see Eggen, *supra* note 5246; Lichtblau, *supra* note 5246.

ion on December 11 denying the motion.⁵²⁴⁸ 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.⁵²⁴⁹ Judge Bates rejected the ACLU's suggestion that the court determine what need not be withheld to protect properly classified information.

[T]he proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review. The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable.⁵²⁵⁰

On May 28, 2014, the *New York Times* filed a FOIA action for additional declassification, in light of the 2013 Snowden revelations, of inspectors general reports on surveillance programs.⁵²⁵¹ Following a September 2015 release of redacted reports with additional declassifications,⁵²⁵² Southern District of New York Judge Analisa Torres granted the government summary judgment against more disclosure.⁵²⁵³

5248. *Motion for Release*, 526 F. Supp. 2d 484; see 1 Kris & Wilson, *supra* note 5068, at 130–35; 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.

5249. *Motion for Release*, 526 F. Supp. 2d at 488; see Williamson, *supra* note 5248.

5250. *Motion for Release*, 526 F. Supp. 2d at 496.

5251. Complaint, N.Y. Times Co. v. U.S. Dep't of Just., No. 1:14-cv-3776 (S.D.N.Y. May 28, 2014), D.E. 2.

5252. Redacted PSP Report, *supra* note 5055.

5253. Opinion, N.Y. Times Co., No. 1:14-cv-3776 (S.D.N.Y. Aug. 18, 2016), D.E. 59, 2016 WL 5946711 (declining in camera review of withheld information).

A companion action filed on June 3, 2014, which sought the release of various filings in the FISA court, was dismissed as settled on October 28, 2015, following disclosure of documents. Stipulated Dismissal, N.Y. Times Co. v. U.S. Dep't of Just., No. 1:14-cv-3948 (S.D.N.Y. Oct. 28, 2015), D.E. 19; see Letter, *id.* (Mar. 30, 2015), D.E. 16; Complaint, *id.* (June 3, 2014), D.E. 2.

Litigation Concludes

In the two cases inherited from Judge Walker—the 2006 Brooklyn action and the 2008 San Francisco action—Judge White granted the government partial summary judgment on February 10, 2015, with respect to the plaintiffs’ Fourth Amendment challenge to a program of “upstream collection,” in which telecommunication companies search their records for communications with identified foreign intelligence targets.⁵²⁵⁴ Judge White’s ruling was based on both standing and state secrets.

Although the public and admissible evidence presented establishes that Plaintiffs are indeed AT&T customers with Internet communications and would fall into the class of individuals surveilled, the evidence at summary judgment is insufficient to establish that the Upstream collection process operates in the manner in which Plaintiffs allege it does.

...

... In addition, without disclosing any of the classified content of the Government Defendants’ submissions, the Court can confirm that the Plaintiffs’ version of the significant operational details of the Upstream collection process is substantially inaccurate.⁵²⁵⁵

An appeal was dismissed on December 18, 2015, for lack of a final judgment.⁵²⁵⁶ Judge White granted the government summary judgment as to all claims on April 25, 2019, in the 2008 San Francisco action, finding that the government would be “unable to defend the litigation or to pursue it to resolution on the merits without grave risk to the national security.”⁵²⁵⁷

Plaintiffs in the 2006 Brooklyn action—the last remaining action assigned to Judge White as part of multidistrict liti

5254. Opinion, *Shubert v. Obama*, No. 4:07-cv-693 (N.D. Cal. Feb. 10, 2015), D.E. 146, 2015 WL 545925, *also filed in* No. 4:08-cv-4373 (N.D. Cal. Feb. 10, 2015), D.E. 321.

5255. *Id.* at 7–8.

5256. *Jewel v. NSA*, 810 F.3d 622 (9th Cir. 2015).

Judge Susan P. Graber replaced Judge Pregerson on the case’s panel in light of Judge Pregerson’s taking senior status on December 11, 2015. Order, *Jewel v. NSA*, No. 15-16133 (9th Cir. Aug. 28, 2015); FJC Biographical Directory, *supra* note 5053.

5257. Opinion at 7, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 25, 2019), D.E. 462 [hereinafter 2019 *Jewel* Summary Judgment Opinion].

“[H]aving reviewed the classified portion of the record, the Court concludes that even if the public evidence proffered by Plaintiffs were sufficiently probative to establish standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security.” *Id.* at 18. Moreover, the court could not provide the plaintiffs with a remedy without exposing classified information. *Id.*

gation—moved for a remand of the case to the Eastern District of New York.⁵²⁵⁸ Several weeks later, they instead stipulated to a stay pending resolution of the appeal.⁵²⁵⁹ Plaintiffs in the 2013 case before Judge White also stipulated to a stay pending resolution of the appeal.⁵²⁶⁰ Declining to reach the national security issue, on August 17, 2021, the court of appeals affirmed Judge White’s April 25, 2019, summary judgment, because the plaintiffs had not set forth sufficient evidence of standing.⁵²⁶¹ Parties in the 2013 case are in resolution discussions.⁵²⁶²

Challenge: Classified Evidence

The Portland case against the government concerned an evidentiary document so secret that it could be seen only by judges, and it had to be stored in a sensitive compartmented information facility (SCIF).⁵²⁶³ Government attorneys would not even disclose whether they were cleared to see it.

5258. Motion, *In re* NSA Telecomm. Records Litig., No. 1791 (J.P.M.L. July 2, 2019), D.E. 151; Motion, *Shubert*, No. 4:07-cv-693 (N.D. Cal. June 14, 2019), D.E. 156.

5259. Stipulated Order, *Shubert*, No. 4:07-cv-693 (N.D. Cal. Aug. 12, 2019), D.E. 170; Motion Withdrawal, *NSA*, No. 1791 (J.P.M.L. July 31, 2019), D.E. 160; Motion Withdrawal, *Shubert*, No. 4:07-cv-693 (N.D. Cal. July 31, 2019), D.E. 167.

5260. Stipulated Order, *First Unitarian Church of L.A. v. NSA*, No. 4:13-cv-3287 (N.D. Cal. Sept. 25, 2019), D.E. 150.

5261. *Jewel v. NSA*, 856 F. App’x 640 (9th Cir. 2021), *cert. denied*, 596 U.S. ___, 142 S. Ct. 2812 (2022).

5262. Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Aug. 25, 2022), D.E. 157 (ordering a joint case-management-conference statement filed by September 28, 2022).

As of this filing, Plaintiffs’ counsel have contacted all of their clients and obtained consent to reach a resolution of this matter consistent with the general terms discussed with counsel for Defendants. Counsel for Defendants continue to confer with their clients regarding the resolution of the case on those terms, and to gather additional information needed to advance the parties’ discussions. The parties have also discussed resolving this matter together with other pending cases raising similar claims and issues, *Shubert v. Biden*, No 4:07-cv-00693-JSW, and *Smith v. Biden*, No. 2:13-cv-00257-BLW (D. Idaho).

Id. at 2 (statement of the parties).

5263. See Robert Timothy Reagan, *Classified Information in Federal Court*, 53 Vill. L. Rev. 889, 911–938 (2008); Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 22–23 (Federal Judicial Center, 2d ed. 2013) [hereinafter *Keeping Government Secrets*] (describing SCIFs).

Judge King, District of Oregon

The plaintiffs attempted to file under seal a classified document inadvertently disclosed to them in an asset-freezing proceeding.⁵²⁶⁴ They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."⁵²⁶⁵ More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.⁵²⁶⁶ A classified information security officer reviewed the document in chambers and determined that it contained "sensitive compartmented information" (SCI), which requires more stringent storage and handling procedures than ordinary top-secret information, so it needed to be stored in a SCIF.⁵²⁶⁷

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.⁵²⁶⁸ Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.⁵²⁶⁹ The government argued that creating a SCIF for the court would be infeasible because of the time and expense required.⁵²⁷⁰ So it was agreed that the document would

5264. *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); In Camera Inspection Motion, *Al-Haramain Islamic Found. v. Bush*, 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 2; see Green, *supra* note 5097; Green, *U.S. Attacks Lawsuit*, *supra* note 5095; Liptak, *supra* note 5073.

5265. Interview with Judge Garr M. King, Feb. 14, 2007; see In Camera Inspection Motion, *supra* note 5264; see also Keefe, *supra* note 5095, at 31.

5266. Interview with Judge Garr M. King, Feb. 14, 2007; see *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Transcript, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21, 2006, filed Jan. 5, 2007), D.E. 98 [hereinafter Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript], also filed as attach. C, Government Brief, *id.* (Apr. 14, 2006), D.E. 24; see also Liptak, *supra* note 5070; Liptak, *supra* note 5073.

5267. Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5266; Interview with Judge Garr M. King, Feb. 14, 2007; see *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Government Lodging Reply at 4, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006), D.E. 32 [hereinafter *Al-Haramain Islamic Found.* Government Lodging Reply]; see also Keefe, *supra* note 5095, at 31; Liptak, *supra* note 5073. See generally Reagan, Keeping Government Secrets, *supra* note 5263, at 3, 21–23 (describing SCI, SCIFs, and classified information security officers).

5268. Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5266; Interview with Judge Garr M. King, Feb. 14, 2007.

5269. Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5266; Interview with Judge Garr M. King, Feb. 14, 2007; see Tim Fought, *Mystery Document Headed to Seattle*, *Seattle Times*, Mar. 24, 2006, at B5.

5270. Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5266.

be sent to the Western District of Washington's U.S. Attorney's SCIF in Seattle.⁵²⁷¹

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.⁵²⁷² 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.⁵²⁷³

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.⁵²⁷⁴ 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."⁵²⁷⁵ The usual procedure for the court's accepting a sealed filing was for the clerk's office to unseal the filing to make a copy for the judge and then file the document under seal.⁵²⁷⁶ 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.⁵²⁷⁷ 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.⁵²⁷⁸ After the judge read the document, classified information 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.⁵²⁷⁹

5271. *Id.*; see Fought, *supra* note 5269; Keefe, *supra* note 5095, at 31.

5272. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Judge Garr M. King, Feb. 14, 2007.

5273. Transcript at 32–33, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006, filed Jan. 5, 2007), D.E. 99 [hereinafter Apr. 25, 2006, *Al-Haramain Islamic Found.* Transcript], also filed as attach. 1, *Al-Haramain Islamic Found.* Government Lodging Reply, *supra* note 5267; see Liptak, *supra* note 5073.

5274. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1229 (granting the government's motion); Government Motion, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006), D.E. 39, 40.

5275. Plaintiffs' Response at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006), D.E. 49.

5276. Interview with Judge Garr M. King, Feb. 14, 2007.

5277. *Id.*

5278. *Id.*

5279. *Id.*

The government said that it might be necessary to purge the plaintiffs' attorneys' computers of data associated with their declaration of what they remember about the classified document.⁵²⁸⁰

Although he saw the classified evidentiary document,⁵²⁸¹ Judge King was careful not to rely on its contents in his ruling against dismissal.⁵²⁸² Judge King granted the government's motion to deny the plaintiffs access to it, but he said that the plaintiffs could file in camera affidavits "attesting to the contents of the document from their memories," and that the government should consider providing the plaintiffs with access to a redacted version of the document under a protective order.⁵²⁸³

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.⁵²⁸⁴ The government said that the identities of persons with clearance to see such documents was a state secret.⁵²⁸⁵ On one occasion, the judge asked a government attorney before him if he had such clearance.⁵²⁸⁶ The attorney responded that he did not think he was permitted to answer that question.⁵²⁸⁷ 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.⁵²⁸⁸

5280. *Id.*; see Liptak, *supra* note 5073.

5281. Mar. 21, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5266; see Green, *Feds' Stance*, *supra* note 5095.

5282. *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").

5283. *Id.* at 1229; see Liptak, *supra* note 5070; Liptak, *supra* note 5073; MacLean, *supra* note 5095.

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 5073. In addition, it appears that a reporter for *The Washington Post* reviewed the document. *Id.*; MacLean, *supra* note 5095.

5284. Interview with Judge Garr M. King, Feb. 14, 2007.

5285. *Id.*; see Liptak, *supra* note 5073.

5286. Interview with Judge Garr M. King, Feb. 14, 2007.

5287. *Id.*

5288. *Id.*

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Members of the appellate panel also reviewed the classified document in camera, pursuant to procedures established by classified information security officers.⁵²⁸⁹

Having reviewed it *in camera*, we conclude that the Sealed Document is protected by the state secrets privilege, along with the information as to whether the government surveilled Al-Haramain. We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be—and has been—provided for us to make a meaningful examination. The process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.⁵²⁹⁰

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.⁵²⁹¹

Judge Walker, Northern District of California

On January 5, 2009, Judge Walker ordered the government to present to him the classified document and to grant, within eight weeks, security clearances to one or more of the plaintiffs' attorneys.⁵²⁹²

5289. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007); see Reagan, Keeping Government Secrets, *supra* note 5263, at 21–22 (providing information about classified information security officers).

5290. *Al-Haramain Islamic Found.*, 507 F.3d at 1203.

5291. *Id.* at 1204.

5292. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089–90 (N.D. Cal. 2009); see Cassman, *supra* note 5059, at 1211; Johnson, *supra* note 5104.

The court of appeals determined that this order was not appropriate for interlocutory appeal. Order, *Al-Haramain Islamic Found., Inc. v. Obama*, No. 09-15266 (9th Cir. Feb. 27, 2009), D.E. 10.

The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document *ex parte* and *in camera*. The court will then issue an order regarding whether plaintiffs may proceed—that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be *ex parte*. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders.⁵²⁹³

The government cleared two attorneys within the court's deadline,⁵²⁹⁴ but the government informed the court that whether the attorneys could see the classified document was a matter for the executive branch to decide, and the executive branch decided that the attorneys still could not see the document.⁵²⁹⁵

5293. NSA, 595 F. Supp. 2d at 1089.

5294. Government's Response to Court Orders at 1, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Feb. 27, 2009), D.E. 576; Plaintiffs' Supplemental Case Management Statement at 1, *id.* (Feb. 18, 2009), D.E. 563 (noting that the attorneys were informed of their clearance on February 12, 2009); see Johnson, *supra* note 5104.

5295. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182, 1184, 1191 (N.D. Cal. 2010); Government's Response to Court Orders at 3–12, NSA, No. 4:06-md-1791 (N.D. Cal. Nov. 5, 2008), D.E. 509; see Transcript, *Al-Haramain Islamic Found. v. Bush*, No. 4:07-cv-109 (N.D. Cal. Sept. 23, 2009, filed Feb. 22, 2010), D.E. 114 (“Mr. Coppelino [for the government]: There is no more direct abrogation of the state secrets privilege than to provide the very information subject to the privilege to counsel for the party that is seeking it.”); see also *Al-Haramain* Remedies Order, *supra* note 5079, at 39–40 (“defendants disobeyed direct court orders to negotiate an appropriate protective order and to give plaintiffs’ counsel access to some of the information once they had obtained security clearances”); Cassman, *supra* note 5059, at 1211.

On May 22, Judge Walker issued an order to show cause why he should not rule in the plaintiffs' favor as to liability.⁵²⁹⁶ On June 5, Judge Walker continued his order to show cause and instead ordered briefing on summary judgment for the plaintiffs against the government.⁵²⁹⁷

Plaintiffs shall base their motion on non-classified evidence. If defendants rely upon the Sealed Document or other classified evidence in response, the court will enter a protective order and produce such classified evidence to those of plaintiffs' counsel who have obtained top secret/sensitive compartmented information clearances . . . for their review. Otherwise, the court will consider the motion on non-classified evidence.⁵²⁹⁸

Judge Walker granted the plaintiffs summary judgment on March 31, 2010, because they could present publicly available evidence of surveillance, and the government presented no evidence of surveillance warrants.⁵²⁹⁹ On August 7, 2012, the court of appeals ruled that the government was protected from liability by sovereign immunity.⁵³⁰⁰

Judge Kennedy, District of Columbia

To decide the validity of exemption claims for documents withheld by the government in response to FOIA requests for information on the warrantless wiretap programs, Judge Kennedy reviewed itemized exemption claims in camera.⁵³⁰¹

The exemption claims were classified and submitted ex parte.⁵³⁰² Plaintiffs and their attorneys were not permitted to see them, and neither were Judge Kennedy's law clerks, although the clerks had secret security clearances.⁵³⁰³

5296. Order to Show Cause re Liability, *Al-Haramain Islamic Found.*, No. 4:07-cv-109 (N.D. Cal. May 22, 2009), D.E. 90, 2009 WL 1468792; see Carrie Johnson, *Showdown Looming on "State Secrets,"* Wash. Post, May 26, 2009, at A4.

5297. Briefing Order, *Al-Haramain Islamic Found.*, No. 4:07-cv-109 (N.D. Cal. June 5, 2009), D.E. 96 [hereinafter *Al-Haramain Islamic Found. Briefing Order*]; see Carrie Johnson, *Judge Revisits Warrantless Eavesdropping,* Wash. Post, June 4, 2009, at A4.

5298. *Al-Haramain Islamic Found. Briefing Order*, *supra* note 5297, at 2.

5299. NSA, 700 F. Supp. 2d 1182; *Al-Haramain Remedies Order*, *supra* note 5079 (awarding damages and attorney fees); see Cassman, *supra* note 5059, at 1211; Savage & Risen, *supra* note 5105.

5300. *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); see Cassman, *supra* note 5059, at 1211.

5301. Interview with Judge Henry H. Kennedy, Jr., Nov. 12, 2008.

5302. *Id.*

5303. *Id.*

Review of the exemption claims required many hours of Judge Kennedy's time over several days without the assistance of staff.⁵³⁰⁴ Doors were closed, windows were covered, and the documents were under the judge's immediate control at all times.⁵³⁰⁵ The documents were not stored in chambers; classified information security officers, whose offices and storage facilities, at the time, were a few blocks away from the federal courthouse in the District of Columbia, delivered and retrieved the documents on request.⁵³⁰⁶

In denying the government's initial motion for summary judgment, Judge Kennedy expressed frustration that he was denied assistance of law clerks to review classified declarations supporting the motion:

Without expressing approval or disapproval of DOJ's use of these *ex parte* declarations—and without opining regarding whether the declaration redactions are legitimately classified (beyond a measure of skepticism as to some portions thereof)—the court does express substantial frustration with one aspect of the Executive's approach to this information: In part for purposes of this case, this judicial officer had his law clerk cleared through an extensive, high-level background investigation so that the clerk would have access to classified information, and specifically to the documents lodged in this case. Notwithstanding the clearance obtained, it has become apparent that the Executive will not grant the clerk access to the classified declarations filed here, at least not in the absence of vociferous resistance from this judicial officer. This stance is baffling and has been significantly disruptive to the court's review of this matter.⁵³⁰⁷

Judge Hogan, District of Columbia

Although Judge Hogan would later join the FISA court, he was not on that court when it issued orders that became the object of the Electronic Frontier Foundation's 2007 FOIA action.⁵³⁰⁸ To resolve the FOIA action, Judge Hogan examined the classified orders as well as classified affidavits supporting the government's objections to the FOIA request.⁵³⁰⁹ When reviewing classified documents that were not kept in the court's file, Judge

5304. *Id.*

5305. *Id.*

5306. *Id.*

5307. *Elec. Privacy Info. Ctr. v. Dep't of Just.*, 511 F. Supp. 2d 56, 63 n.5 (D.D.C. 2007); see Eggen, *supra* note 5226 (quoting text).

5308. Interview with Judge Thomas F. Hogan, Jan. 12, 2010; FJC Biographical Directory, *supra* note 5053 (noting Judge Hogan's FISA-court membership from 2009 to 2016).

5309. Interview with Judge Thomas F. Hogan.

Hogan initialed and dated each document he examined to facilitate assurances that the copies he examined could later be included in the appellate record, if necessary.⁵³¹⁰

Judge White, Northern District of California

While the litigation was in its twelfth year, Judge White ordered the government to inform him, within two weeks of the oral order, whether it would be possible for a career law clerk to receive clearance to see classified materials in the litigation.⁵³¹¹ The government responded that

the Government Defendants are . . . prepared to grant [a career law clerk with a top secret/sensitive compartmented information security clearance (SCI)] access to certain categories of SCI materials that are likely to be responsive to Plaintiffs' forthcoming discovery requests.

The Government Defendants are not, however, in a position to determine whether the Court's career law clerk would have a "need to know," and thus have access to, all classified materials that may be responsive to Plaintiffs' forthcoming discovery requests. . . . [I]t is unlikely that they would grant the Court's career law clerk access to any Exceptionally Controlled Information (ECI), Controlled Access Program, or other forms of unique Special Access Program (SAP) information that is exceptionally sensitive and subject to particular limitations on dissemination.

In short, the Court's career law clerk, if specific predicates are satisfied, may be granted access to Top Secret information and certain categories of Sensitive Compartmented Information, but the law clerk may not be granted access to all classified information either previously disclosed to the Court *in camera* and *ex parte* or that may be disclosed to the Court *in camera* and *ex parte* during the discovery proceedings. The Government Defendants cannot make a final determination on this issue, however, until they know precisely what information will be responsive to Plaintiffs' forthcoming discovery requests.⁵³¹²

The matter remained in negotiations for over a year, during which time Judge White could only receive law-clerk assistance on some matters using vague hypotheticals.⁵³¹³ In 2018, arrangements were made for Judge White to receive assistance from a law clerk for a judge on the Foreign In-

5310. *Id.*

5311. Transcript at 63–67, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. May 19, 2017, filed June 2, 2017), D.E. 362; Minutes, *id.* (May 19, 2017), D.E. 356.

5312. Government Response at 2–3, *id.* (June 2, 2017), D.E. 361 (citation and footnote omitted).

5313. Interview with Judge Jeffrey S. White, May 23, 2018.

telligence Surveillance Court of Review.⁵³¹⁴ With the help of the cleared law clerk, Judge White was able to review classified information and determine that the state-secrets privilege required a grant of summary judgment to the government.⁵³¹⁵

Judge White denied a motion by the plaintiffs' attorneys to see any classified materials presented to the court.⁵³¹⁶

Challenge: Classified Arguments

The government regarded some classified arguments in these cases as so secret that it would not permit even attorneys or law clerks with security clearances to see them.⁵³¹⁷ President Bush personally decided who was cleared to see documents related to the surveillance programs at issue in this litigation.⁵³¹⁸ It was also reported that information about these programs was closely held even at the NSA:

5314. Oral Argument, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 29, 2019), www.uscourts.gov/cameras-courts/jewel-v-nsa (video recording); Interview with Dep't of Just. Litig. Sec. Grp. Staff, Aug. 30, 2018.

5315. 2019 *Jewel* Summary-Judgment Opinion, *supra* note 5257; Transcript at 6, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 29, 2019, filed Apr. 5, 2019), D.E. 461 ("the Court has . . . reviewed volumes of classified materials submitted by defendants in response to the Court's order to marshal all evidence bearing on the issue of plaintiffs' standing").

5316. Order, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. June 13, 2018), D.E. 404; *see* Motion at 1, *id.* (May 5, 2018), D.E. 393 ("plaintiffs seek for three of their counsel of record, after receiving appropriate security clearances, to have access to the classified discovery materials").

5317. *See* Liptak, *supra* note 5073.

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. Government Brief at 13 n.3, *United States v. Adams*, No. 1:06-cv-97 (D. Me. Feb. 6, 2007), D.E. 70. 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).

5318. Unclassified PSP Report, *supra* note 5055, at 10 ("the President made the decision on all requests to 'read in' any non-operational persons, including [Department of Justice] officials"); Redacted PSP Report, *supra* note 5055, at 26; *see* Hayden, *supra* note 5055, at 68 (identifying President Bush as "the access control officer" on Stellar Wind); *id.* at 74 ("By the time the *New York Times* revealed its existence in December 2005, well over a thousand people had been formally read into Stellarwind throughout the government . . ."); Lichtblau, *supra* note 1477.

Intense and unwavering secrecy has been the hallmark of these programs since their inception, and even the number of people at NSA headquarters who know the details of the operations has deliberately been kept to a minimum for security reasons. Each of these programs operates from inside its own special “red seal” work center at Fort Meade, meaning that those NSA employees cleared for these specific programs must pass one at a time through a booth containing a retinal or iris scanner and other biometric sensors before they can get inside their operations center.⁵³¹⁹

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.⁵³²⁰ In response, the government lodged a classified declaration for ex parte in camera review.⁵³²¹ The government subsequently lodged a second classified declaration for ex parte in camera review “for reasons that must be explained in the superseding classified declaration.”⁵³²² 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.”⁵³²³ Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian’s motion,⁵³²⁴ which Judge King denied.⁵³²⁵

5319. Aid, *supra* note 5055, at 288.

5320. *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 5097 (March 17, 2006, filing of the motion, D.E. 7); see Green, *U.S. Attacks Lawsuit*, *supra* note 5095.

5321. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. July 25, 2006), D.E. 25; see Green, *U.S. Attacks Lawsuit*, *supra* note 5095.

The government argued, “On the basis of the public record, therefore, the Oregonian’s Motion to Unseal Records (Mar. 17, 2006) [Docket Nos. 7 & 8] should be denied. Should the Court require additional detail regarding the sealed classified document in this case, however, such detail can only be conveyed in a classified format, which must be reviewed ex parte and in camera, and the Court’s review of Defendants’ classified declaration is appropriate in these circumstances.” *Al-Haramain Islamic Found.* Government Lodging Reply, *supra* note 5267, at 3.

5322. *Al-Haramain Islamic Found.* Government Lodging Reply, *supra* note 5267, at 2 n.1; see Notice of Lodging of Superseding Material, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006), D.E. 33.

5323. Apr. 25, 2006, *Al-Haramain Islamic Found.* Transcript, *supra* note 5273.

5324. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

5325. *Id.* at 1218, 1232–33.

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.⁵³²⁶ 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.⁵³²⁷ Ultimately he decided to review the classified materials⁵³²⁸ and permit the case to proceed.⁵³²⁹

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.⁵³³⁰ 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.⁵³³¹ 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.⁵³³²

Judge King observed that it was difficult to handle a case if there was material that a law clerk could not see.⁵³³³ He had to be careful what he told her, and she could not help him with the material she could not see.⁵³³⁴ The judge's law clerks were going to seek security clearances for this case, but they stopped looking into it when the case was transferred to Judge Walker.⁵³³⁵

5326. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006), D.E. 69 (providing notice of the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006), D.E. 56 (providing notice of the lodging of (1) a classified brief, (2) a classified declaration by the Director of National Intelligence, (3) a classified declaration by the director of the NSA, and (4) a classified opposition to the plaintiffs' pending motion to compel discovery).

5327. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 5097 (D.E. 71).

5328. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 5097 (D.E. 77).

5329. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 5070.

5330. Interview with Judge Garr M. King, Feb. 14, 2007.

5331. *Id.*

5332. *Id.*; Letter from Carra Sahler, law clerk to Judge Garr M. King, Apr. 23, 2007.

5333. Interview with Judge Garr M. King, Feb. 14, 2007.

5334. *Id.*

5335. *Id.*

Because of subsequent cases before Judge King, his law clerks and court reporter later obtained security clearances. Interview with Judge Garr M. King, Sept. 19, 2012; *see* Chapter 13: Ashland and Moscow, *supra* page 227.

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.⁵³³⁶ 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.⁵³³⁷ 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."⁵³³⁸ Judge Taylor elected to wait until after the hearing to review the classified documents,⁵³³⁹ but she considered them in issuing the injunction.⁵³⁴⁰

Judge Taylor reviewed classified documents three times.⁵³⁴¹ 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.⁵³⁴² The security officer told Judge Taylor that she could

5336. E.D. Mich. *ACLU* Docket Sheet, *supra* note 5084; see Plaintiffs' Partial Summary-Judgment Motion, *ACLU v. NSA*, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006), D.E. 4; see also David Ashenfelter, *Battle Over Wiretaps to Begin Today*, *Detroit Free Press*, June 12, 2006, at 1; Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, *N.Y. Times*, June 13, 2006, at A17; Niraj Warikoo, *Wiretap Suit All About Power*, *Detroit Free Press*, June 13, 2006, at 1.

5337. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006), D.E. 36 [hereinafter May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging]; Motion to Dismiss at 4 n.3, *id.* (May 26, 2006), D.E. 34; see Liptak, *supra* note 5336; Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, *L.A. Times*, June 12, 2006, at 5.

Strictly speaking, the defendants' brief supported a separate motion and was not a response to the plaintiffs' motion, but the defendants said, "Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state-secrets privilege—were the appropriate response to Plaintiffs' Motion." Defendants' Motion for Clarification at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 2, 2006), D.E. 45; see Ashenfelter, *supra* note 5336.

5338. May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging, *supra* note 5337, at 2.

5339. Transcript, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 12, 2006, filed July 7, 2006), D.E. 68; see Liptak, *supra* note 5336 (reporting that Judge Taylor did not review the classified documents before the hearing).

5340. *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*").

5341. Interview with Judge Anna Diggs Taylor, Dec. 7, 2006; see Notice of Lodging, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Sept. 1, 2006), D.E. 82; Notice of Lodging, *id.* (June 30, 2006), D.E. 67; May 26, 2006, E.D. Mich. *ACLU* Notice of Lodging, *supra* note 5337.

5342. Interview with Judge Anna Diggs Taylor, Dec. 7, 2006.

take notes, but the security officer would have to take them back with her.⁵³⁴³ So the judge decided not to take notes.⁵³⁴⁴

Judges Batchelder, Gilman, and Gibbons, Sixth Circuit

In the appeal of Judge Taylor's injunction, the court of appeals granted the government permission "to submit separate public and sealed versions of briefs to protect classified information."⁵³⁴⁵ 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."⁵³⁴⁶

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.⁵³⁴⁷ The judges worked out with the parties procedures for the judges' review of classified information.⁵³⁴⁸ Judges Gilman and Gibbons had chambers in Memphis, Tennessee, and Judge Batchelder had 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.⁵³⁴⁹ The meeting was transcribed, and the transcript was sealed.⁵³⁵⁰ 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.⁵³⁵¹ One result of the meeting was the government's agreement to file a list of classified documents presented to the

5343. *Id.*

5344. *Id.*

5345. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (October 11, 2006, order, D.E. 46).

5346. *Id.* (notices, Oct. 16, 2006, D.E. 54, and Dec. 5, 2006, D.E. 117).

5347. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5348. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (letter from the court to the government concerning the filing of classified information with the court, Oct. 19, 2006, D.E. 56; motion by the government for approval of proposed procedures regarding classified information, Nov. 1, 2006, D.E. 80).

5349. Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 5192.

5350. Interview with Judge Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

5351. Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 5192.

judges,⁵³⁵² a list which the government updated upon each additional lodging.⁵³⁵³

Approximately two weeks before oral argument, classified information security officers delivered to the judges' chambers the government's undated opening and reply briefs.⁵³⁵⁴

On January 17, the government announced to Congress and the courts that the President would not reauthorize the warrantless wiretap program at issue in this case, but instead would abide by new secret orders issued by the FISA court one week earlier.⁵³⁵⁵ Five days before this announcement, and two days after the FISA-court orders were issued, the government lodged classified materials for the court's review.⁵³⁵⁶ Security officers brought these materials to the judges at the same time as the briefs.⁵³⁵⁷

The security officer who visited Judge Gilman's chambers presented the judge with the classified materials in the judge's office and waited elsewhere in the building for the judge's call saying that he had completed his review.⁵³⁵⁸ The officer asked Judge Gilman to close his window blinds and close the door to his office.⁵³⁵⁹ Judge Gilman literally had an open-door policy, so although a doorway separated his office from the rest of the chambers, there was no physical door attached.⁵³⁶⁰ Judge Gilman reviewed the materials privately in his office.⁵³⁶¹

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.⁵³⁶² Judge Batchel-

5352. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5353. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (notice of lodging, Jan. 12, 2007, D.E. 143; notice of lodging, Jan. 25, 2007, D.E. 153; notice of lodging, Apr. 9, 2007, D.E. 166; notice of lodging, June 11, 2007, D.E. 176).

5354. Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Ronald Lee Gilman, Oct. 29, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 24, 2007.

5355. *E.g.*, Notice of Attorney General's Letter to Congress, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Jan. 17, 2007), D.E. 127; *see* Eggen, *supra* note 5192; Lichtblau & Johnston, *supra* note 5192.

5356. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (D.E. 143); *see* *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

5357. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5358. Interview with Judge Ronald Lee Gilman, Oct. 29, 2007.

5359. *Id.*

5360. *Id.*

5361. *Id.*

5362. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

der, who was the only tenant in her small-town building, was not asked to close her blinds.⁵³⁶³

No one on the judges' staffs saw the classified materials.⁵³⁶⁴ Knowing that they would not be able to keep them, none of the judges took notes.⁵³⁶⁵ 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.⁵³⁶⁶

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.⁵³⁶⁷ The judges reviewed the classified submission in Cincinnati on the day of oral argument.⁵³⁶⁸

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,⁵³⁶⁹ and within days of these lodgings, classified information security officers delivered the classified submissions to the judges' chambers.⁵³⁷⁰

There were no oral *ex parte* communications with government attorneys in this appeal.⁵³⁷¹

Judge Batchelder's opinion stated,

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 in-

5363. Interview with Judge Alice M. Batchelder, Oct. 30, 2007.

5364. *Id.*; Interview with Judge Ronald Lee Gilman, Oct. 29, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5365. *Id.*

5366. Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5367. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (supplemental submission, Jan. 25, 2007, D.E. 151; notice of lodging, Jan. 25, 2007, D.E. 153); *see* Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. Times, Jan. 27, 2007, at 14.

5368. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5369. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (D.E. 166, 176).

5370. Interview with Judge 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 Judge Ronald Lee Gilman, Oct. 29, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5371. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

formation that was admitted by the district court and made a part of its record.⁵³⁷²

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.⁵³⁷³

With one exception, this was the first time any of these judges had been called upon to review classified information.⁵³⁷⁴ 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.⁵³⁷⁵ The secrets in that case were handled by ordinary sealing procedures.⁵³⁷⁶

Judge Lynch, Southern District of New York

In the Manhattan case against the government, as in the Detroit case, the government lodged a classified brief and classified declarations supporting a motion to dismiss the case in a secure Washington, D.C., location for the court's ex parte in camera review.⁵³⁷⁷ Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,⁵³⁷⁸ but Judge Lynch did not review the classified lodgings before the hearing on the motion.⁵³⁷⁹ He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information during the hearing.⁵³⁸⁰ The case was transferred to the Northern District of

5372. *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.”).

5373. 6th Cir. *ACLU* Docket Sheet, *supra* note 5086 (denial of the motion, July 6, 2007, D.E. 184); see Weinstein, *supra* note 5367 (reporting the filing of the motion).

5374. Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Ronald Lee Gilman, Oct. 29, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007. Judge Batchelder has been a circuit judge since 1991 and was a bankruptcy judge 1983 to 1985 and a district judge 1985 to 1991; Judge Gilman has been a circuit judge since 1997; and Judge Gibbons has been a circuit judge since 2002 and was a district judge 1983 to 2002. FJC Biographical Directory, *supra* note 5053.

5375. *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004); Interview with Judge Alice M. Batchelder, Oct. 30, 2007; Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5376. Interview with Judge Julia Smith Gibbons, Oct. 29, 2007.

5377. Government Brief at 4 n.3, *Ctr. for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006), D.E. 28; Notice of Lodging, *id.* (May 26, 2006), D.E. 31.

5378. Interview with Judge Gerard E. Lynch, May 16, 2007.

5379. Sept. 5, 2006, *Ctr. for Constitutional Rights* Transcript, *supra* note 5092; Interview with Judge Gerard E. Lynch, May 16, 2007.

5380. Sept. 5, 2006, *Ctr. for Constitutional Rights* Transcript, *supra* note 5092; Interview with Judge Gerard E. Lynch, May 16, 2007.

California as part of multidistrict centralization before Judge Lynch ruled on the motion,⁵³⁸¹ and he never read the classified lodgings.⁵³⁸²

Judge Kennelly, Northern District of Illinois

In a Chicago action against AT&T, Judge Kennelly granted the government's motion to dismiss the case on state-secrets grounds.⁵³⁸³ In advance of this ruling, a classified information security officer brought from Washington classified arguments supporting the motion.⁵³⁸⁴ Judge Kennelly reviewed the documents in private while the security officer waited outside his office.⁵³⁸⁵ 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.⁵³⁸⁶ When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.⁵³⁸⁷

Judge Kennelly's opinion stated that he did not rely on classified submissions in reaching this decision.⁵³⁸⁸ His opinion, however, described 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

5381. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 5060; Interview with Judge Gerard E. Lynch, May 16, 2007.

5382. Interview with Judge Gerard E. Lynch, May 16, 2007.

5383. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 5069; McLure, *supra* note 5059; Robinson, *supra* note 5069.

5384. Interview with Judge Matthew F. Kennelly, May 24, 2007; *see* Notice of Lodging, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006), D.E. 50.

5385. Interview with Judge Matthew F. Kennelly, May 24, 2007.

5386. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

5387. *Id.*

5388. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

the classified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.⁵³⁸⁹

In order to avoid inadvertently disclosing information in the classified documents at the public hearing, Judge Kennelly carefully prepared all of his questions for counsel in advance.⁵³⁹⁰ 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.⁵³⁹¹

On the night before the classified proceeding, the judge's chambers were swept for surveillance devices.⁵³⁹² 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.⁵³⁹³ During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.⁵³⁹⁴

Judge Walker, Northern District of California

Judge Walker found his experience reviewing classified *ex parte* arguments very unpleasant.⁵³⁹⁵ *Ex parte* presentations deprive the judge of the perspective and focus that usually comes with an adversary proceeding.⁵³⁹⁶ Classified information was often presented without sufficient context to enable understanding why it was classified or what injury to national security was at stake, so it could be hard to know what to make of it.⁵³⁹⁷

Following the 2013 Snowden revelations, and ensuing political and litigation events, the government partially declassified, from time to time, previously classified filings in the cases before Judge Walker at first and then before Judge White.⁵³⁹⁸

5389. *Id.* at 902 n.2.

5390. Interview with Judge Matthew F. Kennelly, May 24, 2007.

5391. *Id.*

5392. *Id.*

5393. *Id.*

5394. *Id.*

5395. Interview with Judge Vaughn R. Walker, Feb. 23, 2011.

5396. *Id.*

5397. *Id.*

5398. Notice, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 21, 2014), D.E. 209; Government Response, *id.* (Mar. 17, 2014), D.E. 193; Notice, *id.* (Dec. 20, 2013), D.E. 172 [hereinafter Dec. 20, 2013, *Jewel* Notice]; Press Release, Office of the Dir. of Nat'l Intelligence, May 6, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1064-dni-announces-the-release-of-additional-documents-related-to-collection-activities

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.⁵³⁹⁹ The government sought to support its argument with classified documents.⁵⁴⁰⁰ 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.⁵⁴⁰¹

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."⁵⁴⁰²

authorized-by-president-george-w-bush-shortly-after-the-attacks-of-sept-11; Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 21, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/991-dni-announces-the-declassification-of-the-existence-of-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001.

5399. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); Motion to Dismiss, *Hepting v. AT&T Corp.*, No. 4:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 124; First U.S. Statement of Interest, *id.* (Apr. 28, 2006), D.E. 82; see Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, San Jose Mercury News, May 14, 2006, at A1; John Markoff, *U.S. Steps Into Wiretap Suit Against AT&T*, N.Y. Times, Apr. 29, 2006, at A9; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. Times, May 14, 2006, at 4.

5400. Notice of Lodging, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 13, 2006), D.E. 125; see *Hepting*, 439 F. Supp. 2d at 979; see also Carey, *supra* note 5399.

5401. Transcript, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 17, 2006, filed May 22, 2006), D.E. 138, also filed in part as attach., Notice of Motion for Transfer and Coordination, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 31, 2006), D.E. 4.

5402. Order, *Hepting*, No. 4:06-cv-672 (N.D. Cal. June 6, 2006), D.E. 171, 2006 WL 1581965; see *Hepting*, 439 F. Supp. 2d at 980; see also Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. Chron., June 8, 2006, at A4.

"Article III federal judges . . . , by virtue of their Constitutional office, may receive access to classified information in order to address questions before them." U.S. Response to Order to Show Cause, *Hepting*, No. 4:06-cv-672 (N.D. Cal. July 31, 2006), D.E. 315.

Judge Walker reviewed the government's classified briefing in his chambers.⁵⁴⁰³ A security officer brought the documents to the chambers in a sealed pouch.⁵⁴⁰⁴ Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.⁵⁴⁰⁵ The judge took some notes, which the security officer took back with the classified documents.⁵⁴⁰⁶

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.⁵⁴⁰⁷ In part because of time constraints, instead of bringing classified documents to Judge Walker, a classified information security officer arranged for an FBI agent to bring Judge Walker to an FBI SCIF in the same building as the courthouse, where Judge Walker received a secure fax containing the classified documents for his review, and then he shredded the fax.⁵⁴⁰⁸

On the eve of, and concerning, the attorney general's announcement that the government would seek orders from the FISA court for surveillance of international communications with persons in the United States, the government again presented classified briefing materials to Judge

5403. Interview with Judge Vaughn R. Walker, Feb. 15, 2007; see Classified Negroponte Declaration, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 12, 2006), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 222 (redacted); Classified Alexander Declaration, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 12, 2006), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 224 (redacted).

The government also presented a classified reply brief with classified supporting declarations. Notice of Lodging, *Hepting*, No. 4:06-cv-672 (N.D. Cal. June 16, 2006), D.E. 246; see Classified Negroponte Declaration, *id.* (June 16, 2006), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 223 (redacted); Classified Black Declaration, *Hepting*, No. 4:06-cv-672 (N.D. Cal. June 16, 2006), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 226 (redacted).

5404. Interview with Judge 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).

5405. Interview with Judge Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

5406. *Id.*

5407. *Id.*; see Notice of Lodging, *Hepting*, No. 4:06-cv-672 (N.D. Cal. July 31, 2006), D.E. 316.

5408. Interview with Judge Vaughn R. Walker, Feb. 15, 2007; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 24, 2007.

Walker.⁵⁴⁰⁹ Again a classified information security officer brought them to chambers, where Judge Walker reviewed them in private.⁵⁴¹⁰

On fourteen additional occasions, the government lodged classified documents.⁵⁴¹¹

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.⁵⁴¹²

The next lodging supported a scheduling motion.⁵⁴¹³ 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.⁵⁴¹⁴

The public record does not show the reason for the next lodging, and the plaintiffs objected to the government's lodging classified materials without providing any public information about what they were lodging or why.⁵⁴¹⁵ The government responded that "nothing more may be said without compromising the Government's compelling interest in protecting the Nation's security."⁵⁴¹⁶

5409. Notice of Lodging, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Jan. 13, 2007), D.E. 120; Interview with Judge Vaughn R. Walker, Feb. 15, 2007.

5410. Interview with Judge Vaughn R. Walker, Feb. 15, 2007.

5411. Notices of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Oct. 30, 2009), D.E. 681 to 683; Notices of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009), D.E. 19 to 21; Notices of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Feb. 27, 2009), D.E. 578 to 581; Notice of Lodging, *id.* (Nov. 5, 2008), D.E. 510; Notice of Lodging, *id.* (Sept. 19, 2008), D.E. 470; Notice of Lodging, *id.* (Mar. 14, 2008), D.E. 433; Notice of Lodging, *id.* (Oct. 25, 2007), D.E. 387; Notice of Lodging, *id.* (Aug. 3, 2007), D.E. 341; Notices of Lodging, *id.* (June 8, 2007), D.E. 255 to 257; Notices of Lodging, *id.* (May 25, 2007), D.E. 309, 310; Notices of Lodging, *id.* (Apr. 21, 2007), D.E. 296 to 298; Notice of Lodging, *id.* (Apr. 9, 2007), D.E. 239; Notice of Lodging, *id.* (Mar. 13, 2007), D.E. 195; Notice of Lodging, *id.* (Feb. 22, 2007), D.E. 176.

5412. Notice of Lodging, *id.* (Feb. 22, 2007), D.E. 176.

5413. Notice of Lodging, *id.* (Mar. 13, 2007), D.E. 195.

5414. Scheduling Motion, *id.* (Mar. 12, 2007), D.E. 194; see Mark Mazzetti, *In Shift, Director for Intelligence in State Dept.* *Post*, N.Y. Times, Jan. 4, 2007, at A1 (reporting the President's appointment of John D. Negroponte, then Director of National Intelligence, to be deputy secretary of state, and reporting J. Michael McConnell, a former director of the NSA, to be Negroponte's replacement).

5415. Letter, NSA, No. 4:06-md-1791 (N.D. Cal. Apr. 13, 2007), D.E. 246.

5416. Government Response to Plaintiffs' Letter, *id.* (Apr. 27, 2007), D.E. 267.

Judge Walker noted in his published opinion denying the government's motion to dismiss the case that his traveling to Washington to review classified documents might be a suitable future alternative.⁵⁴¹⁷ The next set of lodgings was an unredacted brief and unredacted declarations of the Director of National Intelligence and the NSA director in support of a motion to dismiss actions against Verizon companies, including MCI, on state-secrets grounds.⁵⁴¹⁸ Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.⁵⁴¹⁹

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn⁵⁴²⁰ and Manhattan.⁵⁴²¹ Another lodging was a classified reply brief supporting state-secrets motions to dismiss several other cases.⁵⁴²²

The government lodged a classified declaration in opposition to the plaintiffs' motion for an order requiring defendants to preserve evidence.⁵⁴²³ The government argued that the motion should be denied because the state-secrets privilege prevented the defendants from confirming

5417. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

5418. Notices of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Apr. 21, 2007), D.E. 255 to 257 (a separate notice for each document); *see* Government Motion, *id.* (Apr. 20, 2007), D.E. 253, 254 (redacted brief and declarations); *see* Classified McConnell Declaration, *id.* (Apr. 20, 2007), *filed in* *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 221 (redacted); Classified Alexander Declaration, NSA, No. 4:06-md-1791 (N.D. Cal. Apr. 20, 2007), *filed in* *Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 225 (redacted).

5419. Interview with Judge Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Apr. 24, 2007.

5420. Notices of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 296 to 298; *see* Government Motion, *id.* (May 25, 2007), D.E. 295 (redacted brief and declarations); *see* Classified Alexander Declaration, *id.* (May 25, 2007), *filed in* *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-2 (redacted); Classified McConnell Declaration, NSA, No. 4:06-md-1791 (N.D. Cal. May 24, 2007), *filed in* *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-1 (redacted).

5421. Notices of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. June 8, 2007), D.E. 309, 310; Manhattan Action Dismissal Order, *supra* note 5081, at 5–6; *see* Government's Supplemental Motion, NSA, No. 4:06-md-1791 (N.D. Cal. May 25, 2007), D.E. 295 (redacted brief).

5422. Notice of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Aug. 3, 2007), D.E. 341.

5423. Notice of Lodging, *id.* (Oct. 25, 2007), D.E. 387; *see* Classified Declaration, *id.* (Oct. 25, 2007), *filed in* *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 17, 2014), D.E. 193-1 (redacted).

or denying that there was any evidence to preserve.⁵⁴²⁴ The classified declaration specified “how potentially discoverable information, if any, is being preserved.”⁵⁴²⁵ Determining that the public briefing showed that the plaintiffs were entitled to a preservation order, Judge Walker issued the order without stating whether or not he reviewed the government’s classified brief and declaration.⁵⁴²⁶

Another lodging supported the government’s motion to dismiss the action against the government by the Islamic charity on the grounds of standing, sovereign immunity, and state secrets.⁵⁴²⁷

In September 2008, in open court, Judge Walker observed that classified lodgings had not yet been very helpful to him:

Well, let me tell you what has been my reaction to the filings in these cases here before. And that has been that the classified materials that I have viewed in connection with the state secrets issues that have been litigated here, frankly, have not been very helpful in resolving the issues that I have had to resolve.

And, consequently, I have come to the conclusion that what I should do, if at all possible, is to address the issues that are raised without resort to any classified information, if I can.⁵⁴²⁸

Classified lodgings continued nevertheless. On September 19, 2008, the government lodged a classified certification by the attorney general supporting its motion to dismiss actions against the telephone companies in light of immunity granted by the July 10, 2008, amendments to FISA.⁵⁴²⁹ On November 5, 2008, the government both lodged a classified reply⁵⁴³⁰ and filed a public redacted reply⁵⁴³¹ in support of its motion. But Judge

5424. Preservation Opposition Brief, NSA, No. 4:06-md-1791 (N.D. Cal. Oct. 25, 2007), D.E. 386; see Classified Preservation Opposition Brief, *id.* (Oct. 25, 2007), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. Mar. 17, 2014), D.E. 193-1 (redacted).

5425. Preservation Opposition Brief, *supra* note 5424, at 2.

5426. Preservation Order, NSA, No. 4:06-md-1791 (N.D. Cal. Nov. 6, 2007), D.E. 393.

5427. Notice of Lodging, Al-Haramain Islamic Found. v. Bush, No. 4:07-cv-109 (N.D. Cal. Mar. 14, 2008), D.E. 18; Motion to Dismiss, *id.* (Mar. 14, 2008), D.E. 17.

5428. Transcript, NSA, No. 4:06-md-1791 (N.D. Cal. Sept. 12, 2008, filed Nov. 6, 2008), D.E. 512.

5429. *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949, 957 (N.D. Cal. 2009); Notice of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Sept. 19, 2008), D.E. 470; see Classified Certification, *id.* (Sept. 19, 2008), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. May 5, 2014), D.E. 219 (redacted).

5430. Notice of Lodging, NSA, No. 4:06-md-1791 (N.D. Cal. Nov. 5, 2008), D.E. 510.

5431. Reply, *id.* (Nov. 5, 2008), D.E. 509.

Walker did not review the classified lodgings in advance of oral arguments:

I have not read the classified certification. I concluded that I would attempt to see if the public filings would be sufficient to provide guidance to the Court as to how the action should come out, or, at least, this motion should come out, and, if possible, to make a determination without relying upon the classified certification, then I'd proceed in that fashion.

If I conclude that that is not possible, then I'll have to decide exactly what to do with that particular document. But, you should know, at the outset, that what has been filed in the public record is all that I've seen in connection with the present motions, and nothing else.⁵⁴³²

Later, the government lodged classified declarations in conjunction with case-management statements.⁵⁴³³ Over the following months, the government lodged classified briefs and classified declarations supporting motions for dismissal of the actions against the government originally filed in San Francisco and Brooklyn.⁵⁴³⁴

No one on Judge Walker's staff saw any of the classified documents.⁵⁴³⁵ Judge Walker's career law clerk obtained a security clearance, but the classified warrantless-wiretap briefs were for judges' eyes only.⁵⁴³⁶ The law clerk's clearance allowed her to transport classified briefings between the FBI's SCIF and Judge Walker's chambers.⁵⁴³⁷

Judge Walker observed that presentation of classified information embedded within unclassified material, with the classified information re-

5432. Transcript at 6, *id.* (Dec. 2, 2008, filed Dec. 9, 2008), D.E. 531.

5433. Notices of Lodging, *id.* (Feb. 27, 2009), D.E. 578 to 581.

5434. Notices of Lodging, *id.* (Oct. 30, 2009), D.E. 681 to 683; Notices of Lodging, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009), D.E. 19 to 21; *see* Classified Blair Declaration, NSA, No. 4:06-md-1791 (N.D. Cal. Oct. 30, 2009), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-4 (redacted); Classified Alexander Declaration, NSA, No. 4:06-md-1791 (N.D. Cal. Oct. 30, 2009), *filed in Jewel*, No. 4:08-cv-4373 (N.D. Cal. Dec. 20, 2013), D.E. 172-6 (redacted); Classified Blair Declaration, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Apr. 3, 2009, filed Dec. 20, 2013) (redacted); Classified Bonanni Declaration, *id.* (Apr. 3, 2009, filed Dec. 20, 2013), D.E. 172-5 (redacted).

5435. Interview with Judge Vaughn R. Walker, Feb. 15, 2007.

5436. *Id.* and Sept. 29, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 24, 2008.

Judge Walker was his district's chief judge, and he used his career law clerk as his administrative law clerk. FJC Biographical Directory, *supra* note 5053 (noting Judge Walker's service as chief judge from 2004 to 2010); Interview with Judge Vaughn R. Walker, Feb. 15, 2007.

5437. Interview with Judge Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 24, 2008.

dacted in public versions, made it difficult to remember what was classified and what was not.⁵⁴³⁸ He would have preferred that classified information be referred to in code in the public briefs with a separate document laying out what information was classified.⁵⁴³⁹

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Prior to this litigation, presentation of classified information to Ninth Circuit judges involved delivery of the material to persons in the clerk's office with security clearances who stored it in a safe in San Francisco when the judges were not looking at it.⁵⁴⁴⁰ Judges reviewed the material in San Francisco when they were in town.⁵⁴⁴¹

In the appeals of refusals to dismiss cases 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.⁵⁴⁴²

This had an impact on the judges' work with their law clerks. The law clerks' memoranda had to remain somewhat abstract,⁵⁴⁴³ and the judges had to take care that conversations with law clerks would not include topics that could give the clerks hints about the contents of the restricted materials.⁵⁴⁴⁴

The classified information that the Ninth Circuit judges reviewed included classified briefing by the government to both the district judges and the circuit judges, the classified evidence submitted in Judge King's case, and classified briefing by the plaintiffs concerning the classified evidence submitted in Judge King's case.⁵⁴⁴⁵

5438. Interview with Judge Vaughn R. Walker, Sept. 29, 2008.

Circuit Judge Hawkins, on the other hand, observed that this method facilitated comprehension. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008; *see infra*.

5439. Interview with Judge Vaughn R. Walker, Sept. 29, 2008.

5440. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

The court later established safes suitable for storing top-secret information in each of the court's four principal places of hearing cases: San Francisco, Pasadena, Seattle, and Portland. *Id.*; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 24, 2008.

5441. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

5442. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 5098; 2006 9th Cir. *Hepting* Docket Sheets, *supra* note 5135; *see Vick, supra* note 5136.

5443. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

5444. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008.

5445. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

Judge Hawkins observed that embedding classified information within the narrative structure of the briefs, redacting the classified information for public versions, facilitated comprehension.⁵⁴⁴⁶ A public brief written in code with a separate code sheet would have been more difficult to read.⁵⁴⁴⁷

Judge Pregerson wished that he could have received some guidance from the plaintiffs on what to look for in the classified materials, but the plaintiffs could offer little guidance because they were denied access to the materials.⁵⁴⁴⁸ Perhaps clearance could be granted to an attorney in the Federal Public Defender's office to represent a party's interest in judges' review of classified material when the party is denied access to it.⁵⁴⁴⁹

The same classified information security officer delivered the classified materials to the judges' chambers both before and after oral argument.⁵⁴⁵⁰ Unlike the officers who visited the Sixth Circuit judges, she provided no instructions on closing doors or windows.⁵⁴⁵¹ A separate set of materials was prepared for each judge so that they could make individual notes on the documents.⁵⁴⁵² The officer, whose office was in Washington, D.C., was able to bring the materials back to the judges whenever they wanted to see them on a couple of days' notice.⁵⁴⁵³

As classified information security officers coordinate their visits to judges' chambers, they do not disclose to persons other than the judges, such as attorneys representing the government, which judges they are visiting.⁵⁴⁵⁴ This is an issue more serious for appellate proceedings than for trial court proceedings, because cases are assigned to judges well in advance of the assignments' becoming public information.⁵⁴⁵⁵ And the assignment of opinion authorship is regarded as confidential until the opinion is issued.⁵⁴⁵⁶

5446. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008.

District Judge Walker, on the other hand, observed that this method made it more difficult to remember what was classified and what was not. Interview with Judge Vaughn R. Walker, Sept. 29, 2008; *see supra*.

5447. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008.

5448. Interview with Judge Harry Pregerson, Oct. 1, 2008.

5449. *Id.*

5450. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

5451. *Id.*

5452. *Id.*

5453. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008.

5454. Interview with Judge M. Margaret McKeown, Jan. 9, 2008; Interview with Dep't of Just. Litig. Sec. Grp. Staff, Sept. 24, 2008.

5455. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

5456. *Id.*

The court agreed to permit the televising of oral argument so long as the program was not aired until after the court had an opportunity to exercise any inadvertently disclosed secrets, a contingency that did not occur.⁵⁴⁵⁷ Classified information security officers offered to review the court's opinion for inadvertently disclosed secret information before the opinion's release, but the court declined the offer.⁵⁴⁵⁸

This was Judge Hawkins's first case as a judge involving classified information.⁵⁴⁵⁹ Judge McKeown had to review classified information in approximately two previous cases.⁵⁴⁶⁰ She had substantial experience as a practicing attorney in Seattle arguing trade secret cases in open court without revealing the secrets.⁵⁴⁶¹ In over forty years as a federal judge, including nearly thirty years as a circuit judge, Judge Pregerson had occasionally reviewed classified information before.⁵⁴⁶²

Even after the appeal had been resolved by a remand, the government lodged a classified declaration of the Director of National Intelligence to correct an inaccuracy in an earlier government submission.⁵⁴⁶³ The court ruled, however, that it no longer had jurisdiction to receive the lodging.⁵⁴⁶⁴

In 2011, the appellate court heard appeals of statutorily mandated dismissals of actions against the telephone companies and dismissals of actions against the government for lack of standing. Attorneys for the government admonished the court by letter to its clerk, "All classified information has been provided to the Court with the understanding that the secrecy of this information will be properly protected."⁵⁴⁶⁵ The court

⁵⁴⁵⁷. *Id.*

Footage from the oral argument was included in the 2014 documentary *Citizenfour* concerning Edward Snowden's 2013 surveillance revelations. *Citizenfour*, *supra* note 5217.

⁵⁴⁵⁸. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

⁵⁴⁵⁹. Interview with Judge Michael Daly Hawkins, Sept. 30, 2008.

⁵⁴⁶⁰. Interview with Judge M. Margaret McKeown, Jan. 9, 2008.

⁵⁴⁶¹. *Id.*

⁵⁴⁶². Interview with Judge Harry Pregerson, Oct. 1, 2008.

⁵⁴⁶³. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Nov. 9, 2009).

⁵⁴⁶⁴. Order, *id.* (Nov. 23, 2009).

⁵⁴⁶⁵. *E.g.*, Letter, *Jewel v. NSA*, No. 10-15616 (9th Cir. Aug. 3, 2011); Letter, *Hepting v. AT&T*, No. 09-16676 (9th Cir. Aug. 3, 2011).

determined that it did not need to consider classified materials to resolve the appeals.⁵⁴⁶⁶

Judge White, Northern District of California

In the cases transferred to Judge White following Judge Walker's retirement—the cases against the government originally filed in Brooklyn and San Francisco—the government filed notices of lodging classified declarations on five occasions from 2012 through 2014.⁵⁴⁶⁷ On December 21, 2013, the Director of National Intelligence released redacted copies of eight classified declarations filed in the litigation pursuant to Judge White's instructions at a September 27 case-management conference.⁵⁴⁶⁸

The government adopted a usual practice before Judge White of presenting classified briefing by filing a notice of lodging the classified document with the classified information security officer⁵⁴⁶⁹ and filing a redacted document in the public record.⁵⁴⁷⁰

Especially because of Snowden's disclosures of classified information in 2013, Judge White found it a challenge to remember what information he read was classified and what information was not.⁵⁴⁷¹

5466. *In re NSA Telecomm. Records Litig.*, 671 F.3d 881, 894 n.1 (9th Cir. 2011) ("Because this appeal raises only the constitutionality of [the statute] and not its specific application in this case, we need not consider the classified materials.").

5467. Notice of Lodging, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Dec. 23, 2014), D.E. 317; Notice of Lodging, *id.* (Nov. 7, 2014), D.E. 301; Notice of Lodging, *id.* (Sept. 29, 2014), D.E. 287; Notices of Lodging, *id.* (Sept. 12, 2012), D.E. 106, 107; Notices of Lodging, *id.* (Dec. 20, 2013), D.E. 170, 171; *see* Classified Clapper Declaration, *id.* (Dec. 20, 2013, filed May 5, 2014), D.E. 220 (redacted); Classified Fleisch Declaration, *id.* (Dec. 20, 2013, filed May 5, 2014), D.E. 227 (redacted); Classified Clapper Declaration, *id.* (Sept. 11, 2012, filed Dec. 20, 2013), D.E. 172-7 (redacted); Classified Fleisch Declaration, *id.* (Sept. 11, 2012, filed Dec. 20, 2013), D.E. 172-8 (redacted).

5468. Dec. 20, 2013, *Jewel* Notice, *supra* note 5398; *see* DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001, IC on the Record (Dec. 21, 2013), icontherecord.tumblr.com/post/70683717031/today-the-director-of-national-intelligence.

5469. Notice, *Jewel*, No. 4:08-cv-4373 (N.D. Cal. Oct. 18, 2018), D.E. 422; Notice, *id.* (Apr. 17, 2017), D.E. 349; Notice, *id.* (Nov. 7, 2014), D.E. 301; Notice, *id.* (Sept. 29, 2014), D.E. 287; Notice, *id.* (May 9, 2014), D.E. 231; Notice, *id.* (Mar. 17, 2014), D.E. 194.

5470. Declaration, *id.* (Oct. 22, 2018), D.E. 425; Notice and Declaration, *id.* (Apr. 28, 2017), D.E. 350; Declaration, *id.* (Nov. 7, 2014), D.E. 300; Declaration, *id.* (Sept. 29, 2014), D.E. 288; Declaration, *id.* (Mar. 9, 2014), D.E. 230; Declaration, *id.* (May 5, 2014), D.E. 228; *see also* Notice, *id.* (Dec. 23, 2014), D.E. 317 (notice of a classified ex parte, in camera presentation of a previous classified declarant's identity).

5471. Interview with Judge Jeffrey S. White, Aug. 21, 2014.

Following a June 6, 2014, public telephonic hearing, the government filed with the classified information security officer an ex parte letter for in camera review stating that the government believed that its attorney inadvertently said something classified during the hearing.⁵⁴⁷² The government requested a classification review of the transcript before it was filed publicly or shared with the plaintiffs' attorneys.⁵⁴⁷³ Judge White agreed to consider the matter under seal, but not ex parte, and he asked for a response from the plaintiffs on the government's request.⁵⁴⁷⁴ On July 11, Judge White agreed to the classification review.⁵⁴⁷⁵ On July 28, the government notified the court that the transcript contained no classified information.⁵⁴⁷⁶ Judge White unsealed the filings on this matter on August 5.⁵⁴⁷⁷

Judge White's February 10, 2015, partial summary judgment in favor of the government was based on a review of the government's classified briefing.⁵⁴⁷⁸

None of Judge White's staff received a security clearance to work on classified information in these cases.⁵⁴⁷⁹ A classified information security officer attended court proceedings to help Judge White ensure that public discussions did not include classified information.⁵⁴⁸⁰ Some proceedings were videorecorded and available to the public on the internet.⁵⁴⁸¹

Judge Hogan, District of Columbia

In the Electronic Frontier Foundation's unsuccessful FOIA suit to discover the secret FISA-court orders on which the government said it would rely to obtain surveillance orders 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.⁵⁴⁸² Judge Hogan relied on this declaration both

5472. Letter, *Shubert v. Obama*, No. 4:07-cv-693 (N.D. Cal. June 12, 2014, filed June 13, 2014), D.E. 130.

5473. *Id.*

5474. Order, *id.* (June 13, 2014), D.E. 131.

5475. Order, *id.* (July 11, 2014), D.E. 138.

5476. Notice, *id.* (July 28, 2014), D.E. 141.

5477. Order, *id.* (Aug. 5, 2014), D.E. 143; see Corrected Order, *id.* (Aug. 11, 2014), D.E. 144.

5478. Opinion at 1, 8, *id.* (Feb. 10, 2015), D.E. 146, 2015 WL 545925.

5479. Interview with Judge Jeffrey S. White, Aug. 21, 2014.

5480. *Id.*

5481. *Jewel v. NSA, Cameras in Courts*, www.uscourts.gov/cameras-courts/jewel-v-nsa.

5482. Notice of Lodging, *Elec. Frontier Found. v. Dep't of Just.*, No. 1:07-cv-403 (D.D.C. June 25, 2007), D.E. 12.

to grant the government summary judgment and to deny the motion to review the FISA-court orders.⁵⁴⁸³

Challenge: Classified Opinions

Although Judge Kennelly did not rely on classified submissions in his decision to dismiss, with leave to amend, the 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.⁵⁴⁸⁴

To write the classified opinion, Judge Kennelly was required to compose the opinion on a "clean" laptop computer provided by the classified information security officer.⁵⁴⁸⁵ The computer, and all drafts, were stored in the U.S. Attorney's SCIF in the same building as the courthouse.⁵⁴⁸⁶ As the judge was preparing the classified opinion, he had additional questions for the government.⁵⁴⁸⁷ It was arranged that he would ask them on a "secured telephone unit" in the U.S. Attorney's SCIF.⁵⁴⁸⁸

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret opinion.⁵⁴⁸⁹

Judge White granted the government summary judgment on state-secrets grounds in 2019, and filed, in addition to a public opinion, a classified opinion not available to the plaintiffs further supporting his decision based on classified information presented to him by the government.⁵⁴⁹⁰

5483. D.D.C. *Elec. Frontier Found.* Summary-Judgment Opinion, *supra* note 5245, at 11, 15, 18.

5484. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

5485. Interview with Judge Matthew F. Kennelly, May 24, 2007.

5486. *Id.*

5487. *Id.*

5488. *Id.*

5489. Minute Entry, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007), D.E. 85.

5490. Notice of Filing, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. Apr. 25, 2019), D.E. 463; 2019 *Jewel* Summary-Judgment Opinion, *supra* note 5257, at 7; *see* Transcript at 7,

Challenge: Redacting Secrets

AT&T electronically filed a brief with several lines redacted, but the redacted text could be retrieved easily from the electronic document. It appears that when this was brought to the court's attention, two days after the filing, the electronic text file was replaced with an electronic image file.

At a May 17, 2006, hearing in the first case against telephone companies filed in San Francisco, Judge Walker issued the following order:

Plaintiffs are instructed to file by close of business on May 22, 2006, a memorandum that addresses: (1) whether this case can be litigated without deciding the state secrets issue, thereby obviating any need for the court to review the government's classified memorandum and declarations and (2) whether the state secrets privilege is implicated by plaintiffs' FRCP 30(b)(6) deposition request for information whether AT&T received any certification from the government. AT&T and the government may each file reply memoranda on these issues by close of business on May 24, 2006.⁵⁴⁹¹

As instructed, AT&T filed a reply brief on May 24, 2006.⁵⁴⁹² 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.⁵⁴⁹³ Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.⁵⁴⁹⁴ On the day of the CNET report, the court filed a substitute electronic version of the redacted file.⁵⁴⁹⁵

Jewel, No. 4:08-cv-4373 (N.D. Cal. Mar. 29, 2019, filed Apr. 5, 2019), D.E. 461 (“[T]he Court intends to issue two separate orders. One in the public record and one which will be filed as a classified document and treated with all of the safeguards . . . highly classified documents have.”).

5491. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 4:06-cv-672 (N.D. Cal. May 17, 2006), D.E. 130.

5492. N.D. Cal. *Hepting* Docket Sheet, *supra* note 5119.

5493. Notice of Manual Filing, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 24, 2006), D.E. 142; N.D. Cal. *Hepting* Docket Sheet, *supra* note 5119.

The redacted text appeared in one of AT&T's three arguments—an argument spanning four pages of the twenty-page brief: “II.B. The Court Cannot Adjudicate Plaintiffs’ Prima Facie Claims Until It Reviews The Classified Submissions.” Redacted Reply Brief, *Hepting*, No. 4:06-cv-672 (N.D. Cal. May 26, 2006), D.E. 150 [hereinafter *Hepting* Redacted Reply Brief].

5494. Declan McCullagh, *AT&T Leaks Sensitive Info in NSA Suit*, CNET, May 26, 2006, news.cnet.com/AT38T-leaks-sensitive-info-in-NSA-suit/2100-1028_3-6077353.html.

5495. *Hepting* Redacted Reply Brief, *supra* note 5493; N.D. Cal. *Hepting* Docket Sheet, *supra* note 5119.

CNET's website provided a link to the originally filed Acrobat text file. 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.⁵⁴⁹⁶

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."⁵⁴⁹⁷ The judge wrote, "The court contemplates that the individual would be one who had a security clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters."⁵⁴⁹⁸ Judge Walker did not believe that other judges previously used Federal Rule of Evidence 706(a) to appoint an expert of this type.⁵⁴⁹⁹ He decided, however, not to appoint such an expert "at this stage."⁵⁵⁰⁰

5496. *Hepting* Redacted Reply Brief, *supra* note 5493.

5497. *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); *see also* Sinnar, *supra* note 5060, at 1018–19.

5498. *Hepting*, 439 F. Supp. 2d at 1010–11; *see id.* at 1011 (noting that the court had a specific candidate in mind). Judge Walker thought that former CIA Director James Woolsey would be a good candidate, but one of the parties expressed concerns about Mr. Woolsey's having opined on the secret surveillance program. Interview with Judge Vaughn R. Walker, Feb. 15, 2007.

5499. *Hepting*, 439 F. Supp. 2d at 1010.

5500. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 4:06-cv-672 (N.D. Cal. Aug. 8, 2006), D.E. 239.

Chapter 36

Muslim Surveillance

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

The U.S. District Court for the Central District of California heard a collection of civil actions against the FBI seeking relief from surveillance of Muslims in Orange County. Facing the challenges of classified evidence, closed proceedings, and classified arguments, the district court and the court of appeals undertook judicial review of the government's designations of secrecy.

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Freedom of Information Act

Concerned that many Muslims were avoiding mosques because of suspected government surveillance, on May 15, 2006, with the assistance of the ACLU, six Muslim organizations and five Muslim individuals submitted to the FBI requests pursuant to the Freedom of Information Act (FOIA) for records of their surveillance.⁵⁵⁰¹ On April 27, 2007, the FBI notified five of the organizations and four of the individuals that no records responsive to their requests were found.⁵⁵⁰² In May, the FBI informed the Council on American Islamic Relations—California (CAIR) and Hussam

5501. *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1162 (9th Cir. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 278 F.R.D. 538, 539 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1118 (C.D. Cal. 2011); see 5 U.S.C. § 552 (2020); see also Ann Pepper, *ACLU Seeks FBI Records on Monitoring of Islamic Groups*, Orange Cty. Reg., May 16, 2006; H.G. Reza, *Area Islamic Groups Sue the FBI*, L.A. Times, Sept. 19, 2007, California, at 4 [hereinafter *Islamic Groups Sue*]; H.G. Reza, *On Behalf of Muslims, ACLU Seeks FBI Surveillance Data*, L.A. Times, May 16, 2006, Cal. Metro, at 4.

5502. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539 & n.1; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

Ayloush that it had found one responsive document for each of them.⁵⁵⁰³ The FBI presented them with redacted versions in June: one page for CAIR and three pages for Ayloush.⁵⁵⁰⁴

FOIA's subsection (b) *exempts* nine categories of information from government agencies' production obligations:⁵⁵⁰⁵

- classified national defense or foreign policy information
- internal personnel policies
- statutorily exempt information
- trade secrets
- confidential internal correspondence
- confidential personnel and medical files
- confidential law-enforcement investigations
- financial regulation reports
- geophysical information concerning wells

Redactions from the FBI's production to CAIR and Ayloush were related to internal personnel policies, confidential personnel and medical files, and confidential law-enforcement investigations.⁵⁵⁰⁶

On September 18, 2007, the eleven Muslim organizations and individuals filed an action in the U.S. District Court for the Central District of California for a more complete response to their FOIA requests.⁵⁵⁰⁷ The court assigned the case to Judge Cormac J. Carney.⁵⁵⁰⁸

For the nine plaintiffs whom the government had told no documents existed in response to their requests, the government performed an addi-

5503. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1118. See generally *Al Jazeera Investigates: Informants* (Al Jazeera documentary film 2014) [hereinafter *Informants*], www.youtube.com/watch?v=CMRns4ViuEY (including an interview with Ayloush).

5504. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

5505. 5 U.S.C. § 552(b).

5506. *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

5507. Docket Sheet, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Sept. 18, 2007) [hereinafter C.D. Cal. *Islamic Shura Council* Docket Sheet]; *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539–40; see Reza, *Islamic Groups Sue*, *supra* note 5501.

5508. C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 5507.

Tim Reagan interviewed Judge Carney for this case study in his chambers on October 16, 2012.

tional search as a result of the lawsuit, and it produced to the plaintiffs 120 pages, which included numerous redactions.⁵⁵⁰⁹

FOIA's subsection (c) *excludes* three categories of information from government agencies' production obligations; "the agency may treat the records as not subject to the requirements of [FOIA]".⁵⁵¹⁰

- ongoing confidential law-enforcement investigations
- informant records
- foreign intelligence

"Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information."⁵⁵¹¹

The government supported a motion for summary judgment with a declaration identifying the reasons for each of the redactions in the 124 pages produced to the plaintiffs.⁵⁵¹² The phrase "outside the scope of plaintiffs' requests" was used for subsection (c) exclusions without informing the plaintiffs or the court that that was what the phrase meant.⁵⁵¹³ In its reply brief, the government stated that "outside the scope" meant that "the redacted portions did not contain information responsive to plaintiffs' request."⁵⁵¹⁴

5509. *Islamic Shura Council*, 635 F.3d at 1162–63; *Islamic Shura Council*, 779 F. Supp. 2d at 118.

From September 5 to September 27, 2007, [the Department of Justice's Office of Information and Privacy] affirmed the FBI's "no records" response to the Nine Plaintiffs. Nevertheless, on March 14, 2008, the FBI released an additional 120 pages of responsive documents to seven of the Nine Plaintiffs—a large amount of which was either redacted or withheld as "outside the scope" of Plaintiffs' FOIA request while some of the information was redacted pursuant to specific exemptions under FOIA.

Islamic Shura Council, 278 F.R.D. at 540 (citation omitted).

5510. 5 U.S.C. § 552(c).

5511. *Islamic Shura Council*, 779 F. Supp. 2d at 1123.

5512. Hardy Declaration Supporting Government's Summary-Judgment Motion at 46–131, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Mar. 21, 2008), D.E. 13 [hereinafter Hardy Declaration].

5513. See *Islamic Shura Council*, 278 F.R.D. at 540, 545–46; *Islamic Shura Council*, 779 F. Supp. 2d at 1117–19, 1121–26 & n.4; Hardy Declaration, *supra* note 5512.

5514. Government Reply Brief at 2, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Jan. 23, 2009), D.E. 41.

Judge Carney decided to review unredacted versions of the documents.⁵⁵¹⁵ He concluded, “Although the FOIA allows the Government to withhold certain categories of documents from requestors such as Plaintiffs pursuant to statutory exemptions, 5 U.S.C. § 552(b), or exclusions, 5 U.S.C. § 552(c), the FOIA does not permit the Government to withhold responsive information from the Court.”⁵⁵¹⁶

The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government’s duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.⁵⁵¹⁷

Judge Carney determined, however, that the government had produced to the plaintiffs all of the documents, and portions of documents, that FOIA required.⁵⁵¹⁸

Judge Carney resolved summary-judgment motions by sealed order on June 23, 2009, which Judge Carney said he would unseal unless ordered otherwise by the court of appeals.⁵⁵¹⁹ On March 30, 2011, the court of appeals determined that “full disclosure of the Sealed Order would compromise the authorized secrecy from plaintiffs of some of the information it

5515. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1119–20; *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1163 (9th Cir. 2011); see Defendants’ Notice of In Camera, Ex Parte Submission Pursuant to Court’s Order, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 19, 2009), D.E. 56.

5516. *Islamic Shura Council*, 779 F. Supp. 2d at 1121; accord *Islamic Shura Council*, 635 F.3d at 1165.

5517. *Islamic Shura Council*, 779 F. Supp. 2d at 1125; see *Islamic Shura Council*, 278 F.R.D. at 539 (“false and misleading information”); *id.* (“deception of the court”); *id.* at 540 (“blatantly false and misleading information”); *id.* at 545 (“the Government lied to the Court”).

5518. *Islamic Shura Council*, 779 F. Supp. 2d at 1126; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541; see Transcript at 5, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Apr. 27, 2011, filed Feb. 24, 2012), D.E. 146 [hereinafter *Islamic Shura Council* Transcript] (“What I can say, so you know, is based on the information I received in classified hearings, closed hearings, that the government has complied with its obligations under FOIA.”).

5519. Minutes, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 25, 2009), D.E. 59; C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 5507; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541.

contains.”⁵⁵²⁰ The appellate court ordered “the district court to revise the Sealed Order to eliminate statements the government has designated as national security and sensitive law enforcement information.”⁵⁵²¹

Although the court of appeals agreed with the government that all of Judge Carney’s sealed order could not be unsealed, the court of appeals agreed with Judge Carney that the government may not represent to the court that it has produced all responsive information when in fact it has not.⁵⁵²²

Judge Carney issued a revised and public order on April 27.⁵⁵²³

On November 17, Judge Carney granted the plaintiffs’ motion for sanctions.⁵⁵²⁴ Judge Carney awarded the plaintiffs \$36,248 in attorney fees for bringing the motion.⁵⁵²⁵ The court of appeals reversed the sanction award on March 18, 2014, because “Shura Council served its motion after the district court decided the merits of the underlying dispute.”⁵⁵²⁶

We recognize that because of the *in camera* nature of the proceedings, Shura Council could not have moved for sanctions before the inadequacy of the FBI’s original response was made known to the court. Nevertheless, the motion for sanctions was made after “judicial rejection of the offending contention.” Advisory Committee’s Notes to the 1993 Amendments to Rule 11. The motion for sanctions should not have been granted.⁵⁵²⁷

Tort

In “Operation Flex,” the FBI paid Craig Monteilh in 2006 and 2007 to look for dangerous Muslims in Southern California mosques.⁵⁵²⁸ The inform-

5520. *Islamic Shura Council*, 635 F.3d at 1169; see *Islamic Shura Council*, 278 F.R.D. at 541–42.

5521. *Islamic Shura Council*, 635 F.3d at 1169.

5522. *Id.* at 1166; *Islamic Shura Council*, 278 F.R.D. at 541.

5523. *Islamic Shura Council*, 779 F. Supp. 2d 1114; see *Islamic Shura Council*, 278 F.R.D. at 542; see *Islamic Shura Council* Transcript, *supra* note 5518, at 3 (“my original order did not disclose the nature, content, or number of the documents that were withheld”).

5524. *Islamic Shura Council*, 278 F.R.D. 538.

5525. *Id.* at 548; Order, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Dec. 14, 2011), D.E. 136 (declining to award an additional \$880 in paralegal fees because of insufficient documentation).

5526. *Islamic Shura Council of S. Cal. v. FBI*, 757 F.3d 870, 872 (9th Cir. 2014).

5527. *Id.* at 873.

5528. *Fazaga v. FBI*, 885 F. Supp. 2d 978, 980 (C.D. Cal. 2012); *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1028–30 (C.D. Cal. 2012). See generally *Fazaga v. FBI*, 965 F.3d 1015,

ant's efforts to foster and identify antisocial violence resulted in a restraining order against him issued in June 2007 by a state court in response to complaints by mosque members.⁵⁵²⁹ In the state court proceedings, Monteilh revealed details about the FBI's operation.⁵⁵³⁰ Monteilh's work as an informant was also revealed in the prosecution of Ahmadullah Sais Niazi.⁵⁵³¹ Niazi was indicted in 2009 for association with a designated terrorist and for false statements.⁵⁵³² Judge Carney drew this case.⁵⁵³³ In 2010, the indictment was voluntarily dismissed because of "[e]videntiary issues, including the unavailability of an overseas witness."⁵⁵³⁴

Monteilh filed a civil action against the FBI on January 22, 2010, complaining that his federal undercover work had resulted in a state court criminal conviction and his reputation as an informant had resulted in a prison stabbing.⁵⁵³⁵ The court assigned this case to Judge James V. Selna.⁵⁵³⁶ On February 16, 2011, Judge Selna determined that Monteilh's contract claims against the government needed to be brought in the Court of Fed-

1026–28 (9th Cir. 2020); Informants, *supra* note 5503 ("His ruse was to get Muslim men out of the mosque and into the gym, where they would drop their guards.").

5529. *Fazaga*, 965 F.3d at 1028; see Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010, at A1; H.G. Reza, *Restraining Order Bars Man from Irvine Mosque*, L.A. Times, June 30, 2007, at 5.

5530. See Teresa Watanabe, *Man Says He Was FBI Informant*, L.A. Times, Feb. 26, 2009.

5531. *Fazaga*, 965 F.3d at 1028; *Fazaga*, 884 F. Supp. 2d at 1032; see Markon, *supra* note 5529; Watanabe, *supra* note 5530.

5532. Indictment, *United States v. Niazi*, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009), D.E. 1; see Salvador Hernandez, *Man Lied to Hide Terrorist Links, U.S. Says*, Orange Cty. Reg., Feb. 21, 2009, at A; Markon, *supra* note 5529 ("Prosecutors said he is the brother-in-law of Osama bin Laden's security coordinator."); Carol J. Williams & Christine Hanley, *Al Qaeda Figure's In-Law Arrested*, L.A. Times, Feb. 21, 2009, at 1.

5533. Docket Sheet, *Niazi*, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009).

5534. Fitzgerald Declaration, *id.* (Sept. 29, 2010), D.E. 39; see Order, *id.* (Sept. 30, 2010), D.E. 40 (granting dismissal); see also Scott Glover, *U.S. Won't Pursue Case Against Niazi*, L.A. Times, Oct. 1, 2010, at 1; Salvador Hernandez, *Muslims Question Tactics of FBI in Tustin Man's Case*, Orange Cty. Reg., Oct. 9, 2010, at B; Markon, *supra* note 5529.

5535. Complaint, *Monteilh v. FBI*, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010), D.E. 1; see *id.* at 14 ("Mr. Monteilh is informed that his life was in danger as the Muslim extremists had ordered a 'fatwa,' the Romanian Mafia had ordered a 'hit,' the Mexican Mafia had ordered a 'hit,' and the White Supremacists were given a 'green light' on Craig F. Monteilh."); see also *Fazaga*, 884 F. Supp. 2d at 1033; Scott Glover, *Suit by Alleged Informant Says FBI Endangered Life*, L.A. Times, Jan. 23, 2010, at 11; Salvador Hernandez, *Man Who Says He Was Informant Sues FBI*, Orange Cty. Reg., Jan. 23, 2010, at A; Markon, *supra* note 5529.

5536. Docket Sheet, *Monteilh*, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010).

eral Claims and his tort claims were barred (1) for failure to pursue them administratively first and (2) by discretionary function immunity.⁵⁵³⁷

On February 22, three Orange County Muslims filed a class-action challenge to the FBI's operation.⁵⁵³⁸ With their complaint, the plaintiffs filed a notice that their action might be related to the earlier FOIA action.⁵⁵³⁹ Judge Carney accepted transfer to him of the tort case as related to the FOIA case.⁵⁵⁴⁰ One month later, the government notified the court that the Muslim tort case was related to Monteilh's tort case.⁵⁵⁴¹ The three Muslims argued that their case was not sufficiently related to Judge Selna's.⁵⁵⁴² Judge Selna declined transfer, because the Muslim tort case was about surveillance injuries to Muslims and Monteilh's case was about postsurveillance injuries to Monteilh.⁵⁵⁴³

On August 14, 2012, Judge Carney dismissed a claim against the government in the Muslim tort case based on the Foreign Intelligence Surveillance Act (FISA), relying on a decision by the court of appeals, issued on August 7 in another case, that the government retained sovereign immunity from such claims.⁵⁵⁴⁴

Judge Carney denied the agents' defense of qualified immunity, however, allowing a claim against them of illegal surveillance to go forward.⁵⁵⁴⁵

5537. Minutes, *id.* (Feb. 16, 2011), D.E. 93; see Salvador Hernandez, *Judge Tosses Most of Man's Claims*, Orange Cty. Reg., Feb. 24, 2011, at B.

5538. Complaint, *Fazaga v. FBI*, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011), D.E. 1; *FBI v. Fazaga*, 595 U.S. ___, ___, 142 S. Ct. 1051, 1056, 1058 (2022); *Fazaga v. FBI*, 965 F.3d 1015, 1024–25, 1028 (9th Cir. 2020); *Fazaga v. FBI*, 885 F. Supp. 2d 978, 980–81 (C.D. Cal. 2012); *Fazaga*, 884 F. Supp. 2d at 1028–30, 1033; see Amended Complaint, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Sept. 13, 2011), D.E. 49; see also Salvador Hernandez, *Suit Alleges FBI Wrongly Spied on Muslims*, Orange Cty. Reg., Feb. 24, 2011, at B; Shan Li, *FBI Violated the Rights of Muslims*, *Lawsuit Alleges*, L.A. Times, Feb. 24, 2011, at 3; Jerry Markon, *Lawsuit Alleges FBI Violated Muslims' Freedom of Religion*, Wash. Post, Feb. 23, 2011, at A13; Jennifer Medina, *Suit Accuses F.B.I. of Spying at Mosques in California*, N.Y. Times, Feb. 25, 2011, at A17.

5539. Notice, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011), D.E. 3.

5540. Order, *id.* (Feb. 24, 2011), D.E. 4.

5541. Notice, *id.* (Mar. 31, 2011), D.E. 7.

5542. Notice, *id.* (Apr. 5, 2011), D.E. 8.

5543. Order, *id.* (Apr. 6, 2011), D.E. 9.

5544. *Fazaga v. FBI*, 885 F. Supp. 2d 978, 982–84 (C.D. Cal. 2012); *FBI v. Fazaga*, 595 U.S. ___, ___, 142 S. Ct. 1051, 1059 (2022); *Fazaga v. FBI*, 965 F.3d 1015, 1029 (9th Cir. 2020); see *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); Chapter 35: Warrantless Wiretaps, *supra* page 748.

5545. *Fazaga*, 885 F. Supp. 2d at 984–87; *Fazaga*, 965 F.3d at 1029; see Salvador Hernandez, *Spying at Mosques*, Orange Cty. Reg., Aug. 15, 2012, at A.

On February 5, 2014, Magistrate Judge David T. Bristow reported that efforts to settle the claim had been exhausted without success.⁵⁵⁴⁶

Also on August 14, 2012, after a skeptical review of the government's state-secrets privilege, Judge Carney dismissed the Muslims' other claims.⁵⁵⁴⁷

[F]urther litigation of the action would risk or require the disclosure of state secrets related to Operation Flex. More specifically, the Government contends that because Plaintiffs' claims are premised on their core allegation that Defendants conducted an indiscriminate religion-based investigation, any rebuttal against this allegation would risk or require disclosure of privileged information—whom and what the FBI was investigating under Operation Flex and why—in order to establish that the investigation was properly predicated and focused. The Court agrees.⁵⁵⁴⁸

The court of appeals decided that the agents were entitled to qualified immunity as to recordings of prayer-hall conversations after all.⁵⁵⁴⁹

[W]e hold that Plaintiffs had a reasonable expectation of privacy that their conversations in the mosque prayer hall would not be covertly recorded by a government agent not party to the conversations.

As of 2006 and 2007, however, no federal or state court decision had held that individuals generally have a reasonable expectation of privacy from surveillance in places of worship.⁵⁵⁵⁰

But two of the the agents were not entitled to qualified immunity as to recordings of conversations in the iman's office.⁵⁵⁵¹

On the state-secrets dismissals, the court of appeals determined that evidence on some of the claims required further review.⁵⁵⁵² The court also concluded that the district court should not have dismissed claims over

5546. Minutes, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Feb. 5, 2014).

Judge Bristow retired on June 21, 2017. Judicial Milestones, www.uscourts.gov/judicial-milestones/david-t-bristow.

5547. *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012); *Fazaga*, 965 F.3d at 1025, 1029; see Hernandez, *supra* note 5545; Victoria Kim, *Spying Suit Against FBI Is Rejected*, L.A. Times, Aug. 15, 2012, at 1.

5548. *Fazaga*, 884 F. Supp. 2d at 1039 (citation omitted).

5549. *Fazaga*, 965 F.3d at 1031–38.

5550. *Id.* at 1037.

5551. *Id.* at 1038–39.

5552. *Id.* at 1025, 1039–53; see Maura Dolan, *Court Revives Muslims' Lawsuit Against the FBI*, L.A. Times, Mar. 1, 2019, at B3.

which the government did not invoke the state-secrets privilege; it was not a privilege that the agents were entitled to invoke.⁵⁵⁵³

With respect to electronic surveillance within FISA's purview, the court of appeals ruled that FISA displaced the common-law state-secrets privilege, because when Congress acts, resort to the common law is no longer necessary.⁵⁵⁵⁴ FISA allows for a court's protected review of evidence in a case alleging a violation of FISA requirements.⁵⁵⁵⁵ The Supreme Court concluded on March 4, 2022, however, that nothing about FISA's operation is incompatible with the state-secrets privilege.⁵⁵⁵⁶

Further briefing on the state-secrets privilege remains pending in the court of appeals.⁵⁵⁵⁷

Challenge: Classified Evidence

To assist Judge Carney with these cases, his law clerks received security clearances.⁵⁵⁵⁸ Classified documents were stored in a chambers safe.⁵⁵⁵⁹ Judge Carney made a deliberate decision to look at the classified materials rarely.⁵⁵⁶⁰

The court of appeals determined that before dismissing claims on state-secrets grounds Judge Carney "should have reviewed any state-secrets evidence necessary for a determination of whether the alleged surveillance was unlawful following the secrecy-protective procedure set forth in FISA."⁵⁵⁶¹

⁵⁵⁵³. *Fazaga*, 965 F.3d at 1042–53.

⁵⁵⁵⁴. *Id.* at 1043–53.

⁵⁵⁵⁵. *Id.* at 1045–53, 1065–67.

⁵⁵⁵⁶. *FBI v. Fazaga*, 595 U.S. ___, 142 S. Ct. 1051 (2022); see Adam Liptak, *Court Sides with the F.B.I. in a Case on Surveillance*, N.Y. Times, Mar. 5, 2022, at A18; see also Robert Barnes, *Court Considers Whether State Secrets Claim Can End Lawsuit Against FBI*, Wash. Post, Nov. 9, 2021, at A9; Adam Liptak, *Court Weighs Rules' Scope in Spy Case Against F.B.I.*, N.Y. Times, Nov. 9, 2021, at A14.

⁵⁵⁵⁷. Order, *Fazaga v. FBI*, No. 12-56867 (9th Cir. May 10, 2022), D.E. 160; Docket Sheet, *id.* (Oct. 16, 2012) (noting that completion of briefing is expected by September 19, 2022).

⁵⁵⁵⁸. Interview with Judge Cormac J. Carney, Oct. 16, 2012.

⁵⁵⁵⁹. *Id.*

⁵⁵⁶⁰. *Id.*

⁵⁵⁶¹. *Fazaga*, *Fazaga v. FBI*, 965 F.3d 1015, 1025 (9th Cir. 2020); see *id.* at 1041 (observing that "purely domestic investigations with no international connection do not involve state secrets").

Challenge: Closed Proceedings

To evaluate whether the government had properly responded to FOIA demands, Judge Carney decided to review unredacted versions of the documents produced to the plaintiffs.⁵⁵⁶² Troubled that the unredacted documents showed that the government had not only misled the plaintiffs but had also misled the court about what information the government was withholding from the plaintiffs, Judge Carney presided over a classified ex parte hearing at which the government presented its position on application of FOIA exclusions.⁵⁵⁶³

Before Judge Carney issued his sealed order in the FOIA case, a classified information security officer reviewed it for inadvertent inclusion of classified information.⁵⁵⁶⁴

Challenge: Classified Arguments

In response to the plaintiffs' motion for sanctions in the FOIA action, the government filed a redacted brief and submitted to Judge Carney ex parte an unredacted brief.⁵⁵⁶⁵ The court of appeals granted the government's motion for classified ex parte briefing in the sanction appeal.⁵⁵⁶⁶

With its motion to dismiss the Muslim tort action, the government filed notices that it was lodging with Judge Carney a classified brief and a classified declaration.⁵⁵⁶⁷ Three days later, the plaintiffs filed a motion that Judge Carney not examine the classified materials until after a review of the plaintiffs' response to the government's motion and a determination

5562. *Islamic Shura Council of S. Cal. v. FBI*, 278 F.R.D. 538, 540 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1119–20 (C.D. Cal. 2011); *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1163 (9th Cir. 2011).

5563. Interview with Judge Cormac J. Carney, Oct. 16, 2012.

5564. *Id.*; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

5565. Sanction Response, *Islamic Shura Council of S. Cal. v. FBI*, No. 8:07-cv-1088 (C.D. Cal. Oct. 24, 2011), D.E. 126; C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 5507.

5566. Order, *Islamic Shura Council of S. Cal. v. FBI*, No. 12-55305 (9th Cir. Mar. 25, 2013), D.E. 41.

5567. Notices of Lodging, *Fazaga v. FBI*, No. 8:11-cv-301 (C.D. Cal. Aug. 1, 2011), D.E. 35, 36; see *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1033 (C.D. Cal. 2012).

that the ex parte classified lodgings merit examination.⁵⁵⁶⁸ “Plaintiffs argued that such a ruling would prevent the Court from unnecessarily reviewing information that could be highly prejudicial to Plaintiffs and not properly subject to consideration by the Court.”⁵⁵⁶⁹ Judge Carney denied the plaintiffs’ request that he refrain from reviewing the classified submissions.⁵⁵⁷⁰ He “was confident that [his] independent evaluation would not be compromised by the contents of those submissions.”⁵⁵⁷¹ The government lodged a supplemental classified declaration after the plaintiffs amended their complaint.⁵⁵⁷²

In the tort appeal, the court of appeals granted a request by the government “to file a supplemental brief discussing the classified materials under seal” in the district court.⁵⁵⁷³ In response to the plaintiffs’ objection to the filing of an ex parte brief,⁵⁵⁷⁴ the government stated, “in this case, the classified brief contains no citations to legal authority, but instead merely discusses . . . classified declarations” filed in the district court.⁵⁵⁷⁵ The court of appeals “reviewed the brief and confirmed that this is the case. As the panel will read the classified declarations in their entirety, the classified brief does not add anything to the Court’s consideration of the case. We therefore strike it.”⁵⁵⁷⁶

5568. Motion, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 4, 2011), D.E. 39; *Fazaga*, 884 F. Supp. 2d at 1033.

5569. *Fazaga*, 884 F. Supp. 2d at 1033.

5570. Minutes, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 11, 2011), D.E. 46.

5571. *Fazaga*, 884 F. Supp. 2d at 1033.

5572. Notice of Lodging, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Nov. 4, 2011), D.E. 56; see *Fazaga*, 884 F. Supp. 2d at 1034.

5573. Order, *Fazga v. FBI*, No. 12-5687 (9th Cir. Mar. 17, 2015), D.E. 46 (by appellate commissioner).

5574. Reconsideration Brief, *id.* (Mar. 31, 2015), D.E. 56.

5575. Reconsideration Opposition at 9, *id.* (Apr. 16, 2015), D.E. 58.

5576. Order at 3, *id.* (Nov. 16, 2015), D.E. 102.

Chapter 37

Torture Flights

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

An en banc panel of a court of appeals narrowly determined that a tort action challenging extraordinary rendition could not proceed because of state secrets.

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Challenge: Classified Arguments 832

On May 30, 2007, the ACLU filed a civil action in the U.S. District Court for the Northern District of California on behalf of five men who had experienced extraordinary rendition.⁵⁵⁷⁷ According to the complaint, extraordinary rendition “involves the clandestine apprehension and transfer of persons suspected of involvement in terrorist activities to secret detention and interrogation facilities in countries outside the United States, utilizing methods impermissible under United States and international law.”⁵⁵⁷⁸ The court assigned the case to Judge James Ware, who dismissed the action on state-secrets grounds.⁵⁵⁷⁹

5577. Complaint, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 5:07-cv-2798 (N.D. Cal. May 30, 2007), D.E. 1; see Judgment at 25, *Husayn v. Poland*, No. 7511/13 (Eur. Ct. H.R. July 24, 2014), hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047 (holding Poland liable for Guantánamo detainee Abu Zubaydah’s torture by extraordinary rendition); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 121 (2010); Bob Egelko, *ACLU Sues San Jose Firm*, S.F. Chron., May 31, 2007, at A6; John Schwartz, *Claims of Torture Abroad Face Test Monday in Court*, N.Y. Times, Feb. 6, 2009, at A17; Henry Weinstein, *ACLU Suit Alleges Firm Is Profiting from Torture*, L.A. Times, May 31, 2007, at B1. See generally Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stanford L. Rev. 1173, 1174–75, 1215 (2015).

5578. First Amended Complaint at 4, *Mohamed*, No. 5:07-cv-2798 (N.D. Cal. Aug. 1, 2007), D.E. 27; *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008). See generally M. Cherif Bassiouni, *International Extradition* 289–94 (6th ed. 2014); Jonathan Hafetz, *Habeas Corpus After 9/11* 51–59 (2011).

5579. *Mohamed*, 539 F. Supp. 2d 1128; see Donohue, *supra* note 5577, at 121; Schwartz, *supra* note 5577.

Tim Reagan interviewed Judge Ware for this case study in his chambers on September 24, 2010. Judge Ware retired on August 31, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

Because the action was dismissed without the filing of an answer, the facts were substantially limited to the plaintiffs' allegations.⁵⁵⁸⁰ Ahmed Agiza, an Egyptian seeking asylum in Sweden, was captured by Swedish authorities, transferred to American custody, and flown to Egypt, where he was subjected to extremely harsh conditions of confinement and then sentenced to fifteen years in Egyptian prison on a military-court conviction.⁵⁵⁸¹ Abou Elkassim Britel, a Moroccan-Italian, was detained in Pakistan, transferred to American custody, and flown to Morocco, where he was subjected to extremely harsh conditions of confinement and then sentenced to fifteen years in Moroccan prison.⁵⁵⁸² Binyam Mohamed, an Ethiopian and legal resident of the United Kingdom, was arrested in Pakistan and then transferred in turn to Morocco, Afghanistan, and Guantánamo Bay, where he was subjected to extremely harsh conditions of confinement.⁵⁵⁸³ Bisher al-Rawi, an Iraqi and legal resident of the United Kingdom, was arrested in Gambia and transferred in turn to Afghanistan and Guantánamo Bay, where he was subjected to extremely harsh conditions of confinement.⁵⁵⁸⁴ Mohamed Farag Ahmad Bashmilah, a Yemeni, was arrested in Jordan and transferred in turn to Afghanistan and a CIA black-site prison, where he was subjected to extremely harsh conditions of confinement.⁵⁵⁸⁵ Mohamed, al-Rawi, and Bashmilah were subsequently released.⁵⁵⁸⁶

5580. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010); *Mohamed*, 539 F. Supp. 2d at 1131.

5581. *Mohamed*, 614 F.3d at 1074.

5582. *Id.*; *Mohamed*, 539 F. Supp. 2d at 1130–31.

5583. *Mohamed*, 614 F.3d at 1074; *Mohamed*, 539 F. Supp. 2d at 1130; Executive Summary, Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program, at 238–39 (Dec. 3, 2014), www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf (reporting also, "In the fall of 2010, the British government awarded Binyam Mohammed a reported £1 million in compensation."); see Alistair MacDonald & Jess Bravi, *U.K. Plans to Pay 16 Ex-Detainees*, Wall St. J., Nov. 17, 2010, at A10; see also Docket Sheet, *Al-Habashi v. Bush*, No. 1:05-cv-765 (Apr. 15, 2005) (Guantánamo Bay habeas corpus action).

5584. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32; see Hafetz, *supra* note 5578, at 46–47; see also Docket Sheet, *El-Banna v. Bush*, No. 1:04-cv-1144 (July 6, 2004) (Guantánamo Bay habeas corpus action).

5585. *Mohamed*, 614 F.3d at 1075; *Mohamed*, 539 F. Supp. 2d at 1131.

5586. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32. See generally Chapter 28: Guantánamo Bay, *supra* page 434.

The defendant was Jeppesen DataPlan, Inc., a subsidiary of Boeing with headquarters in San Jose.⁵⁵⁸⁷ It allegedly “provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture.”⁵⁵⁸⁸ There was evidence that “Jeppesen knew what was going on when it arranged flights described by one of its own officials as ‘torture flights.’”⁵⁵⁸⁹

The government intervened to block the suit on state-secrets grounds.⁵⁵⁹⁰ Judge Ware determined on February 13, 2008, that “the very subject matter of this case is a state secret” and dismissed the action.⁵⁵⁹¹

On April 28, 2009, a three-judge panel of the court of appeals reversed the dismissal.⁵⁵⁹² On rehearing, however, an en banc panel determined, by a vote of six to five, on September 8, 2010, that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.”⁵⁵⁹³ The Supreme Court denied certiorari.⁵⁵⁹⁴

5587. *Mohamed*, 539 F. Supp. 2d at 1129; see Schwartz, *supra* note 5577.

5588. *Mohamed*, 614 F.3d at 1075.

5589. *Id.* at 1095 (Judge Hawkins, dissenting).

5590. *Mohamed*, 539 F. Supp. 2d at 1130, 1132–33; see Donohue, *supra* note 5577, at 121.

The government did not intervene in a contract dispute in New York’s state court between Sportsflight, a Long Island aircraft brokerage business, and Richmor Aviation, which provided a plane for Sportsflight’s government contract, apparently a contract for rendition transportation. See *Richmor Aviation, Inc. v. Sportsflight Air, Inc.*, 82 A.D.3d 1423, 918 N.Y.S.2d 806 (2011); see also Peter Finn & Julie Tate, *Billing Dispute Reveals Details of CIA’s Rendition Flights*, Wash. Post, Sept. 1, 2011, at A1.

5591. *Mohamed*, 539 F. Supp. 2d at 1130, 1134–35.

5592. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009) (opinion by Judge Michael Daly Hawkins, joined by Judges Mary M. Schroeder and William C. Canby, Jr.); see Donohue, *supra* note 5577, at 122–23; Bob Egelko, *Court Reinstates Suit in CIA Rendition Case*, S.F. Chron., Apr. 29, 2009, at A8; Carrie Johnson, *Appeals Court Rejects “State Secrets” Claim, Revives Detainee Suit*, Wash. Post, Apr. 29, 2009, at A3; Charlie Savage, *Court Lets Ex-Detainees Proceed with Torture Lawsuit*, N.Y. Times, Apr. 29, 2009, at A15.

5593. *Mohamed*, 614 F.3d at 1083 (opinion by Judge Raymond C. Fisher, joined by Chief Judge Alex Kozinski and Judges Richard C. Tallman, Johnnie B. Rawlinson, and Consuelo Maria Callahan); see *id.* at 1093 (concurring opinion by Judge Carlos T. Bea, finding that the case should be dismissed because its subject matter is a state secret); *cf. id.* at 1093–131 (dissenting opinion by Judge Hawkins, joined by Judges Schroeder, Canby, Sidney R. Thomas, and Richard A. Paez); see Charlie Savage, *Power Wars* 421 (2015) (reporting that revealing information about cooperation with other countries’ intelligence agencies might make them less willing to cooperate in the future); see also Donohue, *supra* note 5577, at 123; Charlie Savage, *Court Dismisses a Case Asserting Torture by C.I.A.*,

Challenge: Classified Arguments

To support its motion for dismissal on state-secrets grounds, the government submitted ex parte to Judge Ware a classified declaration by the head of the CIA.⁵⁵⁹⁵ A classified information security officer brought the declaration to Judge Ware's chambers.⁵⁵⁹⁶ Judge Ware reviewed the declaration privately in his office, with the blinds drawn, while the security officer waited outside.⁵⁵⁹⁷ The officer said that she would take back the declaration and any notes the judge took, but the judge could get them back at any time.⁵⁵⁹⁸ Not wanting unknown persons to have access to his notes, the judge did not take notes.⁵⁵⁹⁹

On appeal, the government submitted to the appellate judges ex parte classified briefs and declarations.⁵⁶⁰⁰ For each judge, a classified information security officer brought the materials to the judge's chambers at the judge's convenience, waited for the judge to finish reviewing them, and took them back, along with any notes the judge took.⁵⁶⁰¹ On the day of oral argument, the security officer again provided each judge with that judge's set of materials.⁵⁶⁰²

Classified information security officers received advance notice that the appeal would be reheard en banc, but they did not share confidential

N.Y. Times, Sept. 9, 2010, at A1. See generally Jeffrey Davis, *Uncloaking Secrecy: International Human Rights Law in Terrorism Cases*, 38 Hum. Rts. Q. 58, 64–67 (2016); *id.* at 79 (“Of the more than 120 US federal courts decisions on the state secrets privilege not even one considered whether enforcing the privilege would violate international law.”).

5594. *Mohamed v. Jeppesen Dataplan, Inc.*, 563 U.S. 1002 (2011).

5595. *Mohamed*, 614 F.3d at 1076; *Mohamed*, 539 F. Supp. 2d at 1130, 1132; Interview with Judge James Ware, Sept. 24, 2010.

5596. Interview with Judge James Ware, Sept. 24, 2010; see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

5597. Interview with Judge James Ware, Sept. 24, 2010.

5598. *Id.*

5599. *Id.*

5600. *Mohamed*, 614 F.3d at 1084 n.6; Docket Sheet, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. Mar. 31, 2008) (noting the lodging of classified materials with the three-judge panel on August 27, 2008, and with the en banc panel on November 13, 2009).

5601. Interview with Dep't of Just. Litig. Sec. Grp. Staff, July 20, 2011.

5602. *Id.*

information of this type with the attorneys representing the government.⁵⁶⁰³

⁵⁶⁰³. *Id.*

Chapter 38

Milan

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

In a civil case about diplomatic immunity, the government's position was that the plaintiff could not present classified information to the judge without the government's permission. The case came to a close without resolution of that legal issue.

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The United States government apparently apprehended Osama Hassan Mustafa Nasr, an Egyptian also known as Abu Omar, in Milan on February 17, 2003, and then subjected him to extraordinary rendition and torture.⁵⁶⁰⁴ On May 14, 2009, Sabrina De Sousa, who worked at the U.S. consulate in 2003, filed a civil action in the U.S. District Court for the District of Columbia seeking enforcement of diplomatic immunity from Italian prosecution.⁵⁶⁰⁵

Nasr was born in 1963 in Alexandria, Egypt, where he was arrested while studying law in 1988 for giving a sermon critical of the government.⁵⁶⁰⁶ Unwelcome in Egypt, he migrated over the course of several years to Jordan, Yemen, Pakistan, Albania, Germany, and Italy.⁵⁶⁰⁷ Italy granted

5604. Press Release, Nasr v. Italy, No. 44883/09 (Eur. Ct. H.R. Feb. 23, 2016) [hereinafter Eur. Ct. H.R. Press Release], [hudoc.echr.coe.int/eng-press#{"kupdate":\["2015-11-27T00:00:00.0Z","2020-11-27T00:00:00.0Z"\],"itemid":\["003-5307169-6607369"\]}](https://hudoc.echr.coe.int/eng-press#{) (including an opinion summary); see *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 96 (D.D.C. 2012); see also Ian Shapira, *A Covert Career Cut Short*, Wash. Post, July 12, 2012, at C1.

5605. Complaint, *De Sousa v. Dep't of State*, No. 1:09-cv-896 (D.D.C. May 14, 2009); *De Sousa*, 840 F. Supp. 2d at 96; see Peter Finn, *Ex-Government Worker Sues for Immunity in CIA Rendition Case*, Wash. Post, May 15, 2009, at A16; Steve Hendricks, *A Kidnapping in Milan* 268–69 (2010); Scott Shane, *Woman in Rendition Case Sues for Immunity*, N.Y. Times, May 14, 2009, at A15.

The court permitted De Sousa to list her attorney's address on her complaint instead of her own, as an exception to local rules. Order, *De Sousa*, No. 1:09-cv-896 (D.D.C. May 14, 2009); see D.D.C. L. Civ. R. 5.1(c) (2022); *id.* R. 5.1(e) (West 2011) (former rule section).

5606. See Hendricks, *supra* note 5605, at 35, 48–49.

5607. See *id.* at 49–61.

"For occupation, he founded the Islamic Media Center, which consisted of himself, a computer, and a printer and through which he aspired to become the voice of righteous

him asylum in 2001.⁵⁶⁰⁸ He was known as Abu Omar because his second child was a son named Omar.⁵⁶⁰⁹

Nasr was seized on a walled street called Via Guerzoni as he walked for noon prayers from his apartment to his mosque, the Islamic Cultural Institute on Viale Jenner, and he was transported to Egypt on the following day.⁵⁶¹⁰ Nasr's apprehension disrupted Italian prosecutors' criminal investigation of him.⁵⁶¹¹

A passerby witnessed Nasr's disappearance.⁵⁶¹² Cell tower detective work yielded a network of suspects.⁵⁶¹³

A Milan judge issued arrest warrants for thirteen Americans, identified as CIA personnel, in June 2005.⁵⁶¹⁴ By the end of 2005, arrest warrants were issued for an additional nine.⁵⁶¹⁵ Two Italian intelligence officers were arrested in 2006; three more ostensible CIA workers, including De Sousa, and an airbase lieutenant colonel were added to the list of targets.⁵⁶¹⁶ Later,

Islam in Italy. The center's primary output was an occasional newsletter called *Islamic Truth*." *Id.* at 107.

5608. *See id.* at 92.

5609. *See id.* at 56.

5610. *See* Stephen Grey & Don Van Natta, *13 with the C.I.A. Sought by Italy in a Kidnapping*, N.Y. Times, June 25, 2005, at A1; Hendricks, *supra* note 5605, at 19–34, 63; Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, Wash. Post, Mar. 13, 2005, at A1.

5611. *See* Stephen Grey & Elisabetta Povoledo, *Inquiry in 2003 Abduction Rivets Italy*, N.Y. Times, July 8, 2006, at A8; Hendricks, *supra* note 5605, at 112.

5612. *See* Hendricks, *supra* note 5605, at 113–19.

5613. *See id.* at 167–91; *see also id.* at 179 (reporting that a mobile telephone suspected of being involved in the apprehension made two calls to the Virginia suburbs of Washington, D.C., during the time of the apprehension).

De Sousa's mobile telephone "was implicated in the conspiracy rather than the kidnapping proper." *Id.* at 181.

5614. *See* Grey & Van Natta, *supra* note 5610; Hendricks, *supra* note 5605, at 198; Craig Whitlock & Dafina Linzer, *Italy Seeks Arrest of 13 in Alleged CIA Action*, Wash. Post, June 25, 2005, at A1.

"Never before had an ally of the United States indicted CIA agents for doing their jobs." Hendricks, *supra* note 5605, at 218.

5615. *See* Brian Wingfield, *3 More Sought in C.I.A. Case*, N.Y. Times, Oct. 1, 2005, at A2; Hendricks, *supra* note 5605, at 198; *Italy Seeks Arrests in Kidnapping Case*, N.Y. Times, Dec. 24, 2005, at A5.

5616. *See* Stephen Grey & Elisabetta Povoledo, *Italy Arrests 2 in Kidnapping of Imam in '03*, N.Y. Times, July 6, 2006, at A1; Hendricks, *supra* note 5605, at 236–38; Craig Whitlock, *Prosecutors: Italian Agency Helped CIA Seize Cleric*, Wash. Post, July 6, 2006, at A15.

Italy's military intelligence chief was charged.⁵⁶¹⁷ The twenty-six Americans and a total of five Italians were indicted on February 16, 2007.⁵⁶¹⁸ The Americans were tried in absentia with court-appointed lawyers.⁵⁶¹⁹

On November 11, 2006, the *New York Times* reported,

A militant Egyptian cleric who prosecutors say was kidnapped by the Central Intelligence Agency said in a newly published account that he was tortured with electric shocks while he lay on a wet mattress in a Cairo prison and was repeatedly beaten and forced to eat rotten bread in a pitch-black cell, while rats and cockroaches ran over his body.⁵⁶²⁰

An Egyptian court ordered Nasr's release on February 11, 2007.⁵⁶²¹

De Sousa was among twenty-three Americans convicted in November 2009.⁵⁶²² De Sousa was sentenced to five years in prison.⁵⁶²³ The Italian defendants were spared to protect Italy's state secrets.⁵⁶²⁴ An appellate court

5617. See Ian Fisher & Elisabetta Povoledo, *Italy Seeks Indictments of C.I.A. Operatives in Egyptian's Abduction*, N.Y. Times, Dec. 6, 2006, at A12; Ian Fisher & Elisabetta Povoledo, *Italy's Top Spy Is Expected to Be Indicted in Abduction Case*, N.Y. Times, Oct. 24, 2006, at A3; Peter Kiefer, *Top Intelligence Chiefs Removed*, N.Y. Times, Nov. 21, 2006, at A17.

5618. See Sarah Delaney & Craig Whitlock, *Milan Court Indicts 26 Americans in Abduction*, Wash. Post, Feb. 17, 2007, at A1; Ian Fisher & Mark Mazzetti, *Italians Indict C.I.A. Operatives in '03 Abduction*, N.Y. Times, Feb. 17, 2007, at A1.

5619. See Rachel Donadio, *Italian Court Upends Trial Involving C.I.A. Links*, N.Y. Times, Mar. 12, 2009, at A6; Rachel Donadio, *Italy Convicts 23 Americans, Most Working for C.I.A., of Abducting Muslim Cleric*, N.Y. Times, Nov. 5, 2009, at A15 [hereinafter *Italy Convicts 23 Americans*]; Hendricks, *supra* note 5605, at 240.

5620. Elisabetta Povoledo, *Egyptian Says He Was Tortured After Being Kidnapped in Milan*, N.Y. Times, Nov. 11, 2006, at A7; see also Shapira, *supra* note 5604 (according to Nasr's wife, his genitals were subjected to electric shocks).

5621. See Eur. Ct. H.R. Press Release, *supra* note 5604 (noting that Nasr was released without charge but was prohibited from leaving Egypt); Nora Boustany, *Freed Cleric Is Planning Lawsuit*, Wash. Post, Feb. 13, 2007, at A15; *Egypt Frees Muslim Cleric Seized in 2003*, N.Y. Times, Feb. 12, 2007, at A8.

5622. *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 96 (D.D.C. 2012); see Donadio, *Italy Convicts 23 Americans*, *supra* note 5619; Hendricks, *supra* note 5605, at 273; Shapira, *supra* note 5604; Craig Whitlock, *Italy Convicts 23 Americans*, Wash. Post, Nov. 5, 2009, at A14.

5623. *De Sousa*, 840 F. Supp. 2d at 96; see Hendricks, *supra* note 5605, at 273.

5624. See Donadio, *Italy Convicts 23 Americans*, *supra* note 5619; Rachel Donadio, *Judge Links Italy Agency to Abduction of a Cleric*, N.Y. Times, Feb. 2, 2010, at A10; Hendricks, *supra* note 5605, at 273 ("the Constitutional Court's rulings on state secrecy kept [the judge] from considering important evidence against them"); International Commission of Jurists, *Transnational Injustices: National Security Transfers and International*

upheld the convictions and increased the sentences for De Sousa and others to seven years.⁵⁶²⁵ Italy's highest court upheld the convictions in September 2012.⁵⁶²⁶

On February 1, 2013, an intermediate appellate court reversed the diplomatic-immunity acquittals.⁵⁶²⁷ Later that month, Italy's military intelligence chief was back on the hook, and the court of appeals sentenced him to ten years.⁵⁶²⁸ Ultimately, however, the Italian courts reversed convictions for the five Italians on February 24, 2014, because the case involved classified information.⁵⁶²⁹ Italy pardoned the American lieutenant colonel in April 2013.⁵⁶³⁰

Claiming that “[p]reparing a response to this Complaint requires consultation with numerous U.S. officials,” the government requested, on July 14, 2009, a thirty-day extension of time.⁵⁶³¹ Judge Ricardo M. Urbina granted the extension and then granted a second extension of two more business days.⁵⁶³² The government's August 31 motion to dismiss the complaint argued that requested relief “would require this Court to subject to

Law 139–41 (2017), www.icj.org/wp-content/uploads/2017/09/Europe-Transnational-Injustices-Publications-Reports-Thematic-reports-2017-ENG.pdf.

5625. See Elisabetta Povoledo, *Court Upholds Convictions of Americans in Kidnapping Case*, N.Y. Times, Dec. 16, 2010, at A8.

5626. See Elisabetta Povoledo, *High Court in Italy Backs Convictions for Rendition*, N.Y. Times, Sept. 20, 2012, at A5; Ian Shapira, *Court Upholds Rendition Verdicts*, Miami Herald, Sept. 20, 2012, at 8A.

5627. See *Court Convicts 3 Americans in Kidnapping Case*, N.Y. Times, Feb. 2, 2013, at A6; see also *Guilty Verdicts in Rendition Case*, N.Y. Times, Mar. 12, 2014, at A6; Hendricks, *supra* note 5605, at 273.

5628. See *Ex-Military Spy Chief Sentenced in CIA Case*, Wash. Post, Feb. 13, 2013, at A6 (reporting also, “The court granted a provisional award of \$1.34 million to Abu Omar and \$670,000 to his wife for the suffering they endured.”); Gaia Pianigiani, *Italy Jails Ex-Officials for Rendition*, N.Y. Times, Feb. 13, 2013, at A12.

5629. See International Commission of Jurists, *supra* note 5624, at 139–40; *Italy—CIA—Kidnapping*, Malone Telegram, Feb. 25, 2014.

5630. See *Pardon Granted in Rendition Case*, N.Y. Times, Apr. 6, 2013, at A5.

5631. Extension Motion, *De Sousa v. Dep’t of State*, No. 1:09-cv-896 (D.D.C. July 14, 2009), D.E. 5.

5632. Extension Order, *id.* (Aug. 27, 2009), D.E. 7; Docket Sheet, *id.* (May 17, 2009) [hereinafter 2009 Docket Sheet]; see Extension Motion, *id.* (Aug. 27, 2009), D.E. 6 (“an event occurred yesterday regarding Plaintiff’s claims which has an impact on this litigation and may have resolved at least a portion of the lawsuit”).

Judge Urbina retired on May 31, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

judicial review the exercise of a discretionary right that has consistently been viewed under U.S. and international law as belonging to the state.”⁵⁶³³ The court and the parties agreed that opposition to the motion would be due on September 28 and a reply would be due on October 9.⁵⁶³⁴

After Judge Urbina granted De Sousa two extensions of time to respond to the government’s motion to dismiss her complaint, the government opposed the third request, so Judge Urbina ordered De Sousa to respond to the motion by December 22 or seek leave to file an amended complaint.⁵⁶³⁵ De Sousa amended her complaint on June 4, 2010.⁵⁶³⁶ Defendants filed motions to dismiss the amended complaint on August 19.⁵⁶³⁷ Judge Urbina granted the parties three extensions of time for De Sousa to respond, finally setting a deadline for December 6.⁵⁶³⁸

On November 24,⁵⁶³⁹ De Sousa’s attorney filed a request to present to the court in camera, with cleared defense counsel present, possibly classified information pertaining to the case.⁵⁶⁴⁰ On December 1, De Sousa sought another extension of the briefing schedule,⁵⁶⁴¹ and Judge Urbina ordered briefing stayed until further order of the court.⁵⁶⁴²

Judge Beryl A. Howell joined the bench on December 27, 2010, and received assignment of this pending case on January 20, 2011.⁵⁶⁴³ Judge

5633. Dismissal Motion, *De Sousa*, No. 1:09-cv-896 (D.D.C. Aug. 31, 2009), D.E. 8.

5634. Extension Order, *supra* note 5632.

5635. 2009 Docket Sheet, *supra* note 5632; see Government Opposition, *De Sousa*, No. 1:09-cv-896 (D.D.C. Nov. 30, 2009), D.E. 13; Extension Motion, *id.* (Nov. 27, 2009), D.E. 12.

5636. Amended Complaint, *De Sousa*, No. 1:09-cv-896 (D.D.C. June 4, 2010), D.E. 17; see Order, *id.* (June 4, 2010), D.E. 16 (granting permission to amend the complaint and denying as moot the pending motion to dismiss the original complaint); Amendment Motion, *id.* (Dec. 22, 2009), D.E. 14.

5637. Dismissal Motions, *id.* (Aug. 19, 2010), D.E. 22, 23.

5638. 2009 Docket Sheet, *supra* note 5632.

5639. See Motion to Modify the Briefing Schedule, *De Sousa*, No. 1:09-cv-896 (D.D.C. Dec. 1, 2010), D.E. 27.

5640. Motion for In Camera Presentation, *id.* (dated Nov. 8, 2010, filed Jan 18, 2011), D.E. 34-1; *De Sousa v. Dep’t of State*, 840 F. Supp. 2d 92, 99 (D.D.C. 2012).

5641. Extension Motion, *De Sousa*, No. 1:09-cv-896 (D.D.C. Dec. 1, 2010), D.E. 38.

5642. 2009 Docket Sheet, *supra* note 5632.

5643. *Id.*; FJC Biographical Directory, *supra* note 5632; *De Sousa*, 840 F. Supp. 2d at 99.

Tim Reagan interviewed Judge Howell for this case study in her chambers on November 4, 2013.

Howell dismissed the case on January 5, 2012.⁵⁶⁴⁴ By the time of Judge Howell's ruling, De Sousa had dropped her demand for enforcement of diplomatic immunity, and Judge Howell agreed that entitlement to diplomatic immunity is a nonjusticiable political question.⁵⁶⁴⁵ With respect to related due-process claims, De Sousa did not allege specific government actions that deprived her of liberty interests.⁵⁶⁴⁶ On October 22, 2012, De Sousa voluntarily dismissed her appeal.⁵⁶⁴⁷

Reviving a case against Nasr that was interrupted by his abduction, Italy convicted him in absentia of terrorism on December 6, 2013, and sentenced him to six years in prison.⁵⁶⁴⁸

One of De Sousa's codefendants in Italy—the CIA's station chief at the time of Nasr's apprehension—was arrested on July 18, 2013, in Panama at Interpol's request.⁵⁶⁴⁹ He was returned, however, to the United States on the following day.⁵⁶⁵⁰ In 2015, Italy's president cut the station chief's pending sentence from nine to seven years and vacated a codefendant's three-year sentence.⁵⁶⁵¹

De Sousa filed an action in the district court for the District of Columbia on November 19, 2014, to enforce Freedom of Information Act requests to the CIA and the Departments of Defense and State for information related to her case.⁵⁶⁵² Following productions of documents to De Sousa, Judge Howell found on March 9, 2017, that the government agencies had produced all that they were required to, with the exception of un-

5644. *De Sousa*, 840 F. Supp. 2d at 102, 106–16; see *Judge Dismisses Lawsuit in Italian Kidnapping Case*, Wash. Post, Jan. 6, 2012, at A10; Mike Scarcella, *Using Classified Information*, Nat'l L.J., Jan. 9, 2012, at 16.

5645. *De Sousa*, 840 F. Supp. 2d at 106.

5646. *Id.* at 108–13.

5647. Motion, *De Sousa v. Dept. of State*, No. 12-5064 (D.C. Cir. Oct. 22, 2012); see Dismissal Order, *id.* (Oct. 29, 2012).

5648. See *Egyptian Cleric Convicted*, N.Y. Times, Dec. 7, 2013, at A5.

5649. See Elisabeth Malkin, Rachel Donadio & Karla Zabloudovsky, *Ex-Employee of C.I.A. Held in Abduction*, N.Y. Times, July 19, 2013, at A4; Greg Miller, *Ex-CIA Operative Held in Panama*, Wash. Post, July 19, 2013, at A11.

5650. See Greg Miller & Karen DeYoung, *Ex-CIA Operative Released by Panama*, Wash. Post, July 20, 2013, at A3; Scott Shane, *Former Spy Returns to U.S.*, N.Y. Times, July 20, 2013, at A7.

5651. See Frances D'Emilio, *Sentences Cut for 2 Americans in Italian Rendition Case*, Wash. Post, Dec. 25, 2015, at A9.

5652. Complaint, *De Sousa v. CIA*, No. 1:14-cv-1951 (D.D.C. Nov. 19, 2014), D.E. 1; *De Sousa v. CIA*, 239 F. Supp. 3d 179, 186–87 (D.D.C. 2017).

certainty about one document.⁵⁶⁵³ The parties settled the case without further judicial review in June, agreeing to a payment to De Sousa of \$1,900 in attorney fees and costs.⁵⁶⁵⁴

De Sousa herself, who had dual U.S. and Portuguese citizenship, was detained in Portugal on October 5, 2015, when she tried to fly to India to visit her ailing mother.⁵⁶⁵⁵ In January 2016, a Portuguese appeals court ordered her extradited,⁵⁶⁵⁶ and Portugal's Constitutional Court affirmed the extradition in April.⁵⁶⁵⁷ De Sousa's mother died in December,⁵⁶⁵⁸ and Portugal detained De Sousa on February 20, 2017, for extradition.⁵⁶⁵⁹ On February 28, Italy's president reduced De Sousa's sentence to three years, which made De Sousa eligible to serve the sentence with community service instead of prison.⁵⁶⁶⁰ Italy revoked her arrest warrant, and a Portuguese court ruled that she was no longer detainable, so she was released

5653. *De Sousa*, 239 F. Supp. 3d 179.

5654. Stipulation, *De Sousa*, No. 1:14-cv-1951 (D.D.C. June 20, 2017), D.E. 41; Settlement Agreement, *id.* (June 12, 2017), D.E. 40.

5655. See Colleen Barry, *Ex-CIA Agent Is Held in Rendition Case*, Miami Herald, Oct. 9, 2015, at 15A; Patricia Kowsmann & Manuela Mesco, *Portugal Detains former CIA Agent*, Wall St. J., Oct. 9, 2015, at A9; Ian Shapira, *Detained Ex-CIA Officer Awaits Fate*, Wash. Post, Oct. 9, 2015, at A7.

"[S]he figured that if she were arrested, the urgency of her case might prompt U.S. and Italian authorities to grant her clemency and reinvestigate the kidnapping." Shapira, *supra* (also reporting that De Sousa arrived in Portugal in April).

5656. See Patricia Kowsmann & Manuela Mesco, *Ex-CIA Operative Faces Italian Prison Term*, Wall St. J., Jan. 16, 2016, at A2; Ian Shapira, *Portuguese Court Orders That Former CIA Officer Be Sent to Italy*, Wash. Post, Jan. 16, 2016, at A7.

5657. See Ian Shapira, *Ex-CIA Officer Faces Jail in Italy*, Wash. Post, Apr. 22, 2016, at A1 (reporting also on an expectation that De Sousa would receive a new trial in Italy); see also Raphael Minder, *In Portugal, Court Backs C.I.A. Agent's Extradition*, N.Y. Times, Apr. 12, 2016, at A10 (reporting on an earlier affirmation by Portugal's supreme court).

5658. See Ian Shapira, *For Ex-CIA Officer, a Bittersweet Sentence in Kidnapping*, Wash. Post, Mar. 6, 2017, at A16.

5659. See Kimiko de Freytas-Tamura & Elisabetta Povoledo, *Ex-Officer in C.I.A. Is Detained in Portugal*, N.Y. Times, Feb. 22, 2017, at A7; Patricia Kowsmann & Manuela Mesco, *Ex-CIA Agent to Be Extradited to Italy*, Wall St. J., Feb. 22, 2017, at A18; Ian Shapira, *Ex-CIA Officer in Portugal Faces Extradition to Italy for Rendition Conviction*, Wash. Post, Feb. 23, 2017.

5660. See Elisabetta Povoledo, *Sentence Reduced for Ex-C.I.A. Officer Sought by Italy*, N.Y. Times, Mar. 1, 2017, at A3 (reporting also that De Sousa's sentence had previously been reduced to four years); Ian Shapira, *For Ex-CIA Officer, a Bittersweet Sentence in Kidnapping*, Wash. Post, Mar. 6, 2017, at A16.

from custody on March 1.⁵⁶⁶¹ She was assigned to teach English in Rome to minors in state care.⁵⁶⁶² She returned to the United States before completing her sentence.⁵⁶⁶³

The European Court of Human Rights issued Nasr and his wife a €115,000 judgment against Italy on February 23, 2016.⁵⁶⁶⁴

Challenge: Classified Evidence

When Judge Howell assumed responsibility for the case, a primary goal was to move on the motions to dismiss by getting a response from De Sousa.⁵⁶⁶⁵

On January 14, 2011, the defendants opposed De Sousa's motion to present classified information to the court: "Plaintiff's request should be denied because the Executive Branch, which holds exclusive responsibility for the protection and control of classified national security information, has not authorized Plaintiff (or her counsel) to disclose classified information for any purpose relating to this civil litigation."⁵⁶⁶⁶ On February 18, De Sousa's attorney completed a six-page reply brief.⁵⁶⁶⁷ The March 11 public filing includes a few redactions that resulted from a classification review.⁵⁶⁶⁸

At a May 26 status conference, Judge Howell "pronounced herself 'literally speechless' at the government's assertions," according to the *New*

5661. See *Ex-CIA Agent Freed in Portugal After Italy Drops Extradition*, Miami Herald, Mar. 2, 2017, at 14A; *Ex-CIA Agent Who Was Freed in Portugal Thanks Trump Administration*, Miami Herald, Mar. 3, 2017, at 12A; Shapira, *supra* note 5658.

5662. See *Ex-CIA Agent Gets Community Service for Kidnap*, Chi. Trib., Nov. 7, 2017, at C9.

5663. See Colleen Barry, *Ex-CIA Agent Serving Community Service in '03 Abduction Flees Italy*, Chi. Trib., Oct. 30, 2019, at C10.

5664. Judgment, *Nasr v. Italy*, No. 44883/09 (Eur. Ct. H.R. Feb. 23, 2016), hudoc.echr.coe.int/eng?i=001-161245 (opinion in French); Eur. Ct. H.R. Press Release, *supra* note 5604 (English summary); see Chamber Hearing, *Nasr*, No. 44883/09 (Eur. Ct. H.R. June 23, 2015), www.echr.coe.int/Pages/home.aspx?p=hearings&w=4488309_23062015&language=en (video recording of court proceeding); *Court Rules Italy Failed to Protect Egypt Cleric*, Wall St. J., Feb. 24, 2016, at A11.

5665. Interview with Judge Beryl A. Howell, Nov. 4, 2013.

5666. Presentation Opposition at 2, *De Sousa v. Dep't of State*, No. 1:09-cv-896 (D.D.C. Jan. 14, 2011), D.E. 33; see *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 99 (D.D.C. 2012).

5667. Reply Brief, *De Sousa*, No. 1:09-cv-896 (D.D.C. dated Feb. 18, 2011, filed Mar. 11, 2011), D.E. 39.

5668. *Id.*; Interview with Judge Beryl A. Howell, Nov. 4, 2013.

York Times.⁵⁶⁶⁹ Because they had received security clearances, it was not surprising that De Sousa and her attorney knew classified information relevant to the case, so the government's position created a substantial challenge for the court: refusing to provide a secure way for De Sousa and her attorney to communicate what they knew to the judge.⁵⁶⁷⁰

Judge Howell ordered De Sousa to respond to the defendants' motions to dismiss the case, and Judge Howell invited De Sousa to indicate how the classified information would be relevant:

[I]n the plaintiff's opposition papers, the plaintiff shall note the specific legal issues for which resolution, in the plaintiff's view, requires the Court to assess facts that implicate classified information. The plaintiff shall identify the need to rely on classified information with respect to any particular claim as precisely as possible without disclosing any classified information.⁵⁶⁷¹

Judge Howell also ordered the government to provide the plaintiff with logistical support that would permit De Sousa's attorney to prepare briefing on a secure computer so as to prevent inadvertent mishandling of classified information.⁵⁶⁷² The government declined to provide the attorney with logistical support that would protect the attorney from inadvertently referring to classified information in a document prepared on a nonsecure computer.⁵⁶⁷³

On June 3, the government provided Judge Howell with an unredacted copy of De Sousa's March 11 reply brief supporting her motion to provide classified information to the court.⁵⁶⁷⁴ "In making this submission, the Government reiterates its position that consideration of classified information in this matter is not necessary, and that Plaintiff and Plaintiff's counsel are prohibited from accessing or disclosing classified information without Executive Branch authorization."⁵⁶⁷⁵

5669. Scott Shane, *U.S. Seeks to Withhold Secret Data from Judge*, N.Y. Times, May 27, 2011, at A13.

5670. Interview with Judge Beryl A. Howell, Nov. 4, 2013.

5671. Order at 1, *De Sousa*, No. 1:09-cv-896 (D.D.C. May 26, 2011), D.E. 40.

5672. *Id.* at 2.

5673. Interview with Judge Beryl A. Howell, Nov. 4, 2013; see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 198–200 (2010) (discussing another case in which the attorney was denied resources to prepare classified briefing).

5674. Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. June 3, 2011), D.E. 41 [hereinafter June 3, 2011, Notice]; Interview with Judge Beryl A. Howell, Nov. 4, 2013.

5675. June 3, 2011, Notice, *supra* note 5674.

Judge Howell ordered the government to explain within one week the reason for every redaction.⁵⁶⁷⁶ Later, she gave the government a two-week extension.⁵⁶⁷⁷ As it turned out, the explanation included the classified information that De Sousa wanted to present to the judge, but neither the judge nor the government, nor De Sousa or her attorney, knew this at the time.⁵⁶⁷⁸

On July 1, De Sousa moved for a status conference, accusing the government of procedural impropriety: “Instead of using the classification process as a means to ensure the protection from unauthorized or even inadvertent public disclosure of classified information, the Executive Branch has turned it into a weapon solely to secure a litigation advantage.”⁵⁶⁷⁹ Portions were redacted from three of the four footnotes in the public filing of this six-page motion.⁵⁶⁸⁰ The government responded, “Defendants’ motions present purely legal arguments, and Defendants submit that those arguments may be fully addressed without making reference to classified information.”⁵⁶⁸¹

Judge Howell held a status conference on August 31 in her chambers.⁵⁶⁸² Because the conference was docketed for her courtroom, members of the public, including members of the news media, were in court to observe proceedings that turned out not to be held there.⁵⁶⁸³ To avoid the appearance of secret proceedings, had Judge Howell to do it over again she would have followed the chambers conference with an in-court presentation of discussions and outcomes.⁵⁶⁸⁴

5676. 2009 Docket Sheet, *supra* note 5632.

5677. *Id.*; see Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. June 24, 2011), D.E. 44; *De Sousa v. Dep’t of State*, 840 F. Supp. 2d 92, 100 (D.D.C. 2012).

5678. Interview with Judge Beryl A. Howell, Nov. 4, 2013; see Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. Sept. 15, 2011), D.E. 51 (“One item of information . . . has previously been made known to Plaintiff’s counsel, pursuant to Executive Branch authorization, in another matter.”).

5679. Status Conference Motion, *De Sousa*, No. 1:09-cv-896 (D.D.C. dated July 1, 2011, filed July 8, 2011), D.E. 45; see *De Sousa*, 840 F. Supp. 2d at 100.

5680. Status Conference Motion, *supra* note 5679.

The government provided Judge Howell with an unredacted copy and explanations for the redactions. Notice, *De Sousa*, No. 1:09-cv-896 (D.D.C. Aug. 3, 2011), D.E. 47.

5681. Government Brief, *De Sousa*, No. 1:09-cv-896 (D.D.C. July 25, 2011), D.E. 46.

5682. 2009 Docket Sheet, *supra* note 5632; Interview with Judge Beryl A. Howell, Nov. 4, 2013.

5683. Interview with Judge Beryl A. Howell, Nov. 4, 2013; see 2009 Docket Sheet, *supra* note 5632.

5684. Interview with Judge Beryl A. Howell, Nov. 4, 2013.

At the August 31 status conference, government attorneys informed Judge Howell that there were no precautions she and the court could take that would permit the plaintiff or her attorney to convey classified information to Judge Howell without the defendants' permission.⁵⁶⁸⁵

Judge Howell considered the possibility of ordering the government to disclose the classified information to her, but the plaintiff refused to disclose to the government what information the plaintiff wanted to disclose to the judge.⁵⁶⁸⁶ Moreover, "despite the Court's requests and the procedures suggested by the Court, the plaintiff has not provided any description, even in broad strokes, of the classified information she seeks to rely upon."⁵⁶⁸⁷

Judge Howell determined that if the plaintiff had made a more compelling showing of a need to present to the judge classified information, the judge could have ordered it:

Upon review of the most pertinent authorities, the Court believes that it has the discretion to order disclosure of classified information to the Court in a civil case where the information is material to the resolution of disputed legal issues and where alternatives to reliance upon classified information are inadequate to satisfy the interests of justice.⁵⁶⁸⁸

5685. *De Sousa v. Dep't of State*, 840 F. Supp. 2d 92, 100–01 & n.3 (D.D.C. 2012).

5686. *Id.* at 104 n.4.

5687. *Id.* at 105 n.5.

5688. *Id.* at 104.

Chapter 39

Section 215

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

A Freedom of Information Act (FOIA) case seeking legal decisions about what a foreign intelligence statute meant required the district judge to review highly classified information at a time when some of that information had already been disclosed.

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The Electronic Frontier Foundation submitted to units of the Department of Justice (DOJ) on June 2, 2011, a FOIA request for records reflecting interpretation or use of orders issued by the Foreign Intelligence Surveillance Court (FISC) pursuant to section 215 of the USA PATRIOT Act,⁵⁶⁸⁹ which amended title V of the Foreign Intelligence Surveillance Act (FISA) concerning tangible things.⁵⁶⁹⁰ Having received no records responsive to the request, the foundation filed a civil FOIA action in the Northern District of California on October 26.⁵⁶⁹¹ On January 18, 2012, the court reassigned the case to Judge Yvonne Gonzalez Rogers, who had joined the bench on November 21, 2011.⁵⁶⁹²

Judge Gonzalez Rogers issued on February 16, 2012, a stipulated production schedule specifying three phases of production to the foundation of records responsive to the FOIA request, to be completed by July 1.⁵⁶⁹³

5689. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

5690. Complaint at 5, *Electronic Frontier Found. v. Dep't of Just.*, No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; *see also* 50 U.S.C. §§ 1861–1862 (2020).

5691. Complaint, *supra* note 5690; *see* Amended Complaint, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Nov. 3, 2011), D.E. 9.

5692. Reassignment Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Jan. 18, 2012), D.E. 16; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

Tim Reagan interviewed Judge Gonzalez Rogers for this case study in her chambers on August 21, 2014.

5693. Stipulated Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Feb. 16, 2012), D.E. 22.

In June 2013, news media reported on classified information about the government's application of section 215 that was provided by Edward Snowden.⁵⁶⁹⁴ As a result, the government decided to declassify some information about section 215,⁵⁶⁹⁵ and it sought time in this FOIA action to determine whether declassifications would amend the government's responses to the foundation's FOIA requests.⁵⁶⁹⁶

On August 11, Judge Gonzalez Rogers determined that "DOJ has established a proper basis for withholding, in full, the FISC orders and opinions at issue, and for withholding all names of telecommunications providers participating in the Call Records Collection Program However, DOJ has not established that [a legal memorandum] is properly withheld" ⁵⁶⁹⁷ On the one hand, the FISA-court opinions contained "no reasonably segregable information."⁵⁶⁹⁸ On the other hand, the legal memorandum, which was prepared by the Office of Legal Counsel on whether the census bureau should turn data over to the NSA, "can no longer be withheld because it has become a controlling statement of the executive branch's legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC."⁵⁶⁹⁹

On January 29, 2015, the government voluntarily dismissed its appeal,⁵⁷⁰⁰ and the government released the legal memorandum on February

5694. Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, Guardian (London), June 6, 2013, at 1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, Wash. Post, June 6, 2013, at A1; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1; see Press Release, Office of the Dir. of Nat'l Intelligence, June 6, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information; see also Chapter 41: Foreign Intelligence Surveillance Act Litigation, *infra* page 860

5695. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifies-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-fisa; see Frederic J. Frommer, *Government to Declassify Some Court Opinions*, Seattle Times, Sept. 6, 2013, at A3.

5696. Status Report, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. July 12, 2013), D.E. 61; see Opinion at 1–2, *id.* (Aug. 11, 2014), D.E. 90, 2014 WL 3945646.

5697. Opinion, *supra* note 5696, at 3; see *id.* at 7–13; see also Bob Egelko, *Judge Won't Force U.S. to Release Spying Program Documents*, S.F. Chron., Aug. 12, 2014, at C4.

5698. Opinion, *supra* note 5696, at 7.

5699. *Id.* at 11; see Egelko, *supra* note 5697.

5700. Voluntary Dismissal, *Electronic Frontier Found. v. U.S. Dep't of Just.*, No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

4.⁵⁷⁰¹ On August 15, the parties notified the court that they had settled the matter of attorney fees.⁵⁷⁰²

Challenge: Classified Evidence

The Justice Department informed the court on November 15, 2012, that it had classified records that were otherwise responsive to the foundation's FOIA request.⁵⁷⁰³ The government stated that it would submit to Judge Gonzalez Rogers a classified declaration for ex parte review in camera.⁵⁷⁰⁴

The declaration would be lodged with a classified information security officer, who, if the court so permitted, would "contact the Court in the near future to ascertain whether the Court has any questions about the procedures [required for handling classified information]."⁵⁷⁰⁵ The notice made clear that the classified information security officer did not report to attorneys representing the government and "thus serves in a neutral capacity providing security oversight in litigation involving classified information."⁵⁷⁰⁶

Finding, on March 26, 2013, that "[t]he public declarations do not begin to explain why [responsive] legal analysis documents would be so replete with descriptions of intelligence activities, sources and methods that no portions thereof would contain non-exempt information," Judge Gonzalez Rogers "decline[d] to look to the *in camera* submission without more from the Department of Justice on the public record in this matter."⁵⁷⁰⁷

On April 1, 2014, to support the government's summary-judgment motion following the production of responsive documents in the aftermath of Snowden's disclosures, the government lodged a classified declaration with the classified information security officer.⁵⁷⁰⁸ Following her re-

5701. Status Report, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Apr. 9, 2015), D.E. 101.

5702. Notice, *id.* (Aug. 15, 2015), D.E. 106.

5703. Letter, *id.* (Nov. 15, 2012), D.E. 39 [hereinafter Nov. 15, 2012, Letter].

5704. *Id.* at 1.

5705. *Id.* at 2; see Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 3, 21–22 (Federal Judicial Center, 2d ed. 2013) (providing information about classified information security officers).

5706. Nov. 15, 2012, Letter, *supra* note 5703, at 2–3.

5707. Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Mar. 26, 2013), D.E. 49.

5708. Notice of Lodging, *id.* (Apr. 1, 2014), D.E. 78.

view of this declaration and other summary-judgment filings, Judge Gonzalez Rogers ordered the government to produce for her ex parte review various withheld classified orders and opinions of the FISA court.⁵⁷⁰⁹ That same day, the government lodged with the classified information security officer redacted versions of the FISA-court filings as they had been provided to Congress.⁵⁷¹⁰

On July 24, Judge Gonzalez Rogers ordered an additional ex parte production.⁵⁷¹¹ The government complied that day.⁵⁷¹²

Judge Gonzalez Rogers's chambers were in Oakland, and the courthouse there did not have a sensitive compartmented information facility (SCIF), which is required for storing sensitive compartmented information, a type of classified information involving sources and methods and therefore requiring extra protections.⁵⁷¹³ For this case, classified information was presented to the judge either in chambers by the classified information security officer or by the judge's visiting the court's SCIF in San Francisco.⁵⁷¹⁴

Challenge: Orders and Opinions

For this case, Judge Gonzalez Rogers relied heavily on her law clerk to prepare initial drafts of orders and opinions, because the law clerk did not have a security clearance and had not seen any classified information.⁵⁷¹⁵ This process ensured that the orders would not inadvertently disclose anything classified.⁵⁷¹⁶

On one occasion, Judge Gonzalez Rogers had to travel to San Francisco to refresh her memory about classified submissions to draft an order.⁵⁷¹⁷

5709. Order, *id.* (June 13, 2014), D.E. 85; see Opinion, *supra* note 5696, at 2.

5710. Notice of Lodging, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. June 16, 2014), D.E. 86.

5711. Order, *id.* (July 24, 2014), D.E. 88; see Opinion, *supra* note 5696, at 2.

5712. Order, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. July 25, 2014), D.E. 89.

5713. See Reagan, *supra* note 5705, at 3, 22–23 (describing SCI and SCIFs).

5714. Interview with Judge Yvonne Gonzalez Rogers, Aug. 21, 2014.

5715. *Id.*

5716. *Id.*

5717. *Id.*

Chapter 40

Learned Helplessness

Salim v. Mitchell (Justin L. Quackenbush, E.D. Wash.)

In a tort action against government contractors, the defendants sought production of classified information to support their defense. The court reviewed classified information, and the case was resolved by settlement.

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A federal complaint filed on October 13, 2015, in the Eastern District of Washington’s Spokane courthouse alleged that psychologists James Mitchell and Bruce Jessen, employing the principles of learned helplessness, “designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency.”⁵⁷¹⁸ The plaintiffs were two survivors of alleged torture and an estate representative of someone who did not survive alleged torture during CIA detention.⁵⁷¹⁹

Following expert assistance to the government on enhanced interrogation techniques, the defendant psychologists formed a company in Spokane that was paid from 2005 to 2009 between \$72 million and \$81 million

5718. Complaint at 1, *Salim v. Mitchell*, No. 2:15-cv-286 (E.D. Wash. Oct. 13, 2015), D.E. 1 [hereinafter *Salim* Complaint]; *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1135–39 (E.D. Wash. 2017); *Salim v. Mitchell*, 183 F. Supp. 3d 1121, 1123 (E.D. Wash. 2016); see Sheri Fink & James Risen, *Suit Aims to Hold Contractors Accountable for C.I.A. Torture*, N.Y. Times, Nov. 28, 2016, at A10; Adam Goldman, *Architects of CIA Interrogations Sued*, Wash. Post, Oct. 14, 2015, at A2; Marisa Taylor & Jonathan S. Landay, *Three Accuse Psychologists of Aiding CIA “Torture,”* Miami Herald, Oct. 14, 2015, at 12A. See generally Sheri Fink & James Risen, *Suit Gives New Details of Brutal Interrogations*, N.Y. Times, June 22, 2017, at A1.

5719. *Salim*, 268 F. Supp. 3d at 1136–38; see *Salim* Complaint, *supra* note 5718, at 1–6.

by the government for further assistance.⁵⁷²⁰ The psychologists' expertise arose from their participation in the air force's training facility in Spokane on "Survival, Evasion, Resistance, Escape (SERE)."⁵⁷²¹

A Separate False-Claims Action

On March 4, 2016, Central District of California Judge Dolly M. Gee dismissed a December 22, 2014, qui tam action against the psychologists under the False Claims Act, originally filed pro se with newspaper articles about the psychologists attached, as precluded by the public disclosure bar to qui tam false-claims actions.⁵⁷²² The court of appeals affirmed the dismissal without oral argument.⁵⁷²³

Spokane Action Not Dismissed

On January 8, 2016, the psychologists moved to dismiss the Spokane complaint on the grounds of political question and derivative sovereign immunity, among others.⁵⁷²⁴ Three months later, the government, which was not a party in the case, filed a notice of interest to prevent discovery from

5720. *Salim*, 268 F. Supp. 3d at 1144; see Goldman, *supra* note 5718; Taylor & Landay, *supra* note 5718. See generally, James Risen, *Pay Any Price* 163–201 (2014) ("The War on Decency").

"[A]s early as March 2002, James Mitchell, a psychologist formerly affiliated with SERE, appeared inside an interrogation room where the C.I.A. was holding a 'high-value' Al Qaeda suspect." Jane Mayer, *The Experiment*, *New Yorker*, July 11, 2005, at 60, 67.

5721. See David H. Hoffman et al., Report to the Special Committee of the Board of Directors of the American Psychological Association: Independent Review Relation to APA Ethics Guidelines, National Security Interrogations, and Torture, July 2, 2015, at 125. See generally Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* 156–81 (2008) (reporting that the program meant to protect American soldiers from torture was reverse-engineered into a protocol for enhanced interrogation); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 214–20 (2007) ("SERE School was a by-product of the Korean War."); Ben Taub, *The Prisoner of Echo Special*, *New Yorker*, Apr. 22, 2019, at 32, 46–47 ("The plan . . . was to induce learned helplessness in humans by combining an individually tailored regimen of torture techniques with environmental manipulation.").

5722. Opinion, *United States ex rel. Yagman v. Mitchell*, No. 2:14-cv-9771 (C.D. Cal. Mar. 4, 2016), D.E. 117; see Amended Complaint, *id.* (June 24, 2015), D.E. 60; Notice of Appearance, *id.* (Apr. 23, 2015), D.E. 19 (providing the relator with representation four months into the case); Complaint, *id.* (Dec. 22, 2014), D.E. 1; see also Goldman, *supra* note 5718.

5723. *United States ex rel. Yagman v. Mitchell*, 711 F. App'x 422 (9th Cir. 2018).

5724. Dismissal Motion, *Salim v. Mitchell*, No. 2:15-cv-286 (E.D. Wash. Jan. 8, 2016), D.E. 27.

impinging on classified aspects of “the CIA’s former detention and interrogation program, a covert action program authorized by the President of the United States in 2001.”⁵⁷²⁵ An attorney for the government participated in the April 22 hearing on the motion to dismiss the complaint, representing the government’s interest in protecting classified information from discovery.⁵⁷²⁶

At the hearing, Judge Justin L. Quackenbush concluded, “I cannot summarily dismiss the complaint that plaintiffs have filed”⁵⁷²⁷ Judge Quackenbush memorialized the conclusion in a published opinion six days later.⁵⁷²⁸

Discovery Litigation

In August, the psychologists filed a motion in the district court for the District of Columbia to compel discovery from the government, alleging that “despite many weeks of meeting and conferring, the Government has not yet produced a single document in response to the subpoenas or even provided a date certain on which it expects to produce responsive documents.”⁵⁷²⁹ On the following day, the psychologists moved to transfer their motion to Judge Quackenbush’s court.⁵⁷³⁰ Judge Ketanji Brown Jackson granted the transfer motion on September 2.⁵⁷³¹

5725. Government Notice, *id.* (Apr. 8, 2016), D.E. 33.

5726. Transcript, *id.* (Apr. 22, 2016, filed Apr. 27, 2016), D.E. 39 [hereinafter Apr. 22, 2016, Transcript]; see *Salim v. Mitchell*, 183 F. Supp. 3d 1121, 1133 (E.D. Wash. 2016).

5727. Apr. 22, 2016, Transcript *supra* note 5726, at 66; see David Welna, *Federal Judge Clears Lawsuit Against CIA Torture Program to Proceed*, Morning Edition (NPR radio broadcast Apr. 25, 2016), www.npr.org/transcripts/475551912 (including an observation by Professor Stephen Vladeck: “What this case reveals is how much easier it is to sue private individuals, to sue contractors, than it is, in this context, to sue the government itself or to sue government employees, military personnel, CIA officers, et cetera.”).

5728. *Salim*, 183 F. Supp. 3d 1121.

Later, on January 27, 2017, Judge Quackenbush denied the psychologists’ motion to dismiss the case as beyond the court’s jurisdiction because of the Detainee Treatment Act of 2005’s jurisdiction restriction for cases against the government and its agents for treatment of enemy combatants. Opinion, *Salim*, No. 2:15-cv-286 (E.D. Wash. Jan. 27, 2017), D.E. 135, 2017 WL 390270.

5729. Discovery Motion, *Mitchell v. United States*, No. 1:16-mc-1799 (D.D.C. Aug. 22, 2016), D.E. 1.

5730. Transfer Motion, *id.* (Aug. 23, 2016), D.E. 2.

5731. Transfer Order, *id.* (Sept. 2, 2016), D.E. 11.

Judge Jackson was elevated to the U.S. Court of Appeals for the District of Columbia Circuit on June 17, 2021, and to the Supreme Court in 2022. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

When Judge Quackenbush heard the discovery motion later in September, the psychologists' attorney acknowledged that pursuant to the psychologists' contracts with the government, "there's an indemnity obligation that covers attorney's fees and exposure in the case"; the government was paying the defense attorneys' fees.⁵⁷³² It was reported that the psychologists were indemnified to \$5 million.⁵⁷³³ Judge Quackenbush expressed some concern about the government's role in the case: "The tremendous volume of pleadings in this case, just on discovery matters, would lead, could lead an impartial person to believe that there is an agreement again by the government and the defendants to attempt to delay this matter."⁵⁷³⁴ Resolving the discovery motion, Judge Quackenbush instructed the government to continue with the document productions that began following the filing of the motion.⁵⁷³⁵

Accommodating New Media

Judge Quackenbush allowed news reporters live blogging in the courtroom during proceedings so long as their devices made no audio or video transmission or recording.⁵⁷³⁶

5732. Transcript at 15, *Salim*, No. 2:15-cv-286 (E.D. Wash. Sept. 29, 2016, filed Sept. 30, 2016), D.E. 29 [hereinafter Sept. 29, 2016, Transcript]; Opinion at 3, *id.* (Oct. 4, 2016), D.E. 80 [hereinafter Oct. 4, 2016, Opinion], 2016 WL 5843383 ("The court was informed an indemnity agreement exists between the Government and the Defendants and the Government is paying the Defendants' attorney fees."); see Notice, *id.* (Oct. 11, 2016), D.E. 84 (attaching copies of service contracts); see also Goldman, *supra* note 5718.

5733. Sheri Fink, *Ex-Detainees Reach Settlement with 2 Psychologists in C.I.A. Torture Case*, N.Y. Times, Aug. 18, 2017, at A12.

5734. Sept. 29, 2016, Transcript, *supra* note 5732, at 4; see Oct. 4, 2016, Opinion, *supra* note 5732, at 3 ("it could appear that neither the Government or the Defendants have an interest in the prompt conclusion of pretrial matters"); Government Statement, *Salim*, No. 2:15-cv-286 (E.D. Wash. Oct. 17, 2016), D.E. 87 ("the Government emphasizes that the disputes between Defendants and the Government with respect to document production are not part of a collusive effort to delay this case").

5735. Oct. 4, 2016, Opinion, *supra* note 5732, at 6; see Status Report, *Salim*, No. 2:15-cv-286 (E.D. Wash. Oct. 11, 2016), D.E. 85.

5736. Blogging Order, *Salim*, No. 2:15-cv-286 (E.D. Wash. Aug. 14, 2017), D.E. 257 (*Guardian*); Blogging Order, *id.* Aug. 9, 2017), D.E. 249 (*Anthropology Today*); Blogging Order, *id.* (Aug. 9, 2017), D.E. 248 (Shadowproof.com); Blogging Order, *id.* (Aug. 8, 2017), D.E. 241 (*New York Times*); Blogging Order, *id.* (July 27, 2017), D.E. 219 (CNN); Blogging Order, *id.* (July 27, 2017), D.E. 218 (*The New Republic*); Blogging Order, *id.* (July 26, 2017), D.E. 216 (Associated Press); Blogging Order, *id.* (July 25, 2017), D.E. 215 (*Spokesman-Review*); Blogging Order, *id.* (July 13, 2017), D.E. 207 (Associated Press); Blogging Order, *id.* (June 26, 2017), D.E. 197 (*Middle East Report*); Blogging Order, *id.*

Only members of the media wearing badges provided by court staff shall be permitted to use electronic devices in the courtroom, and use of electronic devices shall be limited to the transmission of text updates only (blogging, Twitter, Facebook, etc.) Electronic devices may not be used to capture audio or video recordings or photographs within the courtroom or public corridors within the courthouse.

A designated seating area in the courtroom will be reserved for media. Seating for media will be limited and provided on a first come, first served basis.⁵⁷³⁷

Settlement

On August 7, 2017, Judge Quackenbush denied the defendants summary judgment and set trial for September 5.⁵⁷³⁸ On August 17, Judge Quackenbush accepted a stipulated dismissal of the action.⁵⁷³⁹

Testimony in Other Courts

In 2020 and 2022, one or both defendants testified about the use of enhanced interrogation techniques on defendants in military commission prosecutions for the September 11, 2001, terrorist attacks.⁵⁷⁴⁰

(Apr. 20, 2016), D.E. 37 (*Huffington Post*); Blogging Order, *id.* (Apr. 20, 2017), D.E. 36 (NPR); Blogging Order, *id.* (Apr. 19, 2016), D.E. 35 (*Guardian*).

5737. Media Order at 2, *id.* (Aug. 8, 2017), D.E. 242; *see* Transcript at 3–5, *id.* (filed Aug. 3, 2017), D.E. 236.

5738. *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1161 (E.D. Wash. 2017); *see* Sheri Fink, *Two C.I.A. Psychologists Can Face Trial, Judge Rules*, N.Y. Times, July 29, 2017, at A18.

5739. Order, *Salim*, No. 2:15-cv-286 (E.D. Wash. Aug. 17, 2017), D.E. 260; *see* Stipulation, *id.* Aug. 17, 2017), D.E. 259; *see also* Fink, *supra* note 5733; Nicholas K. Geranios, *Deal Is Reached with Psychologists in Lawsuit Over Harsh CIA Interrogations*, Miami Herald, Aug. 18, 2017, at 20A; Ellen Nakashima & Julie Tate, *Lawsuit Over CIA Interrogation Program Settled*, Wash. Post, Aug. 18, 2017, at A2; Sara Randazzo, *CIA Psychologists, Ex-Detainees, Reach Settlement*, Wall St. J., Aug. 18, 2017, at A4.

5740. *See* Jess Bravin, *Psychologist Defends CIA at 9/11 Hearing*, Wall St. J., Jan. 22, 2020, at A5; Ben Fox, *Second CIA Contractor Testifies in 9/11 Case at Guantanamo Court*, Spokane Spokesman-Review, Feb. 1, 2020, at C2; Carol Rosenberg, *Accused 9/11 Mastermind Seeks Access to Secret Testimony*, N.Y. Times, Nov. 18, 2021, at A21; Carol Rosenberg, *At C.I.A. Black Sites, Some Interrogators Practiced on Prisoners*, N.Y. Times, Feb. 27, 2020, at A19; Carol Rosenberg, *C.I.A. Interrogator Describes Threatening Son of Prisoner*, N.Y. Times, Jan. 29, 2020, at A21; Carol Rosenberg, *C.I.A. Interrogator Says Prisoners Adjusted Well*, N.Y. Times, Jan. 31, 2020, at A17; Carol Rosenberg, *A Day of Drama at a 9/11 Hearing*, N.Y. Times, Jan. 22, 2020, at A1; Carol Rosenberg, *Doctor Said He Told Supervisors They Had to See Waterboarding for Themselves*, N.Y. Times, Jan. 23, 2020, at A20; Carol Rosenberg, *Psychologist Describes Fearing for Prisoner at C.I.A. Black Site*, N.Y. Times May 4, 2022, at A22; Carol Rosenberg, *Psychologist Who Used Waterboarding Will Testify at Guantánamo*, N.Y. Times, Jan. 21, 2020, at A15; Carol Rosenberg & Julian E.

In 2022, the Supreme Court ordered dismissed a discovery request by Guantánamo Bay detainee Zayn al-Abidin Muhammad Husayn, commonly known as Abu Zubaydah.⁵⁷⁴¹ A couple of months before the settlement in Judge Quackenbush's case, Abu Zubaydah, filed an application in the Eastern District of Washington for documents and testimony from Mitchell and Jessen to assist a criminal case in Poland "charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah."⁵⁷⁴²

Overruling the U.S. government's objections, Judge Quackenbush granted the discovery petition on September 7.⁵⁷⁴³ On February 21, 2018, however, Judge Quackenbush granted the U.S. government's motion to quash the subpoenas: "Meaningful discovery cannot proceed in this matter without disclosing information the Government contends is subject to the state secrets privilege. Proceeding with discovery would present an unacceptable risk of disclosing state secrets."⁵⁷⁴⁴

A panel of the court of appeals determined on September 18, 2019, by a vote of two to one, "that the district court erred in quashing the subpoenas in toto rather than attempting to disentangle nonprivileged from privi-

Barnes, *Witness Says Haspel, Before Becoming C.I.A. Chief, Observed Use of Waterboard*, N.Y. Times, June 4, 2022, at A17.

5741. *United States v. Husayn*, 595 U.S. ___, 142 S. Ct. 959 (2022).

5742. Discovery Application at 7, *In re Husayn*, No. 2:17-cv-171 (E.D. Wash. May 22, 2017), D.E. 1; *Husayn*, 595 U.S. at ___, 142 S. Ct. at 965; *Husayn v. Mitchell*, 938 F.3d 1123, 1126–28 (9th Cir. 2019); see Discovery Application, *supra*, at 7 ("Abu Zubaydah has the right to submit evidence in aid of the investigation through his attorneys, and the Polish prosecutor has invited counsel for Abu Zubaydah to do so."); see also Thomas Clouse, *Judge Asked to Give Poland CIA Torture Evidence*, Spokane Spokesman-Rev., June 9, 2017, at C1. See generally *The Forever Prisoner* (HBO Documentary film 2021) (discussing Mitchell and Jessen's participation in Abu Zubaydah's CIA interrogation).

5743. Opinion, *Husayn*, No. 2:17-cv-171 (E.D. Wash. Sept. 7, 2017), D.E. 23; *Husayn*, 938 F.3d 1123 at 1126, 1128–29; see Thomas Clouse, *Psychologists May Be Asked About Torture in Poland Case*, Spokane Spokesman-Rev., Nov. 29, 2017, at C1.

5744. Opinion at 17, *Husayn*, No. 2:17-cv-171 (E.D. Wash. Feb. 21, 2018), D.E. 39, 2018 WL 11150135; see *Husayn*, 595 U.S. at ___, 142 S. Ct. at 966; *Husayn*, 938 F.3d 1123 at 1126, 1129.

leged information.”⁵⁷⁴⁵ Over the dissent of twelve circuit judges, the court declined to rehear the appeal en banc.⁵⁷⁴⁶

The Supreme Court decided on March 3, 2022, that perhaps Abu Zubaydah could seek testimony about how he was treated, but he could not seek testimony about where it happened.⁵⁷⁴⁷

Challenge: Classified Evidence

As discovery began, the psychologists asked Judge Quackenbush to issue a case-management order providing for federal-government classification screening of discovery and defense filings.⁵⁷⁴⁸ A previously filed stipulation stated that the defendants anticipated that classified information would possibly be part of discovery, but the plaintiffs believed that classified information would not be necessary to resolve the case.⁵⁷⁴⁹ In response, Judge Quackenbush informed the parties, “It has been the long-standing practice of this court to refrain from incorporating parties’ discovery

5745. *Husayn*, 938 F.3d at 1126; see *Husayn*, 595 U.S. at ___, 142 S. Ct. at 966; see also Thomas Clouse, *9th Circuit Sends Back Case Involving Mitchell, Jessen*, Spokane Spokesman-Rev., Sept. 20, 2019, at A3.

5746. *Husayn v. Mitchell*, 965 F.3d 775 (9th Cir. 2020); *Husayn*, 595 U.S. at ___, 142 S. Ct. at 967.

Following this resolution by the court of appeals, the district court’s case was transferred from Judge Quackenbush to Judge Thomas O. Rice. Docket Sheet, *Husayn*, No. 2:17-cv-171 (E.D. Wash. May 22, 2017) (D.E. 52); see *id.* (dismissing the case and closing the file on April 25, 2022, D.E. 63).

5747. *Husayn*, 595 U.S. ___, 142 S. Ct. 959; see Robert Barnes, *High Court: State-Secrets Doctrine Protects Information on “Black Sites,”* Wash. Post, Mar. 4, 2022, at A5; Jess Bravin, *High Court Blocks Torture Evidence*, Wall St. J., Mar. 4, 2022, at A3; Adam Liptak, *Supreme Court Shields C.I.A. Black Site from a Detainee’s Inquiry*, N.Y. Times, Mar. 4, 2022, at A19; see also Robert Barnes, *Court Reviews What Is a State Secret*, Wash. Post, Oct. 7, 2021, at A3; Robert Barnes, *Justices to Weigh Request for Torture Information*, Wash. Post, Apr. 27, 2021, at A5; Jess Bravin, *Justices Consider “Black Site” Witnesses*, Wall St. J., Oct. 7, 2021, at A4; Jess Bravin, *Justices to Weigh Bid to Hold Testimony*, Wall St. J., Apr. 27, 2021, at A3; Adam Liptak, *Supreme Court’s Surprising Proposal in a Torture Case*, N.Y. Times, Oct. 7, 2021, at A16; Adam Liptak & Carol Rosenberg, *Supreme Court to Rule on Detainee’s Request to Subpoena Interrogators*, N.Y. Times, Apr. 27, 2021, at A21.

5748. Case-Management Motion, *Salim v. Mitchell*, No. 2:15-cv-286 (E.D. Wash. June 9, 2016), D.E. 48.

5749. Stipulation, *id.* (May 23, 2016), D.E. 47; see Transcript at 21, *id.* (July 9, 2016, filed July 13, 2016), D.E. 60 [hereinafter July 9, 2016, Case-Management Transcript] (“[Defense Counsel]: Your Honor, I certainly foresee that classified information is going to play a role and probably a large role in this litigation.”).

agreements, such as Protective Orders and those proposed herein, in a court order.”⁵⁷⁵⁰ Judge Quackenbush observed further, however, that a reasonable amount of time for the government’s classification review of a defense filing would ordinarily be ten days or less, and a reasonable amount of time for a classification review of discovery would ordinarily be thirty days or less.⁵⁷⁵¹

At Judge Jackson’s hearing on the discovery transfer motion, the government’s attorney argued that “because of the classified nature of the documents that are at issue, we think that this matter is more appropriately handled here [in Washington, D.C.] This court has the storage facilities and experience with classified submissions.”⁵⁷⁵² In time, the Justice Department’s Litigation Security Group, which assists federal courts with the handling of classified material and which is neutral with respect to case outcome,⁵⁷⁵³ established a way for classified materials to be stored in Spokane at the local FBI office.⁵⁷⁵⁴

Judge Quackenbush stated at a case-management hearing that if he was required to review classified materials in the case, he would consider regarding them as for judge’s eyes only before he would require a law clerk to seek a security clearance.⁵⁷⁵⁵

To avoid the unauthorized or inadvertent disclosure of classified information, the government sought a protective order so that discovery from CIA agents would be by written questions instead of by depositions.⁵⁷⁵⁶ The psychologists opposed the motion,⁵⁷⁵⁷ and Judge Quackenbush denied it.⁵⁷⁵⁸

Early in the case’s second year, the psychologists filed a motion challenging redactions in the ninety documents, consisting of 1,475 pages,

5750. Order, *id.* (June 15, 2016), D.E. 51.

5751. *Id.* at 4.

5752. Transcript at 7, *Mitchell v. United States*, No. 1:16-mc-1799 (D.D.C. Aug. 31, 2016, filed Sept. 7, 2016), D.E. 13.

5753. See Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* 21–22 (Federal Judicial Center, 2d ed. 2013).

5754. Transcript at 76, 94, *Mitchell v. United States*, No. 2:16-mc-36 (E.D. Wash. May 5, 2017, filed May 19, 2017), D.E. 164 [hereinafter May 5, 2017, Transcript].

5755. July 9, 2016, Case-Management Transcript, *supra* note 5749, at 24–25.

5756. Motion for a Protective Order, *Salim*, No. 2:15-cv-286 (E.D. Wash. Sept. 23, 2016), D.E. 73.

5757. Protective Order Opposition, *id.* (Sept. 28, 2016), D.E. 78.

5758. Oct. 4, 2016, Opinion, *supra* note 5732.

produced by the CIA and the Department of Justice.⁵⁷⁵⁹ Judge Quackenbush ordered the government to produce a privilege log.⁵⁷⁶⁰ A couple of months after that, the psychologists challenged assertions of privilege, arguing that “several of the privileges require formal assertion through a proscribed method, and the U.S. has not employed such methods, e.g. the state secret and deliberative process privileges.”⁵⁷⁶¹ They also challenged restrictions on deposition testimony from a retired CIA officer to whom the psychologists reported.⁵⁷⁶² In response, the government requested an extension of time to decide whether to invoke the state-secrets privilege to quash the deposition.⁵⁷⁶³ The government also filed “Unclassified Summaries of Selected Documents Withheld in Part or in Full on CIA Privilege Log.”⁵⁷⁶⁴ In a subsequent motion, the psychologists moved to compel evidence from two covert CIA employees.⁵⁷⁶⁵ The government responded that “the state secrets privilege prohibits the depositions sought in this case and prevents disclosure of seven categories of national security information redacted from the Government’s documents.”⁵⁷⁶⁶ The psychologists observed that insufficient discovery might entitle them to relief from the litigation.⁵⁷⁶⁷ The plaintiffs responded that the psychologists’ discovery requests were “needlessly burdensome and obviously cumulative.”⁵⁷⁶⁸

5759. Discovery Motion, *Mitchell*, No. 2:16-mc-36 (E.D. Wash. Oct. 28, 2016), D.E. 38.

5760. Order, *id.* (Nov. 23, 2016), D.E. 52.

5761. Discovery Motion at 1, *id.* (Jan. 18, 2017), D.E. 54 [hereinafter Jan. 18, 2017, Discovery Motion]. See generally Reagan, *supra* note 5753.

5762. Jan. 18, 2017, Discovery Motion, *supra* note 5761, at 2, 9.

5763. Discovery Motion Response at 3–4, 6–8, *Mitchell*, No. 2:16-mc-36 (E.D. Wash. Jan. 31, 2017), D.E. 59 [hereinafter Jan. 31, 2017, Discovery Motion Response]; see James Risen & Sheri Fink, *Pentagon Unit Considered Establishing a Secret Overseas Prison*, N.Y. Times, Feb. 9, 2017, at A19. See generally U.S. Att’y Gen., Policies and Procedures Governing Invocation of the State Secrets Privilege, Sept. 23, 2009, *attached as ex. 1*, Jan. 31, 2017, Discovery Motion Response, *supra*.

5764. Ex. 2, Discovery Motion Response, *supra* note 5763.

5765. Discovery Motion, *Mitchell*, No. 2:16-mc-36 (E.D. Wash. Feb. 14, 2017), D.E. 64.

5766. Discovery Motions Response at 17, *id.* (Mar. 8, 2017), D.E. 75; see James Risen, Sheri Fink & Charlie Savage, *State Secrets Privilege Invoked to Block Testimony in C.I.A. Torture Case*, N.Y. Times, Mar. 9, 2017, at A20.

5767. Discovery Motion Reply at 18, *Mitchell*, No. 2:16-mc-36 (E.D. Wash. Mar. 22, 2017), D.E. 76.

5768. Plaintiffs’ Discovery Motion Response, *id.* (Mar. 27, 2017), D.E. 79.

A classified information security officer provided by the Department of Justice's Litigation Security Group attended a hearing on the discovery motions.⁵⁷⁶⁹ With him at the public hearing were unredacted copies of documents disclosed by the government to the psychologists in discovery.⁵⁷⁷⁰ The attorney for the government admonished Judge Quackenbush to handle unredacted documents with care so that persons in the courtroom not authorized to see them would not be able to.⁵⁷⁷¹ Redactions were identified in the unredacted documents with gray highlighting.⁵⁷⁷²

Judge Quackenbush concluded that "the State Secrets Privilege applies to the identification of the CIA officers, to the location of the interrogation site, to what country it was located in."⁵⁷⁷³ Judge Quackenbush also concluded, "at this juncture, the Government's assertion of the state secrets privilege does not prevent this matter from proceeding. In fact, no party credibly argues dismissal is required because of the state secrets privilege."⁵⁷⁷⁴

5769. May 5, 2017, Transcript, *supra* note 5754, at 11.

5770. *Id.* at 51.

5771. *Id.* at 66.

5772. *Id.* at 66–67.

5773. *Id.* at 77.

5774. Discovery Opinion at 15, *Mitchell v. United States*, No. 2:16-mc-36 (E.D. Wash. May 31, 2017), D.E. 91.

VI. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT AND THE COURTS

The importance of both judicial independence and national security was brought into especially sharp focus following surveillance disclosures by Edward Snowden in 2013. The following chapter summarizes both recent and historical litigation concerning the Foreign Intelligence Surveillance Act.

Previous chapters focused on how individual judges managed specific cases or collections of cases. The following chapter is different in that it focuses on a litigation topic as it arose in many cases over several years, and it also illustrates both legal and case-management challenges that judges face in national security litigation.

Chapter 41

Foreign Intelligence Surveillance Act Litigation

The Foreign Intelligence Surveillance Act created procedures for judicial oversight of domestic foreign intelligence surveillance. Over time, the purview of the act expanded from electronic surveillance incidents to surveillance programs encompassing electronic communications and tangible things. Judicial supervision became both more litigated and more public.

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The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) was signed by President Carter on October 25, 1978.⁵⁷⁷⁵ The eleven sections of FISA's title I became chapter 36, sections 1801 through 1811, of the U.S. Code's title 50 on war and national defense. FISA's title II included conforming amendments, and title III concerned the effective date.

FISA provides for court orders authorizing “electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information [involving] the acquisition of communications of [a] United States person.”⁵⁷⁷⁶ Foreign powers include foreign governments, foreign factions, and international terrorists.⁵⁷⁷⁷ Use of FISA-derived evidence in court requires notice to the person against whom the evidence is used.⁵⁷⁷⁸

5775. Pub. L. No. 95-511, 92 Stat. 1783 (1978). *See generally* 2 James G. Carr, Patricia L. Bellia & Evan A. Creutz, *The Law of Electronic Surveillance* 437–511 (May 2020); David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* (3d ed. 2019); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 Harv. J. L. & Pub. Pol'y 757 (2014); Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251 (2016); International Surveillance, *The 2014 Cato Institute Surveillance Conference* (Dec. 12, 2014) [hereinafter *Cato Conference*], www.cato.org/events/2014-cato-institute-surveillance-conference.

5776. FISA § 102(b), 50 U.S.C. § 1802(b) (2020).

5777. *Id.* § 101(a), 50 U.S.C. § 1801(a).

5778. *Id.* § 106(a), 50 U.S.C. § 1806(c).

FISA orders are issued by a FISA court, referred to as the Foreign Intelligence Surveillance Court or FISC, that originally consisted of seven district judges from seven circuits appointed by the Chief Justice for non-renewable seven-year terms.⁵⁷⁷⁹ The court's chief judge is known as the court's presiding judge.

Physical Searches

In 1980, President Carter's second attorney general, Benjamin Civiletti, adopted a policy of seeking FISA-court permission for some physical searches in service of foreign intelligence, searches that are sometimes called black bag jobs.⁵⁷⁸⁰ William French Smith, President Reagan's first attorney general, submitted a black bag petition to the FISA court on June 3, 1981, asking the court to deny the petition and rule that the court did not have jurisdiction over such petitions.⁵⁷⁸¹ Presiding Judge George L. Hart, Jr., a district judge in the district court for the District of Columbia,⁵⁷⁸² acceded to the government's request in the court's first public opinion.⁵⁷⁸³ Expressing a judgment in which all judges on the court concurred, Judge Hart observed that the text of FISA applied only to electronic surveillance.⁵⁷⁸⁴

In 1994, FISA was amended to extend the FISA court's jurisdiction to include physical searches for foreign intelligence purposes.⁵⁷⁸⁵ The new

5779. Pub. L. No. 95-511, §§ 103(a), (d), 92 Stat. at 1788. See generally Elizabeth Goitein & Faiza Patel, What Went Wrong with the FISA Court (Brennan Ctr. for Justice 2015), www.brennancenter.org/sites/default/files/analysis/What_Went_Wrong_With_The_FISA_Court.pdf; Bruce Moyer, *The Most Powerful Court You Have Never Heard Of*, Fed. Law., Mar. 2015, at 6.

5780. See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U. L. Rev. 1, 78 (2000); Charlie Savage, *Takeover* 40 (2007); Benjamin Wittes, *Law and the Long War* 224 (2008).

5781. Brief, *In re Physical Search*, No. 81-____ (FISA Ct. June 3, 1981), reprinted in S. Rep. No. 97-280.

5782. Judge Hart died on May 21, 1984. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

5783. Opinion, *Physical Search*, No. 81-____ (FISA Ct. June 11, 1981), reprinted in S. Rep. No. 97-280.

5784. *Id.*

5785. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423, 3443 (1994); see Wittes, *supra* note 5780, at 59–61 (reporting that the Clinton administration sought expansion of FISA-court authority over black bag jobs because of uncertainty about whether surveillance of the spy Aldrich Ames, whose prosecution

provisions became FISA's title III,⁵⁷⁸⁶ and provisions on effective dates became title IV.

FISA Expansion

In 1998, the FISA court's jurisdiction was expanded further to include pen registers, trap-and-trace devices, and business records, creating new titles IV⁵⁷⁸⁷ and V⁵⁷⁸⁸ and moving effective date provisions to title VI.⁵⁷⁸⁹

The USA PATRIOT Act was signed by President George W. Bush on October 26, 2001.⁵⁷⁹⁰ It relaxed the standard for issuing a FISA order from "the purpose of the surveillance is to obtain foreign intelligence information" to require that only "a significant purpose" be foreign intelligence.⁵⁷⁹¹ The act also expanded the FISA court from seven to eleven district judges, at least three of whom must reside within twenty miles of D.C.⁵⁷⁹² (The FISA Amendments Act of 2008 clarified that the eleven judges must come from "at least" seven circuits.⁵⁷⁹³)

Section 215 of the Patriot Act expanded FISA's title V for business records to include "any tangible things."⁵⁷⁹⁴ Before the Patriot Act, FISA provided for FISA-court orders issued to the FBI "authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle

ended in a plea bargain benefitting Ames's wife, would have withstood judicial scrutiny); Laura K. Donohue, *The Future of Foreign Intelligence* 13 (2016) ("It was not clear . . . that the search of [Aldrich Ames's] home had been legal.").

5786. 50 U.S.C. §§ 1821–1829 (2020) (subchapter II).

5787. *Id.* §§ 1841–1846 (subchapter III, on pen registers and trap-and-trace devices).

5788. *Id.* §§ 1861–1862 (subchapter IV, on business records).

5789. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601–603, 112 Stat. 2396, 2404–12 (1998); see Donohue, *supra* note 5775, at 797 (reporting that the 1998 amendments were triggered by the 1995 Oklahoma City bombing).

5790. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); see Charlie Savage, *Power Wars* 182 (2015) ("The bill contained a grab bag of new and expanded law enforcement and surveillance powers the Justice Department had long coveted, and it made several changes to FISA.").

5791. Pub. L. No. 107-56, § 218, 115 Stat. at 291, 50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B).

5792. *Id.* § 208, 115 Stat. at 283, 50 U.S.C. § 1803(a)(1).

5793. Pub. L. No. 110-261, § 109, 122 Stat. 2436, 2464 (2008), 50 U.S.C. § 1803(a)(1).

5794. Pub. L. No. 107-56, § 215, 115 Stat. at 287, 50 U.S.C. §§ 1861–1862; see Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553, 671 (2017) ("[FISA] was to be the *only* way the Executive branch could engage in domestic electronic surveillance for foreign intelligence purposes. [Footnote omitted.] It later expanded FISA to govern physical searches, pen register and trap and trace devices, and tangible goods."); see also Donohue, *supra* note 5785, at 25–26.

rental facility to release records in its possession for an investigation to gather foreign intelligence information or *an investigation concerning international terrorism*.⁵⁷⁹⁵ The Patriot Act authorized the FISA court to assist the FBI by issuing “an order *requiring* the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or *to protect against international terrorism* or clandestine intelligence activities.”⁵⁷⁹⁶

Minimization and the Wall

FISA imposes on the government a requirement for “minimization procedures” to protect persons from unnecessary violations of privacy.⁵⁷⁹⁷ Over the years, the FISA court exercised oversight over minimization procedures:

In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used *sub rosa* for criminal investigations, the Court routinely approved the use of information screening “walls” proposed by the government in its applications. Under the normal “wall” procedures, where there were separate intelligence and criminal *investigations*, or a single counter-espionage investigation with overlapping intelligence and criminal *interests*, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney–client intercepts occurred, Justice Department lawyers in [the Office of Intelligence Policy and Review] acted as the “wall.” In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, this Court became the “wall” so that FISA information could not be disseminated to crimi-

5795. 50 U.S.C. § 1861(a) (2000) (emphasis added).

5796. *Id.* § 1861(a)(1) (2001) (emphasis added). See generally U.S. Dep’t of Just. Inspector Gen., A Review of the Federal Bureau of Investigation’s Use of Section 215 Orders for Business Records (Mar. 2007) (redacted), oig.justice.gov/sites/default/files/legacy/special/s0703a/final.pdf.

5797. See 50 U.S.C. §§ 1801(h), 1821(4) (2020) (definitions).

nal prosecutors without the Court's approval. In some cases where this Court was the "wall," the procedures seemed to have functioned as provided in the Court's orders; however, in an alarming number of instances, there have been troubling results.

...

In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications. . . .

...

In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors.⁵⁷⁹⁸

Following the attacks of September 11, 2001, the government proposed relaxed minimization procedures, but all seven members of the court agreed that some of the changes were "designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes*, instead of being consistent with the need of the United States to obtain, produce, and disseminate *foreign intelligence information*."⁵⁷⁹⁹ One of the court's concerns was that the government would be able to circumvent probable-cause requirements for criminal investigations by characterizing the investigations as for foreign intelligence.⁵⁸⁰⁰ So the court modified the submitted minimization procedures.⁵⁸⁰¹

FISA requires the Chief Justice to appoint three district or circuit judges to a FISA court of review to hear government appeals from FISA-court rulings.⁵⁸⁰² Hearing its very first appeal, the court of review overruled the FISA court's modifications to the government's minimization procedures.⁵⁸⁰³ "The FISA court's decision and order not only misinterpreted

5798. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620–21 (FISA Ct. 2002).

5799. *Id.* at 623.

5800. *Id.* at 624 (quotation marks omitted).

5801. *Id.* at 625–27.

5802. 50 U.S.C. § 1803(b).

5803. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002); see Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 219 (2014). See generally Donohue, *supra* note 5785, at 26–31 ("National Security and Criminal Law Converge"); Karen J. Greenberg, *Rogue Justice* 55–62 (2016) ("Tearing Down the Wall").

"Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of

and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an article III court.”⁵⁸⁰⁴

The Intelligence Community

The Central Intelligence Agency (CIA) and the National Security Agency (NSA) are well-known members of the U.S. intelligence community (IC).⁵⁸⁰⁵ The FBI is also a member. There are seventeen members,⁵⁸⁰⁶ and a Director of National Intelligence provides some coordination.⁵⁸⁰⁷

- Central Intelligence Agency
- National Security Agency
- Federal Bureau of Investigation
- Defense Intelligence Agency
- Army Intelligence and Security Command
- Office of Naval Intelligence
- Marine Corps Intelligence
- Air Force Intelligence
- U.S. Coast Guard Intelligence
- U.S. Space Force
- Department of State Bureau of Intelligence and Research
- Department of Homeland Security Office of Intelligence and Analysis
- Department of Treasury Office of Intelligence and Analysis
- Department of Energy Office of Intelligence and Counterintelligence
- National Reconnaissance Office
- National Geospatial-Intelligence Agency
- Drug Enforcement Administration Intelligence Program

Stellar Wind

On December 16, 2005, the *New York Times* reported that President Bush had secretly authorized in 2002 a program of surveillance that excluded the FISA court from approval of the surveillance, although the surveillance

Criminal Defense Lawyers (NACDL) as *amici curiae*.” *Sealed Case*, 310 F.3d at 719 (footnote omitted).

5804. *Sealed Case*, 310 F.3d at 731.

5805. We Are the Intelligence Community, www.intelligence.gov/.

5806. Our Organizations, www.intelligence.gov/how-the-ic-works.

5807. Office of the Director of National Intelligence, www.odni.gov.

included international communications with people in the United States.⁵⁸⁰⁸ *USA Today* reported on May 11, 2006, that telephone companies were cooperating with government surveillance in possible violation of FISA.⁵⁸⁰⁹ Many civil suits against the government and against telephone companies followed these revelations.⁵⁸¹⁰ On June 28, 2013, the *Washington Post* reported that a surveillance program authorized on October 4, 2001, was called Stellar Wind.⁵⁸¹¹

Judges in these cases were divided on whether the plaintiffs had standing to challenge the government programs.⁵⁸¹²

Congress amended FISA to provide the telephone companies with retroactive immunity.⁵⁸¹³ The Intelligence Reform and Terrorism Prevention

5808. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

5809. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, *USA Today*, May 11, 2006, at 1A.

"President Bush authorized the NSA to (1) collect the contents of certain international communications, a program that was later referred to as the [terrorist surveillance program], and (2) collect in bulk non-content information, or 'metadata,' about telephone and Internet communications." Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 16 (July 2, 2014) [hereinafter Second Privacy Board Report], documents.pclob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf.

Following the *New York Times* report, the label "terrorist surveillance program" was coined to refer to aspects of a broader program that were revealed by the news report. A Review of the Department of Justice's Involvement with the President's Surveillance Program, in Annex to the Report on the President's Surveillance Program 347, 365 (July 10, 2009), www.dni.gov/files/documents/424/2009%20Joint%20IG%20Report%20on%20the%20PSP_Annex%20Vol.%20III-F.pdf; see Michael V. Hayden, *Playing to the Edge* 106 (2016). "After the *New York Times* reported leaked information about the Terrorist Surveillance Program, the administration had to retroactively justify its actions." Mondale et al., *supra* note 5775, at 2279.

5810. *In re NSA Telecomm. Records Litig.*, 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); Docket Sheet, *In re NSA Telecomm. Records Litig.*, No. 4:06-md-1791 (N.D. Cal. Aug. 14, 2006).

5811. Robert O'Harrow, Jr. & Ellen Nakashima, *NSA Collected Data with Private Sector After 9/11*, *Wash. Post*, June 28, 2013, at A6.

"[Vice President Dick Cheney] and his chief counsel conceived it, enlisted the NSA director, Michael V. Hayden, to build it, found a Justice Department lawyer to bless it, and packaged the program for sign-off by President Bush." Barton Gellman, *Dark Mirror* 26 (2020).

5812. See Chapter 35: Warrantless Wiretaps, *supra* page 748.

Act of 2004 moved FISA's title VI on effective dates to title VII and added a new title VI on requirements for reporting FISA-court statistics to Congress.⁵⁸¹⁴ The FISA Amendments Act of 2008 (FAA) substituted a new title VII providing "additional procedures regarding certain persons outside the United States."⁵⁸¹⁵ Subject to FISA-court approval or exigent circumstances, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."⁵⁸¹⁶ A new title VIII granted the telephone companies retroactive civil immunity.⁵⁸¹⁷

On January 10, 2007, while the warrantless wiretap litigation was pending, the FISA court issued two negotiated classified orders that resulted in the government's no longer circumventing the FISA court in the surveillance program at issue.⁵⁸¹⁸

5813. See *In re NSA Telecomm. Records Litig.*, 671 F.3d 881 (9th Cir. 2011), *affg In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009), *cert. denied*, 568 U.S. 958 (2012); see also Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 137 (2014).

5814. Pub. L. No. 108-458, § 6002, 118 Stat. 3638, 3743 (2004), 50 U.S.C. § 1871 (2020) (subchapter V); see Donohue, *supra* note 5803, at 138–39.

5815. Pub. L. No. 110-261, § 101(a), 122 Stat. 2436, 2437 (2008), 50 U.S.C. §§ 1881–1881g (subchapter VI); see Donohue, *supra* note 5794, at 672 (reporting that the act brought within FISA, for the first time, purely overseas communications, but only those involving U.S. persons); see also *United States v. Hasbajrami*, 945 F.3d 641, 649–58 (2d Cir. 2019); Donohue, *supra* note 5785, at 33–38. See generally *The FISA Amendments Act: Q&A* (Apr. 18, 2017), www.dni.gov/files/icotr/FISA%20Amendments%20Act%20QA%20for%20Publication.pdf (the intelligence community's summary of the act's benefits in advance of the act's 2017 reauthorization).

5816. Pub. L. No. 110-261, § 101(a), 122 Stat. 2438, 50 U.S.C. § 1881a; see Second Privacy Board Report, *supra* note 5809, at 19–24; see also Wittes, *supra* note 5780, at 246 (reporting that this provision, first adopted as part of the Protect America Act, eliminated the difference between wire and radio communications).

"Whereas FISA originally limited intelligence agencies to collecting information from 'foreign powers' and 'agents of foreign powers' . . . the FAA extended FISC jurisdiction to 'any non-U.S. person overseas' so long as collecting that intelligence furthered the goals of collecting 'foreign intelligence.'" Mondale et al., *supra* note 5775, at 2267.

5817. Pub. L. No. 110-261, §§ 201–202, 122 Stat. at 2467–71, 50 U.S.C. §§ 1885–1885c (subchapter VII).

5818. Ex. A, Government Motion for Summary Judgment, *Elec. Frontier Found. v. Dep't of Just.*, No. 1:07-cv-403 (D.D.C. May 11, 2007), D.E. 7; see Offices of Inspectors General, Redacted Classified Report on the President's Surveillance Program 57–58 (July 10, 2009) [hereinafter Redacted PSP Report], oig.justice.gov/reports/2015/PSP-09-18-15-full.

The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court. As a result of the new orders, any electronic surveillance that was conducted as part of the [terrorist surveillance program] is now being conducted subject to the approval of the FISA Court.⁵⁸¹⁹

The Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) on February 27 in the district court for the District of Columbia seeking disclosure of the orders.⁵⁸²⁰ Judge Thomas F. Hogan ruled on August 14 that the orders satisfied the national-defense, statutory, and law-enforcement FOIA exemptions.⁵⁸²¹

On August 9, the ACLU filed a motion directly with the FISA court for public release of the orders.⁵⁸²² FISA Court Judge John D. Bates, a District of Columbia district judge, denied the ACLU its requested relief.⁵⁸²³ “Other

pdf; see also Government Brief, *In re* ___, No. ___ (FISA Ct. Dec. 13, 2006), www.dni.gov/files/documents/1212/Memo%20of%20Law%20as%20filed%2012%2013%202006%20-%2012-11%20Redacted.pdf (redacted brief making a case for the orders).

5819. Redacted Declaration of NSA Director at 3, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175.

In January 2007, the FISC issued orders authorizing the government to conduct certain electronic surveillance of telephone and Internet communications carried over listed communication facilities where, among other things, the *government* made a probable cause determination regarding one of the communicants, and the email addresses and telephone numbers to be tasked were reasonably believed to be used by persons located outside the United States.

Second Privacy Board Report, *supra* note 5809, at 17.

[A] speechwriter for Bush came up with the name “Terrorist Surveillance Program,” a marketing slogan that deliberately misdirected public scrutiny. The domestic surveillance did not spy on known terrorists. It aspired to cover substantially all Americans, collecting hundreds of billions of telephone and internet records, in the hope of discovering *unknown* conspirators.

Gellman, *supra* note 5811, at 123.

5820. Complaint, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007), D.E. 1.

5821. Opinion, *id.* (Aug. 14, 2007), D.E. 17; see *Elec. Frontier Found. v. Dep’t of Just.*, 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a motion for reconsideration based on new revelations by news media).

5822. Motion, *In re* Certain Orders, No. Misc. 07-1 (FISA Ct. Aug. 9, 2007), www.aclu.org/files/images/asset_upload_file968_31228.pdf; *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007).

5823. *Court Records*, 526 F. Supp. 2d at 497.

courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception.”⁵⁸²⁴

The Director of National Intelligence released redacted versions of the two helpful orders on December 12, 2014.⁵⁸²⁵ On January 10, 2007, FISA Court Judge Malcolm J. Howard, of the Eastern District of North Carolina, issued one order covering surveillance of Americans⁵⁸²⁶ and another order covering foreign surveillance.⁵⁸²⁷

Partially declassified declarations released on December 21, 2013, provided some details about the two helpful FISA-court orders:

On January 10, 2007, the FISA Court issued two orders authorizing the Government to conduct certain electronic surveillance that had been occurring under the [surveillance program]. . . . [T]he orders consisted of a [redacted] and a Foreign Telephone and Email Order, which authorized, *inter alia*, electronic surveillance of telephone and Internet communications carried over particularly listed facilities when the Government determines that there is probable cause to believe that (1) one of the communicants is a member or agent of al Qaeda or an associated terrorist organization, and (2) the communication is to or from a foreign country (*i.e.*, a one-end foreign communication to or from the United States). The telephone numbers and email addresses to be targeted under the Foreign Telephone and Email Order were further limited to those that the NSA reasonably believes are being used by persons *outside* the United States.⁵⁸²⁸

5824. *Id.* at 488.

5825. Press Release, Office of the Dir. of Nat’l Intelligence, Dec. 12, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001; *see also* Order, *In re* Tangible Things, No. BR 06-5 (FISA Ct. May 24, 2006), www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf, 2006 WL 7137486.

5826. Order, *In re* Various Known and Unknown Agents, No. ____ (FISA Ct. Jan. 10, 2007), www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%20-%2012-11%20-%20Redacted.pdf.

5827. Order, *In re* ____, No. ____ (FISA Ct. Jan. 10, 2007), *as redacted*, www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%2012-11%20-%20Redacted.pdf.

5828. Classified Alexander Declaration at 15, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. May 25, 2007) (lodged D.E. 298), *as redacted*, www.dni.gov/files/documents/1220/NSA%20Alexander%202007%20Shubert%20Declaration.pdf.

On April 3, 2007, Northern District of Florida Judge Roger Vinson was on FISA-court duty, and he narrowed the government's ability to make probable-cause determinations without FISA-court approval.⁵⁸²⁹

In 2015, *New York Times* journalist Charlie Savage reported that the January 10, 2007, orders resulted from an application presented to the FISA court at a time when a judge that the government viewed to be favorably disposed to the government's position was on duty, and the court thereafter adjusted its procedures so that the government would have less awareness of the court's duty schedule.⁵⁸³⁰

Statutory Enhancement of Surveillance Authority

President Bush signed the Protect America Act on August 5, 2007.⁵⁸³¹ The act was a six-month modification of FISA that excluded from FISA's coverage electronic "surveillance directed at a person reasonably believed to be located outside of the United States."⁵⁸³² The act specified a procedure for the FISA court to enforce a directive by the Director of National Intelligence or the attorney general to a communication service provider for compensated assistance in "the acquisition of foreign intelligence infor-

5829. Opinion, *In re* ___, No. ___ (FISA Ct. Apr. 3, 2007), as redacted, www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-%20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf; see Redacted PSP Report, *supra* note 5818, at 57, 59; see also Greenberg, *supra* note 5803, at 147–48; Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12; Savage, *supra* note 5790, at 204.

Two subsequent FISA-court opinions by Judge Vinson were redacted and released on January 26, 2015, in response to a FOIA action by the *New York Times*. Opinion, No. ___ (FISA Ct. Aug. 27, 2007) (redacted); Opinion, No. ___ (FISA Ct. May 31, 2007) (redacted); Letter from U.S. Dep't of Just. to N.Y. Times, s3.amazonaws.com/s3.documentcloud.org/documents/1509488/nyt-savage-foia-fisc-may-august-2007-orders.pdf (both opinions, redacted); Docket Sheet, *N.Y. Times Co. v. U.S. Dep't of Just.*, No. 1:14-cv-3948 (S.D.N.Y. June 3, 2014); see Charlie Savage, *Collection of Foreigners' Data Began Before Congress Backed It, Papers Show*, N.Y. Times, Jan. 28, 2015, at 13.

5830. Savage, *supra* note 5790, at 199–202; see Greenberg, *supra* note 5803, at 146 ("Late in 2006 the [Justice Department's national security division] settled upon a case to take before FISC Judge Malcolm Howard.").

5831. Pub. L. No. 110-55, 121 Stat. 552 (2007); see Jacob Sommer, *FISA Authority and Blanket Surveillance*, Litigation, Spring 2014, at 40, 44.

5832. Pub. L. No. 110-55, § 2, FISA § 105A, 50 U.S.C. § 1805a (2007); see Second Privacy Board Report, *supra* note 5809, at 19; Donohue, *supra* note 5803, at 135–37; Greenberg, *supra* note 5803, at 148–50.

mation” concerning “persons reasonably believed to be located outside the United States.”⁵⁸³³

The FISA Court of Review’s Second Published Opinion

On August 22, 2008, following closed oral argument held in Providence, Rhode Island, in June, the FISA court of review, in its second published opinion, affirmed an order of compliance issued by the FISA court.⁵⁸³⁴ Reviewing the constitutionality of the directives, the court held “that a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”⁵⁸³⁵ The court determined that the directives satisfied the Fourth Amendment’s reasonableness requirement.⁵⁸³⁶

Yahoo! complied with the directives.⁵⁸³⁷ On June 14, 2013, it filed a motion with the FISA court to make public the lower court’s opinion and to make public Yahoo!’s identity.⁵⁸³⁸ Presiding FISA Court Judge Reggie B. Walton, of the District of Columbia—after consultation with the other FISA-court judges—issued an order on July 15 that the government review the opinion for redaction of classified information.⁵⁸³⁹ In response to the motion, the government stated that Yahoo!’s identity could be declassified and that the government had no objection to publication of unclassified portions of the opinion and the case file.⁵⁸⁴⁰

5833. Pub. L. No. 110-55, §§ 2–3, FISA §§ 105B–105C, 50 U.S.C. §§ 1805b–1805c (2007).

5834. *In re Directives*, 551 F.3d 1004 (FISA Ct. Rev. 2008); see Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 158–59 (2010); Greenberg, *supra* note 5803, at 161–66; Sommer, *supra* note 5831, at 40–41. See generally Donohue, *supra* note 5803, at 234–36.

5835. *Directives*, 551 F.3d at 1012; see Second Privacy Board Report, *supra* note 5809, at 90.

5836. *Directives*, 551 F.3d at 1012–15; see Donohue, *supra* note 5785, at 146; Donohue, *supra* note 5803, at 137. See generally Sommer, *supra* note 5831.

5837. *Directives*, 551 F.3d at 1008; see Craig Timberg & Christopher Ingraham, *Fines in NSA Dispute Might Have Bankrupted Yahoo*, Wash. Post, Sept. 16, 2014, at A13.

5838. *In re Motion*, Directives to ___, No. 105B(g) 07-1 (FISA Ct. June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-1.pdf.

5839. Order, *id.* (July 15, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-3.pdf.

5840. Government Response, *id.* (June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-2.pdf; see Order, *id.* (Oct. 22, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-4.pdf (noting the status of the classification review).

On September 11, 2014, the Director of National Intelligence posted on the internet forty-eight documents comprising 1,283 pages:⁵⁸⁴¹ the FISA-court opinion,⁵⁸⁴² a less redacted version of the FISA court of review's opinion,⁵⁸⁴³ and many documents from the two case files. A redacted transcript of argument before the FISA court of review was released on November 17.⁵⁸⁴⁴

Additional documents were released in March 2015⁵⁸⁴⁵ and April 2016.⁵⁸⁴⁶

5841. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 11, 2014 [hereinafter Sept. 11, 2014, DNI Press Release], www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1109-statement-by-the-odni-and-the-u-s-doj-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation; see Government Supplemental Response, *In re Directives to Yahoo!, Inc.*, No. 105B(g) 07-1 (FISA Ct. Dec. 12, 2014), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-5.pdf; see also Vindu Goel & Charlie Savage, *Threat of Daily Fine Shows Government's Aggressive Push for Data*, N.Y. Times, Sept. 12, 2014, at B1; Craig Timberg, *U.S. Threat Led Yahoo to Relent*, Wash. Post, Sept. 12, 2014, at A1; Danny Yadron, *Yahoo Faced Big U.S. Fines*, Wall St. J., Sept. 12, 2014, at B1.

5842. Opinion, *Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 25, 2008), as redacted, www.dni.gov/files/documents/0909/Memorandum%20Opinion%2020080425.pdf; see Order, *In re Directives to Yahoo!, Inc.*, No. 08-1 (FISA Ct. Rev. Sept. 11, 2014), lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf, archived at web.archive.org/web/20170519023954/lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf (ordering the unsealing of declassified portions of the opinion).

A more redacted version of this opinion was also included in the release: www.dni.gov/files/documents/0909/Redacted%20Memo%20Opinion%20and%20Order%2020080425.pdf.

5843. Opinion, *Directives*, No. 08-1 (FISA Ct. Rev. Aug. 22, 2008), as redacted, www.dni.gov/files/documents/0909/FISC%20Merits%20Opinion%2020080822.pdf, 2008 WL 10632524.

5844. Transcript, *Directives*, No. 08-1 (FISA Ct. Rev. June 19, 2008), www.dni.gov/files/documents/1118/19%20June%202008%20FISCR%20PAA%20Hearing%20Transcript%20%20Declassified%20FINAL.pdf; see Release of Oral Argument Transcript from the Protect America Act Litigation by the Office of the Director of National Intelligence and the U.S. Department of Justice (Nov. 17, 2014), icontherecord.tumblr.com/post/102981813883/release-of-oral-argument-transcript-from-the.

5845. Notice, *Directives*, No. 105B(g) 07-1 (FISA Ct. Mar. 4, 2015), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Notice-1.pdf; Release of Documents Concerning Activities under the Foreign Intelligence Surveillance Act (Mar. 3, 2015), icontherecord.tumblr.com/post/112610953998/release-of-documents-concerning-activities-under; see Motion for Enlargement of Time, *Electronic Frontier Found. v. Dep't of Just.*, No. 1:14-cv-760 (D.D.C. Mar. 4, 2015), D.E. 13 (noting the release of eight out of eleven FOIA documents); see also *Electronic Frontier Found. v. Dep't of Just.*, 141 F. Supp. 3d 51

Challenges to the FISA Amendments Act

The ACLU initiated litigation on the FISA Amendments Act on the day that the act was signed.⁵⁸⁴⁷

The ACLU filed a motion with the FISA court for access to the court's rulings on the constitutionality of the act's provisions.⁵⁸⁴⁸ On August 27, 2008, FISA Court Judge Mary A. McLaughlin, of the Eastern District of Pennsylvania, denied the motion.⁵⁸⁴⁹

The ACLU also filed an action in the Southern District of New York challenging the act's constitutionality.⁵⁸⁵⁰ Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments.⁵⁸⁵¹ A panel of the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.⁵⁸⁵² En banc rehearing was denied by a vote of six to six.⁵⁸⁵³ In *Clapper v. Amnesty International USA*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.⁵⁸⁵⁴

(D.D.C. 2015) (granting the government summary judgment with respect to a FISA-court opinion), *appeal dismissed*, Order, No. 15-5346 (D.C. Cir. Apr. 27, 2016), 2016 WL 3041648.

5846. Government Response, *Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 11, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-8_0.pdf; see Order, *id.* (Apr. 27, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01.pdf, 2016 WL 8233915 (later order in the case); Order, *id.* (Feb. 5, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-9_0.pdf, 2016 WL 6212316 (earlier order in the case).

5847. See *Lawfare Podcast: Jameel Jaffer, Bob Litt, and William Banks Debate FISA* (episode 101, Nov. 22, 2014), www.lawfareblog.com/2014/11/lawfare-podcast-episode-101-jameel-jaffer-bob-litt-and-william-banks-debate-fisa/ (noting that the ACLU filed an action forty-five minutes after the statute was signed into law); Greenberg, *supra* note 5803, at 226.

5848. Motion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. July 10, 2008), www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

5849. Opinion, *id.* (Aug. 27, 2008), 2008 WL 9487946.

Judge McLaughlin retired on July 1, 2020. FJC Biographical Directory, *supra* note 5782.

5850. Complaint, *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

5851. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

5852. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

5853. *Amnesty Int'l USA v. Clapper*, 667 F.3d 163 (2d Cir. 2011).

5854. 568 U.S. 398 (2013).

Concerns by Senators Wyden and Udall

On May 26, 2011, Senators Ron Wyden and Mark Udall warned that the Justice Department's secret interpretation of surveillance authorized by the Patriot Act did not comport with the act's text and would trouble citizens.⁵⁸⁵⁵ On June 22, *New York Times* reporter Charlie Savage submitted a FOIA request to the Department for a report referenced by Senators Wyden and Udall.⁵⁸⁵⁶ Savage and the *Times* filed a complaint to enforce the request in the Southern District of New York on October 5.⁵⁸⁵⁷

On October 26, the ACLU filed an action in the same district to enforce a May 31 FOIA "Request for the release of any and all records concerning the government's interpretation or use of Section 215" of the Patriot Act, which amended FISA's title V on business records and other tangible things.⁵⁸⁵⁸ The case was immediately referred to Judge William H. Pauley III as related to the *Times* case, over which Judge Pauley was presiding.⁵⁸⁵⁹

After an in camera review of the report, Judge Pauley ruled on May 17, 2012, that it was properly withheld.⁵⁸⁶⁰ In 2013⁵⁸⁶¹ and 2014,⁵⁸⁶² the government released to the ACLU additional documents concerning section 215. Judge Pauley decided to review in camera other documents—FISA-court orders and opinions—to resolve the government's FOIA obligations as to them,⁵⁸⁶³ and he determined that they were properly withheld.⁵⁸⁶⁴

5855. *N.Y. Times Co. v. U.S. Dep't of Just.*, 872 F. Supp. 2d 309, 312–13 (S.D.N.Y. 2012); see Savage, *supra* note 5790, at 436; Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, *N.Y. Times*, May 27, 2011, at A17.

5856. *N.Y. Times Co.*, 872 F. Supp. 2d at 313; Complaint at 6, *N.Y. Times Co. v. U.S. Dep't of Just.*, No. 1:11-cv-6990 (S.D.N.Y. Oct. 5, 2011), D.E. 1 [hereinafter *N.Y. Times Complaint*]; see Savage, *supra* note 5790, at 436.

5857. *N.Y. Times Complaint*, *supra* note 5856, at 8; see Savage, *supra* note 5790, at 436.

5858. Complaint, *ACLU v. FBI*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 1; *N.Y. Times Co.*, 872 F. Supp. 2d at 313; see Savage, *supra* note 5790, at 436.

5859. Docket Sheet, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011); see Savage, *supra* note 5790, at 436.

Judge Pauley died on July 6, 2021. FJC Biographical Directory, *supra* note 5782; see Sam Roberts, *William H. Pauley III*, 68, *Judge Who Oversaw Trump Hush Money Case*, *N.Y. Times*, July 18, 2021, at 24.

5860. *N.Y. Times Co.*, 872 F. Supp. 2d at 315, 318; see Savage, *supra* note 5790, at 436–37.

5861. *ACLU v. FBI—FOI Case for Records Relating to Patriot Act Section 215*, www.aclu.org/national-security/section-215-patriot-act-foia; Letters, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 74, 78.

5862. Letter, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. July 9, 2014), D.E. 101.

5863. *ACLU v. FBI*, 59 F. Supp. 3d 584 (S.D.N.Y. 2014).

On July 20, 2012, *Wired* posted a story online that the FISA court had ruled on at least one occasion that the government had applied the FISA Amendments Act unconstitutionally.⁵⁸⁶⁵ The report arose from a July 20 letter to Senator Wyden from the Office of the Director of National Intelligence granting the senator permission to make three statements, including that “on at least one occasion the Foreign Intelligence Surveillance Court held that some collection carried out pursuant to the [FISA] Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment.”⁵⁸⁶⁶ According to the letter,

The text that you have asked us to review concerns classified opinions of the Foreign Intelligence Surveillance Court (FISC). . . . However, . . . the Director of National Intelligence (DNI), has determined, as an exercise of his discretion, “that the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.” Accordingly, the DNI has taken the exceptional step of declassifying your proposed text and the other information contained in this letter.⁵⁸⁶⁷

The Director’s office asked the senator to report also, “The government has remedied these concerns and the FISC has continued to approve the collection as consistent with the statute and reasonable under the Fourth Amendment.”⁵⁸⁶⁸

On August 30, the Electronic Frontier Foundation filed a FOIA complaint in the district court for the District of Columbia to enforce a July 26 FOIA request for any FISA-court opinion supporting Senator Wyden’s statement.⁵⁸⁶⁹ In an April 1, 2013, motion for summary judgment, the gov-

5864. Opinion, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Mar. 31, 2015), D.E. 117, 2015 WL 1566775.

5865. Spencer Ackerman, *U.S. Admits Surveillance Violated Constitution At Least Once*, *Wired*, July 20, 2012, Danger Room, www.wired.com/dangerroom/2012/07/surveillance-spirit-law/.

5866. Letter from Director of Legislative Affairs Kathleen Turner, Office of the Director of National Intelligence, to Senator Ron Wyden, July 20, 2012 [hereinafter Turner Letter], www.wired.com/images_blogs/dangerroom/2012/07/2012-07-20-OLA-Ltr-to-Senator-Wyden-ref-Declassification-Request.pdf; see Ryan Lizza, *State of Deception*, *New Yorker*, Dec. 16, 2013, at 48, 60.

5867. Turner Letter, *supra* note 5866, at 1–2.

5868. *Id.* at 2.

5869. Complaint, *Electronic Frontier Found. v. Dep’t of Just.*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; *Electronic Frontier Found. v. Dep’t of Just.*, 57 F. Supp. 3d 54, 55–57 (D.D.C. 2014); see Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, *Wash. Post*, May 23, 2013, at A3.

ernment argued that it was properly withholding from the plaintiff a FISA-court order otherwise responsive to the FOIA request, and only the FISA court could authorize its publication anyway.⁵⁸⁷⁰

On May 20, the plaintiff sought from the FISA court permission for the government to release the order.⁵⁸⁷¹ On June 12, Presiding Judge Walton determined that FISA-court rules did not prohibit disclosure of the order.⁵⁸⁷²

Judge Bates's Concerns

The FISA-court order at issue in the Electronic Frontier Foundation's FOIA action was an October 3, 2011, opinion by Presiding FISA Court Judge Bates.⁵⁸⁷³ The government publicly released a redacted version of the opinion on August 21, 2013.⁵⁸⁷⁴ FISA's section 702, enacted as part of the FAA, provides for FISA-court approval of surveillance programs "targeting . . . persons reasonably believed to be located outside the United States to acquire foreign intelligence information."⁵⁸⁷⁵ Judge Bates held that as-

5870. Government Summary-Judgment Brief at 26, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Apr. 1, 2013), D.E. 11.

5871. Motion, *In re* Motion for Consent to Disclosure of Court Records, No. Misc. 13-1 (FISA Ct. Mayu 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Motion-1.pdf.

5872. Order, *id.* (June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf, 2013 WL 5460051.

5873. Summary-Judgment motion at 1, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Oct. 2, 2013), D.E. 19 [hereinafter Oct. 2, 2013, *EFF* Summary-Judgment Motion]; see Second Privacy Board Report, *supra* note 5809, at 30–31. See generally Donohue, *supra* note 5803, at 190–94, 259–63.

5874. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011) (redacted) [hereinafter Oct. 3, 2011, Bates Opinion], www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional, 2011 WL 10945618, attached as ex. A, Oct. 2, 2013, *EFF* Summary-Judgment Motion, *supra* note 5873; *Electronic Frontier Found.*, 57 F. Supp. 3d at 57; see Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans' Emails*, Miami Herald, Aug. 22, 2013, at 3A; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

On November 19, 2013, the government posted on the website for the Director of National Intelligence pages of the opinion with a substantially less redacted footnote 14: www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf.

5875. FISA § 702(a), 50 U.S.C. § 1881a(a) (2020); see Second Privacy Board Report, *supra* note 5809, at 1 ("Under the . . . program implemented under Section 702 of the Foreign Intelligence Surveillance Act ('FISA'), the government collects the contents of electronic communications, including telephone calls and emails, where the target is reasonably believed to be a non-U.S. person [footnote omitted] located outside the United

pects of some NSA surveillance violated the Fourth Amendment's reasonableness requirement.⁵⁸⁷⁶

The Court's review of the targeting and minimization procedures submitted with the April 2011 Submissions is complicated by the government's recent revelation that NSA's acquisition of Internet communications through its upstream collection under Section 702 is accomplished by acquiring Internet "transactions," which may contain a single, discrete communication, or multiple discrete communications [multi-communication transactions or MCTs], including communications that are neither to, from, nor about targeted facilities. . . .

. . .
In sum, NSA's collection of MCTs results in the acquisition of a very large number of Fourth Amendment-protected communications that have no direct connection to any targeted facility and thus do not serve the national security needs underlying the Section 702 collection as a whole. Rather than attempting to identify and segregate the non-target, Fourth-Amendment protected information promptly following acquisition, NSA's proposed handling of MCTs tends to maximize the retention of such information and hence to enhance the risk that it will be used and disseminated.⁵⁸⁷⁷

Judge Bates expressed concern that the government's clarifying revelation while the application for Judge Bates's approval was pending was "the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program."⁵⁸⁷⁸

States."); *see also In re DNA/AG 702(h) Certifications* 2018, 941 F.3d 547, 550–51 (FISA Ct. Rev. 2019). *See generally* Donohue, *supra* note 5803, at 139–42.

"Rather than adjudicating individual cases or controversies, the [FISA] court [now] approves systems and procedures developed by the executive branch." Mondale et al., *supra* note 5775, at 2291; *see id.* at 1198–301 (likening approving programmatic surveillance to issuing advisory opinions).

5876. Oct. 3, 2011, Bates Opinion, *supra* note 5874, at 78–80. *See generally* U.S. Dep't of Just. Inspector Gen., A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008 (Sept. 2012) (redacted), oig.justice.gov/reports/2015/o1501.pdf; Donohue, *supra* note 5803, at 190–94; Mondale et al., *supra* note 5775, at 2278 ("It is . . . very questionable whether Section 702 comports with Article III of the Constitution.").

5877. Oct. 3, 2011, Bates Opinion, *supra* note 5874, at 15.

5878. *Id.* at 16 n.14; *see Klayman v. Obama*, 957 F. Supp. 2d 1, 19 (D.D.C. 2013).

On November 30, 2011, Judge Bates ruled that “the government has adequately corrected the deficiencies identified in the October 3 Opinion.”⁵⁸⁷⁹

Presiding over the Electronic Frontier Foundation’s FOIA action, Judge Amy Berman Jackson reviewed Judge Bates’s unredacted opinion and ordered the government to provide additional justifications for some redactions.⁵⁸⁸⁰ The government responded by removing some redactions; Judge Jackson determined that the less redacted opinion complied with FOIA.⁵⁸⁸¹

Litigation Following Edward Snowden’s Revelations

In January 2013, Edward Snowden, who worked in Hawaii for an NSA contractor, contacted documentarian Laura Poitras, who lived in Berlin, because he was interested in disclosing what he believed to be improper surveillance practices.⁵⁸⁸² Poitras brought into the loop journalists Glenn Greenwald, a reporter for the London *Guardian* living in Rio de Janeiro, and Barton Gellman, formerly a reporter for the *Washington Post*, living in New York.⁵⁸⁸³ Snowden turned to Poitras after Greenwald’s cool response to Snowden’s December 2012 efforts to interest him.⁵⁸⁸⁴

5879. Opinion at 2, ___, No. ___ (FISA Ct. Nov. 30, 2011), www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-040.pdf, 2011 WL 10947772.

5880. Docket Sheet, *Electronic Frontier Found. v. Dep’t of Just.*, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012) (June 11, 2014, minute order); *Electronic Frontier Found. v. Dep’t of Just.*, 57 F. Supp. 3d 54, 58–59 (D.D.C. 2014).

5881. *Electronic Frontier Found.*, 57 F. Supp. 3d 54; see Opinion, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Sept. 30, 2015), D.E. 47 (magistrate judge recommendation that the plaintiffs be awarded \$49,474.50 in attorney fees and costs); Notice, *id.* (Nov. 16, 2015), D.E. 50 (notice that the government would not contest the fee award).

5882. See Ken Auletta, *Freedom of Information*, New Yorker, Oct. 7, 2013, at 46, 52; Suzanna Andrews, Bryan Burrough & Sarah Ellison, *The Snowden Saga*, Vanity Fair, May 2014, at 152, 154; Michael Gurnow, *The Edward Snowden Affair* 31–33 (2014); George Packer, *The Holder of Secrets*, New Yorker, Oct. 20, 2014, at 50, 55–56.

5883. See Glenn Greenwald, *No Place to Hide* 10–16 (2014); Andrews et al., *supra* note 5882, at 154, 164, 196–97; Auletta, *supra* note 5882, at 52; Gurnow, *supra* note 5882, at 33–40. See generally Gellman, *supra* note 5811.

5884. See Greenwald, *supra* note 5883, at 7–14, 81–82; Andrews et al., *supra* note 5882, at 154, 163; Gurnow, *supra* note 5882, at 22, 34, 37–38; Luke Harding, *The Snowden Files* 66–69 (2014); see also Mark Hertsgaard, *Bravehearts* 31–32 (2016) (reporting that Snowden was interested in contacting Poitras because of her short film, *The Program*).

On June 1, Poitras and Greenwald flew to Hong Kong to meet Snowden.⁵⁸⁸⁵ The *Guardian* insisted that one of its veteran journalists, Ewen MacAskill, accompany the other two.⁵⁸⁸⁶ Snowden transferred to the journalists files containing classified information about NSA surveillance programs.⁵⁸⁸⁷ The impact of Snowden's revelations resulted in his being the first runner-up as *Time* magazine's person of the year for 2013.⁵⁸⁸⁸ The *Guardian* and the *Washington Post* won public-service Pulitzer Prizes.⁵⁸⁸⁹

In June 2013, the FISA court created a public docket website for selected matters brought by private parties; the website was later expanded to include other declassified filings.⁵⁸⁹⁰

Snowden "had explicitly avoided *The New York Times*, due to the paper's decision to delay publication for nearly a year of its 2005 story detailing the N.S.A.'s Bush-era warrantless wiretapping." Andrews et al., *supra* note 5882, at 202.

5885. See Greenwald, *supra* note 5883, at 24–33 (noting that they arrived Sunday night, June 2); Savage, *supra* note 5790, at 401 (reporting that Snowden selected Hong Kong "because its foreign affairs were controlled by China, which would be less likely to swiftly turn him over to the United States"); see also Auletta, *supra* note 5882, at 52; Gurnow, *supra* note 5882, at 40–41; Harding, *supra* note 5884, at 6–13, 78–83. See generally James Bamford, *The Most Wanted Man in the World*, *Wired*, Sept. 2014, at 87.

5886. See Greenwald, *supra* note 5883, at 24–27, 61–62; Andrews et al., *supra* note 5882, at 154–55; Gurnow, *supra* note 5882, at 40; Harding, *supra* note 5884, at 81–82.

5887. See Citizenfour (Praxis Films 2014); Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, *Wash. Post*, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, *Guardian* (London), June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, *Guardian* (London), June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, *N.Y. Times*, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, *Wash. Post*, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story*, *N.Y. Times*, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, *N.Y. Times*, June 7, 2013, at A1; see also *ACLU v. Clapper*, 785 F.3d 787, 795–96 (2d Cir. 2015). See generally David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. Nat'l Sec. L. & Pol'y 209 (2014).

5888. Michael Scherer, *Edward Snowden: The Dark Prophet*, *Time*, Dec. 23, 2013, at 78.

5889. See Paul Farhi, *Washington Post Wins Pulitzer Prize for NSA Spying Revelations*, *Wash. Post*, Apr. 15, 2014, at A1; Ravi Somaiya, *Pulitzer Prizes Awarded for Coverage of N.S.A. Secrets and Boston Bombing*, *N.Y. Times*, Apr. 15, 2014, at A18.

5890. Public Filings—U.S. Foreign Intelligence Surveillance Court, www.fisc.uscourts.gov/public-filings (remodeled approximately May 1, 2014); see U.S. Foreign Intelligence Surveillance Court Public Filings, www.uscourts.gov/uscourts/courts/fisc/index.html (former website address, archived at web.archive.org/web/20140430090344/http://www.uscourts.gov/uscourts/courts/fisc/index.html); see also Peter Wallsten, Carol D. Leonnig & Alice Crites, *Rare Scrutiny for a Court Used to Secrecy*, *Wash. Post*, June 23, 2012, at A1.

Judicial Approval of Surveillance Programs

On June 12, the ACLU filed a motion with the FISA court for release of orders approving the newly disclosed surveillance programs,⁵⁸⁹¹ and the ACLU filed a civil action in the Southern District of New York on the previous day challenging the constitutionality of the programs.⁵⁸⁹² The New York court assigned the case there to Judge Pauley as related to the 2011 FOIA actions by the *New York Times* and the ACLU.⁵⁸⁹³ On November 20, 2013, FISA Court Judge F. Dennis Saylor IV, of the District of Massachusetts, ordered the government to explain why no part of a February 19 opinion by the FISA court could be released.⁵⁸⁹⁴

On December 20, the government submitted to Judge Saylor a proposed redacted opinion for public release.⁵⁸⁹⁵ After discussions with court staff on January 23, 2014, the government agreed on February 6 to release a less redacted opinion.⁵⁸⁹⁶ On August 7, Judge Saylor approved the government's redactions as achieving "the basic objective sought by the mo-

The Director of National Intelligence posted on the internet additional FISA-court filings. *E.g.*, Primary Order, *In re Tangible Things*, No. BR 14-67 (FISA Ct. Mar. 28, 2014) (Judge Rosemary M. Collyer), www.dni.gov/files/documents/0627/BR_14-67_Primary_Order.pdf; Press Release, Office of the Dir. of Nat'l Intelligence, June 27, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1085-joint-statement-from-the-odni-and-the-doj-on-the-declassification-of-renewal-of-collection-under-section-501-of-fisa; Sept. 11, 2014, DNI Press Release, *supra* note 5841; Primary Order, *In re Tangible Things*, No. BR 09-19 (FISA Ct. Dec. 16, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-19%20Primary%20Order.pdf; Primary Order, *In re Tangible Things*, No. BR 09-15 (FISA Ct. Oct. 30, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-15%20Primary%20Order.pdf; Primary Order, *In re Tangible Things*, No. BR 09-09 (FISA Ct. July 9, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-09%20Primary%20Order.pdf.

5891. Motion, *In re Orders Issued by This Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-2 (FISA Ct. June 10, 2013, filed June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Motion-1.pdf, www.aclu.org/files/assets/fisc_unsealing_motion.pdf.

5892. Complaint, *ACLU v. Clapper*, No. 1:13-cv-3994 (S.D.N.Y. June 11, 2013), D.E. 1; *ACLU v. Clapper*, 804 F.3d 617, 619–20 (2d Cir. 2015); *see* Greenberg, *supra* note 5803, at 233–34.

5893. Assignment Notice, *ACLU*, No. 1:13-cv-3994 (S.D.N.Y. June 14, 2013), D.E. 2; *see* *N.Y. Times Co. v. U.S. Dep't of Just.*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012).

5894. Order, *Section 215 Orders*, No. Misc. 13-2 (FISA Ct. Nov. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-5.pdf, 2013 WL 5460064.

5895. Submission, *id.* (Dec. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-6.pdf.

5896. Submission, *id.* (Feb. 6, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-3.pdf.

vants: disclosure of the Court's legal reasoning, to the extent that it can reasonably be segregated from properly classified facts."⁵⁸⁹⁷

The government submitted the redacted opinion to Judge Saylor on August 27.⁵⁸⁹⁸ In the six-page opinion, Judge Bates addressed the "difficult question [of] whether the [surveillance] application shows reasonable grounds to believe that the investigation of [the target] is not being conducted solely upon the basis of activities protected by the first amendment."⁵⁸⁹⁹ Judge Bates was satisfied: "According to the application, the government is investigating [the target] not only on the basis of his own personal words and conduct (which, as noted, suggest sympathy toward, if not support of, international terrorism), but also on the basis of the admitted or suspected [redacted]."⁵⁹⁰⁰

Because of FOIA actions by the ACLU and the Electronic Frontier Foundation, the Director of National Intelligence released 1,040 pages of documents, including several FISA-court documents, on November 18, 2013.⁵⁹⁰¹ Two long and redacted opinions granted "authority for the [NSA] to collect information regarding e-mail and certain other forms of Internet communications under the pen register and trap and trace provisions of [FISA]."⁵⁹⁰² In later litigation over the public's right to statutory interpretation, Presiding FISA Court Judge Rosemary M. Collyer, of the district court for the District of Columbia, would note the release of these opin-

5897. Order, *id.* (Aug. 7, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf, 2014 WL 5442058.

5898. Submission, *id.* (Aug. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opinion-1.pdf.

5899. Opinion at 4, *In re Tangible Things*, No. BR 13-25 (FISA Ct. Feb. 19, 2013, filed Aug. 27, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2013-25%20Opinion-1.pdf, 2013 WL 9838183.

5900. *Id.* at 5.

5901. Press Release, Office of the Dir. of Nat'l Intelligence, Nov. 18, 2013 [hereinafter Nov. 18, 2013, DNI Press Release], www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act; ACLU, NSA Documents Released to the Public Since June 2013, www.aclu.org/nsa-documents-released-public-june-2013; see Ellen Nakashima & Greg Miller, *Intelligence Director Releases About 1,000 Pages of Documents*, Wash. Post, Nov. 19, 2013, at A5.

5902. Opinion at 1, No. PR/TT ____ (FISA Ct. ____) [hereinafter Kotelly PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; see Opinion, No. PR/TT ____ (FISA Ct. ____) [hereinafter Bates PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

ions on bulk collection.⁵⁹⁰³ The director's press release stated that the surveillance program granted authority by these opinions had been discontinued for lack of effectiveness pursuant to an evaluation begun in 2011.⁵⁹⁰⁴ Additional documents were released in August 2014.⁵⁹⁰⁵

The first opinion is eighty-seven pages by Judge Colleen Kollar-Kotelly, with a redacted date of issue.⁵⁹⁰⁶ The *Washington Post*, however, concluded, "Although the date was blacked out, the opinion appeared to be the order that placed the NSA's Internet metadata program under court supervision in July 2004, according to an NSA inspector-general report leaked this year by former NSA contractor Edward Snowden."⁵⁹⁰⁷ According to Judge Kotelly, "This application seeks authority for a much broader type of collection than other pen register/trap and trace applications and therefore presents issues of first impression. For that reason it is appropriate to explain why the Court concludes that the application should be granted as modified herein."⁵⁹⁰⁸

5903. Opinion, *In re Bulk Collection Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Jan. 25, 2017) [hereinafter Collyer Right-of-Access Opinion], www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf, 2017 WL 427591.

5904. Nov. 18, 2013, DNI Press Release, *supra* note 5901; *see also* Laura K. Donohue, *FISA Reform*, 10 I/S: J. of L. & Pol'y 599, 604 (2014) ("The program appears to have operated until December 2011, when it was discontinued for failure to deliver sufficient operational value to the NSA."); Donohue, *supra* note 5803, at 127–28.

In 2015, the *New York Times* reported that the email collection program became less valuable when the NSA developed a program of collecting foreign internet data, which is not subject to oversight by the FISA court. Charlie Savage, *File Says N.S.A. Found Way to Replace Email Program*, N.Y. Times, Nov. 20, 2015, at A4; *see also* Savage, *supra* note 5790, at 565–66.

5905. Press Release, Office of the Dir. of Nat'l Intelligence, Aug. 11, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1099-newly-declassified-documents-regarding-the-now-discontinued-nsa-bulk-electronic-communications-metadata-pursuant-to-section-402-of-the-foreign-intelligence-surveillance-act (including links to forty-three documents totaling 990 pages on the NSA's discontinued pen-register and trap-and-trace program, including three documents previously released on November 18, 2013, one of which—orders in FISA Ct. No. BR 09-05—was rereleased with slightly fewer redactions); *see* Status Report, *Electronic Privacy Info. Ctr. v. Dep't of Just.*, No. 1:13-cv-1961 (D.D.C. Aug. 8, 2014), D.E. 20 (noting the August 7, 2014, production of documents to the plaintiff); *Electronic Privacy Info. Ctr. v. Dep't of Just.*, 296 F. Supp. 3d 109 (D.D.C. 2017) (approving the withholding of some documents following an in camera review); *Electronic Privacy Info. Ctr. v. Dep't of Just.*, 15 F. Supp. 3d 32 (D.D.C. 2014) (denying a preliminary injunction).

5906. Kotelly PR/TT Opinion, *supra* note 5902.

5907. Nakashima & Miller, *supra* note 5901.

5908. Kotelly PR/TT Opinion, *supra* note 5902, at 1–2.

“[B]ased on the plain meaning of the applicable definitions, the proposed collection involves a form of both pen register and trap and trace surveillance.”⁵⁹⁰⁹ Additionally, Judge Kotelly found that “such an interpretation would promote the purpose of Congress in enacting and amending FISA regarding the acquisition of non-content addressing information.”⁵⁹¹⁰ The surveillance program comports with the Fourth Amendment because “there is no reasonable expectation of privacy under the Fourth Amendment in the meta data to be collected.”⁵⁹¹¹ Additionally, “The weight of authority supports the conclusion that Government information-gathering that does not constitute a Fourth Amendment search or seizure will also comply with the First Amendment when conducted as part of a good-faith criminal investigation.”⁵⁹¹²

On the expiration of Judge Kotelly’s authorization of the email metadata surveillance program, Judge Bates considered an “application to re-initiate in expanded form” such surveillance.⁵⁹¹³ In his 117-page opinion, Judge Bates discussed many violations of surveillance restrictions that the government had disclosed.⁵⁹¹⁴ “The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection.”⁵⁹¹⁵ So Judge Bates’s approval of the surveillance came with some modifications.⁵⁹¹⁶

Disclosing Surveillance Cooperation

On June 18 and 19, 2013, respectively, Google and Microsoft sought permission from the FISA court to disclose aggregate statistics on FISA orders that they had received.⁵⁹¹⁷ Yahoo!, Facebook, and LinkedIn filed similar

5909. *Id.* at 16–17.

5910. *Id.* at 18.

5911. *Id.* at 59.

5912. *Id.* at 66.

5913. Bates PR/TT Opinion, *supra* note 5902, at 1.

5914. *Id.* at 9–22; see Devlin Barrett, *Surveillance Court Judge Criticized NSA “Overcollection” of Data*, Wall St. J., Aug. 12, 2014, at A4.

5915. Bates PR/TT Opinion, *supra* note 5902, at 72; see Savage, *supra* note 5790, at 564–65 (reporting that the opinion was issued in July 2010).

5916. Bates PR/TT Opinion, *supra* note 5902, at 117.

5917. Motion, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-4 (FISA Ct. June 19, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-04%20Motion-10.pdf; Motion, *In re* Motion for Declaratory Judgment of Google Inc.’s First Amendment Right to Publish Aggregate Information About FISA Orders, No. Misc. 13-3 (FISA Ct. June 18, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Motion-10.pdf.

motions in September.⁵⁹¹⁸ Apple joined the litigation as an amicus curiae in November.⁵⁹¹⁹ On January 27, 2014, the government settled the motions by granting permission to the carriers to report the number of FISA orders received in bands of 250, or in bands of 1,000 if broken down into category of FISA order.⁵⁹²⁰

The Electronic Privacy Information Center filed a petition for a writ of mandamus with the Supreme Court on July 8, 2013, seeking review of a leaked FISA-court order requiring Verizon to provide the NSA with telephony metadata for all communications in which at least one party is within the United States.⁵⁹²¹ On July 19, the day that the leaked order ex-

5918. Motion, *In re* Motion for Declaratory Judgment That LinkedIn Corp. May Report Aggregate Data Regarding FISA Orders, No. Misc. 13-7 (FISA Ct. Sept. 17, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-07%20Motion-3.pdf; Motion, *In re* Motion for Declaratory Judgments to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-6 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-06%20Motion-3.pdf (Facebook); Motion, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-5 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-05%20Motion-12.pdf (Yahoo!).

5919. Amicus Curiae Brief, Nos. Misc. 13-3 to 13-7 (FISA Ct. Nov. 5, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Brief-1.pdf; Order, *id.* (Nov. 13, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Order-15.pdf (granting leave to file the brief).

5920. Notice, Nos. Misc. 13-3 to 13-7 (FISA Ct. Jan. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Notice.pdf; Dismissal Stipulation, *id.* (Jan. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Action.pdf; *see* Facebook Releases New Data About National Security Requests (Feb. 3, 2014), about.fb.com/news/2014/02/facebook-releases-new-data-about-national-security-requests/ (public report by Facebook); LinkedIn's Transparency Report for Second Half of 2013 (Mar. 31, 2014), blog.linkedin.com/2014/03/31/linkedin-transparency-report-for-second-half-of-2013 (LinkedIn); More Transparency For U.S. National Security Requests, yahoo.tumblr.com/post/75496314481/more-transparency-for-u-s-national-security-requests (Yahoo!); Providing Additional Transparency on US Government Requests for Customer data (Feb. 3, 2014), blogs.microsoft.com/on-the-issues/2014/02/03/providing-additional-transparency-on-us-government-requests-for-customer-data/ (Microsoft); Shedding Some Light on Foreign Intelligence Surveillance Act (FISA) Requests (Feb. 3, 2014), googleblog.blogspot.ca/2014/02/shedding-some-light-on-foreign.html (Google); *see also* Timothy B. Lee, *Tech Firms Publicize Data on NSA Requests*, Wash. Post, Feb. 4, 2014, at A9; Zoe Tillman, *Tech Companies Reach Deal in Data Fight*, Nat'l L.J., Feb. 3, 2014, at 21; *U.S., Web Firms Reach Deal*, Miami Herald, Jan. 28, 2014, at 3A.

5921. Petition, *In re* Electronic Privacy Info. Ctr., No. 13-58 (U.S. July 8, 2013); *see* Primary Order, *In re* Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf, 2013 WL 5460137.

pired, the Director of National Intelligence reported that the FISA court had renewed authorization for NSA's "telephony metadata collection program."⁵⁹²² The Supreme Court denied mandamus review on November 18.⁵⁹²³

The Electronic Frontier Foundation had filed a FOIA complaint in the Northern District of California on October 26, 2011, to enforce a June 2 FOIA request for records concerning the government's interpretation of the Patriot Act's section 215, which amended FISA's tangible-things title.⁵⁹²⁴ In response to that suit and the ACLU's 2011 FOIA suit in the Southern District of New York, and in light of Snowden's revelations, the government released on September 10, 2013, fourteen previously classified documents, with redactions.⁵⁹²⁵ Eight of the documents were FISA-court orders—a 2006 order by Judge Howard, a 2008 opinion by Judge Walton, and six 2009 orders and opinions by Judge Walton—and two of the documents were government submissions to the FISA court.

The released documents illustrated the FISA court's supervision, through its business records or BR docket, of telecommunication metadata surveillance. They also included concerns by Judge Walton that government surveillance was departing from approved procedures.⁵⁹²⁶

In summary, since January 15, 2009, it has finally come to light that the FISC's authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses BR metadata. This misperception by the FISC existed from the inception of its authorized

5922. Press Release, Office of the Dir. of Nat'l Intelligence, July 19, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata; see Joby Warrick, *NSA Cellphone Surveillance Program Renewed, Officials Say*, Wash. Post, July 20, 2013, at A2.

5923. *In re Electronic Privacy Info. Ctr.*, 571 U.S. 1023 (2013).

5924. Complaint, *Electronic Frontier Found. v. Dep't of Just.*, No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; see Amended Complaint, *id.* (Nov. 3, 2011), D.E. 9.

5925. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifies-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-fisa (providing links to the documents); see Paul Elias, *Records: Officials Abused Spying Program*, Miami Herald, Sept. 11, 2013, at 1A; Siobhan Gorman & Devlin Barrett, *NSA Admits It Violated Privacy Rules*, Wall St. J., Sept. 11, 2013, at A3; Carol D. Leonnig, *Judge Questioned NSA Program*, Wash. Post, Sept. 12, 2013, at A3; Ellen Nakashima, Julie Tate & Carol Leonnig, *NSA Broke Privacy Rules for 3 Years, Documents Say*, Wash. Post, Sept. 11, 2013, at A1; Scott Shane, *N.S.A. Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009*, N.Y. Times, Sept. 11, 2013, at A14.

5926. See generally Donohue, *supra* note 5785, at 142–44.

collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systematically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.⁵⁹²⁷

The Court is deeply troubled by the incidents [disclosed by the government], which have occurred only a few weeks following the completion of an "end to end review" by the government of NSA's procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court's orders going forward.⁵⁹²⁸

[T]he Court . . . continues to be concerned about the likelihood that these queries could reveal communications of United States person users

5927. Order at 10–11, *In re Tangible Things*, No. BR 08-13 (FISA Ct. Mar. 2, 2009), www.dni.gov/files/documents/section/pub_March%20202009%20Order%20from%20FISC.pdf, 2009 WL 9150913; *see* *Klayman v. Obama*, 957 F. Supp. 2d 1, 18–19 & n.23 (D.D.C. 2013).

On January 15, 2009, the Department of Justice notified the Court in writing that the government has been querying the business records acquired pursuant to Docket BR 08-13 in a manner that appears to the Court to be directly contrary to the [court's] Order and directly contrary to the sworn attestations of several Executive Branch officials.

Order at 2, *Tangible Things*, No. BR 08-13 (FISA Ct. Jan. 28, 2009), www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf, 2009 WL 9157881; *see* Lizza, *supra* note 5866, at 56; *see also* Opinion, *Tangible Things*, No. BR 08-13 (FISA Ct. Dec. 12, 2008), www.dni.gov/files/documents/section/pub_Dec%2012%202008%20Supplemental%20Opinions%20from%20the%20FISC.pdf, 2008 WL 9475145 (earlier opinion in the case).

5928. Order at 4, *In re Tangible Things*, No. BR 09-13 (FISA Ct. Sept. 25, 2009), www.dni.gov/files/documents/section/pub_Sept%2025%202009%20Order%20Regarding%20Further%20Compliance%20Incidents.pdf, 2009 WL 9150896; *see also* Order, *id.* (Sept. 3, 2009), www.dni.gov/files/documents/section/pub_Sep%203%202009%20Primary%20Order%20from%20FISC.pdf, 2009 WL 9150914 (earlier order in the case).

of the telephone identifier who are not the subject of FBI investigations.⁵⁹²⁹

A version of one document released on March 28, 2014, with considerably fewer redactions than in the September 2013 release, revealed Judge Walton's specific concerns about the NSA's general counsel's oversight of pen-register and trap-and-trace surveillance:

The court is gravely concerned . . . that NSA analysts, cleared and otherwise, have generally *not* adhered to the dissemination restrictions proposed by the government, repeatedly relied upon by the Court in authorizing the collection of the PR/TT metadata, and incorporated into the Court's orders in this matter [redacted] as binding on NSA. Given the apparent widespread disregard of these restrictions, it seems clear that NSA's Office of General Counsel has failed to satisfy its obligation to ensure that all analysts with access to information derived from the PR/TT metadata "receive appropriate training and guidance regarding the querying standard set out in paragraph c. above, *as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of such information.*" Docket No. PR/TT [redacted] Order at 11 (emphasis added).⁵⁹³⁰

On January 17, 2014, the Director of National Intelligence released twenty-four redacted orders in twenty BR cases before the FISA court in 2006 through 2011.⁵⁹³¹ The orders were periodic approvals of a program to collect "all call detail records or 'telephony metadata'" for periods typically a few days short of ninety days, ranging from eighty-four days to eighty-nine days, but sometimes for shorter periods—forty-two, fifty-seven, or sixty-four days—and once for a longer period—115 days. The orders did not cover the period from July 10, 2009, to February 26, 2010. In addition to Judges Kotelly, Bates, Howard, Vinson, and Walton, orders were signed by Judges Frederick J. Scullin, Jr., of the Northern District of New York; Robert C. Broomfield, of the District of Arizona; Nathaniel M. Gorton, of

5929. Order at 6, *In re Tangible Things*, No. BR 09-15 (FISA Ct. Nov. 5, 2009), www.dni.gov/files/documents/section/pub_Nov%2009%20Supplemental%20Opinion%20and%20Order.pdf, 2009 WL 9150915.

5930. Order at 6, *In re Tangible Things*, No. BR 09-06 (FISA Ct. June 22, 2009), www.dni.gov/files/documents/0328/101.%20Order%20and%20Supplemental%20Order.Redacted%2020140327.pdf.

5931. Press Release, Office of the Dir. of Nat'l Intelligence, Jan. 17, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1001-dni-clapper-declassifies-additional-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act (including links to the twenty-four orders).

the District of Massachusetts; and James B. Zagel, of the Northern District of Illinois.⁵⁹³²

In the Northern District of California FOIA action, Judge Yvonne Gonzalez Rogers decided on June 13, 2014, that she would review in camera and ex parte five FISA-court orders and opinions “to assure that the agency is complying with its obligations to disclose non-exempt material.”⁵⁹³³ “The evidence in the record shows that some documents, previously withheld in the course of this litigation and now declassified, had been withheld in their entirety when a disclosure of reasonably segregable portions of those documents would have been required.”⁵⁹³⁴

On August 11, Judge Gonzalez Rogers determined that the government “has established a proper basis for withholding, in full, the FISC orders and opinions at issue.”⁵⁹³⁵ The judge found, however, that the plaintiffs were entitled to a memorandum from the Office of Legal Counsel to the Department of Commerce, which was “prepared to aid the Department of Commerce in determining its legal obligations with respect to disclosure of census information to federal law enforcement [or] national security officers,” concluding that “it can no longer be withheld because it has become a controlling statement of the executive branch’s legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC.”⁵⁹³⁶ The government voluntarily dismissed an appeal.⁵⁹³⁷

Smith and Jones

On September 17, 2013, the FISA court released a public redacted version of an August 22 opinion by FISA Court Judge Claire V. Eagan, of the

5932. Judge Broomfield died on July 10, 2014. FJC Biographical Directory, *supra* note 5782.

5933. Order at 3, *Electronic Frontier Found. v. Dep’t of Just.*, No. 4:11-cv-5221 (N.D. June 13, 2014), D.E. 85 [hereinafter June 13, 2014, N.D. Cal. *EFF* Order]; see Chapter 39: Section 215, *supra* page 845.

5934. June 13, 2014, N.D. Cal. *EFF* Order, *supra* note 5933, at 2.

5935. Opinion at 3, *Electronic Frontier Found.*, No. 4:11-cv-5221 (N.D. Cal. Aug. 11, 2014), D.E. 90, 2014 WL 3945646; *id.* at 7 (“The FISC orders are properly withheld to protect intelligence sources and methods used by the government to gather intelligence data. . . . [B]ased upon the Court’s review, the documents must be withheld in full and contain no reasonably segregable information.”).

5936. *Id.* at 10–13.

5937. Voluntary Dismissal, *Electronic Frontier Found. v. U.S. Dep’t of Just.*, No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

Northern District of Oklahoma, holding in an ex parte application for surveillance authorization that the FBI's obtaining a large volume of telephony metadata was consistent with the Fourth Amendment as interpreted by the Supreme Court in 1979 in *Smith v. Maryland*.⁵⁹³⁸

In *Smith*, the Supreme Court held by a vote of five to three that installation and use of a pen register to record the numbers dialed on a specific telephone was not a search, because it did not violate reasonable expectations of privacy.⁵⁹³⁹ In 1975, a robbery victim reported "threatening and obscene phone calls from a man identifying himself as the robber."⁵⁹⁴⁰ Michael Lee Smith was identified as a suspect, so "the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at [his] home."⁵⁹⁴¹ Justice Blackmun, writing on behalf of himself, Chief Justice Burger, and Justices White, Rehnquist, and Stevens, reasoned, "All subscribers realize . . . that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills."⁵⁹⁴² In dissent, Justice Stewart responded, "The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment."⁵⁹⁴³ He concluded, "I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in [*Katz v. United States*]."⁵⁹⁴⁴ Justice Marshall, also in dissent, and joined by Justice Brennan, observed, "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for

5938. Opinion, *In re Tangible Things*, No. BR 13-109 (FISA Ct. Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf, 2013 WL 5741573 (amending an August 22, 2013, opinion to correct numbering errors among the footnotes); see Order, *id.* (Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-3.pdf (Judge Eagan's order amending her opinion to renumber footnotes); Order, *id.* (Aug. 23, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-2.pdf (the presiding judge's order for a classification review upon Judge Eagan's sua sponte request for publication of her opinion); see also *Smith v. Maryland*, 442 U.S. 735 (1979); Donohue, *supra* note 5785, at 121–22.

5939. *Smith*, 442 U.S. at 736 & n.1, 745–46.

5940. *Id.* at 737.

5941. *Id.*

5942. *Id.* at 742.

5943. *Id.* at 746 (Justice Stewart, dissenting).

5944. *Id.* at 747; see *Katz v. United States*, 389 U.S. 347 (1967).

a limited business purpose need not assume that this information will be released to other persons for other purposes.”⁵⁹⁴⁵

On October 18, 2013, the FISA court released a public redacted October 11 opinion by FISA Court Judge McLaughlin that adopted Judge Eagan’s analysis.⁵⁹⁴⁶ Judge McLaughlin also addressed the Supreme Court’s 2012 case, *United States v. Jones*.⁵⁹⁴⁷

In *Jones*, Justice Scalia concluded for the court, in an opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, that installation of a GPS tracking device on a vehicle to monitor the vehicle’s movements is a Fourth Amendment search because it is a trespass onto property.⁵⁹⁴⁸

Concurring, Justice Sotomayor observed, “Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property.”⁵⁹⁴⁹ Respecting *Smith*, she observed further,

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.⁵⁹⁵⁰

Concurring in the judgment, Justice Alito wrote for himself and Justices Ginsburg, Breyer, and Kagan that they “would analyze the question presented in this case by asking whether respondent’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.”⁵⁹⁵¹ Respecting older precedents, Justice Alito ob-

5945. *Smith*, 442 U.S. at 749 (Justice Marshall, dissenting).

5946. Opinion at 3, *In re Tangible Things*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) [hereinafter McLaughlin Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; see Order, *id.* (Oct. 15, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Order-1.pdf (the presiding judge’s order for a classification review upon Judge McLaughlin’s sua sponte request for publication of her opinion).

Releases of these redacted opinions by Judges Eagan and McLaughlin would be noted in Judge Collyer’s 2017 opinion finding no constitutional right of access to them. Collyer Right-of-Access Opinion, *supra* note 5903, at 4–5.

5947. McLaughlin Opinion, *supra* note 5946, at 4–6; see *United States v. Jones*, 565 U.S. 400 (2012).

5948. *Jones*, 565 U.S. at 404–06.

5949. *Id.* at 414 (Justice Sotomayor, concurring).

5950. *Id.* at 417 (citations omitted).

5951. *Id.* at 419 (Justice Alito, concurring in the judgment).

served, “In the precomputer age, the greatest protections of privacy were neither constitutional nor statutory, but practical.”⁵⁹⁵²

Judge McLaughlin decided that the concerns expressed by the concurring justices in *Jones* did not suggest a conclusion in the telephony surveillance applications, because noncontent metadata are not the same as location information.⁵⁹⁵³

On December 18, 2013, Judge McLaughlin granted a motion by the Center for National Security Studies to submit an amicus curiae brief on whether FISA authorizes the collection of telephony metadata in bulk, but she denied the Center’s request for en banc rehearing.⁵⁹⁵⁴

Judge Zagel endorsed the analyses of Judges Eagan and McLaughlin in a June 19, 2014, FISA-court opinion.⁵⁹⁵⁵

Conflicting Rulings on Surveillance Constitutionality

In 2013, Larry Klayman and two other persons filed a class action in the U.S. District Court for the District of Columbia against the government and Verizon challenging the newly disclosed surveillance methods.⁵⁹⁵⁶ Five days later, an overlapping collection of four individuals filed a similar action against the government and ten other telecommunication companies.⁵⁹⁵⁷ On December 16, Judge Richard J. Leon granted the plaintiffs a preliminary injunction against bulk metadata collection.⁵⁹⁵⁸

5952. *Id.* at 429.

5953. McLaughlin Opinion, *supra* note 5946, at 5.

5954. Order, *In re Tangible Things*, No. BR 13-158 (FISA Ct. Dec. 18, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf, 2013 WL 1235411.

5955. Opinion, *In re Tangible Things*, No. BR 14-96 (FISA Ct. June 19, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf, 2014 WL 5463290.

5956. Complaint, *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C. June 6, 2013), D.E. 1; *Klayman v. NSA*, 280 F. Supp. 3d 39, 42, 45 (D.D.C. 2017); *Klayman v. Obama*, 957 F. Supp. 2d 1, 7, 11 (D.D.C. 2013); *see* Second Amended Complaint, *Klayman*, No. 1:13-cv-851 (D.D.C. Nov. 23, 2013), D.E. 37; Amended Complaint, *id.* (June 9, 2013), D.E. 4; *see also* Jerry Markon, *Classified Programs Challenged in Court*, Wash. Post, July 16, 2013, at A1; James Risen, *Privacy Group to Ask Supreme Court to Stop N.S.A.’s Phone Spying Program*, N.Y. Times, July 8, 2013, at A9.

The plaintiffs voluntarily dismissed Verizon as a defendant on January 31, 2014. Stipulation, *Klayman*, No. 1:13-cv-851 (D.D.C. Jan. 31, 2014), D.E. 75; *see* Third Amended Complaint, *id.* (Feb. 10, 2014), D.E. 77; *see also* *Klayman*, 280 F. Supp. 3d at 42 n.1.

5957. Complaint, *Klayman v. Obama*, No. 1:13-cv-881 (D.D.C. June 11, 2013), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42, 45 & n.7; *see* Third Amended Complaint, *Klayman*, No. 1:13-cv-881 (D.D.C. Feb. 11, 2016), D.E. 112; Second Amended Complaint, *id.* (Jan. 30,

Judge Leon found that the plaintiffs had standing, because “[t]he Government . . . describes the advantages of bulk collection in such a way as to convince me that plaintiffs’ metadata—indeed *everyone’s* metadata—is analyzed, manually or automatically.”⁵⁹⁵⁹ Judge Leon found the metadata collection constituted an unreasonable search, despite the Supreme Court’s 1979 decision in *Smith*:

In *Smith*, the Supreme Court was actually considering whether local police could collect one person’s phone records for calls made after the pen register was installed and for the limited purpose of a small-scale investigation of harassing phone calls. The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.

...
... I cannot imagine a more “indiscriminate” and “arbitrary invasion” than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on “that degree of privacy” that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware “the abridgment of freedom of the people by gradual and silent encroachments by those in power,” would be aghast.⁵⁹⁶⁰

Moreover, “the Government does *not* cite a single instance in which analysis of the NSA’s bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature.”⁵⁹⁶¹

Judge Leon stayed his injunction pending appeal.⁵⁹⁶² While the district court cases otherwise moved forward,⁵⁹⁶³ the prevailing plaintiffs unsuccessfully sought a writ of certiorari from the Supreme Court so that the

2014), D.E. 55; Amended Complaint, *id.* (Nov. 23, 2013), D.E. 30; *see also* Markon, *supra* note 5956; *Klayman*, 957 F. Supp. 2d at 7 n.1, 11.

5958. *Klayman*, 957 F. Supp. 2d 1; *Klayman*, 280 F. Supp. 3d at 47 (“To say the least, that opinion unleashed a firestorm of press and public discussion.”); *see* ACLU v. Clapper, 785 F.3d 787, 799 (2d Cir. 2015).

5959. *Klayman*, 957 F. Supp. 2d at 26–29.

5960. *Id.* at 33, 42 (citation omitted).

5961. *Id.* at 40.

5962. *Id.* at 10, 43; *Klayman*, 280 F. Supp. 3d at 47.

5963. Docket Sheet, *Klayman v. Obama*, No. 1:13-cv-881 (D.D.C. June 11, 2013); Docket Sheet, *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C. June 6, 2013).

high court could quickly consider the plaintiffs' concerns.⁵⁹⁶⁴ The plaintiffs filed a third class action in the district court on January 23, 2014.⁵⁹⁶⁵

Southern District of New York Judge Pauley issued an opinion on December 27, 2013, finding bulk collection authorized by FISA.⁵⁹⁶⁶ Judge Pauley's opinion included two important observations: (1) "[T]he Government acknowledged that it has collected metadata for substantially every telephone call in the United States since May 2006."⁵⁹⁶⁷ (2) "This blunt tool only works because it collects everything. Such a program, if unchecked, imperils the civil liberties of every citizen."⁵⁹⁶⁸ Judge Pauley determined that *Smith* compelled a decision in favor of the government.⁵⁹⁶⁹ In 2015, the court of appeals declined to consider a constitutional challenge to the surveillance program, because the court determined that the program exceeded congressional authorization.⁵⁹⁷⁰ Vast bulk collection cannot be "relevant to an authorized investigation."⁵⁹⁷¹

On June 3, 2014, Judge B. Lynn Winmill dismissed a complaint filed in the District of Idaho alleging that comprehensive metadata collection vio-

5964. *Klayman v. Obama*, 572 U.S. 1053 (2014) (denying certiorari).

5965. Complaint, *Klayman v. Obama*, No. 1:14-cv-92 (D.D.C. Jan. 23, 2014), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42; see Notice of Related Case, *Klayman*, No. 1:14-cv-92 (D.D.C. Jan. 24, 2014), D.E. 2.

5966. *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), *rev'd*, 785 F.3d 787 (2d Cir. 2015); see Greenberg, *supra* note 5803, at 242; Adam Liptak & Michael S. Schmidt, *Judge Upholds N.S.A.'s Bulk Collection of Data on Calls*, N.Y. Times, Dec. 30, 2013, at A1; Andrew Ramonas, Todd Ruger & Tony Mauro, *Courts Join NSA Fight*, Nat'l L.J., Jan. 6, 2014, at 1; Jennifer Smith & Jacob Gershman, *Judge Backs the NSA's Surveillance*, Wall St. J., Dec. 28, 2013, at A1; Sari Horwitz, *Judge: NSA's Action Lawful*, Wash. Post, Dec. 28, 2013, at A1.

5967. *ACLU*, 959 F. Supp. 2d at 735.

5968. *Id.* at 730.

5969. *Id.* at 749–52.

5970. *ACLU*, 785 F.3d at 792; *ACLU v. Clapper*, 804 F.3d 617, 618–20 (2d Cir. 2015); see Devlin Barrett & Damian Paletta, *Judges Say NSA Program Is Illegal*, Wall St. J., May 8, 2015, at A1; Michael Doyle, *NSA Phone Surveillance Is Illegal, Court Rules*, Miami Herald, May 8, 2015, at 1A; Greenberg, *supra* note 5803, at 259–61; Ellen Nakashima, *Bulk Records Collection Nearing Endgame*, Wash. Post, May 9, 2015, at A3; Ellen Nakashima, *NSA Collection of Phone Data Ruled Unlawful*, Wash. Post, May 8, 2015, at A1; Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data Is Ruled Illegal*, N.Y. Times, May 8, 2015, at A1; Jonathan Weisman & Jennifer Steinhauer, *Court Ruling on N.S.A.'s Data Collection Jolts Both Defenders and Reformers*, N.Y. Times, May 9, 2015, at A13.

5971. *ACLU*, 785 F.3d at 810–21; see 50 U.S.C. § 1861(b)(2)(A) (2020). See generally Donohue, *supra* note 5785, at 51–53.

lated the Fourth Amendment.⁵⁹⁷² Judge Winmill relied on *Smith*, circuit law, and Judge Pauley's decision.⁵⁹⁷³ Judge Winmill urged, however, that "Judge Leon's decision should serve as a template for a Supreme Court opinion."⁵⁹⁷⁴

Appeals from Judge Leon and Judge Winmill's cases were resolved after the 2015 passing of the Freedom Act. Other district court cases did not result in constitutionality rulings.

Data Retention

In a January 3, 2014, FISA-court order, Judge Hogan specified that the metadata authorized for collection by his order must be destroyed within five years of collection.⁵⁹⁷⁵ On March 7, Judge Walton denied⁵⁹⁷⁶ a February 25 motion by the government to extend the five-year limit to permit the government to comply with evidence-preservation obligations in the civil suits challenging the legality of broad metadata surveillance pursuant to section 215.⁵⁹⁷⁷ "Extending the period of retention for these voluminous records increases the risk that information about United States persons may be improperly used or disseminated."⁵⁹⁷⁸ "Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved"⁵⁹⁷⁹

Plaintiffs in the San Francisco post-Snowden challenge before Judge White responded to Judge Walton's Friday decision with a Monday mo-

5972. *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); see Complaint, *Smith v. Obama*, No. 2:13-cv-257 (D. Idaho June 12, 2013), D.E. 1; see also *ACLU*, 785 F.3d at 799; David Cole, *Cd'A Attorneys Sue Obama Over NSA Surveillance*, *Coeur d'Alene Press*, June 13, 2013, at 4A; Markon, *supra* note 5956; Betsy Z. Russell, *CdA Woman's Lawsuit Over NSA Data Tossed*, *Spokane Spokesman-Review*, June 4, 2014, at 6A.

5973. *Smith*, 24 F. Supp. 3d at 1007–08.

5974. *Id.* at 1009.

5975. Order at 14, *In re Tangible Things*, No. BR 14-1 (FISA Ct. Jan. 3, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-02%20Order-2.pdf.

5976. Opinion, *id.* (Mar. 7, 2014) [hereinafter Mar. 7, 2014, FISA Ct. Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-1.pdf; see Corrected Notice, *Smith v. Obama*, No. 2:13-cv-257 (D. Idaho. Mar. 8, 2014), D.E. 20; Notice, *ACLU v. Clapper*, No. 1:13-cv-3994 (S.D.N.Y. Mar. 8, 2014), D.E. 79; Notice, *First Unitarian Church of L.A. v. NSA*, No. 4:13-cv-3287 (N.D. Cal. Mar. 7, 2014), D.E. 85; Notice, *Paul v. Obama*, No. 1:14-cv-262 (D.D.C. Mar. 7, 2014), D.E. 14.

5977. Motion, *Tangible Things*, No. BR 14-1 (FISA Ct. Feb. 25, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

5978. Mar. 7, 2014, FISA Ct. Opinion, *supra* note 5976, at 6.

5979. *Id.* at 8–9.

tion for a temporary restraining order enjoining the government “from destroying any evidence relevant to the claims at issue in this action, including but not limited to prohibiting the destruction of any telephone metadata or ‘call detail’ records.”⁵⁹⁸⁰ Judge White ordered a response from the government by 2:00 that afternoon⁵⁹⁸¹ and then ordered the data retained, pending further hearing on the issue set for March 19.⁵⁹⁸²

On Wednesday, March 12, Judge Walton issued an order permitting the government to comply with Judge White’s order.⁵⁹⁸³ Judge White issued a permanent preservation order on March 21.⁵⁹⁸⁴

Judge Walton scolded the government for failing to inform him of preservation orders remaining in effect from the multidistrict warrantless wiretap litigation that had been transferred to Judge White; the existence of these orders was brought to Judge Walton’s attention by the plaintiffs in Judge White’s cases.⁵⁹⁸⁵ “As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* proceedings.”⁵⁹⁸⁶ In response

5980. Evidence Preservation Motion, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 10, 2014), D.E. 86.

At a subsequent hearing, a plaintiffs’ attorney acknowledged the irony: “It’s a very strange position to be in, to be arguing for the preservation for the very records we think they shouldn’t have gotten in the first place.” Transcript at 14, *id.* (Mar. 19, 2014, filed Mar. 20, 2014), D.E. 101.

5981. Order, *id.* (Mar. 10, 2014), D.E. 87; *see* Government Response, *id.* (Mar. 10, 2014), D.E. 88.

5982. Order, *id.* (Mar. 10, 2014), D.E. 89.

5983. Opinion, *In re Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 12, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-2.pdf.

5984. Preservation Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 21, 2014), D.E. 103, *also filed as* Ex., Notice, *Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 27, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-4.pdf; *see* Bob Egelko, *S.F. in Spotlight as Legal Battles Over NSA Widen*, *S.F. Chron.*, Mar. 22, 2014, at A1.

On June 6, 2014, Judge White denied plaintiffs a preservation order respecting section 702 claims in the earlier warrantless wiretap actions on a finding that the complaint did not encompass a challenge to section 702. Transcript at 50–53, *Jewel v. NSA*, No. 4:08-cv-4373 (N.D. Cal. June 6, 2014, filed Aug. 5, 2014), D.E. 275; Minutes, *id.* (June 6, 2014), D.E. 246.

As it turned out, some data were not preserved. *E.g.*, Stipulation, *id.* (Jan. 18, 2018), D.E. 386; *see also* Charlie Savage, *N.S.A. Says It Deleted Phone Data on Millions*, *N.Y. Times*, June 30, 2018, at A10.

5985. Opinion, *Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 21, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-3.pdf.

5986. *Id.* at 8.

to Judge Walton's order that the government explain its behavior,⁵⁹⁸⁷ the government acknowledged on April 2 that it should have behaved differently, with "the benefit of hindsight," but it "has always understood [the warrantless wiretap litigation] to be limited to certain presidentially authorized intelligence collection activities outside FISA."⁵⁹⁸⁸ The government advised, "no additional corrective action on the part of the Government or this Court is necessary."⁵⁹⁸⁹ A deputy assistant attorney general provided additional clarifying information one week later.⁵⁹⁹⁰

Meanwhile, on March 20, Judge Collyer denied Verizon's challenge to the legality of Judge Hogan's January 3 telephony metadata surveillance order, concluding, "this Court finds Judge Leon's analysis in *Klayman* to be unpersuasive."⁵⁹⁹¹

The Privacy and Civil Liberties Oversight Board

The Privacy and Civil Liberties Oversight Board, "an independent bipartisan agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007," issued a report on January 23, 2014, concluding that surveillance authorized by the FISA court violated FISA.⁵⁹⁹² Although the Privacy Board was established in

5987. *Id.* at 9–10.

5988. Response at 1–2, *id.* (Apr. 2, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Response-2.pdf.

5989. *Id.* at 2.

5990. Letter, *id.* (Apr. 9, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-6.pdf.

5991. Opinion, *id.* (Mar. 20, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion%20and%20Order-1.pdf, 2014 WL 5463097; see Ellen Nakashima, *Court Rejects Challenge to NSA Program*, Wash. Post, Apr. 26, 2014, at A3; Charlie Savage, *Phone Company Bid to Keep Data from N.S.A. Is Rejected*, N.Y. Times, Apr. 26, 2014, at A13.

[T]he Court concludes that it has the discretion to unseal a petition and related Court records under appropriate circumstances. . . .

. . . Accordingly, the Court is satisfied that it would be appropriate to unseal properly redacted versions of the Petition, the Government's Response, the January 23, 2014 Scheduling Order, the March 20, 2014 Opinion and Order, and the instant Order, once the redactions have been finalized.

Opinion, *Tangible Things*, No. BR 14-1 (FISA Ct. Apr. 11, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Order-2.pdf, 2014 WL 5463107; see Order, *id.* (Apr. 25, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Order%20Regarding%20Unsealing%20and%20Publication.pdf, 2014 WL 5460706 (final unsealing order).

5992. Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (Jan. 23, 2014) [hereinafter First Privacy

2007, the full five members were not appointed by the President and confirmed by the Senate until May 7, 2013, shortly before the Snowden revelations.⁵⁹⁹³ The report analyzed the legality of surveillance conducted pursuant to FISA's title V on business records and other tangible things, as expanded by section 215 of the Patriot Act.⁵⁹⁹⁴

There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk—potentially encompassing all telephone calling records across the nation—they cannot be regarded as “relevant” to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of turning over records already in their possession)—an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.

Board Report], documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf; see U.S. Privacy and Civil Liberties Oversight Board, www.pclob.gov/; Pub. L. No. 110-53, § 801(a), 121 Stat. 266, 352 (2007), as amended, 42 U.S.C. § 2000ee (2020); see also Donohue, *supra* note 5904, at 613–14; Siobhan Gorman & Jared A. Favole, *Watchdog Urges NSA to End Phone Program*, Wall St. J., Jan. 24, 2014, at A4; Greenberg, *supra* note 5803, at 242–44; Ellen Nakashima, *Board: NSA Phone Program Should End*, Wash. Post, Jan. 23, 2014, at A4; Todd Ruger, *Privacy Board Divided Over NSA Program*, Nat'l L.J., Jan. 27, 2014, at 15; Savage, *supra* note 5790, at 603–04; Charlie Savage, *Watchdog Report Says N.S.A. Program Is Illegal and Should End*, N.Y. Times, Jan. 23, 2014, at A14.

5993. First Privacy Board Report, *supra* note 5992, at 3–4; see Jeremy W. Peters, *G.O.P. Delays On Nominees Raise Tension*, N.Y. Times, May 12, 2013, at A1; see also 42 U.S.C. § 2000ee(h)(1) (“The Board shall be composed of a full-time chairman and 4 additional members, who shall be appointed by the President, by and with the advice and consent of the Senate.”).

Members of the Board shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party.

§ 2000ee(h)(2); see First Privacy Board Report, *supra* note 5992, at 3.

5994. First Privacy Board Report, *supra* note 5992, at 8; see Second Privacy Board Report, *supra* note 5809, at 2.

In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders.⁵⁹⁹⁵

Two board members dissented from the majority's conclusion that the section 215 surveillance program violates FISA.⁵⁹⁹⁶

The board issued a report on the use of FISA's section 702 on July 2, 2014.⁵⁹⁹⁷ "[T]he Board has found no evidence of intentional abuse."⁵⁹⁹⁸ The board concluded that section 702 could be used constitutionally:

In the Board's view, the core of this program—acquiring the communications of specifically targeted foreign persons who are located outside the United States, upon a belief that those persons are likely to communicate foreign intelligence, using specific communications identifiers, subject to FISA court-approved targeting rules that have proven to be accurate in targeting persons outside the United States, and subject to multiple layers of rigorous oversight—fits within the totality of the circumstances test for reasonableness as it has been defined by the courts to date.

...

[Some features of the program, however,] push the entire program close to the line of constitutional reasonableness. At the very least, too much expansion in the collection of U.S. persons' communications or the uses to which those communications are put may push the program over the line.⁵⁹⁹⁹

New Notices to Criminal Defendants

In 2013, the Justice Department revised its policy on notice to criminal defendants of FISA surveillance to bring its behavior in line with represen-

5995. First Privacy Board Report, *supra* note 5992, at 10; see Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1948 (1986), *relevant sections as amended*, 18 U.S.C. §§ 2701–2712 (2020); see also *ACLU v. Clapper*, 785 F.3d 787, 798–99 (2d Cir. 2015).

5996. First Privacy Board Report, *supra* note 5992, at 208–18.

5997. Second Privacy Board Report, *supra* note 5809; see Ellen Nakashima, *Panel: NSA Program That Targets Foreigners Is Lawful*, Wash. Post, July 2, 2014, at A13; David E. Sanger, *U.S. Privacy Panel Backs N.S.A.'s Internet Tapping*, N.Y. Times, July 3, 2014, at A11; Ali Watkins, *Panel: Little Wrong with NSA Surveillance*, Miami Herald, July 3, 2014, at 3A.

5998. Second Privacy Board Report, *supra* note 5809, at 2.

5999. *Id.* at 96–97.

tations previously made by the solicitor general to the Supreme Court in *Clapper v. Amnesty International USA*.⁶⁰⁰⁰

The issue in *Clapper* was standing to challenge the constitutionality of FISA's section 702, which is section 1881a of the U.S. Code's title 50. The plaintiffs argued "that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged."⁶⁰⁰¹ The Court observed that "if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."⁶⁰⁰² Solicitor General Donald B. Verrilli, Jr., said in his reply brief, "the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance."⁶⁰⁰³

On learning, after the Snowden revelations, that Justice Department practice did not conform to the government's representations in *Clapper*, Solicitor General Verrilli persuaded the department that the proper course was to provide defendants with section 702 surveillance notice.⁶⁰⁰⁴ On De-

6000. 568 U.S. 398 (2013); see Donohue, *supra* note 5803, at 245–52; Human Rights Watch, *Illusion of Justice* 102–03 (2014); Greenberg, *supra* note 5803, at 226–29, 238, 243–44.

6001. *Clapper*, 568 U.S. at 420.

6002. *Id.* at 421.

6003. Reply Brief at 15, *Clapper v. Amnesty Int'l USA*, No. 11-1025 (U.S. Oct. 17, 2012), www.aclu.org/sites/default/files/field_document/2012.10.17_sct_-_govt_reply_brief.pdf; see Transcript at 4, *id.* (Oct. 29, 2012), www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-1025.pdf (referring to "notice that the government intends to introduce information in a proceeding against" an aggrieved person).

"There was, in hindsight, something very odd about Verrilli's assertion. By then, the warrantless surveillance program had been operating under FISA for nearly six years. And yet, in all that time, federal prosecutors had *never given such a notice to any criminal defendant*." Savage, *supra* note 5790, at 559.

6004. *United States v. Hasbajrami*, 945 F.3d 641, 648 n.3 (2d Cir. 2019); see Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 17, 2013, at A3; Savage, *supra* note 5790, at 586–93; see also Donohue, *supra* note 5803, at 245–50 ("The government is required, *prior* to legal proceedings, to notify the aggrieved person and the court (or other authority), that information is to be disclosed or used.").

"The national security prosecutors explained that their division had long used a narrower definition of what *derived from* means for FISA wiretaps than for ordinary criminal-law wiretaps." Savage, *supra* note 5790, at 587; see *id.* at 588 (noting that Justice Department practice shielded section 702 from judicial review).

cember 24, 2013, the Justice Department informed senators who had inquired about the issue,

Based on a recent review, the Department has determined that information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information. Based on this determination, the government has provided notice concerning Section 702-derived information in two criminal cases.⁶⁰⁰⁵

On October 17, 2013, the ACLU filed a complaint in the Southern District of New York based on a March 29 FOIA request for “records related to the government’s use of evidence derived from surveillance authorized by the FISA Amendments Act.”⁶⁰⁰⁶ After examining withheld documents in camera and ex parte, Judge Gregory H. Woods ruled on March 3, 2015, that five documents were properly withheld pursuant to the deliberative-process privilege, but the government’s search had been improperly narrow.⁶⁰⁰⁷ On September 27, 2016, Judge Woods ruled that an expanded search was adequate, but some documents withheld needed further justification.⁶⁰⁰⁸ Judge Woods ruled that they were properly withheld work product on May 2, 2017.⁶⁰⁰⁹

James Clapper, the Director of National Intelligence, provided Senator Wyden with a letter on March 28, 2014, explaining that “NSA sought and obtained the authority to query information collected under Section 702 of the Foreign Intelligence and Surveillance Act (FISA), using U.S. person identifiers,” and “[t]hese queries were performed pursuant to minimization procedures approved by the FISA Court as consistent with the statute and the Fourth Amendment.”⁶⁰¹⁰

6005. Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Mark Udall, Dec. 24, 2013, www.documentcloud.org/documents/1159182-122413-doj-response.html.

6006. Complaint, *ACLU v. U.S. Dep’t of Just.*, No. 1:13-cv-7347 (S.D.N.Y. Oct. 17, 2013), D.E. 1; *see* Donohue, *supra* note 5803, at 250.

6007. *ACLU v. U.S. Dep’t of Just.*, 90 F. Supp. 3d 201 (S.D.N.Y. 2015); *see* 5 U.S.C. § 552(b)(5) (2020).

6008. *ACLU v. U.S. Dep’t of Just.*, 210 F. Supp. 3d 467 (S.D.N.Y. 2016).

6009. *ACLU v. U.S. Dep’t of Just.*, 252 F. Supp. 3d 217 (S.D.N.Y. 2017).

6010. Letter from James R. Clapper to Senator Ron Wyden, Mar. 28, 2014, s3. amazonaws.com/s3.documentcloud.org/documents/1100298/unclassified-702-response.pdf; *see* Ellen Nakashima, *Clapper Confirms Warrantless Searches by NSA*, Wash. Post, Apr. 2, 2014, at A3; Charlie Savage, *Letter Tells of Searches for Emails and Calls*, N.Y. Times, Apr. 2, 2014, at A20.

Historically, federal courts frequently reviewed FISA evidence concerning criminal defendants to determine whether any of the evidence was discoverable as helpful to the defense⁶⁰¹¹ and whether any FISA evidence should be suppressed.⁶⁰¹² Courts also found prosecutions based on FISA evidence to be constitutional.⁶⁰¹³ No court reviewing the use of section 702 evidence in a criminal case has found a constitutional infirmity.⁶⁰¹⁴

6011. *United States v. Amawi*, 695 F.3d 457, 474–75 (6th Cir. 2012), *aff'g* 531 F. Supp. 2d 832 (N.D. Ohio 2008); *United States v. El-Mezain*, 664 F.3d 467, 563–70 (5th Cir. 2011); *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984), *aff'g* *United States v. Megahay*, 553 F. Supp. 1180 (E.D.N.Y. 1982); *United States v. Belfield*, 692 F.2d 141, 146–47 (D.C. Cir. 1982); *United States v. Thomson*, 752 F. Supp. 75, 78 (W.D.N.Y. 1990); *United States v. Spanjol*, 720 F. Supp. 55 (E.D. Pa. 1989).

6012. *United States v. Aldawsari*, 740 F.3d 1015, 1017–19 (5th Cir. 2014); *United States v. Campa*, 529 F.3d 980, 988–89, 993–94 (11th Cir. 2009); *United States v. Ning Wen*, 477 F.3d 896, 897 (7th Cir. 2006); *United States v. Dumeisi*, 424 F.3d 566, 578–79 (7th Cir. 2005); *United States v. Damrah*, 412 F.3d 618, 623–25 (6th Cir. 2005); *United States v. Hammoud*, 381 F.3d 316, 331–34 (4th Cir. 2004) (en banc), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005); *United States v. Squillacote*, 221 F.3d 542, 552–54 (4th Cir. 2000); *United States v. Johnson*, 952 F.2d 565, 571–73 (1st Cir. 1991); *United States v. Isa*, 923 F.2d 1300 (8th Cir. 1991); *United States v. Badia*, 827 F.2d 1458, 1462–64 (11th Cir. 1987); *United States v. Ott*, 827 F.2d 473 (9th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987); *Duggan*, 743 F.2d at 76–80; *United States v. Mahamud*, 838 F. Supp. 2d 881 (D. Minn. 2012); *United States v. Sherifi*, 793 F. Supp. 2d 751 (E.D.N.C. 2011), *aff'd sub nom.* *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014); *United States v. Warsame*, 547 F. Supp. 2d 982 (D. Minn. 2008); *United States v. Mubayyid*, 521 F. Supp. 2d 125, 131–41 (D. Mass. 2007); *United States v. Rosen*, 447 F. Supp. 2d 538, 547–53 (E.D. Va. 2006); *United States v. Abdel Rachman*, 861 F. Supp. 247 (S.D.N.Y. 1994); *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982).

6013. *Ning Wen*, 477 F.3d at 897–99; *United States v. Duka*, 671 F.3d 329, 342–47 (3d Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102 (2d Cir. 2010), *aff'g* 531 F. Supp. 2d 299 (D. Conn. 2008); *United States v. Stewart*, 590 F.3d 93, 126–29 (2d Cir. 2009); *Isa*, 923 F.2d 1300; *United States v. Posey*, 864 F.2d 1487, 1490–91 (9th Cir. 1989) (noting, “As an initial matter, we think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance *against him* violated the Fourth Amendment.”); *United States v. Pelton*, 835 F.2d 1067, 1074–75 (4th Cir. 1987); *Cavanagh*, 807 F.2d 787; *Duggan*, 743 F.2d at 71–76; *Belfield*, 692 F.2d at 148–49; *Mahamud*, 838 F. Supp. 2d at 888–89; *Warsame*, 547 F. Supp. 2d at 992–97; *Mubayyid*, 521 F. Supp. 2d at 135–41; *United States v. Benkahla*, 437 F. Supp. 2d 541, 554–55 (E.D. Va. 2006); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997); *Falvey*, 540 F. Supp. 1306; *see Damrah*, 412 F.3d at 625 (“FISA has uniformly been held to be consistent with the Fourth Amendment”); *Johnson*, 952 F.2d at 573 (noting, “We suspect . . . that appellants have waived this claim for purposes of their appeal.”).

6014. *See* Wadie E. Said, *Crimes of Terror* 78 (2015).

According to the *New York Times* on February 26, 2014, the government had filed section 702 notices in three cases.⁶⁰¹⁵

Jamshid Muhtorov

The FBI arrested Jamshid Muhtorov at Chicago's O'Hare airport on January 21, 2012, interrupting his trip to Turkey.⁶⁰¹⁶ He was indicted in the District of Colorado, and the court assigned his case to Judge John L. Kane.⁶⁰¹⁷

The government filed a section 702 notice on October 25, 2013.⁶⁰¹⁸ On November 19, 2015, Judge Kane denied a motion to suppress evidence derived via section 702.⁶⁰¹⁹ "While I am convinced the [FISA Amendments Act] is susceptible to unconstitutional application as an end-run around the Wiretap Act and the Fourth Amendment's prohibition against warrantless or unreasonable searches, I am equally convinced that it was not unconstitutionally applied to Mr. Muhtorov."⁶⁰²⁰ The court of appeals agreed.⁶⁰²¹

Nearly three years later, Judge Kane sentenced Muhtorov to eleven years in prison on a material-support conviction.⁶⁰²² The court of appeals affirmed the conviction on December 8, 2021.⁶⁰²³

6015. Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3; see Donohue, *supra* note 5803, at 251–52; Greenberg, *supra* note 5803, at 238.

6016. *United States v. Muhtorov*, 20 F.4th 558, 581, 635 (10th Cir. 2021); *United States v. Muhtorov*, 329 F. Supp. 3d 1289, 1291–92, 1296 (D. Colo. 2018); see Complaint, *United States v. Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 19, 2012), D.E. 1; Partially Translated Complaint, *id.* (Feb. 6, 2012), D.E. 22 (Russian translation); see also Bruce Finley & Felisa Cardona, "I Knew Him as a Good Guy, Praying," *Denver Post*, Jan. 31, 2012, at 1A. See generally Chapter 22: Islamic Jihad Union, *supra* page 363.

6017. Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012) D.E. 5; Translated Indictment, *id.* (Feb. 6, 2012), D.E. 21 (Russian translation); see Second Superseding Indictment, *id.* (Mar. 22, 2012), D.E. 59; Superseding Indictment, *id.* (Mar. 20, 2012), D.E. 50; *Muhtorov*, 20 F.4th at 635.

6018. FISA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 25, 2013), D.E. 457; *Muhtorov*, 20 F.4th at 636; see *ACLU v. U.S. Dep't of Just.*, 90 F. Supp. 3d 201, 209 (S.D.N.Y. 2015); see also Charlie Savage, *U.S. Prosecutors Cite Warrantless Wiretaps*, N.Y. Times, Oct. 27, 2013, at 21.

6019. *United States v. Muhtorov*, 187 F. Supp. 3d 1240 (D. Colo. 2015); *Muhtorov*, 20 F.4th at 590, 636.

6020. *Muhtorov*, 187 F. Supp. 3d at 1243.

6021. *Muhtorov*, 20 F.4th at 592–618.

6022. Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Sept. 4, 2018), D.E. 1966; *United States v. Muhtorov*, 329 F. Supp. 3d 1289, 1311 (D. Colo. 2018); see *id.* at 1304 (noting six years, seven months, and nine days of presentence detention); Amended Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 24, 2019), D.E. 2020 (clarifying recommendation for

Mohamed Osman Mohamud

Mohamed Osman Mohamud was convicted on January 31, 2013, of an attempt to use a weapon of mass destruction for attempting to detonate a car bomb—a fake provided by the FBI in a sting—at Portland, Oregon’s November 26, 2010, Christmas tree lighting ceremony.⁶⁰²⁴ Judge Garr M. King presided over the case.⁶⁰²⁵

On November 19, 2013, before Mohamud had been sentenced, the government filed a section 702 notice.⁶⁰²⁶ On June 24, 2014, Judge King denied Mohamud’s motions for a new trial.⁶⁰²⁷

Clearly a lot of time has passed, but otherwise suppression and a new trial would put defendant in the same position he would have been in if the government notified him of the § 702 surveillance at the start of the case. Moreover, the government has apparently changed its practice in making this type of notification, so dismissal is not needed as a deterrence.⁶⁰²⁸

Judge King rejected various constitutional challenges to FISA’s new title VII, section 702 in particular. Respecting separation of powers,

location of imprisonment near family); *see also* Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting release from prison on June 18, 2021, reg. no. 42383-424).

6023. *Muhtorov*, 20 F.4th 558, *cert. pending*, Docket Sheet, No. 22-5188 (U.S. July 22, 2021) (noting distribution for the conference of September 28, 2022).) (noting distribution for the conference of September 28, 2022).

6024. *United States v. Mohamud*, 843 F.3d 420, 428–29 (9th Cir. 2016); *Verdict*, *United States v. Mohamud*, No. 3:10-cr-475 (D. Or. Jan. 31, 2013), D.E. 428; *United States v. Mohamud*, 941 F. Supp. 2d 1303, 1307 (D. Or. 2013) (denying motions for acquittal or a new trial); *Opinion at 3*, *Mohamud*, No. 3:10-cr-475 (D. Or. June 24, 2014), D.E. 517 [hereinafter *Mohamud* Section 702 Opinion], 2014 WL 2866749; *see* *Indictment*, *id.* (Nov. 29, 2010), D.E. 2; *see also* Colin Miner, Liz Robbins & Erik Eckholm, *F.B.I. Says Oregon Suspect Planned “Grand” Attack*, N.Y. Times, Nov. 28, 2010, at A1; Said, *supra* note 6014, at 41.

6025. Docket Sheet, *Mohamud*, No. 3:10-cr-475 (D. Or. Nov. 29, 2010).

6026. FISA Notice, *id.* (Nov. 19, 2013), D.E. 486; *Mohamud*, 843 F.3d at 431; *Mohamud* Section 702 Opinion, *supra* note 6024, at 3; *see* Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A15.

In briefing, the government acknowledged that the notice was untimely. Government Discovery Opposition Brief at 9 n.5, 12, *Mohamud*, No. 3:10-cr-475 (D. Or. Feb. 13, 2014), D.E. 491.

6027. *Mohamud*, 843 F.3d at 431; *Mohamud* Section 702 Opinion, *supra* note 6024; *see* Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15.

6028. *Mohamud* Section 702 Opinion, *supra* note 6024, at 8; *see Mohamud*, 843 F.3d at 436 (“Mohamud cannot demonstrate how the late disclosure prejudiced him.”).

“[r]eview of § 702 surveillance applications is as central to the mission of the judiciary as the review of search warrants and wiretap applications.”⁶⁰²⁹ With respect to the Fourth Amendment, “§ 702 surveillance falls within the foreign intelligence exception to the warrant requirement.”⁶⁰³⁰ Mohamud’s “communications were collected incidentally during intelligence collection targeted at one or more non-U.S. persons outside the United States.”⁶⁰³¹ Acknowledging the issue as presenting “a very close question,” Judge King concluded that a warrant was not required for the examination of evidence incidentally collected on Mohamud.⁶⁰³² Finally,

I made a careful de novo, ex parte review of the § 702 applications and conclude the certification required by 50 U.S.C. § 1881a(g)(2)(A) [FISA § 702(g)(2)(A)] was in place. I also find that the government agents followed appropriate targeting and minimization procedures. Thus I conclude the § 702 surveillance at issue here was lawfully conducted.⁶⁰³³

On October 1, 2014, Judge King sentenced Mohamud to thirty years in prison.⁶⁰³⁴

The court of appeals affirmed the sentence and agreed that no warrant was required for surveillance of Mohamud’s email communications with a foreign national under authorized section 702 surveillance of the foreign national.⁶⁰³⁵ Moreover, surveillance of Mohamud was reasonable.⁶⁰³⁶

6029. *Mohamud* Section 702 Opinion, *supra* note 6024, at 18; see Savage, *supra* note 6027 (“The constitutionality of the 2008 law had never been tested in court before Judge King’s ruling.”).

6030. *Mohamud* Section 702 Opinion, *supra* note 6024, at 27.

6031. *Id.* at 25.

6032. *Id.* at 42–45.

6033. *Id.* at 47.

6034. Judgment, *United States v. Mohamud*, No. 3:10-cr-475 (D. Or. Oct. 3, 2014), D.E. 524; Transcript at 56, *id.* (Oct. 1, 2015, filed Dec. 8, 2014), D.E. 529; *United States v. Mohamud*, 843 F.3d 420, 431–32 (9th Cir. 2016); see Nigel Duara, *Ore. Man Caught in Bomb-Plot Sting Gets 30-Year Term*, Bos. Globe, Oct. 2, 2014, at A8; see also BOP Locator, *supra* note 6022 (noting a release date of July 3, 2036, reg. no. 73079-065).

6035. *United States v. Mohamud*, 666 F. App’x 591 (9th Cir. 2016), *cert. denied*, 583 U.S. ___, 138 S. Ct. 636 (2018); *Mohamud*, 843 F.3d at 439–41; see Maxine Bernstein, *Federal Appeals Court Upholds Conviction*, Oregonian, Dec. 6, 2016, at A1; Charlie Savage, *Panel Backs Warrantless Collection of Email*, N.Y. Times, Dec. 6, 2016, at A15.

6036. *Mohamud*, 843 F.3d at 441–44.

Judge King died on February 5, 2019.⁶⁰³⁷ Judge Marco A. Hernández denied a motion for Mohamud’s compassionate release on May 29, 2022.⁶⁰³⁸

Agron Hasbajrami

On January 8, 2013, Agron Hasbajrami received a sentence of fifteen years in prison from Eastern District of New York Judge John Gleeson, on a plea of guilty to providing material support to terrorism.⁶⁰³⁹ Five days after the September 8, 2011, indictment, the government filed a notice that the government had collected FISA evidence against Hasbajrami.⁶⁰⁴⁰

On February 24, 2014, the government informed Hasbajrami that the FISA evidence against him was obtained pursuant to orders based on section 702 FISA evidence.⁶⁰⁴¹ “In the government’s view, this supplemental notification does not afford you a basis to withdraw your plea or to otherwise attack your conviction or sentence because you expressly waived those rights, as well as the right to any additional disclosures from the government, in your plea agreement.”⁶⁰⁴²

Judge Gleeson ruled on October 2 that Hasbajrami could withdraw his guilty plea, because, “When the government provided FISA notice without

6037. FJC Biographical Directory, *supra* note 5782.

6038. Opinion, *Mohamud*, No. 3:10-cr-475 (D. Or. May 29, 2022), D.E. 86, 2022 WL 1782587; *see id.* At 3 (“Defendant has not demonstrated extraordinary or compelling reasons for his release. Defendant does not have an underlying health condition that puts him at increased risk of serious illness or death if he contracts COVID-19, he has been vaccinated against COVID-19, and he has already contracted COVID-19 and recovered.”).

6039. Minutes, *United States v. Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Jan. 8, 2013), D.E. 44; Judgment, *id.* (Jan. 16, 2013), D.E. 45; *United States v. Hasbajrami*, 945 F.3d 641, 645, 648 (2d Cir. 2019); *see* Superseding Indictment, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Jan. 26, 2012), D.E. 20; Indictment, *id.* (Sept. 8, 2011), D.E. 1; *see also* Mosi Secret, *15-Year Sentence in Terror Case*, N.Y. Times, Jan. 9, 2013, at A22.

Judge Gleeson resigned from the bench on March 9, 2016. FJC Biographical Directory, *supra* note 5782; *see* Ben Protess, *Prominent U.S. Judge, Known as a Maverick, Is Expected to Join a White-Shoe Firm*, N.Y. Times, Feb. 25, 2016, at B3.

6040. FISA Notice, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Sept. 13, 2011), D.E. 9; *Hasbajrami*, 945 F.3d at 645.

6041. Letter, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Feb. 24, 2014), D.E. 65 [hereinafter Feb. 24, 2014, *Hasbajrami* Letter]; *Hasbajrami*, 945 F.3d at 645, 648; *see* Greenberg, *supra* note 5803, at 257–59; Ellen Nakashima, *No Warrant, Inmate Is Told*, Wash. Post, Feb. 26, 2014, at A4; Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3.

6042. Feb. 24, 2014, *Hasbajrami* Letter, *supra* note 6041, at 2.

FAA notice, Hasbajrami was misled about an important aspect of his case.”⁶⁰⁴³

The section 702 evidence complied with the Fourth Amendment, Judge Gleeson ruled.⁶⁰⁴⁴ The Constitution permits “warrantless surveillance of non-U.S. persons who are abroad,” so “the incidental interception of non-targeted U.S. persons’ communications with the targeted persons is also lawful.”⁶⁰⁴⁵

Hasbajrami pleaded guilty to a superseding information on June 26, 2015.⁶⁰⁴⁶ On August 13, Judge Gleeson sentenced Hasbajrami to sixteen years in prison⁶⁰⁴⁷ followed by deportation to Albania.⁶⁰⁴⁸

Hasbajrami reserved the right to appeal Judge Gleeson’s section 702 ruling.⁶⁰⁴⁹ The court of appeals affirmed Judge Gleeson’s decision in part, but remanded the case for more factfinding on database queries.⁶⁰⁵⁰

The vast majority of Section 702 surveillance at issue here involves information the government collected about Hasbajrami incidental to its

6043. Opinion, *Hasbajrami v. United States*, No. 1:13-cv-6852 (E.D.N.Y. Oct. 2, 2014), D.E. 30, 2014 WL 4954596 (noting that withdrawal of the plea was against advice of counsel); see *Hasbajrami*, 945 F.3d at 645, 648; see also Devlin Barrett, *NSA Data Collection Gets Day in Court*, Wall St. J., Nov. 1, 2014, at A5.

6044. Opinion, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Mar. 8, 2016), D.E. 165 [hereinafter E.D.N.Y. *Hasbajrami* Suppression Denial Opinion], 2016 WL 1029500; see *Hasbajrami*, 945 F.3d at 645, 647, 659–60.

6045. E.D.N.Y. *Hasbajrami* Suppression Denial Opinion, *supra* note 6044, at 17.

6046. Minutes, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. June 26, 2015), D.E. 142; Superseding Information, *id.* (June 26, 2015), D.E. 141; see *Hasbajrami*, 945 F.3d at 645, 660; Waiver of Indictment, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. June 26, 2015), D.E. 140.

Hasbajrami filed a pro se motion to withdraw his plea and fire his attorney a few weeks later. Motion, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. July 20, 2015), D.E. 146. Judge Gleeson denied these motions. Docket Sheet, *id.* (Sept. 8, 2011) [hereinafter *Hasbajrami* Docket Sheet].

6047. Minutes, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Aug. 13, 2015), D.E. 151; Second Amended Judgment, *id.* (Nov. 3, 2015), D.E. 161; Amended Judgment, *id.* (Sept. 4, 2015), D.E. 158; Judgment, *id.* (Aug. 17, 2015), D.E. 152; Transcript, *id.* (Aug. 13, 2015, filed Nov. 19, 2015), D.E. 163; *Hasbajrami*, 945 F.3d at 660; see BOP Locator, *supra* note 6022 (noting a release date of September 9, 2025, reg. no. 65794-053).

6048. Order, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Aug. 17, 2015), D.E. 150; see *Hasbajrami*, 945 F.3d at 660; see also Zachary R. Dowdy, *Terror Suspect Gets 16 Years*, *Newsday*, Aug. 14, 2015, at A35.

6049. *Hasbajrami*, 945 F.3d at 645, 647, 660.

6050. *Id.*, 945 F.3d 641.

After a classification of the court’s opinion, the panel met ex parte with intelligence community personnel to discuss how the opinion would be expressed with a minimum of redactions; a few portions of the opinion remain redacted. *Id.*, at 646 n.1.

surveillance of other individuals without ties to the United States and located abroad. . . .

...
[Q]uering databases of stored information derived from Section 702-acquired surveillance . . . raises novel and difficult questions. Querying, depending on the particulars of a given case (such as what databases are queried, for what purpose, and under what circumstances), *could* violate the Fourth Amendment, and thus require the suppression of evidence; therefore, a district court must ensure that any such querying was reasonable. But no information about any queries conducted as to Hasbajrami was provided to the district court, and the information provided to us on this subject is too sparse to reach a conclusion as to the reasonableness of any such queries conducted as to Hasbajrami.⁶⁰⁵¹

Reaz Qadir Khan

A fourth case arose in April 2014.

A grand jury in the District of Oregon returned a sealed indictment against Reaz Qadir Khan on December 27, 2012, for providing advice and financial assistance to Ali Jaleel and his family; Jaleel perished in a suicide attack against Pakistan's Inter-Services Intelligence headquarters in Lahore on May 27, 2009.⁶⁰⁵² Khan, who worked at Portland's wastewater treatment plant, was arrested on March 5, 2013.⁶⁰⁵³ The court assigned Khan's case to Judge Michael W. Mosman.⁶⁰⁵⁴

On the day that Khan was arrested, the government filed a notice that it would use against the defendant evidence collected pursuant to FISA.⁶⁰⁵⁵ On April 3, 2014, just over one year later, the government filed a notice that evidence against Khan was acquired pursuant to FISA's section 702.⁶⁰⁵⁶ Judge Mosman scheduled FISA motions for hearing on July 27,

6051. *Id.* at 646; see *Hasbajrami* Docket Sheet, *supra* note 6046 (noting a status conference on October 19, 2021, before Judge LaShann DeArcy Hall).

Tim Reagan remotely attended a status conference on October 19, 2021, at which the government's response to the appellate court's mandate was briefly discussed.

6052. Indictment, *United States v. Khan*, No. 3:12-cr-659 (D. Or. Dec. 27, 2012), D.E. 1.

6053. Arrest Warrant, *id.* (Mar. 6, 2013), D.E. 11; see Helen Jung, *Indictment Ties Portland Man to Pakistan Attack*, *Oregonian*, Mar. 6, 2013.

6054. Docket Sheet, *Khan*, No. 3:12-cr-659 (D. Or. Dec. 28, 2012) [hereinafter *D. Or. Khan* Docket Sheet].

6055. Notice, *id.* (Mar. 5, 2013), D.E. 7.

6056. Notice, *id.* (Apr. 3, 2014), D.E. 59.

2015.⁶⁰⁵⁷ On June 17, 2014, Judge Mosman ruled that his 2013 appointment to the FISA court did not require recusal.⁶⁰⁵⁸

The case was resolved by a plea agreement filed on February 13, 2015.⁶⁰⁵⁹ On June 19, Judge Mosman sentenced Khan to seven years and three months in prison.⁶⁰⁶⁰ Kahn was released on September 30, 2021.⁶⁰⁶¹

Adel Daoud

Litigation over section 702 arose in a fifth case because it was championed by Senator Dianne Feinstein on December 27, 2012, as a success story for the FISA Amendments Act.⁶⁰⁶² The defendant did not demonstrate the use of section 702 in his case.

Adel Daoud was arrested in Chicago on September 14, 2012, for attempting to bomb a bar with a fake bomb provided by the FBI.⁶⁰⁶³ The court assigned the case to Judge Sharon J. Coleman.⁶⁰⁶⁴ The government filed a notice on September 18 that it would use against Daoud evidence derived pursuant to FISA.⁶⁰⁶⁵ On May 22, 2013, Daoud filed a motion for clarification from the government whether the FISA evidence against Daoud derived from traditional pre-FAA FISA surveillance or FAA FISA surveillance, often referred to as section 702 FISA surveillance.⁶⁰⁶⁶ The government responded on June 12 that “the information the government

6057. Litigation Schedule, *id.* (Dec. 22, 2014), D.E. 175.

6058. D. Or. Khan Docket Sheet, *supra* note 6054 (D.E. 91); *see* Motion, *Khan*, No. 3:12-cr-659 (D. Or. May 5, 2014), D.E. 73; Transcript at 26–28, *id.* (Apr. 25, 2014, filed June 12, 2014), D.E. 89 (oral order, in an abundance of caution, by Judge Mosman to Khan’s attorneys for briefing on reasons for Judge Mosman’s recusal); *see also* FJC Biographical Directory, *supra* note 5782.

6059. Plea Agreement, *Khan*, No. 3:12-cr-659 (D. Or. Feb. 13, 2015), D.E. 187; Superseding Information, *id.* (Feb. 13, 2015), D.E. 182.

6060. Judgment, *id.* (June 19, 2015), D.E. 193.

6061. BOP Locator, *supra* note 6022 (reg. no. 74926-065).

6062. *See* Ellen Nakashima, *NSA Surveillance Questioned in Plot Case*, Wash. Post, June 22, 2013, at A2.

6063. *United States v. Daoud*, 980 F.3d 581, 584–86 (7th Cir. 2020); *United States v. Daoud*, 755 F.3d 479, 480 (7th Cir. 2014); Minutes, *United States v. Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 15, 2012), D.E. 2; *see* Michael Schwirtz & Marc Santora, *Chicago-Area Teenager Accused of Terrorism Plot*, N.Y. Times, Sept. 16, 2012, at 20; Annie Sweeney, Dawn Rhodes & Ryan Haggerty, *FBI: Car Bomb Plan Foiled*, Chi. Trib., Sept. 16, 2012, at 4. *See generally* Human Rights Watch, *Illusion of Justice* 6, 28–30, 192–93 (2014).

6064. Docket Sheet, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 20, 2012).

6065. Notice, *id.* (Sept. 18, 2012), D.E. 9; *Daoud*, 755 F.3d at 480.

6066. FISA Clarification Motion, *Daoud*, No. 1:12-cr-723 (N.D. Ill. May 22, 2013), D.E. 43.

intends to use was acquired pursuant to a traditional FISA order . . . as opposed to a Section 702 Order.”⁶⁰⁶⁷ In sur-reply on August 8, the government said that it would “provide notice to the defense and this Court if the government intended to use in this case any information obtained or derived from surveillance authorized under Title VII of FISA . . . as to which the defendant is an aggrieved person.”⁶⁰⁶⁸ On the following day, Daoud’s attorneys moved to examine and suppress all FISA evidence because “there is no indication that the prerequisites for a FISA warrant were present in this case.”⁶⁰⁶⁹

On January 29, 2014, Judge Coleman ruled that Daoud’s secured counsel should be able to review FISA application materials pertaining to Daoud’s case.⁶⁰⁷⁰

Here, counsel for defendant Daoud has stated on the record that he has top secret SCI (sensitive compartmented information) clearance. Assuming that counsel’s clearances are still valid and have not expired, top secret SCI clearance would allow him to examine the classified FISA application material, if he were in the position of the Court or the prosecution. Furthermore, the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances. The government’s only response at oral argument was that it has never been done. That response is unpersuasive where it is the government’s claim of privilege to preserve national security that triggered this proceeding. Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel. Upon a showing by counsel, that his clearance is still valid, this Court will allow disclosure of the FISA application materials subject to a protective order consistent

6067. FISA Clarification Motion Response, *id.* (June 12, 2013), D.E. 46.

6068. FISA Clarification Motion Sur-Reply, *id.* (Aug. 8, 2013), D.E. 49.

6069. FISA Suppression Motion at 2, *id.* (Aug. 9, 2013), D.E. 52.

6070. Opinion, *id.* (Jan. 29, 2014), D.E. 92 [hereinafter Jan. 29, 2014, N.D. Ill. *Daoud* Opinion], 2014 WL 321384; *Daoud*, 755 F.3d at 481; see Andrew Grossman, *Lawyers Win Right to See Secret Court Files*, Wall St. J., Jan. 30, 2014, at A5; Jason Meisner, *Defense to Get Terrorism Files*, Chi. Trib., Jan. 30, 2014, at 11; Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance Program*, Wash. Post, Jan. 30, 2014, at A13; Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A13.

with procedures already in place to review classified materials by the court and cleared government counsel.

While this Court is mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense, in this case, the Court finds that the disclosure may be necessary. This finding is not made lightly, and follows a thorough and careful review of the FISA application and related materials. The Court finds however that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding. The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 743 (1967). Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. “The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656 (1984).⁶⁰⁷¹

On June 4, 2014, the court of appeals—Circuit Judges Richard A. Posner, Michael S. Kanne, and Ilana Diamond Rovner—heard the government’s appeal from Judge Coleman’s order granting Daoud’s attorneys access to FISA application materials.⁶⁰⁷² Following a public argument, the court held a closed ex parte session with the government.⁶⁰⁷³ Daoud’s attorneys were not notified in advance that the court would hold part of the proceeding ex parte.⁶⁰⁷⁴

Because of an error by court staff, the public argument was not recorded as it should have been.⁶⁰⁷⁵ Court staff members misinterpreted security precautions for the ex parte session as a signal that the public session should not be recorded.⁶⁰⁷⁶ The ex parte session was recorded by a cleared

6071. Jan. 29, 2014, N.D. Ill. *Daoud* Opinion, *supra* note 6070, at 4–5.

6072. *Daoud*, 755 F.3d 479; Docket Sheet, *United States v. Daoud*, No. 14-1284 (7th Cir. Feb. 11, 2014) [hereinafter 7th Cir. *Daoud* Docket Sheet]; see Jason Meisner, *Secret Appeals Hearing Held*, Chi. Trib., June 5, 2014, at 12.

Judge Posner retired on September 2, 2017, and Judge Kanne died on June 16, 2022. FJC Biographical Directory, *supra* note 5782.

6073. *Daoud*, 755 F.3d at 479 n.*, 485; see Defendant’s Objection, *Daoud*, No. 14-1284 (7th Cir. June 8, 2014) [hereinafter 7th Cir. *Daoud* Defendant’s Objection]; see also Meisner, *supra* note 6072.

6074. See 7th Cir. *Daoud* Defendant’s Objection, *supra* note 6073; see also Meisner, *supra* note 6072.

6075. *Daoud*, 755 F.3d at 479 n.*; see Jason Meisner, *Court Didn’t Record Terror Case Arguments*, Chi. Trib., June 6, 2014, at 4.

6076. See Meisner, *supra* note 6075.

court reporter, however.⁶⁰⁷⁷ The court agreed to ask the government to approve a redacted transcript for defense counsel's use.⁶⁰⁷⁸ Attached to a motion to remove some redactions, the defense filed the redacted transcript on the public docket.⁶⁰⁷⁹

To remedy the recording error, the court ordered a second argument session at the beginning of the following week.⁶⁰⁸⁰ Daoud was represented by a different attorney at the second argument.⁶⁰⁸¹

At the second argument, Judges Posner and Rovner explained to the defense attorney that the purpose of the ex parte proceeding was to provide the court with an opportunity to cross-examine the government about the government's representations to the court.⁶⁰⁸² At the closed proceeding, the government assured the court that Senator Feinstein's comment about Daoud "was not meant to be understood as a statement that the FAA was used in this case."⁶⁰⁸³ Following the ex parte proceeding, the court issued a "Classified *Ex Parte* Order Requiring Additional Submission from the Government."⁶⁰⁸⁴

On June 16, the court of appeals reversed Judge Coleman's discovery order, because she had not adequately established Daoud's attorneys' "need to know" the classified FISA application materials.⁶⁰⁸⁵

The court of appeals also ruled that the investigation of Daoud did not violate FISA.⁶⁰⁸⁶ The court determined that Senator Feinstein had not identified Daoud's case as an FAA success story; the court concluded that

6077. *Daoud*, 755 F.3d at 479 n.*; see Meisner, *supra* note 6075.

6078. *Daoud*, 755 F.3d at 485; 7th Cir. *Daoud* Docket Sheet, *supra* note 6072; Oral Argument, *Daoud*, No. 14-1284 (7th Cir. June 9, 2014), D.E. 53 [hereinafter June 9, 2014, 7th Cir. *Daoud* Oral Argument], media.ca7.uscourts.gov/sound/2014/rs.14-1284.14-1284_06_09_2014.mp3 (audio recording).

6079. Transcript Motion, *Daoud*, No. 14-1284 (7th Cir. June 25, 2014) [hereinafter 7th Cir. *Daoud* Transcript Motion].

6080. *Daoud*, 755 F.3d at 479 n.*; Orders, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014); see Jason Meisner, *Court Will Redo Terror Case Oral Arguments*, Chi. Trib., June 7, 2014, at 4.

6081. 7th Cir. *Daoud* Docket Sheet, *supra* note 6072.

6082. June 9, 2014, 7th Cir. *Daoud* Oral Argument, *supra* note 6078; see *Daoud*, 755 F.3d at 485; see also Steve Schmadeke, *Attorney, Judge Trade Shots in Terror Case*, Chi. Trib., June 10, 2014, at 9.

6083. Transcript at 7, *attached to* 7th Cir. *Daoud* Transcript Motion, *supra* note 6079.

6084. Order, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014) (cover page).

6085. *Daoud*, 755 F.3d at 484, *cert. denied*, 574 U.S. 1158 (2015); *United States v. Daoud*, 980 F.3d 581, 587 (7th Cir. 2020); see Ellen Nakashima, *Landmark Surveillance Disclosure Order Reversed*, Wash. Post, June 17, 2014, at A2.

6086. *Daoud*, 755 F.3d at 485.

Senator Feinstein meant to list thwarted attacks as evidence of needed vigilance, only some of which were FAA success stories.⁶⁰⁸⁷

Also filed against Daoud were indictments for attempted murder following detention.⁶⁰⁸⁸ On August 25, 2016, Judge Coleman found Daoud “incompetent to stand trial at this time,” noting that “his rational understanding of the proceedings is significantly undermined by his pervasive belief that the Court and the prosecution are members of the Illuminati and that his attorneys are Freemasons.”⁶⁰⁸⁹ Following many months of treatment with psychotropic medication, Judge Coleman found on March 12, 2018, that Daoud was competent to stand trial.⁶⁰⁹⁰

On November 26, 2018, Judge Coleman accepted Daoud’s plea of guilty in all three cases while maintaining his innocence pursuant to *North Carolina v. Alford*.⁶⁰⁹¹ Following a sentencing hearing held from April 29 to May 6, 2019,⁶⁰⁹² Judge Coleman sentenced Daoud to sixteen years in prison on May 20.⁶⁰⁹³ The court of appeals vacated that sentence and re-

6087. *United States v. Daoud*, 761 F.3d 678, 682–83 (7th Cir. 2014).

6088. Indictment, *United States v. Daoud*, No. 1:15-cr-487 (N.D. Ill. Aug. 13, 2015), D.E. 1; Indictment, *United States v. Daoud*, No. 1:13-cr-703 (N.D. Ill. Aug. 29, 2013), D.E. 1; *Daoud*, 980 F.3d at 586–87 (7th Cir. 2020).

6089. Opinion at 1–2, *United States v. Daoud*, No. 1:12-cr-723 (N.D. Ill. Aug. 25, 2016), D.E. 216; *id.* at 4 (“it is in the best interest of the defendant to be immediately placed in a secure psychiatric treatment facility where persistent treatment for an initial period of three months may assist in a finding of competency”); *see id.* at 2–3 (noting that the government’s forensic psychologist “appeared to be conflicted about Daoud’s sincerity in his espoused beliefs”); Transcript, *id.* (Aug. 25, 2016, filed Oct. 3, 2016), D.E. 223 (ruling); Transcript, *id.* (Aug. 18 to 19, 2016, filed Oct. 3, 2016), D.E. 221, 222 (hearing); *see Daoud*, 980 F.3d at 587–88.

6090. Minutes, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Mar. 12, 2018), D.E. 246; *Daoud*, 980 F.3d at 588.

6091. Order, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Nov. 26, 2018), D.E. 303; Transcript, *id.* (Nov. 26, 2018, filed Jan. 29, 2019), D.E. 307; *see North Carolina v. Alford*, 400 U.S. 25 (1970); *see also Alford Motion*, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Nov. 14, 2018), D.E. 295.

6092. Transcripts, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Apr. 29 and 30 and May 1 and 6, 2019, filed June 10, 2019), D.E. 338 to 342; Minutes, *id.* (Apr. 29 and 30 and May 1 and 6, 2019), D.E. 330, 331, 332, 335.

6093. Judgments, Nos. 1:12-cr-723, 1:13-cr-703, and 1:15-cr-487 (N.D. Ill. May 20, 2019), D.E. 386, 45, and 55, respectively; Amended Judgment, No. 1:13-cv-703 (May 28, 2019), D.E. 47; *Daoud*, 980 F.3d at 588–90, 596 (noting that the sentence was one year longer than recommended by Daoud’s probation officer); *see BOP Locator*, *supra* note 6022 (noting a release date of May 3, 2026, reg. no. 43222-424); *see also Jason Meisner, 16 Years for Plot to Bomb Loop Bar*, Chi. Trib., May 7, 2019, at C1.

manded the case for sentencing by a different judge.⁶⁰⁹⁴ The district court reassigned Daoud's prosecutions to Judge John Z. Lee.⁶⁰⁹⁵

Daoud's new attorney orally informed the court on July 27, 2022, that she anticipated filing a change-of-plea motion on behalf of her client soon.⁶⁰⁹⁶

The Qazi Brothers

In another case highlighted by Senator Feinstein, the court determined that section 702 was not at issue.

Raees Alam Qazi and Sheheryar Alam Qazi, brothers who were born in Pakistan and who became naturalized U.S. citizens, were indicted on November 30, 2012, in the Southern District of Florida for a plot to use a weapon of mass destruction.⁶⁰⁹⁷ On December 6, the government filed notices that it would use FISA evidence against the defendants.⁶⁰⁹⁸

On April 22, 2013, the defendants moved for notice whether any of the FISA evidence was obtained pursuant to the FAA.⁶⁰⁹⁹ The defendants observed that their capture also was championed by Senator Feinstein as an FAA success.⁶¹⁰⁰ On May 6, Magistrate Judge John J. O'Sullivan granted

6094. *Daoud*, 980 F.3d 581.

Three judges dissented from the court's decision not to rehear the appeal en banc. *United States v. Daoud*, 989 F.3d 610 (7th Cir. 2021).

6095. Transfer Orders, Nos. 1:12-cr-723, 1:13-cr-703, and 1:15-cr-487 (N.D. Ill. Mar. 29 and Apr. 1, 2021), D.E. 369, 75, and 90, respectively.

Tim Reagan attended a telephonic status hearing on January 27, 2022, in which Judge Lee determined that Daoud was competent to request new counsel. Minutes, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Jan. 27, 2022), D.E. 402. Tim Reagan also attended a telephonic status conference on May 25, 2022. See Minutes, *id.* (May 25, 2022), D.E. 410 (noting new counsel's becoming familiar with the case).

6096. Tim Reagan attended a telephonic status hearing on July 27, 2022, at which the defense attorney, with the defendant present, announced her intention to file a change-of-plea motion soon, and the court set the next status hearing for October 12, 2022. Minutes, *Daoud*, No. 1:12-cr-723 (N.D. Ill. July 27, 2022), D.E. 412.

6097. Indictment, *United States v. Qazi*, No. 0:12-cr-60298 (S.D. Fla. Nov. 30, 2012), D.E. 1; see Scott Hiaasen, *Broward Brothers Held on Terror Charges*, Miami Herald, Dec. 1, 2012, at 1B.

6098. Notice, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Dec. 6, 2012), D.E. 10 (Sheheryar); Notice, *id.* (Dec. 6, 2012), D.E. 9 (Raees).

6099. Amended FAA Motion, *id.* (Apr. 22, 2013), D.E. 67 [hereinafter *Qazi* Amended FAA Motion] (motion by Sheheryar); see Order, *id.* (Apr. 24, 2013), D.E. 73 (granting Raees permission to join Sheheryar's motion).

6100. *Qazi* Amended FAA Motion, *supra* note 6099, at 3–4.

the defendants' motion so that they could challenge the lawfulness of any FAA surveillance, as promised by *Clapper*.⁶¹⁰¹

On September 5, 2014, Judge O'Sullivan issued a report and recommendation advising that (1) after "a thorough *in camera*, *ex parte* review of the classified Foreign Intelligence Surveillance Act ("FISA") materials, the undersigned respectfully recommends that the defendants' motions to disclose FISA materials and to suppress evidence of FISA intercepts be DENIED"⁶¹⁰² and (2) because "the government does not intend to introduce or otherwise use or disclose evidence obtained or derived from FAA surveillance,"⁶¹⁰³ deciding the constitutionality of the FAA would be an impermissible advisory opinion.⁶¹⁰⁴

District Judge Beth Bloom adopted Judge O'Sullivan's opinion.⁶¹⁰⁵ The Qazis pleaded guilty to some counts of a superseding indictment on March 12, 2015.⁶¹⁰⁶

On June 12, Judge Bloom sentenced Raees Alam Qazi to thirty-five years, and she sentenced Sheheryar Alam Qazi to twenty years.⁶¹⁰⁷

6101. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. May 6, 2013), D.E. 77; see Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 16, 2013, at A11.

I would like to have someone here maybe, you know, from the Solicitor General's Office who took the position in front of the Supreme Court that, "Hey, Supreme Court, don't rule on this now because, you know, these people don't have standing," but some day there is going to be somebody who is going to have standing, and they are going to be able to come before the Supreme Court, and now we have got some folks here who may have standing, but you don't want to tell them they have standing.

Transcript at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. July 26, 2013, filed July 30, 2013), D.E. 129 (remarks by Judge O'Sullivan).

Judge O'Sullivan retired on January 7, 2022. Judicial Milestones, www.uscourts.gov/judicial-milestones/john-j-osullivan; see Cindy Kent, *People on the Move*, S. Fla. Sun-Sentinel, Jan. 23, 2022, at A35.

6102. Redacted Report and Recommendation at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Sept. 5, 2014), D.E. 245 [hereinafter Sept. 5, 2014, *Qazi* Redacted Report and Recommendation]; see Redacted Report and Recommendation, *id.* (Sept. 3, 2014, filed Sept. 19, 2014), D.E. 250 (showing the locations in the document of the redactions).

6103. Sept. 5, 2014, *Qazi* Redacted Report and Recommendation, *supra* note 6102, at 9.

6104. *Id.* at 17.

6105. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Oct. 29, 2014), D.E. 259.

6106. Plea Agreement, *id.* (Mar. 12, 2015), D.E. 283 (Raees); Plea Agreement, *id.* (Mar. 12, 2015), D.E. 282 (Sheheryar); Transcript, *id.* (Mar. 12, 2015, filed Sept. 17, 2015), D.E. 304; see Factual Basis, *id.* (Mar. 12, 2015), D.E. 284; Superseding Indictment, *id.* (Jan. 15, 2015), D.E. 267.

Najibullah Zazi

While sentencing was pending, the government filed a section 702 notice in Najibullah Zazi's case on July 27, 2015.⁶¹⁰⁸ Zazi was indicted in the Eastern District of New York on September 23, 2009, for conspiracy to use weapons of mass destruction.⁶¹⁰⁹ Upon Zazi's agreement to plead guilty and cooperate in other prosecutions, the indictment was converted to an information on February 22, 2010.⁶¹¹⁰ Recognizing Zazi's cooperation and his testimony at two trials, Judge Raymond J. Dearie sentenced Zazi to ten years in prison on May 3, 2019.⁶¹¹¹

6107. Judgments, *id.* (June 12, 2015), D.E. 301, 302; see Curt Anderson, *Brothers Sentenced for Plot to Bomb NYC Landmarks*, Bos. Globe, June 12, 2015, at A7; Jay Weaver, *Brothers Get Long Terms for "Evil" Plot*, Miami Herald, June 12, 2015, at 1B; see also BOP Locator, *supra* note 6022 (noting release dates of January 24, 2030, for Sheheryan, reg. no. 01224-104, and September 26, 2042, for Raees, reg. no. 01223-104).

A pro se habeas corpus action by Raees claiming that the guilty plea resulted from a misunderstanding was unsuccessful. Order, *Qazi v. United States*, No. 0:16-cv-61177 (S.D. Fla. June 13, 2017), *adopting* Report and Recommendation, *id.* (May 15, 2017), D.E. 16.

6108. Notice, *United States v. Zazi*, No. 1:09-cr-663 (E.D.N.Y. July 27, 2015), D.E. 59.

6109. Indictment, *id.* (Sept. 23, 2009), D.E. 1; see William K. Rashbaum, *Terror Suspect Is Charged with Preparing Explosives*, N.Y. Times, Sept. 25, 2009, at A1. See generally Matt Apuzzo & Adam Goldman, *Enemies Within: Inside the NYPD's Secret Spying Unit and Bin Laden's Final Plot Against America* (2013); Simon Akam, Alison Leigh Cowan, Michael Wilson & Karen Zraick, *From Smiling Coffee Vendor to Terror Suspect*, N.Y. Times, Sept. 26, 2009, at A1; Peter Bergen, *United States of Jihad* 113–23 (2016); *id.* at 114 (Zazi "wanted to blow up as many commuters as possible, and himself, on the New York City subway system").

6110. Information, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. Feb. 22, 2010), D.E. 29; Cooperation Agreement, *id.* (Feb. 22, 2010, filed June 30, 2010), D.E. 44; see Carrie Johnson & Spencer S. Hsu, *N.Y. Terror Plea Hailed as Validation of Court Strategy*, Wash. Post, Feb. 23, 2010, at A1; A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. Times, Feb. 23, 2010, at A1; see also *United States v. Medunjanin*, 752 F.3d 576 (2d Cir. 2014); Mosi Secret, *Man Convicted of a Terrorist Plot to Bomb Subways Is Sent to Prison for Life*, N.Y. Times, Nov. 17, 2012, at A19.

6111. Judgment, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. May 3, 2019), D.E. 76; see Colin Moynihan, *Trained by Al Qaeda, He Later Switched Sides*, N.Y. Times, May 3, 2019, at A22; Emily Saul, *NY Bomb Plotter Gets "Time Served,"* N.Y. Post, May 3, 2019, at 13 ("a sentence that amounts to time served").

Abid Naseer was sentenced on January 26, 2016, to forty years in prison. Judgment, *United States v. Naseer*, No. 1:10-cr-19-4 (E.D.N.Y. Jan. 28, 2016), D.E. 464 (noting credit of two and one-half years for pre-extradition detention in England), *aff'd*, 775 F. App'x 28 (2d Cir. 2019), D.E. 164, *cert. denied*, 589 U.S. ___, 140 S. Ct. 826 (2020); see BOP Locator, *supra* note 6022 (noting a release date of September 2, 2044, reg. no. 05770-748); Transcript at 252–319, *Naseer*, No. 1:10-cr-19-4 (E.D.N.Y. Feb. 18, 2015, filed July 20,

Zazi was under federal surveillance when he was stopped on September 10, 2009, by New York authorities on the George Washington Bridge during a drive from Colorado to New York.⁶¹¹² A recipe for explosives was found on his computer.⁶¹¹³ Because of several signs of surveillance in New York, Zazi flew back to Colorado on September 12.⁶¹¹⁴ He and his father were arrested in Colorado on September 21 and initially charged with making false statements.⁶¹¹⁵

The father was indicted on January 28, 2010, in the Eastern District of New York for conspiracy to obstruct justice, and six related counts were added on November 29.⁶¹¹⁶ Following a jury verdict of guilty, the father was sentenced on February 15, 2012, by Judge Gleeson to four years for the Eastern District indictment and to an additional six months for a Southern

2016), D.E. 468 (partial record of Zazi's testimony); *see also* Stephanie Clifford, *Defendant Tries to Foil a Witness at His Trial*, N.Y. Times, Feb. 19, 2015, at A20 (describing Zazi's testimony).

Adis Medunjanin was sentenced on November 20, 2020, to ninety-five years in prison. Amended Judgment, *United States v. Medunjanin*, No. 1:10-cr-19-1 (E.D.N.Y. Nov. 20, 2020), D.E. 519; *see* BOP Locator, *supra* note 6022 (noting a release date of January 15, 2091, reg. no. 65114-053); *see also* Mosi Secret, *Bomb-Making Described in Thwarted Subway Plot*, N.Y. Times, Apr. 19, 2012, at A23 (describing Zazi's testimony); Mosi Secret, *Organizer of Subway Plot Testifies About Plan's Evolution*, N.Y. Times, Apr. 18, 2012, at A21 (same).

6112. *See* Transcript at 25–28, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. Feb. 22, 2010, filed Apr. 4, 2013), D.E. 57 (defendant's recitation of facts at his plea colloquy); *see also* Al Baker & Karen Zraick, *F.B.I. Searches Colorado Home of Man in Terror Inquiry That Reached Queens*, N.Y. Times, Sept. 17, 2009, at A27; Greenberg, *supra* note 5803, at 191.

6113. *See* Carrie Johnson & Spencer S. Hsu, *U.S. Resident Held Without Bail in Terrorism Case*, Wash. Post, Sept. 22, 2009, at A6.

6114. *See* William K. Rashbaum & Al Baker, *How Using Imam in Terror Inquiry Backfired on New York Police*, N.Y. Times, Sept. 23, 2009, at A1; Karen Zraick & David Johnston, *Man in Queens Raids Denies Any Terrorist Link*, N.Y. Times, Sept. 16, 2009, at A24.

6115. Complaint, *United States v. Zazi*, No. 1:09-mj-3001 (D. Colo. Sept. 19, 2009), D.E. 1 (Najibullah Zazi); Complaint, *United States v. Zazi*, No. 1:09-mj-3000 (D. Colo. Sept. 19, 2009), D.E. 1 (Mohammed Wali Zazi); *see* William K. Rashbaum & David Johnston, *U.S. Agents Arrest Father and Son in Terror Inquiry*, N.Y. Times, Sept. 21, 2009, at A28.

6116. Superseding Indictment, *United States v. Zazi*, No. 1:10-cr-60 (E.D.N.Y. Nov. 29, 2010), D.E. 42; Indictment, *id.* (Jan. 28, 2010), D.E. 1; *see* Order, *United States v. Zazi*, No. 1:09-cr-438 (D. Colo. Feb. 1, 2010), D.E. 50 (dismissing without prejudice an indictment in Colorado).

District of New York indictment for visa fraud, to which the father pleaded guilty.⁶¹¹⁷

Mohammads and Salims

December 21, 2015, notices of intent to use section 702 evidence⁶¹¹⁸ were filed in a case against two pairs of brothers on a September 30 indictment in the Northern District of Ohio for conspiracy to provide material support to terrorism.⁶¹¹⁹

Following a report that one of the defendants was seeking the murder of Judge Jack Zouhary, to whom the case was assigned, a second indictment was filed against Yahya Farooq Mohammad on July 6, 2016.⁶¹²⁰ The circuit's chief judge reassigned the two cases to Judge Edmund A. Sargus, Jr., a judge in Ohio's other district.⁶¹²¹

Mohammad pleaded guilty in both cases in July 2017,⁶¹²² and the case against the other defendants was reassigned to Northern District Judge Jeffrey J. Helmick.⁶¹²³

Mohammad was sentenced on November 8, 2017, to twenty-seven-and-a-half years in prison,⁶¹²⁴ following which he will be deported to India.⁶¹²⁵

6117. Judgment, *Zazi*, No. 1:10-cr-60 (E.D.N.Y. Feb. 15, 2012), D.E. 195; see Jury Verdict, *id.* (July 22, 2011), D.E. 169; Consent to Transfer, *United States v. Zazi*, No. 1:11-cr-718 (E.D.N.Y. Oct. 21, 2011), D.E. 1; Indictment, *United States v. Zazi*, No. 1:11-cr-604 (S.D.N.Y. July 15, 2011), D.E. 1; see Mosi Secret, *Prison for Father Who Lied About Terror Plot*, N.Y. Times, Feb. 11, 2012, at A19.

6118. Notices, *United States v. Mohammad*, No. 3:15-cr-358 (N.D. Ohio Dec. 21, 2015), D.E. 27, 28, 29; see Charlie Savage, *Disclosures in Cases Put Surveillance in Question*, N.Y. Times, Apr. 27, 2016, at A14.

6119. Indictment, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Sept. 30, 2015), D.E. 1; *United States v. Mohammad*, 339 F. Supp. 3d 724, 730 (N.D. Ohio 2018).

6120. Indictment, *United States v. Mohammad*, No. 3:16-cr-222 (N.D. Ohio July 6, 2016), D.E. 1.

6121. Order, *id.* (July 12, 2016), D.E. 3; Order, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 12, 2016), D.E. 108.

6122. Minutes, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio July 10, 2017), D.E. 59; Minutes, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 10, 2017), D.E. 252; *Mohammad*, 339 F. Supp. 3d at 730.

6123. Order, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 7, 2017), D.E. 60.

6124. Judgment, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio Nov. 8, 2017), D.E. 68; Judgment, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Nov. 8, 2017), D.E. 284; Transcript at 18, *Mohammad*, No. 3:16-cr-222 (filed Nov. 6, 2017, Apr. 27, 2021), D.E. 80; see BOP Locator, *supra* note 6022 (noting a release date of April 18, 2039, reg. no. 86552-083); Opinion, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio June 27, 2019), D.E. 393, 2019 WL

Judge Helmick denied Mohammad's motion to suppress section 702 evidence on March 20, 2018, in an opinion released on September 11 following a classification review.⁶¹²⁶

[The] facts do not evince a voluntary connection to the United States sufficient to bestow on Farooq the Fourth Amendment's protections. Farooq studied in the United States for roughly five years. But Farooq finished his studies in the United States years before the acquisitions at issue occurred. And after finishing his studies and leaving the United States in 2004, Farooq returned to visit the country only twice in the subsequent years—for around 25 days in 2007 and for around 16 days in 2008.

...

That Farooq's wife is a United States citizen does little to alter the Fourth Amendment analysis. Farooq's marriage is to an individual, not a nation.⁶¹²⁷

Judge Helmick also concluded the following: (1) "When a search is electronic, the location of the search carries less weight."⁶¹²⁸ (2) "[N]o warrant was required."⁶¹²⁹ (3) "I agree an individual loses some expectation of privacy in an electronic communication after it has reached its recipient."⁶¹³⁰ "When this limited expectation of privacy in delivered electronic communications is weighed against the Government's interest in acquiring foreign intelligence information through Section 702, the Government's interest prevails."⁶¹³¹

2644211 (denying habeas relief); *see also* Earl Rinehart, *Ex-OSU Student Gets 27½ Years*, Columbus Dispatch, Nov. 7, 2017, at 1B.

6125. Stipulated Judicial Order of Removal, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio Nov. 7, 2017), D.E. 67; Stipulated Judicial Order of Removal, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Nov. 7, 2017), D.E. 283.

6126. *Mohammad*, 339 F. Supp. 3d at 730, 746–53; Docket Sheet, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Sept. 30, 2015).

The motion had been joined by the other two defendants who received section 702 notices. *Mohammad*, 339 F. Supp. 3d at 730 n.1; Motion, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Oct. 16, 2016), D.E. 160; Motion, *id.* (Oct. 7, 2016), D.E. 155.

6127. *Mohammad*, 339 F. Supp. 3d at 748–49.

6128. *Id.* at 749.

6129. *Id.* at 750.

6130. *Id.* at 752.

6131. *Id.* at 753.

The case against the other three defendants was dismissed on the government's motion.⁶¹³²

Aws Mohammed Younis al-Jayab

Aws Mohammed Younis al-Jayab received a section 702 notice on April 8, 2016,⁶¹³³ in a material-support case filed in the Northern District of Illinois on March 17.⁶¹³⁴ Later transferred to the Northern District of Illinois⁶¹³⁵ was a January 14 indictment filed in the Eastern District of California for failure to disclose travel to Syria to recruit terrorists.⁶¹³⁶

On June 28, 2018, Judge Sara L. Ellis held that the section 702 surveillance was constitutional in al-Jayab's case.⁶¹³⁷ Warrants are not required for surveillance of persons in foreign countries who are not United States persons.⁶¹³⁸ Judge Ellis found the surveillance a constitutionally reasonable way to obtain foreign intelligence information.⁶¹³⁹

Both cases were resolved by a guilty plea in October.⁶¹⁴⁰ Al-Jayab was sentenced to five years in prison on October 31, 2019.⁶¹⁴¹ He was released on April 10, 2020.⁶¹⁴²

Moalin, Mohamud, Doreh, and Nasir

Southern District of California Judge Jeffrey T. Miller denied a new trial motion on November 14, 2013, a motion based in part on postconviction

6132. Judgment, *United States v. Mohammad*, No. 3:15-cr-358 (N.D. Ohio Jan. 22, 2019), D.E. 384 (Ibrahim Mohammad); Judgment, *id.* (Jan. 16, 2019), D.E. 378 (Sultane Roome Salim); Judgment, *id.* (Nov. 9, 2018), D.E. 377 (Asif Ahmed Salim).

6133. Notice, *United States v. Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Apr. 8, 2016), D.E. 14; *see Savage, supra* note 6118.

6134. Indictment, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Mar. 17, 2016), D.E. 1.

6135. Docket Sheet, *United States v. Al-Jayab*, No. 1:18-cr-721 (N.D. Ill. Oct. 22, 2018).

6136. Indictment, *United States v. Al-Jayab*, No. 2:16-cr-8 (E.D. Cal. Jan. 14, 2016), D.E. 13.

6137. Redacted Opinion at 38–64, 84, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. June 28, 2018), D.E. 115.

6138. *Id.* at 43–45.

6139. *Id.* at 48–56.

6140. Plea Agreement, *id.* (Oct. 31, 2018, filed Nov. 2, 2018), D.E. 129; *see Revised Superseding Information, id.* (Nov. 5, 2018), D.E. 131; *Superseding Information, id.* (Oct. 29, 2018), D.E. 125.

6141. Judgment, *id.* (Oct. 31, 2019), D.E. 154; Judgment, *United States v. Al-Jayab*, No. 18-cr-721 (Oct. 31, 2019), D.E. 31; Transcript at 59, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Oct. 3, 2019, filed Oct. 23, 2019), D.E. 153.

6142. BOP Locator, *supra* note 6022 (reg. no 74900-097).

Snowden revelations.⁶¹⁴³ “Here, when Defendant Basaaly Saeed Moalin used his telephone to communicate with third parties, whether in Somalia or the United States, he had no legitimate expectation of privacy in the telephone numbers dialed.”⁶¹⁴⁴

The defendants—also including Mohamed Mohamed Mohamud, Issa Doreh, and Ahmed Nasir Taalil Mohamud—were indicted in San Diego late in 2010 for sending money to support Al Shabaab in Somalia.⁶¹⁴⁵ A jury found them guilty on February 22, 2013.⁶¹⁴⁶ Sentences ranged from six to eighteen years.⁶¹⁴⁷ Affirming the convictions in all respects on September 2, 2020, the court of appeals concluded

that the government may have violated the Fourth Amendment and did violate the Foreign Intelligence Surveillance Act (“FISA”) when it collected the telephony metadata of millions of Americans, including at least one of the defendants, but suppression is not warranted on the facts of this case. Additionally, we confirm that the Fourth Amendment requires notice to a criminal defendant when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from surveillance of that defendant conducted pursuant to the government’s foreign intelligence authorities. We do not decide whether the

6143. Amended Opinion, *United States v. Moalin*, No. 3:10-cr-4246 (S.D. Cal. Nov. 18, 2013), D.E. 388 [hereinafter Amended S.D. Cal. *Moalin* Opinion], 2013 WL 6079518; *United States v. Moalin*, 973 F.3d 977, 987–88 (9th Cir. 2020).

6144. Amended S.D. Cal. *Moalin* Opinion, *supra* note 6143, at 12; *see* *Smith v. Maryland*, 442 U.S. 735 (1979); *see also Moalin*, 973 F.3d at 989–90.

6145. Indictment, *United States v. Mohamud*, No. 3:10-cr-4645 (S.D. Cal. Nov. 19, 2010), D.E. 1 (Nasir); Indictment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Oct. 22, 2010), D.E. 1 (Moalin, Mohamud, and Doreh); *see* Second Superseding Indictment, *id.* (June 8, 2012), D.E. 147 (all four defendants); Superseding Indictment, *id.* (Jan. 14, 2011), D.E. 38 (same); *Moalin*, 973 F.3d at 985.

6146. Jury Verdict, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Feb. 22, 2013), D.E. 303; *Moalin*, 973 F.3d at 987.

6147. Judgment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Jan. 31, 2014), D.E. 431 (six years for Nasir); Judgment, *id.* (Nov. 21, 2013), D.E. 394 (ten years for Doreh); Judgment, *id.* (Nov. 12, 2013), D.E. 393 (thirteen years for Mohamud); Judgment, *id.* (Nov. 22, 2013), D.E. 392 (eighteen years for Moalin); *see also* BOP Locator, *supra* note 6022 (noting releases from prison on February 22, 2016, for Nasir, reg. no. 23137-298; July 18, 2019, for Doreh, reg. no. 22869-298; and November 29, 2021, for Mohamud, reg. no. 22868-298; and noting a release date of March 2, 2026, for Moalin, reg. no. 22855-298).

government failed to provide any required notice in this case because the lack of such notice did not prejudice the defendants.⁶¹⁴⁸

Summary of Section 702 Notice Cases

So far, no court has found a constitutional infirmity in section 702 surveillance. All of the section 702 notice cases described here are included in a list maintained by the University of Michigan Law School's Civil Rights Litigation Clearinghouse, a list which also includes a couple of other cases that did not involve section 702 litigation.⁶¹⁴⁹

President Obama's Reforms

On December 12, 2013, the President's Review Group on Intelligence and Communications Technologies issued a 303-page report presenting forty-six recommendations for surveillance reform.⁶¹⁵⁰ One month later, Judge Bates, who served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015, submitted to Congress a report on behalf of the judiciary urging moderation in any reforms that would substantially change the work of the FISA court.⁶¹⁵¹

6148. *Moalin*, 973 F.3d at 984; see Devlin Barrett, *Court: Effort That Collected Phone Data Was Illegal*, Wash. Post, Sept. 3, 2019, at A2; Kristina Davis, *NSA Program Illegal, but S.D. Convictions Upheld*, San Diego Union-Trib., Sept. 3, 2020, at A1.

In 2021, Judge Miller denied *Moalin*'s motions for compassionate release. Opinion, *Moalin*, No. 3:10-cv-4246 (S.D. Cal. Sept. 29, 2021), D.E. 554, 2021 WL 4460705; Opinion, *id.* (Aug. 4, 2021), D.E. 553, 2021 WL 3419417.

6149. Civil Rights Litigation Clearinghouse, www.clearinghouse.net/results.php?searchSpecialCollection=55; see Docket Sheet, *United States v. Daher*, No. 2:18-cr-20559-2 (E.D. Mich. Aug. 14, 2018); Docket Sheet, *United States v. Gartenlaub*, No. 8:14-cr-173 (C.D. Cal. Oct. 23, 2014).

6150. *Liberty and Security in a Changing World* (Dec. 12, 2013), obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; see Donohue, *supra* note 5904, at 611–12; Siobhan Gorman, *Panel Pushes Revamp of NSA*, Wall St. J., Dec. 13, 2013, at A1; Siobhan Gorman, Devlin Barrett & Carol E. Lee, *Obama Urged to Curb NSA Spying*, Wall St. J., Dec. 19, 2013, at A1; Ellen Nakashima & Ashkan Soltani, *Panel Urges New Curbs on Surveillance by U.S.*, Wash. Post, Dec. 19, 2013, at A1; David E. Sanger, *Obama Panel Said to Urge N.S.A. Curbs*, N.Y. Times, Dec. 13, 2013, at A1; David E. Sanger & Charlie Savage, *Obama Is Urged to Sharply Curb N.S.A. Data Mining*, N.Y. Times, Dec. 19, 2013, at A1.

6151. Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=70bed5e2-c28f-4f3c-ad94-7cb6d647f328; Letter from John D. Bates to Senator Dianne Feinstein, Jan. 13, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=3bcc8fbc-d13c-4f95-8aa9-09887d6e90ed; see Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. Times, Jan. 15, 2014, at A1; Ellen Nakashima,

At a televised address to the Justice Department on January 17, 2014, President Obama announced that he was “ordering a transition that will end the Section 215 Bulk metadata program as it currently exists, and establish a mechanism that preserves the capabilities we need without the government holding this bulk metadata.”⁶¹⁵²

Among the ordered changes, the President decided that the NSA’s extensive database of who has called whom now “can be queried only after a judicial finding or in the case of a true emergency.”⁶¹⁵³ On February 6, the Director of National Intelligence reported that the FISA court had approved such a change in procedures.⁶¹⁵⁴

President Obama ordered the attorney general and the intelligence community to present by March 28 alternatives to the NSA’s maintaining the metadata database.⁶¹⁵⁵ On March 25, newspapers reported that a proposal in development would cease the government’s bulk harvesting of metadata and rely on individual orders for metadata customarily held by telecommunication companies.⁶¹⁵⁶ In the event, “the deadline came and went, and the program continued.”⁶¹⁵⁷

The Freedom Act

The House of Representatives’ Permanent Select Committee on Intelligence proposed to the House on May 8, 2014, a Uniting and Strengthening

Judges Oppose Secret-Court Changes, Wash. Post, Jan. 15, 2014, at A3; Mike Scarcella, *FISA Judges’ Concerns*, Nat’l L.J., Jan. 20, 2014, at 16; see also FJC Biographical Directory, *supra* note 5782.

6152. Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014 [hereinafter President’s Jan. 17, 2014, Remarks], www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence; see *ACLU v. Clapper*, 785 F.3d 787, 798 (2d Cir. 2015); see also Anita Kumar, *Days Later, Obama’s Speech on Surveillance Perplexes*, Miami Herald, Jan. 23, 2014, at 3A; Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. Times, Jan. 18, 2014, at A1; Carol E. Lee & Siobhan Gorman, *Obama Shakes Up Surveillance Program*, Wall St. J., Jan. 18, 2014, at A1; Ellen Nakashima & Greg Miller, *Obama Moves to Rein in Surveillance: Orders Limits on Phone Data*, Wash. Post, Jan. 18, 2014, at A1.

6153. President’s Jan. 17, 2014, Remarks, *supra* note 6152.

6154. FISC Approves Government’s Request to Modify Telephony Metadata Program, IC on the Record (Feb. 6, 2014), icontherecord.tumblr.com/post/75842023946/test.

6155. President’s Jan. 17, 2014, Remarks, *supra* note 6152.

6156. Ellen Nakashima, *Bill Will Target NSA Phone Program*, Wash. Post, Mar. 25, 2014, at A3; Charlie Savage, *Obama Will Seek Limits for N.S.A. on Call Records*, N.Y. Times, Mar. 25, 2014, at A1; see Andrews et al., *supra* note 5882, at 203.

6157. Donohue, *supra* note 5785, at 51.

America by Fulfilling Rights and Ending Eavesdropping, Dragnet Collection, and Online Monitoring Act (USA FREEDOM Act), which would modify the NSA's surveillance authority.⁶¹⁵⁸ Judge Bates, on May 13, asked that the committee's report include another letter by him on behalf of the judiciary recommending that Congress not impose on the FISA court "a permanent institution of a public advocate or impose[e] an adversarial process in the general run of cases" or create a requirement for public summaries of secret FISA-court opinions, because summaries in the absence of access to the originals could be misleading.⁶¹⁵⁹ Judge Bates expressed similar sentiments in an August 5 letter to Senate Judiciary Committee Chair Patrick Leahy, explaining that while occasional amicus curiae participation in FISA-court proceedings could be helpful, a special advocate would interfere with the court's special ex parte relationship with the government.⁶¹⁶⁰

6158. 160 Cong. Rec. D486 (May 8, 2014); see *ACLU v. Clapper*, 785 F.3d 787, 799 (2d Cir. 2015); Greenberg, *supra* note 5803, at 261; Ellen Nakashima, *NSA Reform Measure to Move to House Floor*, Wash. Post, May 9, 2014, at A3; Charlie Savage, *House Panel Passes Bill to Replace N.S.A. Program*, N.Y. Times, May 9, 2014, at A17; see also Savage, *supra* note 5790, at 600 (reporting that the initial spell-out for the acronym was created by a Republican congressional staffer and two high school friends). See generally Thomas Massie, Opening Remarks, Cato Conference, *supra* note 5775.

6159. Letter from John D. Bates to Representative Mike Rogers, May 13, 2014, in Committee Report for H.R. 3361, www.congress.gov/113/crpt/hrpt452/CRPT-113hrpt452-pt2.pdf (page 41). See generally *Lawfare Podcast: The Case For and Against a FISA Advocate* (episode 79, June 14, 2014), www.lawfareblog.com/2014/06/lawfare-podcast-episode-79-the-case-for-and-against-a-fisa-advocate/.

6160. Letter from John D. Bates to Senator Patrick J. Leahy, Aug. 5, 2014, online.wsj.com/public/resources/documents/Leahyletter.pdf; see Siobhan Gorman, *Federal Judge Blasts Bill to Revamp Surveillance*, Wall St. J., Aug. 7, 2014, at A2.

On August 14, 2014, the Ninth Circuit's Chief Circuit Judge Alex Kozinski, an ex officio member of the Judicial Conference of the United States, wrote to Senator Leahy to state, "I was not aware of Director Bates's letter before it was sent, nor did I receive a copy afterwards. I first learned of the letter this past weekend when a copy was sent to me by a distinguished law professor." Letter from Alex Kozinski to Senator Patrick J. Leahy, Aug. 14, 2014, images.politico.com/global/2014/08/20/kozinski_to_leahy.html, archived at web.archive.org/web/20170226214128/http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html. Judge Kozinski concluded, "I have serious doubts about the views expressed by Judge Bates. Insofar as Judge Bates's August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so." *Id.* Judge Kozinski retired on December 18, 2017. FJC Biographical Directory, *supra* note 5782.

Retired District of Massachusetts Judge Nancy Gertner opposed Judge Bates's letter in a *National Law Journal* opinion essay on September 22. Nancy Gertner, Opinion Essay, *One Voice on Surveillance Doesn't Make a Chorus*, Nat'l L.J., Sept. 22, 2014, at 34.

President Obama signed the USA FREEDOM Act on June 2, 2015.⁶¹⁶¹ By then, the acronym stood for “Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring,” which changed what the letters EDO stood for.

The new act ended bulk metadata surveillance by the government, and the act required telecommunication companies to maintain metadata for at least eighteen months.⁶¹⁶² The act also required the FISA court and the FISA court of review to jointly appoint at least five persons to act as occasional amici curiae in cases deemed by the courts to involve novel or significant interpretations of the law.⁶¹⁶³

The new act provided for a delay of 180 days, from June 2 until November 29, before curtailment of bulk metadata surveillance.⁶¹⁶⁴ On June 17, FISA Court Judge Saylor determined that although bulk metadata surveillance authority had sunsetted on June 1, the Freedom Act’s establishment of December 15, 2019, as a new sunset date revived bulk surveillance authority.⁶¹⁶⁵ On June 29, 2015, Judge Mosman agreed with Judge Saylor

On November 18, retired Southern District of New York Judge Michael B. Mukasey, who also was President George W. Bush’s third attorney general, co-authored with Michael V. Hayden, a former director of both the NSA and the CIA, a newspaper column opposing the USA FREEDOM Act. Michael V. Hayden & Michael B. Mukasey, Opinion Essay, *NSA Reform That Only ISIS Could Love*, Wall St. J., Nov. 18, 2014, at A19; see Ellen Nakashima & Ed O’Keefe, *NSA Reform Measure’s Shifting Fortunes*, Wash. Post, Nov. 20, 2014, at A2.

6161. Pub. L. No. 114-23, 129 Stat. 268 (2015) [hereinafter Freedom Act]; see *Klayman v. NSA*, 280 F. Supp. 3d 39, 47 (D.D.C. 2017). See generally Donohue, *supra* note 5785, at 51–53; Mondale et al., *supra* note 5775, at 2268–69, 2273–75; Savage, *supra* note 5790, at 616–20.

6162. See Mike DeBonis, *Senate Vote Rolls Back a Post-9/11 Spy Power*, Wash. Post, June 3, 2015, at A1; Ellen Nakashima, *Two Years After Snowden’s Leaks, Law Marks a Milestone*, Wash. Post, June 3, 2015, at A2; Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. Times, June 3, 2015, at A1.

6163. Freedom Act, § 401; see 50 U.S.C. § 1803(i) (2020).

6164. Pub. L. No. 114-23, Freedom Act § 109(a), 50 U.S.C. § 1861 note; Opinion at 10, *In re Tangible Things*, Nos. BR 15-75 and Misc. 15-1 (FISA Ct. June 29, 2015) [hereinafter Mosman Freedom Act Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order.pdf, 2015 WL 5637562.

6165. Opinion, *In re Tangible Things*, Nos. BR 15-77 and BR 15-78 (FISA Ct. June 17, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-77%2015-78%20Memorandum%20Opinion.pdf.

and disagreed with the Second Circuit conclusion that bulk metadata collection was not authorized by FISA.⁶¹⁶⁶

On October 29, 2015, the Second Circuit's court of appeals agreed that Congress had authorized bulk collection for the Freedom Act's first 180 days, as a transition period.⁶¹⁶⁷ The court also declined to enjoin bulk collection during the transition period on constitutional grounds.⁶¹⁶⁸

We need not, and should not, decide such momentous constitutional issues based on a request for such narrow and temporary relief. To do so would take more time than the brief transition period remaining for the telephone metadata program, at which point, any ruling on the constitutionality of the demised program would be fruitless.⁶¹⁶⁹

On November 24, Judge Mosman determined that metadata collected before November 29 could be retained only pursuant to evidence preservation obligations in the warrantless wiretap litigation in the Northern District of California and for limited data-quality purposes to expire on February 29, 2016.⁶¹⁷⁰

A key document leaked in 2013 by Edward Snowden and made public by journalists was an April 25, 2013, secondary FISA-court order issued by Judge Vinson requiring Verizon Business Network Services to continue to provide "all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii)

6166. Mosman Freedom Act Opinion, *supra* note 6164; *ACLU v. Clapper*, 804 F.3d 617, 621 (2d Cir. 2015); *see Mondale et al.*, *supra* note 5775, at 2273, 2302–03 (noting that FISA-court proceedings are less adversarial than proceedings before the circuits' courts of appeals); Charlie Savage, *Surveillance Court Rules That N.S.A. Can Resume Bulk Data Collection*, N.Y. Times, July 1, 2015, at A14; *see also* Order, *Tangible Things*, No. BR 15-75 (FISA Ct. June 29, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Primary%20Order%20%28redacted%29%20.pdf, 2015 WL 5662641 (surveillance order, a companion to Judge Mosman's opinion).

6167. *ACLU*, 804 F.3d at 625–26; *see* Charlie Savage, *No Early End to Collection of Records by the N.S.A.*, N.Y. Times, Oct. 30, 2015, at A16.

"Such a transitional period would likely have been appropriate even had we held § 215 unconstitutional in our earlier decision in the instant matter." *ACLU*, 804 F.3d at 626.

6168. *ACLU*, 804 F.3d at 623–25.

6169. *Id.* at 626 (footnote omitted).

6170. Opinion, *In re Tangible Things*, No. BR 15-99 (FISA Ct. Nov. 24, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Opinion%20and%20Order.pdf, 2015 WL 12696366; *see* Order, *id.* (Sept. 17, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Order%20Appointing%20Amicus%20Curiae.pdf (order appointing amicus curiae); *see also* Ellen Nakashima, *NSA's Bulk Collection of Americans' Phone Records to End*, Wash. Post, Nov. 28, 2015, at A2; Damian Paletta, *NSA Won't Extend Phone Program*, Wall St. J., Nov. 28, 2015, at A3.

wholly within the United States, including local telephone calls.”⁶¹⁷¹ On August 28, 2015, the U.S. Court of Appeals for the District of Columbia Circuit reversed Judge Leon’s injunction against bulk surveillance for lack of standing because “plaintiffs are Verizon *Wireless* subscribers and not Verizon *Business Network Services* subscribers. Thus, the facts marshaled by plaintiffs do not fully establish that their own metadata was ever collected.”⁶¹⁷² Although Circuit Judge David Sentelle would have ordered the case dismissed, Circuit Judges Janice Rogers Brown and Stephen Williams agreed to remand the case to Judge Leon for a possible standing cure.⁶¹⁷³

Following amendment of the complaint to include Verizon Business customers,⁶¹⁷⁴ Judge Leon again enjoined the surveillance program on November 9, 2015.⁶¹⁷⁵ On November 16, the court of appeals stayed the injunction pending another appeal,⁶¹⁷⁶ and the court of appeals vacated

6171. Secondary Order at 2, *In re Tangible Things*, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order; *Klayman v. NSA*, 280 F. Supp. 3d 39, 45 (D.D.C. 2017); see Savage, *supra* note 5790, at 168.

6172. *Obama v. Klayman*, 800 F.3d 559, 563 (D.C. Cir. 2015) (Judge Janice Rogers Brown); see *id.* at 565 (Judge Stephen Williams: “plaintiffs are subscribers of Verizon Wireless, not of Verizon Business Network Services, Inc.—the sole provider that the government has acknowledged targeting for bulk collection.”); *Klayman*, 280 F. Supp. 3d at 49; Docket Sheets, *Klayman v. Obama*, No. 14-5016 and 14-5017 (D.C. Cir. Jan. 15, 2014) (cross-appeals); Docket Sheets, *Klayman v. Obama*, Nos. 14-5004 and 14-5005 (D.C. Cir. Jan. 9, 2014) (appeals); Oral Argument, *id.* (Nov. 4, 2014), [www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/\\$file/14-5004.mp3](http://www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/$file/14-5004.mp3) (audio recording); see also Devlin Barrett, *Panel Rules Collection of Phone Data Legal*, Wall St. J., Aug. 29, 2015, at A4; Ellen Nakashima, *Court Deals Blow to NSA Call Records Suit*, Wash. Post, Aug. 29, 2015, at A2; James Risen, *N.S.A. Phone Program Can Go On, Court Says*, N.Y. Times, Aug. 29, 2015, at A13.

6173. *Obama*, 800 F.3d 559; see *Klayman*, 280 F. Supp. 3d at 49.

Judge Brown retired on August 31, 2017, and Judge Williams died on August 7, 2020. FJC Biographical Directory, *supra* note 5782.

6174. Fourth Amendment Complaint, *Klayman v. Obama*, No. 1:13-cv-851 (D.D.C. Sept. 8, 2015), D.E. 145-1.

6175. *Klayman v. Obama*, 142 F. Supp. 3d 172 (D.D.C. 2015); *Klayman*, 280 F. Supp. 3d at 49; see Spencer S. Hsu, *Judge Again Hits NSA Program*, Wash. Post, Nov. 10, 2015, at A7; Charlie Savage, *Judge Curbs N.S.A. Data Collection*, N.Y. Times, Nov. 10, 2015, at A17.

6176. Order, *Klayman v. Obama*, No. 15-5307 (D.C. Cir. Nov. 16, 2015); *Klayman*, 280 F. Supp. 3d at 49; see *Klayman v. Obama*, 805 F.3d 1148 (2015) (Circuit Judge Brett M. Kavanaugh concurring in the denial of rehearing en banc).

Judge Leon's injunction as moot on April 4, 2016.⁶¹⁷⁷ Judge Leon determined on November 21, 2017, that the claims the plaintiffs had standing to pursue were mooted by the Freedom Act.⁶¹⁷⁸ On March 5, 2018, Judge Leon dismissed a June 5, 2017, complaint of widespread improper government surveillance filed by Larry Klayman and Dennis Montgomery.⁶¹⁷⁹ On February 5, 2019, the court of appeals affirmed Judge Leon's 2017 and 2018 rulings.⁶¹⁸⁰

Senator Rand Paul had filed an action in the district court for the District of Columbia challenging bulk surveillance on February 18, 2014.⁶¹⁸¹ Judge Leon dismissed Paul's action in 2019 for want of prosecution.⁶¹⁸²

Also because of Congress's passing the Freedom Act, the Ninth Circuit's court of appeals remanded the District of Idaho case back to Judge Winmill on March 22, 2016.⁶¹⁸³

The plaintiff did not pursue the case further.⁶¹⁸⁴

Section 402(a) of the Freedom Act requires the declassification and public release of any opinion by the FISA courts that "includes a significant construction or interpretation of any provision of law."⁶¹⁸⁵ The Elec-

6177. Order, *Klayman*, No. 15-5307 (D.C. Cir. Apr. 4, 2016); *Klayman*, 280 F. Supp. 3d at 49.

6178. *Klayman*, 280 F. Supp. 3d at 50-58; see Opinion, *Klayman v. Obama*, No. 1:14-cv-92 (D.D.C. Mar. 28, 2018), D.E. 55 (dismissing the third class action, observing that accusations that the judge had been coopted by the Deep State was no substitute for a well-pleaded complaint).

6179. *Montgomery v. Comey*, 300 F. Supp. 3d 158 (D.D.C. 2018); see Complaint, *Montgomery v. Comey*, No. 1:17-cv-1074 (D.D.C. June 5, 2017), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42 n.1.

6180. *Klayman v. Obama*, 759 F. App'x 1 (D.C. Cir. 2019) (2017 ruling); *Montgomery v. Comey*, 752 F. App'x 3 (D.C. Cir. 2019) (2018 ruling).

6181. Complaint, *Paul v. Obama*, No. 1:14-cv-262 (D.D.C. Feb. 18, 2014), D.E. 3; Amended Complaint, *id.* (Mar. 26, 2014), D.E. 17; see also Dana Milbank, *In Rand Paul's NSA Sideshow, a Plaintiffs Tiff*, Wash. Post, Feb. 20, 2014, at A2.

The court of appeals dismissed as frivolous appeals from denials of intervention by a pro se litigant in Senator Paul's case and Larry Klayman's cases. Orders, Nos. 14-5207 to 14-5209 and 14-5212 (D.C. Cir. Mar. 4, 2015).

6182. Order, *Paul*, No. 1:14-cv-262 (D.D.C. Feb. 7, 2019), D.E. 39.

6183. *Smith v. Obama*, 816 F.3d 1239 (9th Cir. 2016); see Oral Argument, *Smith v. Obama*, No. 14-35555 (9th Cir. Dec. 8, 2014); www.ca9.uscourts.gov/media/video/?20141208/14-35555/ (video recording).

6184. Docket Sheet, *Smith v. Obama*, No. 2:13-cv-257 (June 12, 2013) (April 14, 2016, minute order, D.E. 43, noting that the plaintiff was given two weeks to express an intention to pursue the case).

6185. 50 U.S.C. § 1872(a) (2020).

tronic Frontier Foundation filed an April 19, 2016, federal complaint to enforce a March 7 FOIA request for FISA-court opinions and orders covered by section 402(a).⁶¹⁸⁶ Eighty-five redacted opinions and orders were produced:⁶¹⁸⁷ eighteen on June 13, 2017,⁶¹⁸⁸ twenty-three on September 25, 2017,⁶¹⁸⁹ thirteen on January 30, 2018,⁶¹⁹⁰ and thirty-one on August 20, 2018.⁶¹⁹¹ Among the redactions were dates of issue and case numbers. Northern District of California Judge Haywood S. Gilliam, Jr., determined on March 26, 2019, that an additional six court rulings were properly withheld in full.⁶¹⁹² A stipulated payment of attorney fees and costs brought the case to a close.⁶¹⁹³

In 2020, the government allowed authorization to lapse for some surveillance activities that began as part of Stellar Wind and came to be authorized by the Freedom Act.⁶¹⁹⁴

6186. Complaint, *Electronic Frontier Found. v. U.S. Dep't of Just.*, No. 4:16-cv-2041 (N.D. Cal. Apr. 19, 2016), D.E. 1; see Significant FISC Opinions, www.eff.org/cases/significant-fisc-opinions (the plaintiff's website).

6187. See Release of FISA Title IV and V Documents, icontherecord.tumblr.com/post/165800143933/release-of-fisa-title-iv-and-v-documents.

6188. FISC Opinions on Sec. 702, www.eff.org/document/fisc-opinions-sec-702; Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. June 21, 2017), D.E. 49; see Additional Release of FISA Section 702 Documents, icontherecord.tumblr.com/post/161824569523/additional-release-of-fisa-section-702-documents.

6189. Update: EFF Lawsuit Results in Release of More FISC Opinions, www.eff.org/deeplinks/2017/09/update-eff-lawsuit-results-release-more-fisc-opinions; Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. Sept. 28, 2017), D.E. 53.

6190. Newly Released Surveillance Orders Show That Even with Individualized Court Oversight, Spying Powers Are Misused, www.eff.org/deeplinks/2018/02/newly-released-surveillance-orders-show-even-individualized-court-oversight-spying; see Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. Jan. 8, 2018), D.E. 57.

6191. New Surveillance Court Orders Show That Even Judges Have Difficulty Understanding and Limiting Government Spying, www.eff.org/deeplinks/2018/09/new-surveillance-court-orders-show-even-judges-have-difficulty-understanding-and; see Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. June 7, 2018), D.E. 62.

6192. *Electronic Frontier Found. v. U.S. Dep't of Just.*, 376 F. Supp. 3d 1023 (N.D. Cal. 2019).

6193. Stipulated Dismissal, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. July 3, 2019), D.E. 82; Joint Status Report, *id.* (June 10, 2019), D.E. 81.

6194. See Devlin Barrett & Ellen Nakashima, *Democrats Wary of Administration Bid to Renew NSA Surveillance Program*, Wash. Post, Sept. 19, 2019, at A19; Ellen Nakashima, *NSA Halts Program Using Phone Logs After Value Doubt*, Wash. Post, Mar. 6, 2019, at A6; Andrew Restuccia & Dustin Volz, *Surveillance Powers Are Nearing Expiration*, Wall St. J., Mar. 5, 2020, at A3; Charlie Savage, *McConnell Appears Set to Let Long-Debated Surveillance Bill Wither*, N.Y. Times, Aug. 15, 2020, at A16; Charlie Savage, *N.S.A. Has*

Additional Rulings

On August 6, 2015, Western District of Texas Judge Kathleen Cardone stayed and administratively closed a February 18, 2014, action filed in El Paso, noting the plaintiffs' heavy reliance on pending appeals in other circuits for authority.⁶¹⁹⁵

An attorney's pro se complaint filed in the Western District of Pennsylvania on June 2, 2014, alleged that "[n]ow, for the first time in history, a small group of persons within the United States government is attempting to seize all of the private, electronic communications of the American citizenry, with little or no independent review."⁶¹⁹⁶ Judge Cathy Bissoon dismissed the complaint, observing that "courts have refused to find standing based on naked averments that an individual's communications must have been seized because the government operates a data collection program and the individual utilized the service of a large telecommunications company or companies."⁶¹⁹⁷ The court of appeals determined that the plaintiff "alleged a program of government surveillance that, though universal in scope, is unmistakably personal in the purported harm."⁶¹⁹⁸ On remand, Judge Bissoon concluded, "Defendants have shown, by a preponderance of the evidence, that the government did not engage in dragnet-type collection activity"⁶¹⁹⁹ A different panel of the court of appeals concluded on April 23, 2020, that Judge Bissoon did not abuse her discretion.⁶²⁰⁰

Ended Gleaning of Data from U.S. Phones, N.Y. Times, Mar. 5, 2019, at A1; Aruna Viswanatha & Dustin Volz, *Surveillance Law's Lapse Limits Terror Probes, Justice Official Says*, Wall St. J., Apr. 13, 2020, at A3; Dustin Volz, *NSA Eyes Killing Call Monitoring Program*, Wall St. J., Mar. 5, 2019, at A6; Dustin Volz, *NSA Urges Dropping Call-Data Collection*, Wall St. J., Apr. 25, 2019, at A1.

6195. Order, *Perez v. Clapper*, No. 3:14-cv-50 (W.D. Tex. Aug. 6, 2015), D.E. 79; see Third Amended Complaint, *id.* (Oct. 31, 2014), D.E. 26; Second Amended Complaint, *id.* (Sept. 12, 2014), D.E. 21; Amended Complaint, *id.* (May 27, 2014), D.E. 12; Complaint, *id.* (Feb. 5, 2014), D.E. 1.

6196. Complaint at 5, *Schuchardt v. Obama*, No. 2:14-cv-705 (W.D. Pa. June 2, 2014), D.E. 1; *Schuchardt v. President*, 839 F.3d 336, 340 (3d Cir. 2016); see Second Amended Complaint, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Nov. 24, 2014), D.E. 19; Amended Complaint, *id.* (Sept. 1, 2014), D.E. 9.

6197. Opinion at 10, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Sept. 30, 2015), D.E. 28, 2015 WL 5732117; *Schuchardt*, 839 F.3d at 342.

6198. *Schuchardt*, 839 F.3d at 346.

6199. Opinion at 2, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Feb. 4, 2019), D.E. 77, 2019 WL 426482.

6200. *Schuchardt v. President*, 802 F. App'x 69 (3d Cir.), *cert. denied*, 592 U.S. ___, 141 S. Ct. 367 (2020).

Judge Hogan issued an opinion on November 6, 2015, which was publicly released in redacted form on April 19, 2016, that blessed law-enforcement searches of foreign-intelligence surveillance collected pursuant to section 702.⁶²⁰¹ FISA section 101 defines minimization procedures to include “the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.”⁶²⁰² Judge Hogan reasoned,

It would be a strained reading of the definition of minimization procedures to permit FBI personnel to retain and disseminate Section 702 information constituting evidence of a crime implicating a United States person for law enforcement purposes, but to prohibit them from querying Section 702 data in a manner designed to identify such evidence.⁶²⁰³

The FISA court of review issued an opinion on April 14, 2016,⁶²⁰⁴ which was made public in redacted form on August 22,⁶²⁰⁵ that validated an interpretation of pen-register authority by FISA-court judges that differed from the consensus of judges in the district courts.⁶²⁰⁶ A pen register is a surveillance device that records the digits entered when initiating a telephone call.⁶²⁰⁷ Digits entered after a call is established are post-cut-through digits, which might (1) be entered to complete the intended call if the first digits merely establish access to a long-distance service and additional digits are required to establish access to the intended recipient of the call or (2) be communication content, such as a password, account num-

6201. Opinion, ___, No. ___ (FISA Ct. Nov. 6, 2015) [hereinafter Nov. 6, 2015, Hogan Opinion], *as redacted*, www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf; see Ellen Nakashima, *Court Rejects Assessment of FBI Use of Surveillance Data*, Wash. Post, Apr. 21, 2016, at A3; Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without a Warrant*, N.Y. Times, Apr. 20, 2016, at A7; cf. Donohue, *supra* note 5803, at 265 (“The best example of practice beyond the pale is in the query of Section 702 data using U.S. person information for potential violations of criminal law.”).

6202. 50 U.S.C. §1801(h)(3) (2020).

6203. Nov. 6, 2015, Hogan Opinion, *supra* note 6201, at 33.

6204. *In re* Certified Question of Law, 858 F.3d 591 (FISA Ct. Rev. 2016) (redacted).

6205. Release of FISC Question of Law & FISCR Opinion, icontherecord.tumblr.com/post/149331352323/release-of-fisc-question-of-law-fiscr-opinion.

6206. Certification of Question at 9–10, *In re* A U.S. Person, No. PR/TT 2016-___ (FISA Ct. Feb. 12, 2016) (redacted), www.fisc.uscourts.gov/sites/default/files/PCTD%20FISC-R%20Certification%20Redactions%2020160818%20pdf.pdf.

6207. 18 U.S.C. § 3127(3).

ber, or instruction.⁶²⁰⁸ The FISA court of review determined that “a court can authorize the use of a pen register to collect post-cut-through digits, as long as the collecting agency takes all reasonably available steps to minimize the collection of content information and is prohibited from making use of any content information that may be collected.”⁶²⁰⁹

The question came to the court of review as a certified question of law from Presiding FISA Court Judge Hogan on February 12, following a discussion of the issue by the FISA-court judges at their semiannual conference in October 2015.⁶²¹⁰

Following an extensive review of compliance, Judge Collyer approved section 702 certifications on April 26, 2017, in an opinion that began with a recognition of violations brought to the court’s attention in 2016 and 2017.⁶²¹¹

On October 24, 2016, the government orally apprised the Court of significant noncompliance with the NSA’s minimization procedures involving queries of data acquired under Section 702 using U.S. person identifiers. The full scope of non-compliant querying practices had not been previously disclosed to the Court. . . .

On January 3, 2017, the government made a further submission describing its efforts to ascertain the scope and causes of those compliance problems and discussing potential solutions to them. The Court was not satisfied that the government had sufficiently ascertained the scope of the compliance problems or developed and implemented adequate solutions for them and communicated a number of questions and concerns to the government.⁶²¹²

On April 11, 2019, Presiding Judge Collyer denied a motion for appointment as amicus curiae and for leave to file an amicus curiae brief to assist the Court in deciding whether the appointment of Matthew Whitaker as Acting Attorney General was unlawful, such that

6208. *E.g., In re Pen Register and Trap and Trace Device or Process*, 411 F. Supp. 2d 816, 818 (S.D. Tex. 2006).

6209. *Certified Question*, 858 F.3d at 598.

6210. Certification of Question, *supra* note 6206, at 5.

6211. Opinion, ___, No. ___ (FISA Ct. Apr. 26, 2017) [hereinafter Apr. 26, 2017, Collyer Opinion], www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf; see Tim Johnson, *Secret Court Rebukes NSA for Illegal Surveillance of U.S. Citizens*, Miami Herald, May 27, 2017, at 16A.

6212. Apr. 26, 2017, Collyer Opinion, *supra* note 6211, at 4–5.

he could not properly act as Attorney General pursuant to the Foreign Intelligence Surveillance Act.⁶²¹³

Judge Collyer observed that by the time of her ruling William P. Barr had been confirmed as attorney general and “[t]he government has not relied on any action taken by Mr. Whitaker as the Acting Attorney General in any submission to the Court.”⁶²¹⁴

The FISA Amendments Reauthorization Act of 2017 added to section 702 a new subsection (f) regulating queries of surveillance data collected pursuant to FISA.⁶²¹⁵ On July 12, 2019, the FISA court of review agreed with FISA Court Judge James E. Boasberg, of the district court for the District of Columbia, that the government was not adequately memorializing whether query terms were United States persons, and the court ordered the government to revise its procedures.⁶²¹⁶

On July 16, 2013, a collection of eighteen organizations, including the First Unitarian Church of Los Angeles, Greenpeace, the California Association of Federal Firearms Licensees, and the National Organization for the Reform of Marijuana Laws, filed a complaint against the government in the Northern District of California alleging “an illegal and unconstitutional program of dragnet electronic surveillance.”⁶²¹⁷ Judge Jeffrey S. White accepted the case as related to warrantless wiretap litigation, over which he

6213. Order, *In re* Appointment of Goldstein, No. Misc. 18-4 (FISA Ct. Apr. 11, 2019) [hereinafter Goldstein Order], www.fisc.uscourts.gov/sites/default/files/Misc%2018-04%20Order%20190411.pdf; see Motion, *id.* (Dec. 11, 2018), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2018-04%20Motion%20of%20Thomas%20C.%20Goldstein%20181211.pdf.

6214. Goldstein Order, *supra* note 6213, at 1.

6215. Pub. L. No. 115-118, 132 Stat. 3 (2018), 50 U.S.C. § 1881a(f) (2020); see Karoun Demirjian, *Senate Votes to Reauthorize Surveillance Program One Day Before Deadline*, Wash. Post, Jan. 19, 2018, at A13; Charlie Savage, *Surveillance Program Is Extended for 6 Years*, N.Y. Times, Jan. 19, 2018, at A14.

6216. *In re* DNA/AG 702(h) Certifications 2018, 941 F.3d 547 (FISA Ct. Rev. 2019), *affg in part* Secret Court Opinion, 402 F. Supp. 3d 45 (FISA Ct. 2018).

Available on Westlaw is an earlier “Secret Court Opinion,” (FISA Ct. Aug. 24, 2012), 2012 WL 9189263.

6217. Complaint, First Unitarian Church of L.A. v. NSA, No. 4:13-cv-3287 (N.D. Cal. July 16, 2013), D.E. 1; see Second Amended Complaint, *id.* (Aug. 20, 2014), D.E. 119; Amended Complaint, *id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations); see also Bob Egelko, *Suit Seeks Limit on Government Data Collection*, S.F. Chron., July 16, 2013, at D1.

presided.⁶²¹⁸ The Court of appeals determined in 2021 that plaintiffs in the litigation did not have standing.⁶²¹⁹

Carter Page's Surveillance

The presentation to the FISA court of political opposition research to obtain a surveillance order embroiled the FISA court in significant partisan politics.

A dossier was compiled by former British intelligence officer Christopher Steele, who was stationed in Russia in the 1990s.⁶²²⁰ It was prepared as part of opposition research commissioned by opponents of presidential candidate Donald Trump: Republicans during the primary elections and Democrats during the general election.⁶²²¹

Among the dossier's assertions was that Carter Page represented the Trump campaign in meetings with senior Russian officials to negotiate deals on business, sanctions, and Russia's interference with the presidential election.⁶²²²

Page was a witness in a 2013 federal prosecution of a Russian spy.⁶²²³

6218. Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7; see Chapter 35: Warrantless Wiretaps, *supra* page 748.

6219. *Jewel v. NSA*, 856 F. App'x 640 (9th Cir. 2021), *affg* Opinion, No. 4:08-cv-4373 (N.D. Cal. Apr. 25, 2019), D.E. 462, *cert. denied*, 596 U.S. ___, 142 S. Ct. 2812 (2022).

6220. See Jane Mayer, *The Man Behind the Dossier*, *New Yorker*, Mar. 12, 2018, at 48; Tom Hamburger & Rosalind S. Helderman, *How a British Ex-Spy Became a Flash Point in Russia Probe*, *Wash. Post*, Feb. 7, 2018, at A1; Evan Perez, Jim Sciutto, Jake Trapper & Carl Bernstein, *Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him*, *CNN*, Jan. 12, 2017, www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html; see also www.documentcloud.org/documents/3259984-Trump-Intelligence-Allegations.html (apparent posting of dossier documents by BuzzFeed); Ken Bensinger, Miriam Elder & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, *BuzzFeed*, Jan. 10, 2017, www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.yk261zjg3#.gla5RWwK9.

6221. See U.S. Dep't of Just. Office of the Inspector Gen., Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation 93 (Dec. 2019) [hereinafter DOJ OIG Crossfire Hurricane Review], www.justice.gov/storage/120919-examination.pdf (revised, and redacted for public release); Jeremy Herb, *GOP Considers Releasing Intel Behind Memo Alleging FISA Abuses*, *CNN*, Jan. 22, 2018, www.cnn.com/2018/01/22/politics/gop-classified-intelligence-fisa-memo/index.html; Mayer, *supra* note 6220, at 54; Perez et al., *supra* note 6220.

6222. See Evan Perez, Shimon Prokupecz & Manu Raju, *FBI Used Dossier Allegations to Bolster Trump-Russia Investigation*, *CNN*, Apr. 18, 2017, www.cnn.com/2017/04/18/politics/fbi-dossier-carter-page-donald-trump-russia-investigation/index.html.

6223. See Perez et al., *supra* note 6222.

The intelligence community presented the dossier to a FISA-court judge in July 2016 to justify permission to surveil Page as an agent of a foreign power.⁶²²⁴

A two-page synopsis of the dossier was presented to President Obama and President-Elect Trump in January 2017.⁶²²⁵

Republican Representative Devin Nunes oversaw the preparation of a four-page memo concluding that the Page FISA surveillance order was part of an abuse of surveillance authority.⁶²²⁶ Two Republican senators referred Steele to the Justice Department for a criminal investigation into whether he falsely represented to the FISA court that he had not discussed the dossier with journalists.⁶²²⁷

Public release of the classified memo became a partisan issue: one party appeared motivated to discredit the Justice Department's investigation of President Trump, and the other party argued that the memo was not an objective assessment but rather a collection of partisan talking points.⁶²²⁸

Following FOIA actions,⁶²²⁹ the government released redacted FISA filings in Page's case on July 21, 2018.⁶²³⁰ The October 21, 2016, FISA appli-

6224. See Herb, *supra* note 6221; Josh Meyer, *Former Trump Adviser Page Says He Welcomes FISA Warrant Against Him*, Politico, Apr. 11, 2017, www.politico.com/story/2017/04/carter-page-fisa-russia-trump-237137; Perez et al., *supra* note 6222.

6225. See Perez et al., *supra* note 6220.

6226. See Devlin Barrett, Karoun Demirjian & Philip Rucker, *Memo Released, and Recriminations Fly*, Wash. Post, Feb. 3, 2018, at A1; Herb, *supra* note 6224.

6227. See Glenn Kessler, *What You Need to Know About Christopher Steele, the FBI and Trump "Dossier,"* Wash. Post, Jan. 14, 2018, at A4.

6228. See Herb, *supra* note 6224; Ellen Nakashima, Devlin Barrett & Karoun Demirjian, *GOP Memo on Surveillance "Abuse" Targets Dossier*, Wash. Post, Jan. 21, 2018, at A2; Charlie Savage, Nicholas Fandos & Adam Goldman, *Justice Dept. Challenges Republican Chief of Intelligence Committee Over Memo*, N.Y. Times, Jan. 25, 2018, at A20.

6229. *E.g.*, Settlement Order, N.Y. Times Co. v. Dep't of Just., No. 1:18-cv-2054 (S.D.N.Y. Aug. 9, 2018), D.E. 16.

FISA-court filings in February 2018 also sought Page FISA order records. Motion, *In re* Matters Before the Foreign Intelligence Surveillance Court Relating to Carter Page, No. Misc. 18-2 (FISA Ct. Feb. 8, 2018), www.fisc.uscourts.gov/sites/default/files/Misc%2018-02%20Motion%20For%20Leave%20to%20File.pdf; Motion, *In re* Orders and Records of This Court Related to the Surveillance of Carter Page, No. Misc. 18-1 (FISA Ct. Feb. 6, 2018), www.fisc.uscourts.gov/sites/default/files/Case%20No%20Misc%2018-01.pdf. A July 25 motion, later dismissed voluntarily, sought transcripts of any Page application hearings. Order, *In re* Transcripts of This Court Related to the Surveillance of Carter Page, No. Misc. 18-3 (FISA Ct. July 13, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2018%2003%20Order%20JEB%20July%2013%202020%20200713.pdf; Motion, *id.* (July 25,

cation stated, “The target of this application is Carter W. Page”; it further stated, “The target of this application is an agent of a foreign power.”⁶²³¹

The Justice Department’s inspector general issued a report of more than four hundred pages: “Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation.”⁶²³² The report disclosed that surveillance of Page was part of an operation called Crossfire Hurricane “into whether individuals associated with the Donald J. Trump for President Campaign were coordinating, wittingly or unwittingly, with the Russian government’s efforts to interfere in the 2016 U.S. presidential

2018), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2018-03%20Judicial%20Watch%20Inc%27s%20Motion%20For%20Publication%20of%20Transcripts%20180725_2.pdf.

6230. See Charlie Savage, *FISA Files on Former Trump Aide Are Released*, N.Y. Times, July 22, 2018, at 18; see also Shane Harris, *Justice Department Releases Application to Wiretap Page*, Wash. Post, July 22, 2018, at A6; Elise Viebeck & David A. Fahrenthold, *Carter Page Denies Spying Allegations After FISA Release*, Wash. Post, July 23, 2018, at A3; Del Quentin Wilber & Byron Tau, *Carter Page Records Revive Partisan Spat*, Wall St. J., July 23, 2018, at A4.

A FOIA action seeking fewer redactions was unsuccessful. Opinion, James Madison Project v. U.S. Dep’t of Just., No. 1:17-cv-597 (D.D.C. Mar. 3, 2020), D.E. 62, 2020 WL 1033301; see Notice, *id.* (July 31, 2020), D.E. 70 (voluntary dismissal); Opinion, *id.* (May 4, 2020), D.E. 67 (clarifying a denial of relief); Opinion, *id.* (July 30, 2019), D.E. 51, 2019 WL 3430728 (requiring more information to resolve summary-judgment motions).

6231. Application, *In re Page*, No. 16-1182 (FISA Ct. Oct. 21, 2016), vault.fbi.gov/d1-release/d1-release (FBI’s electronic reading room), int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf (New York Times posting of produced documents); see Order, *id.* (Jan. 7, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Declassified%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf (disclosing the application’s case number); DOJ OIG Crossfire Hurricane Review, *supra* note 6221, at vi, 5, 121 (disclosing October 21 as the date of the application).

6232 DOJ OIG Crossfire Hurricane Review, *supra* note 6221; see Devlin Barrett, Matt Zapotosky, Karoun Demirjian & Ellen Nakashima, *FBI Probe of Trump Not Biased, Report Says*, Wash. Post, Dec. 10, 2019, at A1; Adam Goldman & Charlie Savage, *Report Is Said to Clear F.B.I. of Bias Claims*, N.Y. Times, Nov. 23, 2019, at A1; Shane Harris, Carol D. Leonnig & Rosalind S. Helderman, *Tip About Possible Russian Assistance Shook FBI Officials*, Wash. Post, Dec. 10, 2019, at A8; Mark Mazzetti, *Trump’s Allies Look to the Next Query*, N.Y. Times, Dec. 10, 2019, at A1; Charlie Savage, *Surveillance Court Orders Review of Actions by an Ex-F.B.I. Lawyer*, N.Y. Times, Dec. 21, 2019, at A20; Charlie Savage, Adam Goldman & Katie Benner, *Report Debunks Anti-Trump Plot in Russia Inquiry*, N.Y. Times, Dec. 10, 2019, at A1; Scott Shane, *Report Details Bungled Relationship Between F.B.I. and Dossier Author*, N.Y. Times, Dec. 10, 2019, at A18; Aruna Viswanatha, Sadie Gurman & Byron Tau, *Report Points to FBI Failures, Sees No Bias in Russia Probe*, Wall St. J., Dec. 10, 2019, at A1; see also Ellen Nakashima, *After Finding Surveillance Errors in Trump Probe, IG Looks For Pattern*, Wash. Post, Dec. 15, 2019, at A6.

election.”⁶²³³ Three FISA-court renewal applications in 2017 followed the initial FISA Page surveillance application.⁶²³⁴ Although the inspector general “did not find documentary or testimonial evidence that political bias or improper motivation influenced the FBI’s decision to seek FISA authority on Carter Page,”⁶²³⁵ he

found that FBI personnel fell far short of the requirement in FBI policy that they ensure that all factual statements in a FISA application are “scrupulously accurate.” We identified multiple instances in which factual assertions relied upon in the first FISA application were inaccurate, incomplete, or unsupported by appropriate documentation, based upon information the FBI had in its possession at the time the application was filed.⁶²³⁶

On December 17, 2019, Presiding FISA Court Judge Collyer issued a published order that the government inform her court “what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application.”⁶²³⁷ In March 2020, Presiding Judge Boasberg determined that the government’s remedi-

6233. DOJ OIG Crossfire Hurricane Review, *supra* note 6221, at i.

6234. *Id.* at vi (“A different FISC judge considered each application . . .”).

6235. *Id.*

6236. *Id.* at viii.

The wrongdoing led to a criminal prosecution. See Adam Goldman, *Ex-F.B.I. Lawyer Expected to Plead Guilty in Review of Russia Inquiry*, N.Y. Times, Aug. 15, 2020, at A16; Charlie Savage, *Ex-F.B.I. Lawyer Who Altered Email in Russia Case Is Given Probation*, N.Y. Times, Jan. 30, 2021, at A20; Byron Tau, *Ex-FBI Lawyer Admits Altering Warrant Email*, Wall St. J., Aug. 15, 2020, at A3; Byron Tau, *Former FBI Lawyer Sentenced to Probation*, Wall St. J., Jan. 30, 2021, at A3; Matt Zapotosky & Devlin Barrett, *Ex-FBI Lawyer to Plead Guilty in Case Tied to Russia Probe*, Washington Post, Aug. 15, 2020, at A1.

6237. *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, 411 F. Supp. 3d 333, 337 (FISA Ct. 2019); see Government Response, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-2 (FISA Ct. Jan. 10, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Response%20to%20the%20Court%27s%20Order%20Dated%20December%2017%202019%20200110.pdf; Order, *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, No. ____ (FISA Ct. Dec. 5, 2019), www.fisc.uscourts.gov/sites/default/files/FISC%20Dec%205%20Redacted%20Order%20191220.pdf (noting that an FBI attorney who altered an email in evidence had resigned and become the object of a criminal referral); see also Devlin Barrett, *Court Orders Explanation of FBI Failings in 2016 Case*, Wash. Post, Dec. 18, 2019, at A1; Charlie Savage, *Berating F.B.I., Federal Court Orders Fix to Wiretap Process*, N.Y. Times, Dec. 18, 2019, at A1; Byron Tau & Dustin Volz, *FISA Court Rebukes FBI on Wiretap*, Wall St. J., Dec. 18, 2019, at A1.

al measures held promise and that the court would continue to oversee improvements.⁶²³⁸ Later that month, the inspector general revealed “that his investigators found errors in every FBI application to [the FISA] court examined as part of an ongoing review.”⁶²³⁹

Judge Boasberg ordered additional reporting from the government on its FISA application procedures.⁶²⁴⁰ The most recent report was filed on June 1, 2022.⁶²⁴¹

A May 23, 2019, FISA-court motion for publication of records sought orders, opinions, and other records concerning the “Carter Page FISA application.”⁶²⁴² Presiding Judge Boasberg determined on September 15, 2020, that the FISA court

is not empowered by Congress to consider constitutional claims generally, First Amendment claims specifically, or freestanding motions filed by persons who are not authorized by FISA to invoke this Court’s jurisdic-

6238. Corrected Opinion, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. Mar. 5, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Corrected%20Opinion%20and%20Order%20JEB%20200305.pdf; see Charlie Savage, *F.B.I. Pledges Fixes to Wiretap Requests*, N.Y. Times, Jan. 11, 2020, at A16; Charlie Savage, *F.B.I.’s Proposals to Fix Surveillance Fall Short, Expert Tells FISA Court*, N.Y. Times, Jan. 16, 2020, at A15; Charlie Savage, *Surveillance Court Bars F.B.I. Agents from Page Case*, N.Y. Times, Mar. 5, 2020, at A18; Byron Tau, *DOJ Rethinks Basis for Surveillance*, Wall St. J., Jan. 24, 2020, at A4; Matt Zapotosky, *Justice Dept. Cites Flaws in 2 Requests to Monitor Page*, Wash. Post, Jan. 24, 2020, at A6.

6239. Devlin Barrett & Ellen Nakashima, *Audit of FBI Surveillance Finds Chronic Problems*, Wash. Post, Apr. 1, 2020, at A1; see Aruna Viswanatha & Dustin Volz, *FBI Wiretap Requests Show Persistent Flaws*, Wall St. J., Apr. 1, 2020, at A1.

6240. Opinion, *In re Page*, Nos. 16-1182, 17-52, 17-375, and 17-679 (FISA Ct. June 25, 2020), www.intelligence.gov/assets/documents/702%20Documents/declassified/June_2020_FISC_Opinion.pdf; Order, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. Apr. 3, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf, 2020 WL 1975053; see Charlie Savage, *Secret Court Orders F.B.I. to Reassess Its Wiretaps*, N.Y. Times, Apr. 4, 2020, at A21.

6241. Letter, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. May 31, 2022, filed June 1, 2022), fisc.uscourts.gov/sites/default/files/Misc.%2019-02%20Letter%20of%20May%2031%2C%202022.pdf.

6242. Motion, *In re Motion for Publication of Records*, No. Misc. 19-1 (FISA Ct. May 23, 2019), www.fisc.uscourts.gov/sites/default/files/Misc%2019-01%20Motion%20of%20John%20Solomon%20and%20Southeastern%20Legal%20Foundation%20for%20Publication%20of%20Records%20190523.pdf; see Notice of Supplemental Information, *id.* (Jan. 6, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2001%20Notice%20of%20Supplemental%20Information%20200106.pdf (discussing additional public disclosures).

tion. By the same token, FISA does not grant the FISC jurisdiction over claims asserting a common-law right of access either.⁶²⁴³

Steele Dossier controversy continued in 2021 with the indictment of Igor Danchenko, one of Steele’s researchers, for lying to the FBI about his sources.⁶²⁴⁴

The Public’s Right of Access to Statutory Interpretation

Over nearly a decade of litigation, efforts to establish a qualified First Amendment right of access to judicial interpretations of FISA were unsuccessful.

On November 7, 2013, the ACLU filed a motion with the FISA court “to unseal its opinions addressing the legal basis for the ‘bulk collection’ of data by the United States government under the Foreign Intelligence Surveillance Act.”⁶²⁴⁵ ProPublica filed a similar motion on November 12.⁶²⁴⁶ On December 5, Presiding Judge Walton granted permission for the Re-

6243. Opinion at 3, *id.* (Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2019%2001%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637506 (citations omitted); see Opinion, *In re Release of Court Records*, No. Misc. 13-9 (FISA Ct. Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2009%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637412 (similar holding).

6244. Minutes, *United States v. Danchenko*, No. 1:21-cr-245 (Aug. 1, 2022), D.E. 63 (“Government estimates their case to take approximately 5–6 trial days.”); Arraignment Transcript, *id.* (Nov. 10, 2022, filed Nov. 16, 2021), D.E. 18 (according to counsel for the government, “we believe that discovery is going to be fairly extensive. The government will move expeditiously to produce the unclassified discovery as soon as possible, but there’s going to be a vast amount of classified discovery here, Your Honor.”); Indictment, *id.* (Nov. 3, 2021), D.E. 1; see Devlin Barrett & Tom Jackman, *Trump Dossier Source Charged*, Wash. Post, Nov. 5, 2021, at A1; Adam Goldman & Charlie Savage, *Contributor to Steele Dossier Is Arrested*, N.Y. Times, Nov. 5, 2021, at A14; Glenn Kessler, *The Steele Dossier: A Guide to Latest Revelations, Allegations*, Wash. Post, Nov. 21, 2021, at A4; Michael Kranish & Isaac Stanley-Becker, *Questions Intensify Over Sourcing of Steele Dossier*, Wash. Post, Nov. 26, 2021, at A1; Charlie Savage, *Shy Discredited Dossier Does Not Undercut Russia Inquiry*, N.Y. Times, Dec. 2, 2021, at A210; Byron Tau & Alan Cullison, *Dossier Source Arrested, Accused of Lying to FBI*, Wall St. J., Nov. 5, 2021, at A3.

6245. Motion, *In re Bulk Collection Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Nov. 7, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf.

6246. Motion, *In re Release of Court Records*, No. Misc. 13-9 (FISA Ct. Nov. 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-09%20Motion-2.pdf (“opinions that appear to underlie the government’s collection of telephone metadata”).

porters Committee for Freedom of the Press and twenty-five other media organizations to file an amicus curiae brief.⁶²⁴⁷

Over three years later, noting that “the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews [and redaction],” Presiding Judge Collyer relied in part on Judge Bates’s 2007 opinion and concluded that the public does not have a qualified First Amendment right to FISA-court opinions.⁶²⁴⁸ Judge Collyer dismissed the motion for lack of jurisdiction, concluding that the movants did not have standing to pursue meritless First Amendment rights.⁶²⁴⁹ En banc, the FISA court decided on November 9, 2017, by a vote of six to five, that a standing analysis requires a presumption of merit, and the court remanded the motion to Judge Collyer for reconsideration.⁶²⁵⁰ Dissenting from the en banc holding, Judge Collyer certified the standing question to the FISA Court of Review.⁶²⁵¹

The court of review agreed, on March 16, 2018, with the majority of the FISC judges that the movants have standing to seek disclosure of the classified portions of the opinions at issue. As the majority explained, standing is a prerequisite to a party’s filing suit. It entails a threshold inquiry, one that is separate from the merits of the underlying claim—and one that requires far less substantiation. Movants need not show that they are ultimately entitled to access the materials in question. Instead, they need only show that their claim is not immaterial nor wholly insubstantial and frivolous. Regardless of whether the mo-

6247. Order, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Dec. 5, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6.pdf; see Brief, *id.* (Nov. 26, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Brief-2.pdf.

6248. Collyer Right-of-Access Opinion, *supra* note 5903 (holding that the court did not have jurisdiction to hear the motion, because the movants lacked standing to pursue a motion without merit); see *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISA Ct. 2007).

6249. Collyer Right-of-Access Opinion, *supra* note 5903.

6250. Opinion, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Nov. 9, 2017), www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf, 2017 WL 5983865.

6251. Certification, *id.* (Jan. 5, 2018), www.fisc.uscourts.gov/sites/default/files/Misc%2013%2008%20Certification%20Order%20with%20Attached%20En%20Banc%20Decision.pdf, 2018 WL 396244.

vants are entitled to relief on their claim, they have standing to present that question to the court.⁶²⁵²

The court cautioned, however, that

while we agree with the movants that they have standing to litigate the issue of access to the redacted portions of the court's opinions, our decision should not be taken as an endorsement of their suggestion that First Amendment analysis applies to the FISC in the same manner that it applies to more conventional courts.⁶²⁵³

A couple of years later, Judge Collyer decided that the public was not entitled to any more in the four opinions than what had already been disclosed.⁶²⁵⁴ She rejected the government's argument that access to court opinions was beyond the court's subject-matter jurisdiction.⁶²⁵⁵

The ACLU's appeal from Judge Collyer's decision, however, was beyond the FISA court of review's jurisdiction; the appellate court was established to provide the *government* with appeals.⁶²⁵⁶

In November 2020, the court of review affirmed⁶²⁵⁷ another decision by Judge Collyer⁶²⁵⁸ that the FISA court did not have jurisdiction to consider the ACLU's 2016 motion for the unsealing of FISA-court "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act on

6252. Opinion at 2, *In re Certification of Questions of Law*, No. 18-1 (FISA Ct. Rev. Mar. 16, 2018), www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf, 2018 WL 2709456.

6253. *Id.* at 3–4.

6254. Opinion, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Feb. 11, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2008%20Opinion%20RMC%20200211.pdf, 2020 WL 897659.

6255. *Id.* at 4–11.

6256. *In re Opinions & Orders by the FISC Addressing Bulk Collection of Data*, 957 F.3d 1344 (FISA Ct. Rev. 2020).

6257. Opinion, *In re Opinions and Orders of the FISC*, No. Misc. 20-2 (FISA Ct. Rev. Nov. 19, 2020), www.fisc.uscourts.gov/sites/default/files/FISCR%20Misc%2020%2002%20Opinion%20and%20Order%20Nov%2019%202020%20201119.pdf, 2020 WL 6888073 (also declining to certify a question to the Supreme Court).

6258. Opinion, *In re Opinions and Orders of This Court*, No. Misc. 16-1 (FISA Ct. Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2016%2001%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637419.

June 2, 2015.”⁶²⁵⁹ The Supreme Court denied review on November 1, 2021.⁶²⁶⁰

On August 12, 2022, the Office of the Director of National Intelligence publicly released “redacted versions of all seven remaining [FISA court] opinions and orders” “containing a significant interpretation of law” not previously released publicly.⁶²⁶¹

Section 702 Certifications

FISA’s section 702, enacted in 2008 as part of the FAA, provides for the FISA court’s judicial review of the government’s certification that it is complying with FISA requirements.⁶²⁶² From time to time, the Director of National Intelligence releases redacted certification opinions.⁶²⁶³ Case

6259. Motion at 1, *id.* (Oct. 19, 2016), www.fisc.uscourts.gov/sites/default/files/Misc%2016%2001%20Motion%20of%20the%20ACLU%20for%20the%20Release%20of%20Court%20Records%20161019.pdf.

6260. *ACLU v. United States*, 595 U.S. ___, 142 S. Ct. 22 (2021); *see id.* at ___, 142 S. Ct. at 23 (Gorsuch, joined by Sotomayor, dissenting: “On the government’s view, literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts.”); *see also* Charlie Savage, *Justices Are Asked to Open Secret Rulings of Spy Court*, N.Y. Times, Apr. 20, 2021, at A16.

6261. ODNI Releases All Remaining FISA Decisions Determined to Contain Significant Construction of Law (Aug. 12, 2022), icontherecord.tumblr.com/post/692398319938535424/odni-releases-all-remaining-fisa-decisions.

6262. 50 U.S.C. § 1881a(h), (j) (2020).

6263. IC on the Record, icontherecord.tumblr.com/tagged/declassified. Certification opinions include the following:

1. Opinion, *In re* DNI/AG Certification ___, No. 702(i)-08-1 (FISA Ct. Sept. 4, 2008), www.dni.gov/files/documents/0315/FISC%20Opinion%20September%204%202008.pdf; *see* Release of Documents Concerning Activities Under the Foreign Intelligence Surveillance Act (Last Updated 9/29/15) (Mar. 3, 2015), icontherecord.tumblr.com/post/112610953998/release-of-documents-concerning-activities-under.
2. Opinion, ___, No. ___ (FISA Ct. Nov. 30, 2011), www.dni.gov/files/documents/November%202011%20Bates%20Opinion%20and%20Order%20Part%201.pdf (part 1) and www.dni.gov/files/documents/November%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf (part 2); *see* DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA) (Aug. 21, 2013), icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents.
3. Opinion, ___, No. ___ (FISA Ct. Aug. 26, 2014), www.dni.gov/files/documents/0928/FISC%20Memorandum%20Opinion%20and%20Order%2026%20August%202014.pdf; *see* Statement by the Office of the Director of Na-

numbers for these opinions typically are redacted, and the opinions are not posted on the FISA court's website, which organizes public FISA-court filings by case number.⁶²⁶⁴

Among other things, certification opinions describe and discuss compliance issues.⁶²⁶⁵ The Director of National Intelligence also issues semianual compliance reports.⁶²⁶⁶

tional Intelligence and the Department of Justice on the Declassification of Documents Related to Section 702 of the Foreign Intelligence Surveillance Act (Sept. 29, 2015), icontherecord.tumblr.com/post/130138039058/statement-by-the-office-of-the-director-of.

4. Nov. 6, 2015, Hogan Opinion, *supra* note 6201; *see* Release of Three Opinions Issued by the Foreign Intelligence Surveillance Court (Apr. 19, 2016), icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign.
5. Apr. 26, 2017, Collyer Opinion, *supra* note 6211; *see* Release of the FISC Opinion Approving the 2016 Section 702 Certifications and Other Related Documents (May 11, 2017), icontherecord.tumblr.com/post/160561655023/release-of-the-fisc-opinion-approving-the-2016.
6. Secret Court Opinion, 402 F. Supp. 3d 45 (FISA Ct. 2018), *aff'd in part*, *In re* DNA/AG 702(h) Certifications 2018, 941 F.3d 547 (FISA Ct. Rev. 2019).
7. Opinion, ___, No. ___ (FISA Ct. Dec. 6, 2019), www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_OCR.pdf; *see* Release of Documents Related to the 2019 FISA Section 702 Certifications (Sept. 4, 2020), icontherecord.tumblr.com/post/628356110309572608/release-of-documents-related-to-the-2019-fisa; *see also* Charlie Savage, *Court Approves Warrantless Surveillance Rules While rebuking the F.B.I.*, N.Y. Times, Sept. 6, 2020, at 26.
8. Opinion, ___, No. ___ (FISA Ct. Nov. 18, 2020), www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_FISC%20Cert%20Opinion_10.19.2020.pdf; *see* Release of Documents Related to the 2020 FISA Section 702 Certifications (Apr. 26, 2021), icontherecord.tumblr.com/post/649560355508486144/release-of-documents-related-to-the-2020-fisa; *see also* Charlie Savage, *Special Court Scolds F.B.I for Monitoring of Americans*, N.Y. Times, Apr. 27, 2021, at A17.

6264. Public Filings—U.S. Foreign Intelligence Surveillance Court, www.fisc.uscourts.gov/public-filings.

6265. *See* Charlie Savage, *Court Approves Warrantless Surveillance Rules While Rebuking the F.B.I.*, N.Y. Times, Sept. 6, 2020, at 26; Charlie Savage, *Special Court Scolds F.B.I. for Monitoring of Americans*, N.Y. Times, Apr. 27, 2021, at A17.

6266. *E.g.*, ODNI Releases 23rd Joint Assessment of Section 702 Compliance (July 18, 2022), icontherecord.tumblr.com/post/690141801614540800/odni-releases-23rd-joint-assessment-of-section-702.

In addition, the Director of National Intelligence annually releases, on behalf of the intelligence community, a transparency report of “statistics and context regarding the

Transition

The twentieth-century FISA court approved surveillance orders for foreign intelligence. In the twenty-first century, the court also assesses the propriety of surveillance programs and interprets surveillance statutes, sometimes in secret and sometimes publicly.

Litigation in and about the Foreign Intelligence Surveillance Court has grown increasingly complex. The Georgetown University Law Center maintains a useful and comprehensive archive of records of that litigation.⁶²⁶⁷ The Director of National Intelligence occasionally releases FISA-court records on Tumblr, often as a result of FOIA lawsuits.⁶²⁶⁸

government's use of FISA authorities, national security letters, and other national security authorities. *E.g.*, ODNI Releases Annual Intelligence Community Transparency Report (Apr. 29, 2022), icontherecord.tumblr.com/post/682887513999818752/odni-releases-annual-intelligence-community; see Charlie Savage, *Report Shows N.S.A. Use of Court-Approved Domestic Surveillance Fell to a New Low*, N.Y. Times, Apr. 30, 2022, at A15.

Court-approved national security surveillance on domestic soil fell for the third straight year in 2021, extending a trend that has coincided with the decline of the Islamic State, the rise of the coronavirus pandemic and the tightening of procedures after the F.B.I.'s botching of wiretap applications in the Trump-Russia investigation.

Savage, *supra*; see Charlie Savage, *F.B.I. Surveillance Cases Plummet Amid Pandemic and Inquiry Fallout*, N.Y. Times, May 2, 2021, at A15; Dustin Volz, *Fewer Are Targeted for FISA Wiretaps*, Wall St. J., May 1, 2021, at A5.

6267. Foreign Intelligence Law Collection, repository.library.georgetown.edu/handle/10822/1052698.

6268. IC on the Record, icontherecord.tumblr.com.

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