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CLASSIFIED INFORMATION IN FEDERAL COURT

ROBERT TIMOTHY REAGAN*

THIS Article provides an account of how federal courts have handled classified information in recent cases. Part I describes a criminal case in which classified information played a modest but important role. The judge was required to store the classified information in her chambers' safe. Part II describes civil litigation challenging warrantless surveillance programs by the federal government. To defend against the suits, the Government submitted briefs and declarations to judges that were so secret they could not be stored in judges' chambers, and even law clerks or plaintiffs' attorneys with security clearances could not see them.

I. CLASSIFIED INFORMATION IN A CRIMINAL PROSECUTION
FOR FUNDING HAMAS

A prosecution for conspiracy to fund Hamas terrorism began in 1998 with secret grand jury proceedings. A witness's refusal to testify resulted in semi-public contempt proceedings. The prosecution of this witness and another defendant on a 2004 indictment for conspiracy to fund terrorism required the court to take unusual measures to protect classified information—especially the identities of Israel Security Agency agents.

A. *Abdelhaleem Ashqar*

Abdelhaleem Hasan Abdelraziq Ashqar—a Palestinian who was residing in Alexandria, Virginia, and was in the United States on a student visa—was called to testify before a federal grand jury in Manhattan that was investigating the funding of “Hamas.”¹ Hamas is an acronym for Harakat al-Muqawama al Islamiyya, which is Arabic for “The Islamic Resis-

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1. See Benjamin Weiser, *2 Men Jailed over Refusal to Aid Inquiry*, N.Y. TIMES, Apr. 18, 1998, at B1 [hereinafter Weiser, *2 Men Jailed*] (reporting on Ashqar's background and refusal to testify); Benjamin Weiser, *Appeal Lost by Inmate Who Refuses to Testify*, N.Y. TIMES, July 22, 1998, at B7 [hereinafter Weiser, *Appeal Lost*] (same).

tance Movement.² The organization was founded in 1987 to support Palestinian interests in Israel.³

Ashqar once attended the Islamic University of Gaza, where he was the university newsletter's spokesperson and editor.⁴ He has told reporters that he had long supported the Islamic movement and always deplored terrorism.⁵ In 1989, Ashqar came to the United States from Gaza to pursue a doctorate at the University of Mississippi's business school; his stay was supported by a fellowship funded by the United States Agency for International Development (USAID).⁶

While living as a student in Oxford, Mississippi, Ashqar was subject to surveillance by the Federal Bureau of Investigation (FBI).⁷ Ashqar has said that in September 1996, he declined FBI offers of money, United States citizenship and jobs for himself and his wife in exchange for supplying the FBI with incriminating information about Hamas activists.⁸ Ashqar received his doctorate in 1997 and moved to Virginia.⁹ When Ashqar's visa expired in 1998, he applied for political asylum, claiming he would be harmed if he returned to Israel.¹⁰

When called to testify before the grand jury, Ashqar—through lawyers—announced that he would rely on the Fifth Amendment and refuse

2. See *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 712 (7th Cir. 2007) (explaining acronym); William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, CHI. TRIB., Sept. 8, 1998, at 1 (same).

3. See *Boim*, 511 F.3d at 712 (describing Hamas as “an outgrowth of the Muslim Brotherhood in Egypt”); Gaines & Martin, *supra* note 2 (describing origins of Hamas); Ron Grossman, *The Case of the Globe-Trotting Grocer*, CHI. TRIB., Sept. 3, 2006, Magazine, at 12 (describing Hamas as Palestinian offshoot of “the Muslim Brotherhood, a militant group founded in Egypt in 1928”).

4. See Wilson Boyd, *Feds Attempt to Build Immigration Case Against Ole Miss Alum*, CLARION-LEDGER (Jackson, Miss.), July 27, 2003, at 1A (reporting on Ashqar's past, and seeming incongruity between Ashqar's background and current accusations); Stephen Franklin, *Palestinian Jailed for Refusal to Testify Before Grand Jury*, CHI. TRIB., Sept. 6, 2003, at 11 [hereinafter Franklin, *Palestinian Jailed*] (describing background facts); Caryle Murphy, *Muslims See New Clouds of Suspicion*, WASH. POST, Nov. 27, 2000, at B1 (same); Robert E. Pierre, *Palestinian Activist Faces Jail Again*, WASH. POST, Sept. 5, 2003, at A3 (same).

5. See Murphy, *supra* note 4 (quoting Ashqar as saying, “I'm against killing civilians period, both sides . . . Palestinians and Israelis”).

6. See Boyd, *supra* note 4 (describing Ashqar's academic promise); Franklin, *Palestinian Jailed*, *supra* note 4 (same); Murphy, *supra* note 4 (same); Pierre, *supra* note 4 (same).

7. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 70 (D.D.C. 2002) (noting FBI surveillance of meeting of two Muslim charities with “senior Hamas activist” Ashqar in action challenging designation of charity as terrorist organization); Boyd, *supra* note 4 (describing constant surveillance); Pierre, *supra* note 4 (same).

8. See Murphy, *supra* note 4 (noting Ashqar's rejection of FBI offers).

9. See *id.* (describing Ashqar's background in United States); Pierre, *supra* note 4 (same).

10. See Franklin, *Palestinian Jailed*, *supra* note 4; Pierre, *supra* note 4 (reporting that Ashqar believed “that his outspoken views on Israel would make him a target if he tried to return home”).

to testify.¹¹ He continued to refuse to testify even after the government granted him immunity; Ashqar claimed that the proceeding was part of the government's persecution of advocates of Palestinian interests.¹² "[M]y answers will be used against my friends, relatives and colleagues in the Palestinian liberation movement," he read to the grand jury.¹³ Ashqar was willing to give only his name, date of birth and profession.¹⁴ In a sealed proceeding on February 23, 1998, Judge Denise L. Cote, of the Southern District of New York, found Ashqar in contempt.¹⁵ Judge Cote ordered Ashqar jailed; Ashqar immediately began a hunger strike in protest.¹⁶

On June 17, 1998, Judge Cote denied Ashqar's motion for release.¹⁷ Because the hunger strike had caused a substantial deterioration of Ashqar's health, Judge Cote on June 25 ordered Ashqar force-fed by a tube to be inserted through Ashqar's nose.¹⁸ Ashqar was transferred to the prison ward of the Westchester County Medical Center in Valhalla, New York; his hands were shackled to the bed to prevent him from removing the tube.¹⁹

Ashqar appealed his imprisonment and his force-feeding to the United States Court of Appeals for the Second Circuit.²⁰ The appeal was sealed pursuant to an order of the district court, and was captioned *In re Grand Jury Subpoena, John Doe v. United States*.²¹ Second Circuit Judge José

11. See Weiser, *2 Men Jailed*, *supra* note 1 (summarizing Ashqar's basis for refusal to testify).

12. See *In re Grand Jury Subpoena*, 150 F.3d 170, 171 (2d Cir. 1998) (noting hunger strike started "for political and religious reasons"); Weiser, *2 Men Jailed*, *supra* note 1 (describing basis for refusal even after grant of immunity); Weiser, *Appeal Lost*, *supra* note 1 (same).

13. Weiser, *2 Men Jailed*, *supra* note 1 (quoting grand jury testimony).

14. See *id.* (summarizing Ashqar's limited testimony before grand jury).

15. See *In re Grand Jury Subpoena*, 150 F.3d at 171; Weiser, *2 Men Jailed*, *supra* note 1 (describing contempt holding and secrecy); Weiser, *Appeal Lost*, *supra* note 1 (noting secrecy requirement for grand jury matters).

16. See *In re Grand Jury Subpoena*, 150 F.3d at 171 (noting that Ashqar began hunger strike upon confinement); Weiser, *2 Men Jailed*, *supra* note 1 (same); Weiser, *Appeal Lost*, *supra* note 1 (same).

17. See *In re Grand Jury Subpoena*, 150 F.3d at 171 (holding that district court applied appropriate standard correctly).

18. See *id.*; Weiser, *2 Men Jailed*, *supra* note 1 (reporting that by April 18, 1998, Ashqar had lost approximately twenty-five pounds); Weiser, *Appeal Lost*, *supra* note 1 (reporting that by July 22, 1998, Ashqar had dropped fifty pounds, bringing his total weight down to 126 pounds, and that he would rather die than testify).

19. See *Palestinian Released After Hunger Strike*, WASH. POST, Aug. 22, 1998, at A4 [hereinafter *Palestinian Released*] (reporting on Ashqar's hunger strike and subsequent release from confinement).

20. See *In re Grand Jury Subpoena*, 150 F.3d at 171; Docket Sheet, *In re Grand Jury Subpoena*, 150 F.3d 170 (No. 98-6137) [hereinafter *Ashqar* 2d Cir. Docket Sheet] (noting M11-189 as district court docket number); Weiser, *Appeal Lost*, *supra* note 1 (describing events leading up to appeal and appeal's result).

21. See *In re Grand Jury Subpoena*, 150 F.3d at 170 (providing full case name); *Ashqar* 2d Cir. Docket Sheet, *supra* note 20 (same).

A. Cabranes, Fifth Circuit Judge Thomas M. Reavley (sitting by designation) and Judge Barbara S. Jones of the Southern District of New York heard the appeal in closed session on July 16, 1998.²² On that same day, the court issued a published per curiam opinion affirming both Ashqar's imprisonment and his force-feeding.²³ On August 21, 1998, Judge Cote concluded in a sealed decision that there was no possibility that imprisonment would persuade Ashqar to testify; accordingly, Judge Cote ordered that Ashqar be released.²⁴

Following his release, Ashqar taught as an assistant professor at Howard University from 2000 to 2003, and joined the board of the Dar Al Hijra Mosque in Falls Church, Virginia; local politicians frequently visited the mosque in attempts to maintain links to the local Muslim community.²⁵ After roughly five years of waiting for political asylum, Ashqar withdrew his application in June 2002 and agreed to leave the country.²⁶

Ashqar was then called again to testify before a grand jury investigating Hamas funding—this time in Chicago.²⁷ In August 2002, United States District Judge Charles Kocoras held Ashqar in civil contempt for refusing to testify.²⁸ Initially, Ashqar was required to check in with Chicago marshals twice each day, visit a local immigration office twice each week and remain in Virginia.²⁹ On September 5, 2003, Ashqar surren-

22. See *In re Grand Jury Subpoena*, 150 F.3d at 170-71 (identifying judges on panel hearing appeal); *Ashqar* 2d Cir. Docket Sheet, *supra* note 20 (same); Weiser, *Appeal Lost*, *supra* note 1 (same).

23. See *In re Grand Jury Subpoena*, 150 F.3d at 170-72 (affirming district court's decisions and reasoning that "there remains a realistic possibility that [Ashqar's] continued confinement might cause him to testify"); *Ashqar* 2d Cir. Docket Sheet, *supra* note 20 (showing appeal and affirmation); Weiser, *Appeal Lost*, *supra* note 1 (reporting on panel's opinion affirming confinement and force-feeding).

24. See *Judge Releases Man Who Would Not Testify*, N.Y. TIMES, Aug. 22, 1998, at B3 (reporting that Ashqar "had lost nearly sixty pounds and suffered from diabetes"); Murphy, *supra* note 4; *Palestinian Released*, *supra* note 19 (describing testimony before district court judge).

25. See Boyd, *supra* note 4 (describing Ashqar's past employment and associations); Murphy, *supra* note 4 (same); Pierre, *supra* note 4 (same).

26. See Franklin, *Palestinian Jailed*, *supra* note 4 (noting reasons for withdraw of application).

27. See *In re Grand Jury Proceedings of the Special April 2002 Grand Jury (In re Grand Jury Proceedings)*, 347 F.3d 197, 199 (7th Cir. 2003) (describing background facts and events leading up to grand jury); Franklin, *Palestinian Jailed*, *supra* note 4 (describing timeline of events); Pierre, *supra* note 4 (noting that Ashqar's scheduled deportation was postponed in order for him to attend grand jury).

28. See *In re Grand Jury Proceedings*, 347 F.3d at 197 (affirming order); Franklin, *Palestinian Jailed*, *supra* note 4 (describing Ashqar's refusal to testify and consequences of contempt); Pierre, *supra* note 4 (same).

29. See *Palestinian Jailed*, *supra* note 4 (describing Ashqar's initial contempt penalties); Pierre, *supra* note 4 (same).

dered for imprisonment in Chicago.³⁰ Again, he staged a hunger strike and was subsequently force-fed and hospitalized.³¹

The Seventh Circuit's Court of Appeals affirmed the district court's holding that collateral estoppel did not bar imprisoning Ashqar for civil contempt a second time.³² Circuit Judges Ilana Diamond Rovner, William J. Bauer and Terence T. Evans reviewed the sealed record—which included an in camera and ex parte review of warrants issued by the Foreign Intelligence Surveillance Court (FISC) for surveillance of Ashqar—and determined that the warrants were valid.³³ To preserve the secrecy of the Chicago grand jury proceeding, the case was titled *In re Grand Jury Proceedings of the Special April 2002 Grand Jury*.³⁴ The opinion was issued four days after argument at a public hearing, and was released to the public one week later.³⁵

On October 9, 2003—not quite two weeks after the court of appeals affirmed Ashqar's civil contempt conviction—the United States filed an indictment against Ashqar for criminal contempt.³⁶ On reference from United States District Judge Amy J. St. Eve, United States Magistrate Judge Arlander Keys released Ashqar to home confinement in Virginia on one million dollars bail; the bail terms were secured by roughly \$875,000 of equity in real property put up by seven supporters of Ashqar.³⁷ The following June, the Government filed a superseding indictment adding a count for obstruction of justice.³⁸

30. See *In re Grand Jury Proceedings*, 347 F.3d at 201 (noting that under incarceration order, Ashqar was to be “confined until he testifies, or until the expiration of the special Grand Jury . . . or until the district court determines that confinement is punitive rather than coercive”); Franklin, *Palestinian Jailed*, *supra* note 4 (reporting that U.S. Court of Appeals for Seventh Circuit rejected motion to delay imprisonment).

31. See Stephen Franklin, *Wiretap Use Challenged by Palestinian Activist*, CHI. TRIB., Sept. 23, 2003, at 1 [hereinafter Franklin, *Wiretap Use Challenged*].

32. See *In re Grand Jury Proceedings*, 347 F.3d at 200-02 (noting that estoppel theory did not apply because circumstances and Ashqar's state of mind had changed).

33. See *id.* at 202 n.5, 205 (noting that “all of the requisite certifications [necessary for the warrants] are in order”).

34. 347 F.3d 197 (7th Cir. 2003).

35. See *id.* at 197 n.1 (noting publication date of order and opinion); *Court Upholds Jailing of Activist*, CHI. TRIB., Oct. 5, 2003, Metro, at 3 (reporting on decision); Franklin, *Wiretap Use Challenged*, *supra* note 31 (reporting on hearing).

36. See Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003); Stephen Franklin & Laurie Cohen, *Activist Charged with Contempt*, CHI. TRIB., Oct. 11, 2003, Metro, at 20 (reporting that Ashqar lost thirty pounds during hunger strike).

37. See Order Setting Conditions of Release, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. Nov. 3, 2003) (enumerating bail amounts); Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, CHI. TRIB., Nov. 4, 2003, Metro, at 1.

38. See Superseding Indictment, *United States v. Ashqar*, No. 1:03-cr-978 (N.D. Ill. June 24, 2004) (adding count for obstruction of justice); *Palestinian Activist Faces New Charge*, CHI. TRIB., June 26, 2004, Metro, at 16 (reporting on new count).

Eight weeks later, on August 19, 2004, the Government named Ashqar as the third defendant in a second superseding indictment, which exposed Ashqar and the two other defendants to life in prison.³⁹ The charges in the second indictment included conspiracy to provide funds to Hamas for terrorism.⁴⁰ According to the *Boston Globe*, “[m]uch of the case apparently [was] based on surveillance tapes from the early ‘90s that would have been useless to prosecutors before the USA Patriot Act Information from that type of surveillance was off-limits to criminal prosecutors until after the passage of the Patriot Act.”⁴¹

The lead defendant in the superseding indictment was Mousa Mohammed Abu Marzook, who was then the chief deputy of Hamas’s political branch, and who was living in Damascus at that time.⁴² Abu Marzook had earned a master’s degree in industrial sciences from Colorado State University,⁴³ and a doctorate in industrial engineering from the University of Louisiana.⁴⁴ Subsequently, Abu Marzook had lived in Falls Church, Vir-

39. See *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006) (describing defendants); *United States v. Marzook*, 435 F. Supp. 2d 778, 779-80 (N.D. Ill. 2006) (same); *United States v. Marzook*, 435 F. Supp. 2d 708, 711-12 (N.D. Ill. 2006) (same); *United States v. Marzook*, 426 F. Supp. 2d 820, 821 (N.D. Ill. 2006) (denying Salah’s motion to dismiss RICO count); *United States v. Marzook*, 412 F. Supp. 2d 913, 915 (N.D. Ill. 2006) (describing defendants); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1057-58 (N.D. Ill. 2005) (denying Salah’s motion to dismiss count for material support to terrorists); Second Superseding Indictment at 1, *United States v. Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004) [hereinafter *Marzook Indictment*] (naming additional defendants); Dan Eggen & Jerry Markon, *Hamas Leader, 2 Others Indicted*, WASH. POST, Aug. 21, 2004, at A4 (describing indictment); Eric Lichtblau, *U.S. Indicts 3 on Charges of Helping Militant Group*, N.Y. TIMES, Aug. 21, 2004, at A6 (same); Matt O’Connor & Laurie Cohen, *3 Accused of Aiding Hamas*, CHI. TRIB., Aug. 21, 2004, Metro, at 1 (same); Charlie Savage, *US Indicts 3 as Past Hamas Fund-Raisers*, BOSTON GLOBE, Aug. 21, 2004, at A1 (same); Richard B. Schmitt, *U.S. Accuses Hamas Figure of Racketeering*, L.A. TIMES, Aug. 21, 2004, at 15.

40. See *Marzook Indictment*, *supra* note 39 (enumerating charges); Lichtblau, *supra* note 39 (summarizing charges against Ashqar and other defendants); Savage, *supra* note 39 (same); Schmitt, *supra* note 39 (same).

41. Savage, *supra* note 39 (explaining impact of Patriot Act on availability of certain surveillance to prosecutors).

42. See *Marzook Indictment*, *supra* note 39, at 3 (describing Abu Marzook’s alleged involvement with Hamas); Grossman, *supra* note 3 (same); *Hamas Official Denies Accusations*, N.Y. TIMES, Aug. 22, 2004, at N10 [hereinafter *Hamas Official*] (same); Lichtblau, *supra* note 39 (same); Mousa Abu Marzook, Op-Ed., *What Hamas Is Seeking*, WASH. POST, Jan. 31, 2006, at A17 (same); Savage, *supra* note 39 (same); Schmitt, *supra* note 39 (same).

43. See Charles W. Hall & Robert O’Harrow, Jr., *Virginia Man Suspected of Terrorism Known for Anonymity*, WASH. POST, Aug. 8, 1995, at B1 (describing Abu Marzook’s educational background).

44. See *Hamas Official*, *supra* note 42; Youssef M. Ibrahim, *Hamas Political Chief Says Group Can’t Curb Terrorists*, N.Y. TIMES, Mar. 9, 1996, at 5 (describing Abu Marzook’s educational background).

ginia.⁴⁵ Since the indictment, Abu Marzook has been regarded as a fugitive.⁴⁶

The other defendant in the superseding indictment was Muhammad Hamid Khalil Salah, a naturalized United States citizen residing in the Chicago suburb of Bridgeview.⁴⁷ According to the *Chicago Tribune*, “[a]s he drove in Oak Lawn, Salah was pulled over on a bogus traffic stop by a state trooper so that two FBI agents could serve him with the arrest warrant and take him into custody”⁴⁸

B. *Mousa Abu Marzook*

Mousa Abu Marzook was born in Gaza in 1951.⁴⁹ Since 1982, Abu Marzook had been in the United States on a student visa; from 1990 onward, he had enjoyed permanent resident status and a Yemeni passport.⁵⁰ From 1992 onward, he headed Hamas’s political branch.⁵¹

On July 25, 1995, Abu Marzook was detained at JFK Airport in New York City, while trying to return with his wife and children to the United States from the United Arab Emirates.⁵² Abu Marzook had been abroad

45. See Steven Greenhouse, *U.S. Detains Arab Tied to Militants*, N.Y. TIMES, July 28, 1995, at A1 (describing background facts regarding Abu Marzook); James C. McKinley, Jr., *U.S. Rejects Offer of Leader of Hamas Never to Return*, N.Y. TIMES, Aug. 3, 1995, at A10 (same); Savage, *supra* note 39 (same); Pierre Thomas & Charles W. Hall, *Palestinian with Local Ties is Detained as Suspected Hamas Leader*, WASH. POST, July 28, 1995, at A31 (same).

46. See O’Connor & Cohen, *supra* note 39 (describing Abu Marzook’s fugitive status); Schmitt, *supra* note 39 (same).

47. See *Marzook Indictment*, *supra* note 39, at 4; Answer of Muhammad Salah to First Amended Complaint ¶ 12, *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (No. 1:00-cv-2905) [hereinafter *Boim Amended Salah Answer*] (describing Salah’s background); Lichtblau, *supra* note 39 (same); O’Connor & Cohen, *supra* note 39 (same); Schmitt, *supra* note 39 (same).

48. O’Connor & Cohen, *supra* note 39.

49. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006 (providing background facts related to Abu Marzook), *aff’d*, 291 F.3d 1000 (7th Cir. 2002); Greenhouse, *supra* note 45 (same).

50. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006 (describing citizenship status); *Marzook v. Christopher*, No. 1:96-Civ-4107 (KMW), 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996) (same); Greenhouse, *supra* note 45 (same); Neil MacFarquhar, *Terror Suspect Freed by U.S.; Flies to Jordan*, N.Y. TIMES, May 6, 1997, at A1 [hereinafter *MacFarquhar, Terror Suspect Freed*] (same); McKinley, *supra* note 45 (same); Mike O’Connor, *Jordan Acts to Enforce Hamas Ban*, WASH. POST, Sept. 23, 1999, at A21 (same).

51. See *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 718 n.6 (7th Cir. 2007) (describing Abu Marzook’s alleged relationship with Hamas); *In re Extradition of Marzook*, 924 F. Supp. 565, 568 (S.D.N.Y. 1996) (same); *Christopher*, 1996 WL 583378, at *1-2 (same); Greenhouse, *supra* note 45 (same); Ibrahim, *supra* note 44 (same); MacFarquhar, *Terror Suspect Freed*, *supra* note 50 (same).

52. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006 (describing Abu Marzook’s detention); *Marzook v. Albright*, No. 1:97-cv-2293 (DLC), 1997 WL 181163, at *1 (S.D.N.Y. Apr. 14, 1997) (same); *Christopher*, 1996 WL 583378, at *1; Greenhouse, *supra* note 45 (same); Thomas & Hall, *supra* note 45 (same).

for five months, and in June had been expelled from the state of Jordan.⁵³ The United States Immigration and Naturalization Service (INS) initiated exclusion proceedings because of his suspected ties to terrorism, and he was detained in solitary confinement at the Metropolitan Correctional Center in lower Manhattan pending exclusion.⁵⁴

On July 31, 1995, an Israeli judge issued a warrant for Abu Marzook's arrest.⁵⁵ Hamas responded with threats against both Israel and the United States.⁵⁶ Because he would not admit to terrorist activity, the United States government rejected Abu Marzook's offer to leave the United States and to never return.⁵⁷ On September 28, 1995, Israel requested Abu Marzook's extradition.⁵⁸

On May 7, 1996, United States District Judge Kevin Thomas Duffy determined that Abu Marzook could be extradited to Israel.⁵⁹ Abu Marzook filed an appeal on May 10, 1996, and the Second Circuit's Court of Appeals stayed extradition, pending a hearing on Abu Marzook's motion for a stay pending appeal.⁶⁰ The Second Circuit stayed Abu Marzook's extradition on consent of the parties until three weeks after a decision in *Lo Duca v. United States*,⁶¹ a separate case that was then challenging the constitutionality of the United States' extradition statute.⁶²

53. See Greenhouse, *supra* note 45 (noting Abu Marzook's residence).

54. See *Albright*, 1997 WL 181163, at *1 (describing INS proceedings); *Christopher*, 1996 WL 583378, at *1 (same); Greenhouse, *supra* note 45 (same); Ibrahim, *supra* note 44 (reporting that he was allowed newspapers and reading material but not television); Don Van Natta, Jr., *Judge Orders Hamas Leader Extradited to Israel*, N.Y. TIMES, May 9, 1996, at 9 (same).

55. See *Christopher*, 1996 WL 583378, at *1 (describing Israeli judge's order); John Lancaster, *Israel Seeks Custody of Alleged Terrorist*, WASH. POST, Aug. 1, 1995, at A12 (same).

56. See Serge Schmemmann, *Israel Moves Toward Taking Hamas Figure from U.S. Custody*, N.Y. TIMES, Aug. 2, 1995, at 3 (suggesting threats were aimed at ensuring Abu Marzook's release).

57. See John M. Goshko & Nancy Reckler, *U.S. Rejects Militant's Offer to Leave*, WASH. POST, Aug. 8, 1995, at A18 (noting INS attorneys would continue to try to prove Abu Marzook's connection to Hamas); McKinley, *supra* note 45 (highlighting plan not to accept "a nonterrorism plea in a terrorism case").

58. See *Christopher*, 1996 WL 583378, at *1 (noting extradition request); *Israel Asks U.S. to Yield Hamas Bombing Suspect*, N.Y. TIMES, Oct. 6, 1995, at 6 (same).

59. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001) (discussing previous denial of habeas relief), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *Christopher*, 1996 WL 583378, at *2 (same); *In re Extradition of Marzook*, 924 F. Supp. 565, 593 (S.D.N.Y. 1996) (denying Abu Marzook's petition for habeas corpus relief); Docket Sheet, *Marzook v. Christopher*, No. 1:95-cv-9799 (S.D.N.Y. Nov. 20, 1995) [hereinafter *Abu Marzook 1st S.D.N.Y. Habeas Docket Sheet*] (same); see also John M. Goshko, *Hamas Leader's Extradition Allowed*, WASH. POST, May 9, 1996, at A37 (noting judge's ruling); Van Natta, *supra* note 54 (same).

60. See Docket Sheet, *Marzook v. Christopher*, No. 96-2372 (2d Cir. May 10, 1996) [hereinafter *Abu Marzook 2d Cir. Docket Sheet*]; *Abu Marzook 1st S.D.N.Y. Habeas Docket Sheet*, *supra* note 59 (noting May 10, 1996 notice of appeal).

61. 93 F.3d 1100 (2d Cir. 1996) (upholding constitutionality of extradition statute).

62. See *Abu Marzook 2d Cir. Docket Sheet*, *supra* note 60.

Abu Marzook, however, abandoned the appeal, which was therefore dismissed a year later.⁶³

Meanwhile, on May 31, 1996, Abu Marzook filed a petition for habeas corpus relief from Judge Duffy's decision.⁶⁴ United States District Judge Kimba M. Wood denied relief on October 10, 1996.⁶⁵ Abu Marzook filed an appeal to the Second Circuit on October 24, and subsequently filed a brief before that court in December, but withdrew the appeal in January, 1997.⁶⁶

Abu Marzook abandoned his appeals because on January 28, 1997, he consented to extradition to Israel.⁶⁷ Two months later, Abu Marzook filed a petition for habeas corpus relief on the grounds that the statutory limit for extradition detention had expired.⁶⁸ Israel suspended its extradition request on April 2, 1997.⁶⁹ The news media reported on speculation that Israel was concerned about terrorist retaliation if it went through with the extradition.⁷⁰

In a telephone conference with this Court on the evening of April 2, the Government requested permission to delay informing Petitioner's counsel of the Israeli decision until the following morning. The Court gave its consent. A second *ex parte* conference call was held the following morning to create a record of the earlier *ex parte* communication. At the Government's request, this transcript was sealed.⁷¹

63. *See id.* (noting August 4, 1997 dismissal for failure to comply with scheduling order).

64. *See* Docket Sheet, *Marzook v. Christopher*, No. 1:96-cv-4107, 1996 WL 583378 at *1 (S.D.N.Y. May 31, 1996) [hereinafter *Abu Marzook* 2d S.D.N.Y. Habeas Docket Sheet]; *Christopher*, 1996 WL 583378, at *2.

65. *See Christopher*, 1996 WL 583378, at *1; *Abu Marzook* 2d S.D.N.Y. Habeas Docket Sheet, *supra* note 64; *Judge Backs Extradition of a Palestinian to Israel*, N.Y. TIMES, Oct. 10, 1996, at 17.

66. *See* Docket Sheet, *Marzook v. Christopher*, No. 96-2841 (2d Cir. Oct. 24, 1996); *Abu Marzook* 2d S.D.N.Y. Habeas Docket Sheet, *supra* note 64 (noting October 21, 1996 notice of appeal).

67. *See Marzook v. Albright*, No. 1:97-cv-2293, 1997 WL 181163, at *1 (S.D.N.Y. Apr. 14, 1997); Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. TIMES, Jan. 29, 1997, at A9 (noting intention to drop extradition challenge); John M. Goshko & Nancy Reckler, *Palestinian Held in U.S. Said Ready for Extradition*, WASH. POST, Jan. 29, 1997, at A6 (suggesting decision was made to highlight injustices of U.S. system toward Abu Marzook).

68. *See Albright*, 1997 WL 181163, at *1; Docket Sheet, *Abu Marzook*, No. 1:97-cv-2293 (S.D.N.Y. Apr. 1, 1997) [hereinafter *Abu Marzook* 3d S.D.N.Y. Habeas Docket Sheet] (noting petition filed on April 1, 1997).

69. *See Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *Albright*, 1997 WL 181163, at *1.

70. *See* Barton Gellman, *Israel Drops Bid to Try Hamas Aide*, WASH. POST, Apr. 4, 1997, at A1; Serge Schmemmann, *Hamas Leader May Be Spared Extradition*, N.Y. TIMES, Feb. 20, 1997, at A14.

71. *Albright*, 1997 WL 181163, at *2; *see also Abu Marzook* 3d S.D.N.Y. Habeas Docket Sheet, *supra* note 68 (noting filing of sealed document on April 9, 1997).

Judge Cote ruled on April 14 that Abu Marzook could still be held pending the INS's exclusion proceeding.⁷²

On April 30, 1997, Jordan announced that it would accept Abu Marzook.⁷³ Abu Marzook promised Jordan's King Hussein that he would not engage in illegal activity while living in Jordan's capitol city of Amman.⁷⁴ Agreeing also to relinquish his permanent residence status in the United States, Abu Marzook was released from detention late on May 4, 1997, and early on May 5, was flown in shackles to Amman on a military jet.⁷⁵ Abu Marzook's wife and six children—four of whom were born American citizens—remained in Virginia.⁷⁶ One year later, in 1998, Abdelhaleem Ashqar was subpoenaed to answer a grand jury's questions about Abu Marzook and other Palestinians.⁷⁷

In September 1999, Jordan's newly-crowned King Abdullah decided to close Hamas's political headquarters in Jordan; Abu Marzook was subsequently detained and deported from Jordan.⁷⁸ In December 2002, Abu Marzook, his wife Nadia Elashi and five of her second cousins (all of whom were brothers), were indicted in the Northern District of Texas for conspiracy to use a computer business to fund Hamas.⁷⁹ By that time, Nadia

72. See *Albright*, 1997 WL 181163, at *2.

73. See *Hamas Leader to Go to Jordan*, WASH. POST, May 1, 1997, at A28 (suggesting Jordan accepted Abu Marzook for "humanitarian reasons"); Neil MacFarquhar, *Jordan to Let Terror Suspect Held in U.S. into Kingdom*, N.Y. TIMES, May 1, 1997, at A7 [hereinafter MacFarquhar, *Jordan to Let Suspect into Kingdom*] (same).

74. See Lee Hockstader, *In About-Face, Jordan Cracks Down on Militant Palestinian Group*, WASH. POST, Sept. 1, 1999, at A16 [hereinafter Hockstader, *In About-Face*].

75. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); John Lancaster, *Freedom Suits Hamas Leader*, WASH. POST, May 9, 1997, at A27 (describing conditions of Abu Marzook's transport); MacFarquhar, *Terror Suspect Freed*, *supra* note 50 (noting Abu Marzook's agreement to relinquish residence and to not contest terrorism accusations).

76. See MacFarquhar, *Terror Suspect Freed*, *supra* note 50.

77. See Wieser, *Appeal Lost*, *supra* note 1 (reporting that his refusal to testify resulted in contempt charges).

78. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006-07; Hockstader, *In About-Face*, *supra* note 74 (reporting that Abu Marzook was in Iran at time of crackdown); Lee Hockstader, *A Test of Royal Will*, WASH. POST, Oct. 7, 1999, at A25 [hereinafter Hockstader, *A Test of Royal Will*] (reporting that Abu Marzook was deported to Yemen); Judith Miller, *Suit Accuses Islamic Charities of Fund-Raising for Terrorism*, N.Y. TIMES, May 13, 2000, at A10 (reporting that civil suit filed contended Abu Marzook was either in Syria or United Arab Emirates); O'Connor, *supra* note 50 (reporting that Abu Marzook was detained upon his return to Jordan from Iran); William A. Orme, Jr., *Plot Report in Israel and Arrests in Jordan Renew Fear of Hamas*, N.Y. TIMES, Sept. 23, 1999, at A7 (reporting that it was uncertain to where Abu Marzook would be deported).

79. See Docket Sheet, *United States v. Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002) [hereinafter *Elashi* N.D. Tex. Docket Sheet]; Eric Lichtblau & Judith Miller, *5 Brothers Charged with Aiding Hamas*, N.Y. TIMES, Dec. 19, 2002, at A19; Steve McGonigle, *4 Area Men Accused of Links to Hamas*, DALLAS MORNING NEWS, Dec. 19, 2002, at 1A; John Mintz, *5 in Texas Jailed in Hamas Probe*, WASH. POST, Dec. 19, 2002, at A3.

was also a fugitive.⁸⁰ The cousins were convicted and were sentenced to prison terms that ranged from sixty to eighty-four months.⁸¹ Their appeals are currently pending.⁸² The computer business was also convicted, and has abandoned its appeal.⁸³

On January 31, 2006, Abu Marzook published an op-ed piece in the *Washington Post* concerning Hamas's recent victory in Palestinian elections.⁸⁴ He published a second op-ed in the *Los Angeles Times* in July of the following year.⁸⁵

C. Muhammad Salah

Muhammad Salah was born in Jerusalem.⁸⁶ In 1970, he moved from Jordan to the Chicago area and ultimately became a United States citizen.⁸⁷ Salah settled in the Chicago suburb of Bridgeview.⁸⁸ He sold used cars and worked in a grocery store.⁸⁹

80. See Roy Appleton & Matt Stiles, *3 Guilty of Terror Dealings*, DALLAS MORNING NEWS, Apr. 14, 2005, at 1B; Steve McGonigle, *Trial to Look at Exports*, DALLAS MORNING NEWS, June 6, 2004, at 1B (reporting that wife was believed to be with her husband in Syria or in Jordan).

81. See Amended Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Nov. 7, 2006) (sentencing Ghassan Elashi to eighty months); Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Oct. 16, 2006) (sentencing Basman Elashi to eighty months and Bayan Elashi to eighty-four months); Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Feb. 1, 2006) (sentencing Hazim Elashi to sixty months); Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Jan. 27, 2006) (sentencing Ihsan Elashy to seventy-two months); see also Appleton & Stiles, *supra* note 80 (reporting on convictions).

82. See Docket Sheet, *United States v. Ghassan Elashi*, No. 06-11167 (5th Cir. Oct. 25, 2006); Docket Sheet, *United States v. Basman Elashi*, No. 06-11166 (5th Cir. Oct. 25, 2006); Docket Sheet, *United States v. Bayan Elashi*, No. 06-11164 (5th Cir. Oct. 25, 2006); Docket Sheet, *United States v. Hazim Elashi*, No. 06-10177 (5th Cir. Feb. 15, 2006); Docket Sheet, *United States v. Ihsan Elashy*, No. 06-10176 (5th Cir. Feb. 15, 2006).

83. See Docket Sheet, *United States v. InfoCom Corp.*, No. 06-11165 (5th Cir. Oct. 10, 2006) (noting appeal); Judgment, *Elashi*, No. 3:02-cr-52 (N.D. Tex. Oct. 16, 2006) (noting conviction of Infocom Corporation).

84. See Marzook, *supra* note 42.

85. See Mousa Abu Marzook, Op-Ed., *Hamas' Stand*, L.A. TIMES, July 10, 2007, at 15 (concerning release of BBC journalist).

86. See Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); Boim Amended Salah Answer, *supra* note 47, ¶ 12 (admitting to birthplace); Grossman, *supra* note 3; David Jackson et al., *Money Trail Leads to Saudi*, U.S. SAYS, CHI. TRIB., Oct. 28, 2001, at C1.

87. See Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707, 712 (7th Cir. 2007); *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006; Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, CHI. TRIB., June 6, 2003, Metro, at 1; Grossman, *supra* note 3.

88. See Grossman, *supra* note 3; Jackson et al., *supra* note 86.

89. See Grossman, *supra* note 3; Jackson et al., *supra* note 86.

Salah was arrested in Jerusalem on January 25, 1993.⁹⁰ Israeli authorities found \$97,400 in his East Jerusalem YMCA hotel room.⁹¹ Salah confessed that he was in Israel on orders from Abu Marzook, and that he was there to distribute money for terrorist attacks.⁹² In January 1995, Salah pleaded guilty in a military court and was sentenced to five years in prison.⁹³ He later claimed his confession had been coerced by torture.⁹⁴ While Salah was in prison in Israel, the United States froze his assets and formally designated him a terrorist.⁹⁵ His wife was permitted to draw a living stipend.⁹⁶ He was released in November 1997.⁹⁷

Upon release, Salah returned to Bridgeview, Illinois.⁹⁸ Beginning in 2002, he taught computer systems at City College of Chicago, and was a substitute teacher in the Chicago public schools.⁹⁹ In 2003, however, both schools fired him after learning of his Israeli conviction.¹⁰⁰

Earlier—on June 9, 1998—the Government had filed a civil forfeiture action against Salah and the Quranic Literacy Institute (the Institute); Salah had worked for the Institute, whose stated purpose is to translate Islamic texts.¹⁰¹ The Government seized \$1.4 million in property and

90. See *Boim*, 511 F.3d at 712; *United States v. Marzook*, 435 F. Supp. 2d 708, 712, 716 (N.D. Ill. 2006); *United States v. Marzook*, 412 F. Supp. 2d 913, 916 (N.D. Ill. 2006); *United States v. One 1997 E35 Ford Van (One Ford Van)*, 50 F. Supp. 2d 789, 793 (N.D. Ill. 1999); Drew Bailey, *Family Fears for Israeli-Held Chicagoan*, CHI. TRIB., Jan. 29, 1993, Chicagoland, at 4; Grossman, *supra* note 3; Jackson et al., *supra* note 86.

91. See *One Ford Van*, 50 F. Supp. 2d at 794; Grossman, *supra* note 3; Jackson et al., *supra* note 86 (reporting that \$96,400 was found).

92. See Gaines & Martin, *supra* note 2 (reporting that Salah was to reorganize and re-staff Hamas cells).

93. See *Boim*, 511 F.3d at 712; *One Ford Van*, 50 F. Supp. 2d at 793; Grossman, *supra* note 3; Jackson et al., *supra* note 86.

94. See Cohen & Ahmed-Ullah, *supra* note 87.

95. See *One Ford Van*, 50 F. Supp. 2d at 793; *Boim Amended Salah Answer*, *supra* note 47, ¶ 12 (admitting incarceration and designation as terrorist); Gaines & Martin, *supra* note 2; Grossman, *supra* note 3.

96. See *One Ford Van*, 50 F. Supp. 2d at 793.

97. See *Boim*, 511 F.3d at 712; *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *One Ford VanBoim Amended Salah Answer*, *supra* note 47, ¶ 12 (confirming release).

98. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006 (noting Salah's return to United States upon release); Jackson et al., *supra* note 86.

99. See Cohen & Ahmed-Ullah, *supra* note 87.

100. See *id.*

101. See *One Ford Van*, 50 F. Supp. 2d at 792–95; Docket Sheet, *One Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998) (noting entry of complaint for forfeiture); see also *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006 (discussing employment as computer analyst); *Boim Amended Salah Answer*, *supra* note 47, ¶ 5 (admitting to performing data entry and other computer services for QLI without pay); Gaines & Martin, *supra* note 2; Jackson et al., *supra* note 86; Andrew Martin, *Religious Group Denies Terrorist Link*, CHI. TRIB., Oct. 20, 1998, Metro Chicago, at 4.

funds belonging to Salah and to the Institute.¹⁰² The Government claimed that the seized funds were intended to support international terrorism, and that the seized property had been purchased with tainted funds.¹⁰³ On May 12, 1999, United States District Judge Wayne R. Anderson denied a motion to dismiss.¹⁰⁴ The action remains pending.¹⁰⁵

On May 12, 2000, Stanley and Joyce Boim filed a lawsuit against Salah, Abu Marzook, the Institute and other defendants, alleging that the defendants had helped to fund Hamas; that organization had killed their 17-year-old son David in a drive-by shooting at a bus stop in the West Bank on May 13, 1996.¹⁰⁶ The Boims were all American citizens living in Jerusalem; at the time of his death, David had been studying at a West Bank yeshiva near Beit-El.¹⁰⁷

On January 10, 2001, United States District Judge George W. Lindberg denied the defendants' motion to dismiss the Boim's claim.¹⁰⁸ On interlocutory appeal, the Seventh Circuit's Court of Appeals affirmed the district court's denial.¹⁰⁹ The parties then transferred the action to Magistrate Judge Keys on April 13, 2001 for all further proceedings.¹¹⁰

On November 10, 2004, Judge Keys awarded partial summary judgment to the Boims, holding that Salah had provided material support to Hamas.¹¹¹ On December 8, 2004, a jury returned a verdict in favor of the plaintiffs in the amount of \$52 million.¹¹² Pursuant to the antiterrorism

102. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1006; Gaines & Martin, *supra* note 2; Grossman, *supra* note 3 (reporting seizure of Salah's bank accounts and failed seizure of his home); Jackson et al., *supra* note 86; Martin, *supra* note 101.

103. See *One Ford Van*, 50 F. Supp. 2d at 792.

104. See *id.* at 789.

105. See Docket Sheet, *One Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998).

106. See *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 709 (7th Cir. 2007); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001-02 (7th Cir. 2002); *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1003-04; Complaint at 12-13, *Boim*, No. 1:00-cv-2905 (N.D. Ill. May 12, 2000) (alleging facts surrounding death of David Boim); Grossman, *supra* note 3; Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, CHI. TRIB., May 15, 2000, Metro Chicago, at 1 [hereinafter O'Connor, *Parents File Suit*].

107. See *Boim*, 511 F.3d at 711; *Boim*, 291 F.3d at 1002; *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1004; O'Connor, *Parents File Suit*, *supra* note 106.

108. See *Quranic Literacy Inst.*, 127 F. Supp. 2d at 1002; see also Matt O'Connor, *U.S. Appeals Court Debates a Lawsuit over Israel Slaying*, CHI. TRIB., Sept. 26, 2001, Metro, at 2.

109. See *Boim*, 291 F.3d at 1001 (providing issue and decision on appeal); see also Michael Higgins, *Family Can Continue Suit in Hamas Case*, CHI. TRIB., June 6, 2002, News, at 21 (providing history of lawsuit).

110. See Reassignment Order, *Quranic Literary Inst.*, No. 1:00-cv-2905 (N.D. Ill. Apr. 13, 2001); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 889-92 (N.D. Ill. 2004) (describing procedural background).

111. See *Boim*, 340 F. Supp. 2d at 914-15 (looking to record); see also Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, CHI. TRIB., Nov. 11, 2004, News, at 1 (describing court's decision).

112. See *Boim v. Quranic Literacy Inst.*, No. 1:00-cv-2905, 2005 WL 433463, at *2 (N.D. Ill. Feb. 18, 2005) (detailing jury verdict); see also Grossman, *supra* note 3

statute under which the plaintiffs sued,¹¹³ Judge Keys awarded the plaintiffs triple damages plus attorney fees and costs.¹¹⁴

Seventh Circuit Judges Ilana D. Rovner, Diane P. Wood and Terence T. Evans heard the defendants' appeals on November 30, 2005.¹¹⁵ On December 28, 2007, the court vacated the district court's liability judgments (over Judge Evans's dissent), and remanded the action for a determination of whether the defendants' actions were causes in fact of David Boim's murder.¹¹⁶

D. *The Criminal Trial*

Roughly four weeks after their indictment, Salah and Ashqar were released to home confinement in the suburbs of Chicago and Washington, D.C., respectively.¹¹⁷ On October 17, 2005, Salah moved to suppress evidence derived from his confession in Israel, alleging that confession had been coerced by torture.¹¹⁸ Salah claimed that while detained in Israel, he had been the victim of stomping, sleep deprivation, extreme temperatures, naked interrogation and fear of rape or death.¹¹⁹

The United States moved to close Salah's suppression hearing for the period during which testimony was being taken from agents of the Israel Security Agency (ISA).¹²⁰ The Government asserted that the substance of

(detailing verdict); Matt O'Connor, *\$156 Million Awarded in Terrorist Killing*, CHI. TRIB., Dec. 9, 2004, Metro, at 1 (same) [hereinafter O'Connor, *\$156 Million Awarded*].

113. 18 U.S.C. § 2333 (2000) (allowing recovery for victims of terrorism).

114. See *Boim*, 2005 WL 433463, at *2 (describing verdict); see also Grossman, *supra* note 3 (same); O'Connor, *\$156 Million Awarded*, *supra* note 112 (same).

115. See *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 709 (7th Cir. 2007) (listing judges that heard case).

116. See *id.* at 710-11 (supplying appellate decision); see also *\$156 Million Award Thrown Out*, N.Y. TIMES, Dec. 29, 2007, at A13 (describing verdict and its effect); Darryl Fears, *Ruling Against Muslim Groups Overturned*, WASH. POST, Dec. 29, 2007, at A2 (same); Maurice Possley, *Terror Suit Award Tossed Out*, CHI. TRIB., Dec. 29, 2007, News, at 1 (same).

117. See Minute Order, *United States v. Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 15, 2004); Matt O'Connor, *Hamas-Case Men Sent Home*, CHI. TRIB., Sept. 16, 2004, Metro, at 3 (describing home confinement orders).

118. See *United States v. Marzook*, 435 F. Supp. 2d 708, 712 (N.D. Ill. 2006) (detailing issue and decision); *United States v. Marzook*, 412 F. Supp. 2d 913, 915-16 (N.D. Ill. 2006) (same); Mohammad Salah's Motion to Suppress at 1, *United States v. Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 17, 2005) (same); Michael Higgins, *Terrorism Case Ruling Eyed*, CHI. TRIB., Oct. 18, 2005, Metro, at 3 (detailing Salah's contentions).

119. See *Marzook*, 435 F. Supp. 2d at 739-40 (describing allegations); Salah Affidavit, *Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 17, 2005).

120. See Government's Response to Defendant Salah's Motion for Material Discovery Necessary for Evidentiary Hearing on Motion to Suppress at 7, *Marzook*, No. 1:03-cr-978 (N.D. Ill. Jan. 5, 2006) [hereinafter *Marzook*, Government's Response to Defendant Salah's Motion for Material Discovery] (arguing against production of Israeli policies and guidelines); see also *Marzook*, 412 F. Supp. 2d at 915-

the agents' testimony would be classified.¹²¹ The ISA is an Israeli intelligence agency also known as the General Security Service (GSS) or Shin Bet; the agency provides internal security in Israel.¹²² The true identities and identifying characteristics of ISA agents are kept secret.¹²³ It is a crime in Israel to breach this secrecy.¹²⁴

Israel had never before permitted ISA agents to give live testimony in the United States.¹²⁵ Nevertheless, Israel waived classification of most of their testimony as to Salah and his attorney, as well as to Ashqar's attorney—but not as to the public generally.¹²⁶ The United States moved the court to permit the ISA agents to use a non-public entrance to the court and to testify in "light disguise."¹²⁷

In support of its motion, the Government offered several classified documents. Exhibit A included information provided by Israel, some of which was classified and some of which was not.¹²⁸ The Government presented the exhibit to the court, Salah and defense counsel, but it was not filed publicly.¹²⁹ The Government classified Exhibit B—an affidavit by the FBI's assistant director for counterintelligence—as "secret"; the Government presented that exhibit only to Judge St. Eve.¹³⁰ In response to Judge St. Eve's request for additional information, the Government submitted another affidavit that was simultaneously distributed to Salah and defense attorneys, but not to the public court file.¹³¹

In further support of its motion for protection of the testifying ISA agents, the Government invoked the Classified Information Procedures Act (CIPA).¹³² CIPA was enacted in 1980, and specifies procedures for

16 (same); Michael Higgins, *Hamas-Case Secrecy Urged*, CHI. TRIB., Jan. 6, 2006, Metro, at 7 (same).

121. See *Marzook*, 412 F. Supp. 2d at 916 (outlining Government's argument).

122. See *Marzook*, 435 F. Supp. 2d at 712 (describing Israeli Security agencies); *Marzook*, 412 F. Supp. 2d at 916 (same).

123. See *Marzook*, 412 F. Supp. 2d at 923 (asserting requirement that agents' identities remain secret).

124. See *id.* at 923 (detailing importance of secrecy).

125. See *id.* at 918 (providing further significance of secrecy); Michael Higgins, *Hamas Case at Key Point*, CHI. TRIB., Mar. 3, 2006, Metro, at 1 (same).

126. See *Marzook*, 412 F. Supp. 2d at 916 (discussing Israel's cooperation).

127. See *id.* at 915 (describing suggested security procedures).

128. See *Marzook*, Government's Response to Defendant Salah's Motion for Material Discovery Necessary for Evidentiary Hearing on Motion to Suppress, *supra* note 120, at 2 n.2, (describing procedure for classifying Israeli information).

129. See *id.* (assessing level of disclosure).

130. See *id.* at 3-4 n.3 (determining that level of classification improper because of public nature of court proceedings).

131. See Defendant Salah's Response in Opposition to the Government's Motion to Conduct Certain Portions of Evidentiary Hearing on Defendant Salah's Motion to Suppress Pursuant to CIPA and for Application of Other Measures to Ensure Witness Safety, *Marzook*, No. 1:03-cr-978 (N.D. Ill. Jan. 25, 2006) (explaining Government's response).

132. See *Marzook*, 412 F. Supp. 2d at 915, 918 (asserting applicable statute); see also 18 U.S.C. app. 3 (2000) (supplying terms of act).

protecting government secrets while also affording a criminal defendant a fair trial.¹³³ Section 4 of CIPA provides for the withholding of discovery from a defendant by deletion, summarization or admission.¹³⁴

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information, from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.¹³⁵

Judge St. Eve observed that courts had applied section 4 to testimony as well as to documents.¹³⁶ Judge St. Eve agreed that the true identities of the agents could be withheld from Salah, noting, “[t]he government does not even know their true identities.”¹³⁷ The judge further agreed that the agents could testify under the pseudonyms they had previously adopted in order to conduct their work.¹³⁸

Section 6(a) of CIPA provides for in camera hearings.

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General)

133. See *United States v. Marzook*, 435 F. Supp. 2d 708, 744 (N.D. Ill. 2006) (describing statute); *Marzook*, 412 F. Supp. 2d at 918 (same); ROBERT TIMOTHY REAGAN, KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS 8-17 (2007) (analyzing statute).

134. See REAGAN, *supra* note 133, at 12 (providing discovery rules).

135. 18 U.S.C. app. 3 § 4 (2000) (giving statute terms).

136. See *Marzook*, 412 F. Supp. 2d at 918 (citing *United States v. Lee*, 90 F. Supp. 2d 1324, 1326 n.1 (D.N.M. 2000)) (discussing applicability of statute); *United States v. North*, 708 F. Supp. 399, 399-400 (D.D.C. 1988) (same).

137. See *Marzook*, 412 F. Supp. 2d at 923-24 (describing appropriateness of pseudonyms under Constitution).

138. See *id.* at 923 (determining which pseudonyms are appropriate for use in court).

shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.¹³⁹

If the Attorney General certifies to the court that a public proceeding may result in the disclosure of classified information, a section 6(a) hearing then must be held in camera.¹⁴⁰ Section 14 of CIPA provides that the Attorney General may delegate that certification function to a limited number of subordinates: "[t]he functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official."¹⁴¹ The delegatee of this certification function was the assistant attorney general in charge of the criminal division, who made a section 6(a) certification.¹⁴²

Because the agents' testimony at the suppression hearing would serve as a precursor to their testimony at trial, the suppression hearing would also function as a discovery hearing; accordingly, Judge St. Eve concluded that CIPA's section 6(a) authorized her to close the suppression hearing to the public during the classified testimony of the ISA agents.¹⁴³ Salah, his attorney and Ashqar's attorney could be present, but the public and any court staff members who lacked appropriate security clearances could not.¹⁴⁴ The Government conducted a small portion of the hearing *ex parte*.¹⁴⁵

Nevertheless, other portions of Salah's suppression hearing were public.¹⁴⁶ Judge St. Eve ordered that any documents introduced into evidence during the hearing become public seven business days after having been admitted, unless the Government determined that the documents

139. 18 U.S.C. app. 3 § 6(a) (2000) (providing statute terms).

140. *See id.* (describing courtroom procedures under statute); *see also Marzook*, 412 F. Supp. 2d at 918 (same).

141. 18 U.S.C. app. 3 § 14 (2000) (detailing statute).

142. *See Marzook*, 412 F. Supp. 2d at 919 n.4 (describing delegation ability under statute).

143. *See id.* at 919 n.5 (acknowledging dual role of testimony under CIPA statute); *United States v. Marzook*, 435 F. Supp. 2d 708, 714 (N.D. Ill. 2006) (detailing actions taken by court to suppress testimony); Michael Higgins, *Ruling Backs Closed Court*, CHI. TRIB., Feb. 1, 2006, Metro, at 3 (same).

144. *See Marzook*, 412 F. Supp. 2d at 919 (describing court's level of suppression).

145. *See Marzook*, 435 F. Supp. 2d at 712, 746-47 (determining that *ex parte* information would not effect Salah's guilt and should thus remain suppressed).

146. *See id.* at 926-28 (detailing public testimony).

were classified.¹⁴⁷ Judge St. Eve also ordered the Government to review the transcript within seven business days of its issuance to determine what portions could be made public.¹⁴⁸

The defense attorneys elected not to seek security clearances.¹⁴⁹ Some of Judge St. Eve's law clerks sought clearance for themselves, but the clearance process took so long that Judge St. Eve handled all classified matters without the assistance of law clerks.¹⁵⁰ For proceedings that involved classified information, Judge St. Eve used a court reporter with appropriate clearance.¹⁵¹ In order to record classified proceedings, the cleared reporter used a laptop computer that was stored in a safe in Judge St. Eve's chambers, to which only Judge St. Eve and the reporter had the combination.¹⁵² The computer was provided to the court by a small office in the Justice Department called the Litigation Security Section, which helps courts protect classified information.¹⁵³

Judge St. Eve took closed testimony from the ISA agents for six days.¹⁵⁴ Judge St. Eve allowed the agents to use a non-public entrance, but denied their request that they testify in light disguise; the judge concluded that because Salah had already seen the agents, there was no showing of risk concerning the few persons permitted to attend their testimony.¹⁵⁵

After thirteen days of testimony, Judge St. Eve ruled that most of Salah's confession statements were admissible.¹⁵⁶ Her 138-page public opinion¹⁵⁷ occupies seventy pages of the *Federal Supplement*.¹⁵⁸ Nineteen portions are redacted.¹⁵⁹ The parties to the litigation received un-re-

147. See *id.* at 924, 928 (describing level of suppression).

148. See *id.* (outlining Government's ability to review documents); *Marzook*, 435 F. Supp. 2d at 714 (same).

149. See Interview with the Honorable Amy St. Eve, Judge, U.S. Dist. Court, N. Dist. Of Ill. (July 2, 2007) [hereinafter Interview with the Honorable Amy St. Eve].

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*; REAGAN, *supra* note 133, at 17-18 (describing role of court security officers); Adam Liptak, *Secrecy at Issue in Suits Opposing Domestic Spying*, N.Y. TIMES, Jan. 26, 2007, at A1 (same).

154. See *United States v. Marzook*, 435 F. Supp. 2d 708, 713-14 (N.D. Ill. 2006) (detailing length of closed testimony); Michael Higgins, *Prosecutors Rest in Hamas Case*, CHI. TRIB., Mar. 15, 2006, Metro, at 3 (same).

155. See *United States v. Marzook*, 412 F. Supp. 2d 913, 927-28 (N.D. Ill. 2006) (describing measures used to ensure anonymity).

156. See *Marzook*, 435 F. Supp. 2d at 712-13, 777 (deciding that most statements were admissible but two were not); Jeff Coen, *Hamas Suspect Loses on Key Issue*, CHI. TRIB., June 9, 2006, Metro, at 1 (describing decision).

157. See *Opinion, United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 8, 2006) (providing length of opinion).

158. See *Marzook*, 435 F. Supp. 2d at 708-77.

159. See *id.* at 715-16, 718, 721, 726, 746-47, 750-51, 758, 767 (identifying those portions removed).

dacted copies, and the un-redacted original is stored in Judge St. Eve's safe.¹⁶⁰

Two weeks after having denied Salah's motion to suppress, Judge St. Eve denied Abdelhaleem Ashqar's motion to suppress evidence against him that had been obtained in a December 1993 search of his home in Oxford, Mississippi.¹⁶¹ Ashqar learned of the FBI's 1993 search of his home at Ashqar's August 2004 detention hearing regarding the second superseding indictment against him.¹⁶² In the course of the search, FBI agents had copied computer files and photographed approximately 1,600 pages of documents.¹⁶³ The agents did so without a warrant, but with approval from the Attorney General.¹⁶⁴ The FBI had warrants from the FISC to tap Ashqar's telephone, but the Foreign Intelligence Surveillance Act did not provide for physical searches at that time.¹⁶⁵ Judge St. Eve ruled that the foreign intelligence exception to the warrant requirement applied to the search because Ashqar was regarded as an agent of Hamas—a foreign power.¹⁶⁶

The trial began with jury selection on October 12, 2006.¹⁶⁷ The Government moved for the empanelling of an anonymous jury, both in order to protect jurors from harm done against them by the defendants or their supporters and to prevent outside influences in the high-profile case.¹⁶⁸ Defense counsel argued that having an anonymous jury sends an improper message to jurors that the defendants are dangerous.¹⁶⁹ Observing that the defendants were not in custody, had strictly adhered to the

160. See Interview with the Honorable Amy St. Eve, *supra* note 149.

161. See *Marzook*, 435 F. Supp. 2d at 778 (supplying decision).

162. See *id.* at 780 (providing facts of past searches).

163. See *id.* at 781 (describing contents of search).

164. See *id.* (discussing 1993 search of Abu Marzook's home).

165. See *id.* at 780-81, 785-87 (reviewing authority and limitations of warrants authorized by statute).

166. See *id.* at 794 (holding that FBI search fell within foreign intelligence exception to Fourth Amendment's warrant requirement because search protected against unreasonable search under contemporary standards for reasonableness).

167. See *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006) (discussing jury selection); see also Rudolph Bush, *Jury Selection to Start for Hamas-Case Trial*, CHI. TRIB., Oct. 12, 2006, *Metro*, at 1 (reporting on commencement of trial).

168. See Government's Motion for an Anonymous Jury at 1-2, *United States v. Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006) (arguing that defendants were charged with racketeering conspiracy "in the service of furthering the overall goal of the Hamas terrorist organization to violently supplant the State of Israel through *jihad* and replace it with a Palestinian Islamic state"); see also Jeff Coen, *Hamas-Case Motion Challenged: Defense Opposes an Anonymous Jury*, CHI. TRIB., June 29, 2006, *Metro*, at 3 (reporting on anonymous jury request).

169. See Defendant Abdelhaleem Hasam Abdelraziq Ashqar's Opposition to the Government's Motion for an Anonymous Jury, *Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006) (arguing that presumption of openness should apply to jury empanelling); Muhammad Salah's Response to the Government's Motion for an Anonymous Jury at 1, *Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006) (challenging anonymous jury motion as presumption of guilt); see also Coen, *supra* note 156, at 3 (reporting that Salah's lawyer labeled Government's motion as "outrageous")

terms of their release and otherwise posed no danger, Judge St. Eve denied the Government's motion for an anonymous jury.¹⁷⁰

The ISA agents testified again at trial.¹⁷¹ Again, Judge St. Eve permitted the ISA agents to testify in a closed courtroom under adopted pseudonyms.¹⁷² Judge St. Eve further permitted the witnesses to use non-public entrances.¹⁷³ Moreover, Judge St. Eve permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.¹⁷⁴ Because of the presence of 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 the agents' credibility.¹⁷⁵ Nevertheless, the ISA agents ultimately decided to testify without

and prejudicial because it would associate danger with defendants' knowledge of jurors' identities).

170. See Interview with the Honorable Amy St. Eve, *supra* note 149; see also August 8, 2006 Minute Order at 2-3, *Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006) (holding that nature of charges did not warrant anonymous jury); Rudolph Bush, *Hamas-Case Jury to Be Named, but Public May Not Get Jurors' Identities*, CHI. TRIB., Aug. 10, 2006, Metro, at 3 (reporting how Judge St. Eve rejected Government's argument concerning anonymous jury but declined to rule out keeping jurors' identities under seal to prevent press and public from learning jurors' identities).

171. See *Salah*, 462 F. Supp. 2d at 925 (describing witness's testimony and cross-examination at trial); see also Rudolph Bush, *Hamas Suspect's Questioning Told*, CHI. TRIB., Oct. 27, 2006, Metro, at 3 (describing agents' testimony at trial concerning their 1993 interrogation of Salah); Rudolph Bush, *Israeli Agent Insists Terrorism Suspect Salah Was Not Tortured*, CHI. TRIB., Nov. 2, 2006, Metro, at 3 [hereinafter Bush, *Israeli Agent Insists*] (describing cross-examination of one ISA agent).

172. See August 29, 2006 Minute Order at 2-3, 5-6, *Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 29, 2006) [hereinafter Aug. 29, 2006, Minute Entry] (permitting ISA agents to testify using pseudonyms and in light disguise and granting ISA agents private access to courtroom and courthouse); see also Rudolph Bush, *Hamas-Case Defense Says U.S. Conspiring with Israel*, CHI. TRIB., Aug. 30, 2006, Metro, at 6 [hereinafter Bush, *Hamas-Case Defense*] (reporting on court's determination that substantial threats against agents necessitated testimony under aliases and in light disguise and in close courtroom); Bush, *Israeli Agent Insists*, *supra* note 171, at 3 (reporting that ISA agents testified under aliases in closed courtroom); Dan Eggen, *Two Men Acquitted of Conspiracy to Fund Hamas Activities in Israel*, WASH. POST, Feb. 2, 2007, at A1, A8 (reporting that Israeli interrogators testified under aliases). Judge St. Eve decided to open the courtroom for the rest of the trial. See Aug. 29, 2006, Minute Entry, *supra*, at 5 (granting ISA agents private access to courtroom); see also Bush, *Hamas-Case Defense*, *supra* at 6 (reporting on judge's decision to open courtroom during other witness' testimony).

173. See Aug. 29, 2006, Minute Entry, *supra* note 172, at 6.

174. See *id.* at 4 (granting government's request for closed courtroom with limited exception of "[d]efendants, their attorneys, the government, the jury, court personnel, and immediate family members of each Defendant"); see also Bush, *Hamas-Case Defense*, *supra* note 172, at 6 (reporting how court decided to permit defendants' immediate family members to remain in closed courtroom).

175. See Aug. 29, 2006, Minute Entry, *supra* note 172, at 5-6 (permitting ISA agents to testify in light disguise); see also Bush, *Hamas-Case Defense*, *supra* note 172, at 6 (reporting how judge permitted ISA agents to testify in light disguise). Judge St. Eve permitted the ISA agents to testify in light disguise so long as the disguise did not interfere with the jurors' ability to judge their credibility. See Aug. 29, 2006, Minute Entry, *supra* note 172, at 5-6 (granting request for ISA agents to tes-

disguise because of the limitations on who would be in the courtroom to see them.¹⁷⁶ Judge St. Eve decided that the remainder of the trial would be public.¹⁷⁷

Judge St. Eve preserved some openness even during the closed portions of the trial. First, the judge established a live video and audio feed to another courtroom, where spectators could listen to the closed session and view the people in the courtroom (except for the witnesses).¹⁷⁸ Second, in order to disguise the closed nature of the courtroom from the jury, Judge St. Eve told the jurors that the camera was a precaution in case of an overflow crowd; the judge also allowed the witnesses to use the non-public entrance before the jury was brought in.¹⁷⁹

In order to prevent the revelation of classified information during the ISA agents' testimony, Judge St. Eve approved government admissions in lieu of information sought by Salah from the agents' testimony.¹⁸⁰ Judge St. Eve approved five specific admissions as substitutions.¹⁸¹ For example, for purposes of the trial, the Government admitted that interrogation methods authorized by the ISA included the use of handcuffs, shackles, hoods, slaps, threats of harm, threats to arrest family members and sleep deprivation for up to forty-eight hours.¹⁸² That admission obviated the need for defense counsel to elicit such information from testimony that might include classified information, and "[t]he Court permitted Defendant to pursue extensive cross examination except in the limited areas that would elicit classified information."¹⁸³ Judge St. Eve determined that the admissions provided Salah with substantially the same ability to make his defense as would the live testimony, as required by section 6(c)(1) of CIPA, which states¹⁸⁴

Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of

tify in light disguise to extent that light disguise did not interfere with jury's ability to judge credibility).

176. See Interview with the Honorable Amy St. Eve, *supra* note 149.

177. Aug. 29, 2006, Minute Entry, *supra* note 172, at 5; Bush, *Hamas-Case Defense*, *supra* note 172.

178. See Aug. 29, 2006, Minute Entry, *supra* note 172, at 4-5 (granting government's motion for closed courtroom and ordering live video feed of court proceedings); see also Bush, *Hamas-Case Defense*, *supra* note 172, at 6 (reporting on closed courtroom); Bush, *Israeli Agent Insists*, *supra* note 171, at 3 (same).

179. See Aug. 29, 2006, Minute Entry, *supra* note 172, at 6 (granting ISA agents private access to courtroom and courthouse).

180. See *United States v. Salah*, 462 F. Supp. 2d 915, 917-18 (N.D. Ill. 2006) (listing admissions substituted for testimony to have been elicited from ISA witnesses).

181. See *id.* (same).

182. See *id.* (describing content of first substitution).

183. See *id.* at 925 (describing extensive cross-examination).

184. See *id.*

the disclosure of such specific classified information, the court order— (A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information. The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.¹⁸⁵

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.¹⁸⁶

On February 1, 2007, after fourteen days of deliberation, the jury convicted Ashqar and Salah of obstruction of justice—and further convicted Ashqar of criminal contempt—but acquitted both defendants of conspiracy to fund Hamas terrorism.¹⁸⁷ Judge St. Eve sentenced Salah to one year and nine months in prison,¹⁸⁸ and Ashqar to eleven years and three

185. 18 U.S.C. app. 3 § 6(c)(1) (2000).

186. *Salah*, 462 F. Supp. 2d at 924 (stating jury instructions that accompanied ISA agents' testimony).

187. See February 1, 2007 Minute Entry, *United States v. Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007); see also *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 713 (7th Cir 2007) (recounting Salah's acquittal on conspiracy charge); Eggen, *supra* note 172, at A1, A8 (same).

188. See Judgment in a Criminal Case at 2, *Marzook*, No. 1:03-cr-978-2 (N.D. Ill. July 19, 2007) (sentencing Salah to one year and nine months imprisonment); see also *Boim*, 511 F.3d at 713 (reporting facts concerning guilty verdict and twenty-one

months in prison.¹⁸⁹ According to the Bureau of Prisons, Salah's expected release date is April 12, 2009; Ashqar's expected release date is June 13, 2017.¹⁹⁰

E. *Ashqar's Appeal*

Abdelhaleem Ashqar filed an appeal before the Seventh Circuit's Court of Appeals; the appeal was docketed on November 30, 2007.¹⁹¹ Four weeks later, the court notified the involved parties that parts of the record under seal could be kept under seal on appeal only by motion:

This Court has received 10 envelopes, document nos. 182, 407, 531, 532, 537, 538, 1034, 1033, 972 and 1016, under seal from the district court. All documents filed in this Court, except those required to be sealed by [statute] or rule are considered public. Pursuant to 7th Circuit Operating Procedure 10(b), documents sealed in the district court will be maintained under seal in this Court for 14 days, to afford time to request the approval required by section (a) of this operating procedure. Absent a motion from a party these sealed documents will be placed in the public record on 1/14/08.¹⁹²

II. CLASSIFIED INFORMATION IN CIVIL LITIGATION CHALLENGING A PROGRAM OF WARRANTLESS WIRETAPS

The government has defended civil challenges to warrantless surveillance programs with classified briefing so secret that judges must review briefs and declarations in private and cannot keep in chambers either the documents or the notes they've made concerning them. Law clerks and plaintiffs' attorneys may not see the documents. In one case, the plaintiffs supported their allegations with inadvertently disclosed top-secret evidence that was so secret that the Government would not disclose, even to the court, whether the Government's attorneys in the case were cleared to see it.

month prison sentence for conviction of obstruction of justice); Michael Higgins, *21-Month Sentence for Salah*, CHI. TRIB., July 12, 2007, Metro, at 1 (reporting on Salah's twenty-one month prison sentence); Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. TIMES, July 12, 2007, at A19 (same).

189. See Judgment in a Criminal Case at 2, 5, *Marzook*, No. 1:03-cr-978-3 (N.D. Ill. Nov. 21, 2007) (sentencing Ashqar to eleven years and three months imprisonment and fine); see also *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. TIMES, Nov. 22, 2007, at A29 (reporting on sentencing hearing).

190. See Federal Bureau of Prisons, Inmate Locator, <http://www.bop.gov/iloc2/LocateInmate.jsp> (last visited Oct. 20, 2008) (enter defendants' first and last names in database).

191. See General Docket at 1, *United States v. Ashqar*, No. 07-3879 (7th Cir. Nov. 30, 2007).

192. *Id.* at 3.

On December 16, 2005, under the headline, "Bush Lets U.S. Spy on Callers Without Courts," the *New York Times* reported that the National Security Agency (NSA) had been monitoring the international communications of people in the United States, without having first obtained warrants to do so:

Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications The White House asked The New York Times not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. 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.¹⁹³

On the following day, President Bush acknowledged the existence of the program in his weekly radio address:

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 highly classified program 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,

193. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1192, 1194 (9th Cir. 2007) (summarizing circumstances surrounding discovery of National Security Agency surveillance program); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986-87 (N.D. Cal. 2006). The National Security Agency, an agency much larger than the CIA, monitors foreign communications. See generally TIM WEINER, *LEGACY OF ASHES* 51, 239, 367 (Doubleday 2007).

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.¹⁹⁴

On July 26, 2006, a former NSA employee received a grand jury subpoena in a criminal probe of the leak to the *New York Times*.¹⁹⁵

One week after the *New York Times* revealed the warrantless wiretap program, the news media began reporting on what was speculated upon as being either a second intelligence program or another part of the originally reported program: data mining. On December 23, 2005, the *Boston Globe* reported that the NSA “has probably been using computers to monitor all . . . Americans’ international communications”¹⁹⁶ “[S]pecialists said the agency serves as a vast data collection and sorting operation. It captures reams of data from satellites, fiberoptic lines, and [i]nternet switching stations, and then uses a computer to check for names, numbers, and words that have been identified as suspicious.”¹⁹⁷

On the following day, the *New York Times* reported that telephone companies were routing telecommunication traffic through NSA computers for “a large data-mining operation”:

The volume of information harvested from telecommunication data and voice networks, without court-approved warrants, is much larger than the White House has acknowledged, [current and former government] officials said. It was collected by tapping directly into some of the American telecommunication system’s main arteries, they said What has not been publicly acknowledged is that N.S.A. technicians, besides actually eavesdropping on specific conversations, have combed through large volumes of phone and Internet traffic in search of patterns that

194. President George W. Bush, Radio Address, ¶¶ 8-9 (Dec. 17, 2005) [hereinafter President’s Radio Address], available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (acknowledging existence of NSA surveillance program); see also *Al-Haramain*, 507 F.3d at 1194 (acknowledging public disclosure of NSA surveillance program); *Hepting*, 439 F. Supp. 2d at 987 (summarizing President Bush’s disclosure concerning NSA surveillance program). Of the thirteen paragraphs of text in the President’s address, the last seven responded to the *New York Times* article, beginning with the two quoted paragraphs. See President’s Radio Address, *supra*.

195. See Scott Shane, *Leak of Classified Information Prompts Inquiry*, N.Y. TIMES, July 29, 2006, at A8; see also Michael Isikoff, *Looking for a Leaker*, NEWSWEEK, Aug. 13, 2007, at 8 (reporting on search of former Justice Department lawyer’s papers).

196. Charlie Savage, *Wiretaps Said to Sift All Overseas Contacts*, BOSTON GLOBE, Dec. 23, 2005, at A1.

197. *Id.* (reporting possible scope of data mining aspect of NSA surveillance program).

might point to terrorism suspects. Some officials describe the program as a large data-mining operation.¹⁹⁸

On Christmas Day, 2005, the *Los Angeles Times* reported, “[p]hone companies and others have cooperated with U.S. agencies including the NSA for years. In the early 1990s, AT&T agreed to use an NSA-designed chip to ensure that law enforcement had access to phone calls.”¹⁹⁹ In February 2006, *USA Today* reported that AT&T, MCI (recently acquired by Verizon) and Sprint had cooperated with the warrantless wiretap program.²⁰⁰

A. *An Injunction Against Warrantless Wiretaps Is Overturned*

On January 17, 2006—one month after the President in his radio address had acknowledged the existence of warrantless wiretaps—the ACLU, other civil rights organizations, journalists, scholars and attorneys filed a complaint in the United States District Court for the Eastern District of Michigan to enjoin the warrantless wiretaps.²⁰¹ On the same day, the Center for Constitutional Rights and members of its legal staff filed a similar suit in the United States District Court for the Southern District of New York.²⁰²

On March 9, 2007, the plaintiffs in the Michigan action filed a motion for permanent injunction by summary judgment.²⁰³ On May 26, the

198. Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1 (describing data mining aspect of NSA surveillance program).

199. Josh Meyer & Joseph Menn, *U.S. Spying Is Much Wider, Some Suspect*, L.A. TIMES, Dec. 25, 2005, Main News, at 1.

200. See Leslie Cauley & John Diamond, *Telecoms Let NSA Spy on Calls*, USA TODAY, Feb. 6, 2006, at 1A (reporting on cooperation of several major telecommunications companies with government surveillance program).

201. See Complaint for Declaratory and Injunctive Relief at 59-60, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006) (seeking injunctive relief against NSA surveillance program); see also ANTHONY D. ROMERO & DINA TEMPLE-RASTON, IN DEFENSE OF OUR AMERICA 71-72 (HarperCollins 2007); David Ashenfelter & Niraj Warikoo, *Suits Filed to Stop Spying*, DET. FREE PRESS, Jan. 18, 2006, at 1B (reporting on first challenge to NSA surveillance program); Eric Lichtblau, *Two Groups Planning to Sue over Federal Eavesdropping*, N.Y. TIMES, Jan. 17, 2006, at A14 (reporting how ACLU and Center for Constitutional Rights lawsuits intend to determine whether NSA surveillance program used to monitor certain individuals with ties to Middle East).

202. See Complaint at 15-16, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-0313 (S.D.N.Y. Jan. 17, 2006) (seeking injunctive relief against NSA surveillance program); see also Ashenfelter & Warikoo, *supra* note 201, at 5B (reporting how Center for Constitutional Rights sought to have “all information and records” compiled by NSA surveillance program turned over to plaintiffs and destroyed); Lichtblau, *supra* note 201, at A14 (reporting how lawsuits would be used to probe scope of NSA surveillance program).

203. See Plaintiffs’ Motion for Partial Summary Judgment at 1-2, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006); see also ACLU v. NSA, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006) (recapitulating plaintiffs’ claim for injunctive relief), *vacated*, 493 F.3d 644 (6th Cir. 2007), and *cert. denied*, No. 07-468, 2008 WL 423556 at *1 (U.S. Feb. 19, 2008); Niraj Warikoo, *Court Is Asked to End Bush Spy*

United States responded by filing a motion to dismiss, or alternatively for summary judgment, on two grounds: (1) the plaintiffs could not show that any of their communications were monitored, and (2) the state-secrets privilege precluded litigation of the case.²⁰⁴

The [state-secrets] privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.²⁰⁵

The Government supported its motion with a publicly filed brief and publicly filed declarations by the Director of National Intelligence and the NSA's signals intelligence director.²⁰⁶ The Government also filed a notice that longer, classified versions of those documents were lodged with the Department of Justice's Litigation Security Section, a small office that helps courts protect classified information.²⁰⁷ According to the filed notice, "[t]he Court may contact the undersigned counsel to assist in secur-

Effort, DET. FREE PRESS, Mar. 10, 2006, at 4A (reporting on ACLU's motion for immediate injunction against NSA surveillance program's warrantless surveillance activities).

204. See Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 1-2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006) (responding that (1) plaintiffs lack standing and (2) unavailability of information due to assertion of state secrets and other statutory privileges requires dismissal); see also *ACLU*, 438 F. Supp. 2d at 758 (recounting basis for Government's response to plaintiffs' motion for summary judgment); David Ashenfelter, *Battle over Wiretaps to Begin Today*, DET. FREE PRESS, June 12, 2006, at 8A (reporting on opening of trial); Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, L.A. TIMES, June 12, 2006, at A5 (same).

205. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1952); see also REAGAN, *supra* note 133, at 3-7.

206. See Declaration of Major General Richard J. Quirk, Signals Intelligence Director, National Security Agency at 5, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 27, 2006) (supporting assertion of state secrets privilege); Declaration of John D. Negroponete, Director of National Intelligence at 7-8, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 27, 2006) (same); Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *supra* note 204, at 1, 14-15 (omitting redacted text) (asserting state secrets privilege).

207. See Defendants' Notice of Lodging of In Camera, Ex Parte Material at 1-2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006) [hereinafter May 26, 2006, *ACLU* Notice of Lodging] (notifying court of lodging); see also REAGAN, *supra* note 133, at 17-18 (describing Litigation Security Section); Ashenfelter, *supra* note 204, at 8A (reporting on filing of classified information); Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, N.Y. TIMES, June 13, 2006, at A17 [hereinafter Liptak, *Arguments Heard by Federal Judge*] (reporting on existence of undisclosed classified information); Liptak, *Secrecy at Issue*, *supra* note 153, at A1 (describing lodging as Justice Department filing papers with itself).

ing delivery of these submissions for review at the Court's convenience."²⁰⁸

The hearing on the plaintiffs' motion in the Michigan case was already scheduled for June 12, and United States District Judge Anna Diggs Taylor ruled that the hearing would occur as planned.²⁰⁹ Judge Taylor observed that the Government's motion was not strictly a response to the plaintiffs' motion, but ruled that the Government could nevertheless appear at the hearing.²¹⁰ Judge Taylor ruled that the Government's motion would be heard on July 10, 2006.²¹¹

Before a packed courtroom, the June 12 hearing went on as planned.²¹² Judge Taylor did not review the classified briefing in advance of the hearing.²¹³ On June 30, the Government lodged a classified reply brief supporting its motion to dismiss.²¹⁴ The July 10 hearing also occurred as scheduled.²¹⁵

Judge Taylor reviewed the classified briefing before deciding the motions.²¹⁶ On each occasion, an information security specialist in the Litigation Security Section flew from Washington, D.C. to Detroit and brought the classified materials to Judge Taylor's chambers.²¹⁷ Without the assistance of chambers staff, Judge Taylor reviewed the documents in her office—in the presence of the security specialist.²¹⁸ The security specialist told Judge Taylor that she could take notes on the materials, but

208. May 26, 2006, *ACLU Notice of Lodging*, *supra* note 207, at 2 (notifying court of lodging).

209. *See* Order Denying Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Partial Summary Judgment at 1-2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 31, 2006) (ordering hearing on June 12, 2006).

210. *See id.* at 1 (ordering that defendants may argue at hearing).

211. *See id.* (ordering oral argument on July 10, 2006); *see also* Weinstein, *supra* note 204, at A5 (reporting Judge Taylor's decisions on motions to dismiss and for summary judgment).

212. *See* Liptak, *Arguments Heard by Federal Judge*, *supra* note 207, at A17 ("The small courtroom was jammed for the argument, with a dozen people standing in the aisles and journalists sitting in the jury box."); Niraj Warikoo, *Wiretap Suit All About Power*, DET. FREE PRESS, June 12, 2006, at 1A (describing arguments and environs).

213. *See* Liptak, *Arguments Heard by Federal Judge*, *supra* note 207, at A17 ("At Monday's hearing, she shook her head no when Mr. Coppolino asked her whether she had 'had a chance to review our classified submission.'").

214. *See* Notice of Lodging, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 30, 2006) (notifying court of lodging of classified document).

215. *See* Henry Weinstein, *Domestic Spying Program Faces First Challenge*, L.A. TIMES, July 11, 2006, at A12 (reporting on July 10 hearing).

216. *See* *ACLU v. NSA*, 438 F. Supp. 2d 754, 764 (E.D. Mich. 2006) ("[T]he court acknowledges that it has reviewed all of the materials Defendants submitted *ex parte* and *in camera*.").

217. *See* Interview with the Honorable Anna Diggs Taylor, Judge, U.S. Dist. Court, E. Dist. of Mich. (Dec. 7, 2006) [hereinafter Interview with the Honorable Anna Diggs Taylor].

218. *See id.*

that the notes would have to go back to Washington for storage; in light of that stipulation, Judge Taylor decided not to take notes.²¹⁹

On August 17, 2006, Judge Taylor enjoined the warrantless wiretap program that had been acknowledged by the President.²²⁰ Judge Taylor dismissed, however, the plaintiffs' claims relating to data mining because that program was still a state secret.²²¹ Judge Taylor decided that the warrantless wiretap program's chill on international communications between journalists, scholars, attorneys and persons whom the Government might think had ties to supporters of terrorism afforded plaintiffs standing to bring the suit.²²² The judge then ruled that the secrecy of the program enhanced the plaintiffs' standing, holding that the plaintiffs' communications were chilled because there was no way to determine the risk that those communications would be monitored.²²³ Judge Taylor ruled that the plaintiffs could demonstrate the illegality of the warrantless wiretap program on public information alone and that the secret information presented in chambers did not afford the Government a valid defense.²²⁴ Ultimately, Judge Taylor concluded that the warrantless wiretap program violated the Foreign Intelligence Surveillance Act (FISA) and the First and Fourth Amendments to the Constitution; accordingly, the judge granted the plaintiffs a permanent injunction to end the program.²²⁵

The Government appealed the injunction the day it was issued;²²⁶ roughly two weeks later, the Government also moved to stay the injunction

219. *See id.*

220. *See ACLU*, 438 F. Supp. 2d at 782; Judgment, *ACLU*, 438 F. Supp. 2d 754 (No. 2:06-cv-10204); Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps*, WASH. POST, Aug. 18, 2006, at A1 (discussing judicial ruling against wiretapping program); Gail Gibson, *NSA Wiretaps Ruled Illegal*, CHI. TRIB., Aug. 18, 2006, News, at 1 (describing injunction against NSA program); Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. TIMES, Aug. 18, 2006, at A1 (noting court decision to halt secret wiretapping); Henry Weinstein, *Wiretap Project Ruled Illegal*, L.A. TIMES, Aug. 18, 2006, at 1 (stating that judge had ruled wiretapping program illegal).

221. *See ACLU*, 438 F. Supp. 2d at 759, 765-66 (finding that plaintiffs could not challenge data mining program); *ACLU v. NSA*, 493 F.3d 644, 650, 687 (6th Cir. 2007) (noting that secret data mining program could not be challenged); Eggen & Linzer, *supra* note 220, at A1 (discussing judicial holding against data mining claim); Liptak & Lichtblau, *supra* note 220, at A1 (reviewing court holding against plaintiffs on data mining claim); Weinstein, *supra* note 220, at A1 (describing dismissal of plaintiff's claim against data mining).

222. *See ACLU*, 438 F. Supp. 2d at 766-71 (stating reasons for finding that plaintiffs had standing).

223. *See id.* at 771 (holding that communications were further chilled by impossibility of risk assessment).

224. *See id.* at 765-66 (finding that secret information was not necessary for plaintiffs to prove their case).

225. *See id.* at 771-82 (holding that warrantless wiretapping program was unconstitutional and ordering injunction).

226. *See* Docket, *ACLU*, No. 2:06-cv-10204 (6th Cir. Aug. 17, 2006); Defendant's Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); Gibson, *supra* note 220 (noting Government's timely appeal of injunction).

pending appeal.²²⁷ The plaintiffs agreed to a stay pending resolution of the stay motion.²²⁸ The plaintiffs appealed the dismissal of their data mining claims.²²⁹ In advance of the hearing on the stay motion, the Government again lodged a classified declaration by the Director of National Security.²³⁰ Again, an information security specialist brought the classified declaration to Judge Taylor's chambers for review.²³¹

Judge Taylor denied the stay on September 29, but gave the Government one week in which to seek a stay from the court of appeals.²³² On October 4, a Sixth Circuit panel comprised of Judges Alice M. Batchelder, Ronald L. Gilman and Julia S. Gibbons granted a stay.²³³ Nine months later, Judges Batchelder and Gibbons vacated Judge Taylor's injunction and ordered the case dismissed for lack of standing; Judge Gilman dissented.²³⁴

Early in the appeal, the Government moved to "Submit Separate Public and Sealed Versions of its Briefs to Protect Classified Information in the Record."²³⁵ One week after staying the injunction, the Sixth Circuit panel granted the Government's motion to submit classified briefs.²³⁶ The following week, the Government gave notice of the lodging of a classified

227. See *ACLU*, 493 F.3d at 651 (noting Government's request for temporary stay); Defendants' Memorandum of Points and Authorities in Support of a Stay Pending Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Sept. 1, 2006); *Bloomberg News, Judge Asked to Suspend Ruling Against Wiretaps*, WASH. POST, Sept. 2, 2006, at A5 (describing Government's motion).

228. See Stipulated Order Staying Case, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 28, 2006); Liptak & Lichtblau, *supra* note 220 (noting that temporary stay was granted).

229. See Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006); Plaintiff's Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006).

230. See Defendant's Notice of Lodging of In Camera, Ex Parte Material in Support of Defendant's Motion for a Stay Pending Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Sept. 1, 2006).

231. See Interview with the Honorable Anna Diggs Taylor, *supra* note 217.

232. See *ACLU*, 493 F.3d at 651 (deciding on stay pending appellate court ruling on injunction); Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Sept. 29, 2006); David Ashenfelter, *Bush's Wiretap Program Gets a 7 Day Reprieve*, DET. FREE PRESS, Sept. 29, 2006 (describing Government's chance to get injunction stay).

233. See *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (granting stay); *ACLU*, 493 F.3d at 720 (vacating stay and dismissing case); *U.S. Eavesdropping Is Allowed to Continue During Appeal*, N.Y. TIMES, Oct. 5, 2006, at A23 (discussing appellate court decisions).

234. See *ACLU*, 493 F.3d at 644 (ordering dismissal for lack of standing); Amy Goldstein, *Lausuit Against Wiretaps Rejected*, WASH. POST, July 7, 2007, at A1 (describing appellate decision); Adam Liptak, *Panel Dismisses Suit Challenging Secret Wiretaps*, N.Y. TIMES, July 7, 2007, at A1 (noting court's new decision); Charlie Savage, *Court Gives Bush Win on Surveillance*, BOSTON GLOBE, July 7, 2007, at 1A (stating that injunction against wiretapping program failed court review).

235. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting filing on September 26, 2006); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

236. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting order on October 11, 2006); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

brief.²³⁷ Later, the Government gave notice of the lodging of a classified reply brief.²³⁸

The appeal was heard on January 31, 2007.²³⁹ On January 17, 2007 (between briefing and argument) the Government announced that it would cease the warrantless wiretap program, explaining that the Government had worked out a way for the surveillance to be approved by the FISC.²⁴⁰ The issuing press release stated

[O]n January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of [A]l Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from [A]l Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will

237. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting filing on October 16, 2006); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

238. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting filing on December 5, 2006); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

239. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006); Adam Liptak, *Judges Weigh Arguments in U.S. Eavesdropping Case*, N.Y. TIMES, Feb. 1, 2007, at A11 (discussing case on appeal).

240. See *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007) (noting that warrantless wiretapping program would not go forward in current form); Dan Eggen, *Court Will Oversee Wiretap Program*, WASH. POST, Jan. 18, 2007, at A1 (describing new program allowing judicial oversight of wiretapping program); Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1 (stating that some judicial review will now occur in wiretapping program).

allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.²⁴¹

The *New York Times* reported that “[Justice Department] officials said the orders were the result of two years of discussing with the court how to bring the eavesdropping program under court review, a process that began long before the program became public.”²⁴² The *Washington Post* reported that the FISC judge who issued the helpful orders was the judge who was assigned to hear cases that week.²⁴³ The FISC denied a request by the ACLU to make the orders public.²⁴⁴

Five days before the Attorney General's announcement, the Government again lodged classified materials for review by the Sixth Circuit.²⁴⁵ Security specialists again brought the classified briefing and the classified supplemental submission to each judge's chambers approximately two weeks before oral argument.²⁴⁶ Judge Batchelder has chambers in Medina, Ohio; Judges Gilman and Gibbons each have chambers in Memphis, Tennessee. Each judge reviewed the classified materials privately in chambers, took no notes and called the security specialist back to reclaim the materials when the judge was finished with them.²⁴⁷

241. See *ACLU*, 493 F.3d at 651 n.4 (quoting from first paragraph); see also, e.g., Notice of Attorney General's Letter to Congress, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Jan. 17, 2007).

242. Lichtblau & Johnston, *supra* note 240 (describing judge's involvement in wiretapping activities).

243. See Eggen, *supra* note 240 (noting that initial judge issued order); Lichtblau & Johnston, *supra* note 240 (describing judge's involvement in wiretapping activities).

244. See *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (F.I.S.C. Dec. 11, 2007) (No. MISC. 07-01); James Risen, *Surveillance Court Declines to Release Secret Opinions*, N.Y. TIMES, Dec. 12, 2007, at A27 (noting that court review of wiretapping program will remain secret); Elizabeth Williamson, *Secret U.S. Intelligence Court Intends to Keep Wiretap Rulings Under Wraps*, WASH. POST, Dec. 12, 2007, at A27 (describing secret nature of court oversight of wiretapping program).

245. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting January 12, 2007 notice of lodging); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

246. See Interview with the Honorable Alice M. Batchelder, Judge, U.S. Court of Appeals for the Sixth Circuit (Oct. 30, 2007) [hereinafter Interview with the Honorable Alice M. Batchelder]; Interview with the Honorable Ronald Lee Gilman, Judge, U.S. Court of Appeals for the Sixth Circuit (Oct. 29, 2007) [hereinafter Interview with the Honorable Ronald Lee Gilman]; Interview with the Honorable Julia Smith Gibbons, Judge, U.S. Court of Appeals for the Sixth Circuit (Oct. 29, 2007) [hereinafter Interview with the Honorable Julia Smith Gibbons]; see also Liptak, *supra* note 153 (“Plaintiffs and judges’ law clerks cannot see [the] secret filings. Judges have to make appointments to review them and are not allowed to keep copies.”).

247. See Interview with the Honorable Alice M. Batchelder, *supra* note 246; Interview with the Honorable Ronald Lee Gilman, *supra* note 246; Interview with the Honorable Julia Smith Gibbons, *supra* note 246.

Approximately one week before oral argument, the Government lodged another classified submission.²⁴⁸ The judges reviewed this classified submission in Cincinnati on the day of oral argument.²⁴⁹ While a ruling from the court was pending, the Government lodged classified submissions on two additional occasions;²⁵⁰ within days of those lodgings, security specialists brought the classified submissions to the judges' chambers for the judges' review.²⁵¹ There were no oral *ex parte* communications with Government attorneys in the appeal.²⁵²

Judge Batchelder's opinion states

At the behest of the government, I reviewed these privileged documents, but their contents—being privileged—are excluded from our consideration and I have not relied on any of that information in this opinion. The state secrets privilege granted by the district court has been maintained on appeal and this opinion is decided solely on the publicly available information that was admitted by the district court and made a part of its record.²⁵³

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.²⁵⁴ Judges Batchelder and Gibbons decided that the plaintiffs had not demonstrated standing, and that in any event the state-secrets privilege prevented the plaintiffs from discovering evidence of standing.²⁵⁵ A petition for certiorari to the United States Supreme Court is pending.²⁵⁶

B. *Secret Evidence of Warrantless Wiretapping is Kept Secret*

In 2004, the United States government froze the assets of the Ashland, Oregon, office of the Al Haramain Islamic Foundation, a Saudi Ara-

248. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting January 25, 2007 lodging); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

249. See Interview with the Honorable Julia Smith Gibbons, *supra* note 246.

250. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting lodgings of April 9 and June 11, 2007); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same).

251. See Interview with the Honorable Alice M. Batchelder, *supra* note 246; Interview with the Honorable Ronald Lee Gilman, *supra* note 246; Interview with the Honorable Julia Smith Gibbons, *supra* note 246.

252. See Interview with the Honorable Julia Smith Gibbons, *supra* note 246.

253. *ACLU*, 493 F.3d at 650 n.3 ("All three members of the panel have reviewed the documents filed by the government under seal that arguably are protected by the privilege.")

254. See Docket, *ACLU*, No. 06-2095 (6th Cir. Aug. 17, 2006) (noting denial of motion on July 6, 2007); Docket, *ACLU*, No. 06-2140 (6th Cir. Aug. 30, 2006) (same); Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. TIMES, Jan. 27, 2007, at 14 (reporting filing of motion).

255. See *ACLU*, 493 F.3d at 687-88 (stating Justice Batchelder's and Justice Gibbons's opinions).

256. See Docket, *ACLU v. NSA*, No. 07-468 (U.S. Oct 9, 2007) (noting consideration of petition at January 18, 2008 conference).

bian charity that the government had determined supported terrorism.²⁵⁷ The Saudi government shut the charity down several months later.²⁵⁸ As part of the effort to freeze the charity's assets, the United States government inadvertently produced to the charity's attorney a document apparently showing—or creating the inference—that in the spring of 2004, the United States had monitored telephone calls between a Saudi director of the charity and two of the charity's American lawyers.²⁵⁹

Lawyers for the charity filed a complaint in the United States District Court for the District of Oregon against the NSA, the FBI, the President and associated defendants on February 28, 2006, claiming violation of FISA, separation of powers, the First, Fourth and Sixth Amendments and the International Covenant on Civil and Political Rights.²⁶⁰ The lawyers for the charity supported the complaint by attempting to file under seal for in camera review the inadvertently produced document.²⁶¹ The complaint describes the document as "United States Treasury Office of Foreign Assets Control logs of [plaintiffs'] conversations."²⁶²

The plaintiff charity accompanied the complaint with both a motion to file the document under seal, and a sealed envelope that contained the

257. See *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006) (reviewing government actions against foreign charity), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); Carol D. Leonnig & Mary Beth Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, Mar. 2, 2006, at A1 (describing government freeze on charity's assets); Matthew Preusch, *U.S. Freezes a Charity's Assets*, N.Y. TIMES, Feb. 21, 2004, at A9 (noting freeze of Saudi charity's assets by United States federal government).

258. See Douglas Jehl, *Saudis Are Shutting Down a Charity Tied to Terrorists*, N.Y. TIMES, June 3, 2004, at A12 (noting that Saudi government shut down charity under United States investigation).

259. See *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193-95 (9th Cir. 2007) (describing document detailing government intelligence activities); Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Case*, THE OREGONIAN, Apr. 25, 2006, at A1 (noting that document existed revealing government surveillance); Leonnig & Sheridan, *supra* note 257 (reporting on document accidentally produced showing government spy activity); Liptak, *supra* note 153 (reviewing secret document contents).

260. See *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217 (reviewing American attorneys' claims against government); Complaint at 4-6, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter *Al-Haramain Complaint*]; see also *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1195 (stating that lawyers' rights had been violated by government action); Susan Goldsmith, *Islamic Charity, Lawyers File Wiretapping Lawsuit*, THE OREGONIAN, Mar. 1, 2006, at E5 (discussing lawsuit filed against secret government wiretapping program).

261. See *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218 (noting that secret document was filed under seal by plaintiffs); Green, *supra* note 259 (describing submission of secret document).

262. See *Al-Haramain Complaint*, *supra* note 260, at 4; Carol D. Leonnig, *Paper Said to Show NSA Spying Given to Post Reporter in 2004*, WASH. POST, Mar. 3, 2006, at A4 (reporting that *Washington Post* reporter who saw document confirmed that "it appeared to be a summary of one or more conversations intercepted by the government").

document.²⁶³ On the day the complaint was filed, the case was assigned to United States District Judge Michael W. Mosman; one week later, the case was reassigned to United States District Judge Garr M. King.²⁶⁴ The sealed envelope was delivered to Judge King's chambers.²⁶⁵

Sixteen days after the secret document was delivered to court—and while the motion to file the document under seal was pending—an information security specialist in the Litigation Security Section contacted Judge King's chambers to report that the government was concerned about the security of the document in the sealed envelope.²⁶⁶ Five days later, a local information security specialist—who worked for the United States Attorney rather than the Litigation Security Section—reviewed the secret document in chambers and determined that it had to be stored in a Sensitive Compartmented Information Facility (SCIF).²⁶⁷

“Sensitive compartmented information” is “information that not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods.”²⁶⁸ “Usually sensitive compartmented information is top secret information, access to which is restricted to a limited set of individuals on a need-to-know basis specific to the information.”²⁶⁹ It must be stored in an especially secure facility, one that is more secure than a judge's safe.²⁷⁰

Several federal courthouses have SCIFs, but the federal courthouse in Portland, Oregon, is not one of them.²⁷¹ The FBI has a SCIF at its offices across town, as does the United States Attorney in Seattle.²⁷² At a tele-

263. See *Al-Haramain Islamic Found.*, 507 F.3d at 1195 (describing how document was brought into case); Motion and Memorandum in Support to File Material Under Seal and Request for In Camera Inspection, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006).

264. See Docket, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter *Al-Haramain D. Or. Docket*].

265. See Interview with the Honorable Garr M. King, Judge, U.S. Dist. Court, Dist. Or. (Feb. 14, 2007) [hereinafter Interview with the Honorable Garr M. King].

266. See *id.*

267. See Transcript at 4-5, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21, 2006) [hereinafter *Al-Haramain Mar. 21, 2006 Transcript*]; Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records at 8, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006) [hereinafter *Al-Haramain Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records*]; Interview with the Honorable Garr M. King, *supra* note 265; Interview with Staff, Dep't of Justice Litig. Sec. Section (Apr. 24, 2007).

268. 28 C.F.R. § 17.18(a) (2007) (defining sensitive compartmented information).

269. REAGAN, *supra* note 133, at 3 (providing explanation of sensitive information).

270. See *id.* at 19 (outlining proper storage requirements for sensitive information).

271. See Interview with the Honorable Garr M. King, *supra* note 265.

272. See *Al-Haramain Mar. 21, 2006 Transcript*, *supra* note 267, at 4.

phonic status conference on March 21, the plaintiffs objected to the storing of the secret document at the FBI's SCIF because the FBI was a defendant.²⁷³ Accordingly, the document was sent to Seattle for storage in the United States Attorney's SCIF there.²⁷⁴ At a telephonic status conference on April 7, the parties agreed to a plan for storing the secret document at the FBI's SCIF in Portland.²⁷⁵ 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.²⁷⁶

Meanwhile, on March 17, 2006, *The Oregonian* filed a motion to intervene in the litigation, in order to move that the secret document be unsealed.²⁷⁷ On April 14, the Government responded to the motion.²⁷⁸ The Government noticed the lodging of a classified declaration for the court's review *ex parte* and *in camera*.²⁷⁹ The plaintiffs objected to the Government's briefing of the court *ex parte*.²⁸⁰ Judge King held a teleconference to discuss the matter on April 25 without reading the classified declaration.²⁸¹ Following the conference, the Government lodged a supplemental classified declaration on May 12.²⁸² On September 7, Judge King denied *The Oregonian's* motion without reviewing the classified declarations, holding that the inadvertent production of the document to the plaintiffs did not declassify it.²⁸³

273. *See id.* at 5, 9.

274. *See id.* at 9, 19; Tim Fought, *Mystery Document Headed to Seattle*, SEATTLE TIMES, Mar. 24, 2006, at B5 (noting Seattle storage location).

275. *See Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1195 (9th Cir. 2007) (describing compromise); *see also Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006) (noting new storage location for secret document), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); *Al-Haramain* D.Or. Docket, *supra* note 264.

276. *See* Transcript at 31-33, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006) [hereinafter *Al-Haramain* Apr. 25, 2006 Transcript].

277. *See Al-Haramain* D. Or. Docket, *supra* note 264; *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; *see also* Boaz Herzog, *Newspaper's Motion Seeks Files in Eavesdropping Case*, THE OREGONIAN, Mar. 23, 2006, at B8 (reporting that plaintiffs' attorney "would not be opposed to *The Oregonian* examining the material in the case with the caveat that any protected communication between attorneys and plaintiffs is redacted").

278. *See Al-Haramain* Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records, *supra* note 267, at 8.

279. Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; *see also* Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, THE OREGONIAN, Apr. 15, 2006, at B1 (noting sequence of events predating government's filing of classified Declaration).

280. *See* Plaintiffs' Opposition to Defendants' Lodging of Material Ex Parte and In Camera, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 24, 2006).

281. *See Al-Haramain* Apr. 25, 2006 Transcript, *supra* note 276, at 31-33.

282. *See* Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8.

283. *See Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8.

On May 26, 2006, the Government moved to prevent the plaintiffs from having any further access to the secret evidentiary document.²⁸⁴ The plaintiffs filed a response on June 16.²⁸⁵ To support their response, the plaintiffs attempted to file, under seal, a declaration by one of the plaintiffs' attorneys describing the secret evidentiary document "as he recalls seeing it."²⁸⁶ The usual procedure for the court's acceptance of a sealed filing is for the clerk's office to first unseal the filing to make a copy for the judge and then to file the document under seal.²⁸⁷ Although the plaintiffs had included a cover letter with the sealed declaration asking that it be delivered to Judge King unopened, the clerk's office followed its usual procedure.²⁸⁸ 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.²⁸⁹ After the judge read the document, security officers picked it up and deposited it in the judge's locked bag in the SCIF, using the judge's key to do so.²⁹⁰

In his September 7, 2006 opinion, Judge King held that the plaintiffs must be denied further access to the secret evidentiary document.²⁹¹ Nevertheless, Judge King ruled that the plaintiffs could still rely on their memories of the secret document: "I will permit plaintiffs to file *in camera* any affidavits attesting to the contents of the document from their memories to support their standing in this case and to make a *prima facie* case. The government may request that these declarations be deposited in the SCIF."²⁹²

It was difficult for the plaintiffs to determine whom on the Government's side they could serve with papers describing the classified evidentiary document.²⁹³ The Government argued that the identities of persons with clearance to see such documents are a state secret.²⁹⁴ On one occasion, the judge asked a government attorney before him if he had such

284. See Government Motion to Prevent Access, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219.

285. See Plaintiffs' Response to Motion to Prevent Access, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006).

286. See *id.* at 15.

287. See Interview with the Honorable Garr M. King, *supra* note 265.

288. See *id.*

289. See *id.*

290. See *id.*

291. See *Al-Haramain Islamic Found.*, 451 F. Supp. 2d 1215, 1217, 1228–29 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); see also *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (affirming Judge King's decision barring plaintiffs from viewing secret document).

292. See *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1229. *But see Al-Haramain Islamic Found.*, 507 F.3d at 1193 (reversing Judge King's decision allowing plaintiffs "to reconstruct the essence of the document through memory").

293. See Interview with the Honorable Garr M. King, *supra* note 265.

294. See *id.*

clearance.²⁹⁵ The government attorney responded that he did not think he was permitted to answer that question.²⁹⁶ 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.²⁹⁷

On June 21, the Government moved to dismiss the case on state secrets grounds:²⁹⁸

This lawsuit puts at issue a classified foreign intelligence program authorized by the President after September 11, 2001, to detect and prevent further terrorist attacks on the United States by al Qaeda and affiliated terrorist organizations. Plaintiffs, a designated terrorist entity and affiliated individuals, claim that their communications were unlawfully intercepted under this program. For the reasons set forth in more detail below, the very subject matter of this lawsuit—including whether any of the Plaintiffs was subject to such surveillance, and whether any such surveillance was lawful—implicates classified activities and information, the disclosure of which would be required or risked if Plaintiffs' claims were to be adjudicated. The United States therefore has moved to dismiss this action based on an assertion of the military and state secrets privilege (hereafter "state secrets privilege") by the Director of National Intelligence (DNI), John D. Negroponte, as well as the assertion of statutory privileges by Director Negroponte and Lieutenant General Keith B. Alexander, Director, National Security Agency (DIRNSA).²⁹⁹

The Government supported its motion with an unclassified brief, and unclassified declarations of the directors of national intelligence and the NSA,³⁰⁰ but the Government also lodged for ex parte, in camera review more complete, classified versions of these documents.³⁰¹ On July 25, the

295. *See id.*

296. *See id.*

297. *See id.*

298. *See* Government Motion to Dismiss or for Summary Judgment, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. June 21, 2006); *see also* *Al-Haramain Islamic Found. v. Bush*, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006), *rev'd*, 507 F.3d 1190 (9th Cir. 2007); Ashbel S. Green, *U.S. Claims "State Secrets Privilege" in Oregon Case*, *THE OREGONIAN*, June 22, 2006, at B4 (explaining thrust of Government's argument for motion to dismiss).

299. Government Memorandum Supporting Motion to Dismiss or for Summary Judgment at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 21, 2006).

300. *See id.*; *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1195 (9th Cir. 2007); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219.

301. *See* Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Jul. 21, 2006); *Al-Haramain Islamic Found.*, 507 F.3d 1195; *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219.

Government both filed an unclassified reply brief³⁰² and lodged a more complete classified reply brief for ex parte, in camera review.³⁰³ Judge King decided that he would review the classified briefing materials supporting the Government's state-secrets motion.³⁰⁴ In his September 7 opinion, Judge King denied the Government's state-secrets motion.³⁰⁵ "As a result of . . . official statements and publications, the existence of the Surveillance Program is not a secret, the subjects of the program are not a secret, and the general method of the program—including that it is warrentless—is not a secret."³⁰⁶ Judge King certified an interlocutory appeal,³⁰⁷ which the Ninth Circuit's Court of Appeals agreed to hear.³⁰⁸

The appeal was heard on August 15, 2007, by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins and M. Margaret McKeown.³⁰⁹ The court granted C-SPAN permission to make a video recording of oral arguments for broadcast later that day.³¹⁰ The appellate judges—and only the judges, without the assistance of law clerks—reviewed classified submissions to both the district court and the court of appeals by both the plaintiffs (concerning the secret evidentiary document) and the Government (concerning the state-secrets privilege).³¹¹

The Ninth Circuit agreed that "the state secrets privilege does not bar the very subject matter of th[e] action."³¹² On November 16, 2007, the court decided that the plaintiffs could not substitute their memories of the secret evidentiary document for access to the document itself:³¹³ "either

302. See Government Reply Supporting Motion to Dismiss or for Summary Judgment, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006).

303. See Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006).

304. See *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219.

305. See *id.* at 1217, 1220–28; see also Ashbel S. Green, *Eavesdropping Case Gains Steam*, THE OREGONIAN, Sept. 8, 2006, at A1 (reiterating Judge King's rationale for denying Government's motion to dismiss); Adam Liptak, *Judge Allows Islamic Group to Challenge Wiretapping*, N.Y. TIMES, Sept. 8, 2006, at A20 (same).

306. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1222.

307. See *id.* at 1233.

308. See Docket, *Al-Haramain Islamic Found. v. Bush*, No. 06-80134 (9th Cir. Sept. 22, 2006) (noting grant of interlocutory appeal on December 21, 2006).

309. See *Al-Haramain Islamic Found.*, 507 F.3d at 1192; Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Dec. 22, 2006) [hereinafter *Al-Haramain Islamic Found.* 9th Cir. Appeal Docket]; see also Karl Vick, *Judges Skeptical of State-Secrets Claim*, WASH. POST, Aug. 16, 2007, at A4 (describing oral argument).

310. See *Al-Haramain Islamic Found.*, 507 F.3d at 1198 n.5; *Al-Haramain Islamic Found.* 9th Cir. Appeal Docket, *supra* note 309.

311. See *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1194 n.2, 1203; *Al-Haramain Islamic Found.* 9th Cir. Appeal Docket, *supra* note 309.

312. *Al-Haramain Islamic Found.*, 507 F.3d at 1193; 1197-1201; see also Dan Eggen, *Both Government and Islamic Charity Claim Victory in Eavesdropping Case*, WASH. POST, Nov. 17, 2007, at A2 (noting that both sides of litigation claimed victory from Ninth Circuit's decision).

313. See *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1201-05; see also Eggen, *supra* note 312; Ashbel Green, *Islamic Charity's Suit Blocked in Use of U.S. Secret Docu-*

the memory is wholly accurate, in which case the approach is tantamount to release of the document itself, or the memory is inaccurate, in which case the court is not well-served and the disclosure may be even more problematic from a security standpoint.”³¹⁴ Without the evidentiary document, the plaintiffs could not establish standing.³¹⁵ The Ninth Circuit remanded the action to the district court to determine whether “FISA preempts the [common law] state secrets privilege” with respect to the evidentiary document.³¹⁶

C. *An Action Against Telephone Companies is Dismissed
on State-Secrets Grounds*

A May 11, 2006, article in *USA Today* launched dozens of civil suits against telephone companies:

The 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*.

The NSA program reaches into homes and businesses across the nation by amassing information about the calls of ordinary Americans—most of whom [are not] suspected of any crime. This program does not involve the NSA listening to or recording conversations. But the spy agency is using the data to analyze calling patterns in an effort to detect terrorist activity, sources said in separate interviews.³¹⁷

On June 30, *USA Today* retracted its story respecting Verizon and BellSouth:

Based on its reporting after the May 11 article, *USA Today* has now concluded that while the NSA has built a massive domestic calls record database involving the domestic call records of telecommunications companies, the newspaper cannot confirm that BellSouth or Verizon contracted with the NSA to provide bulk calling records to that database.³¹⁸

ment, THE OREGONIAN, Nov. 17, 2007, at C5 (describing effects of Ninth Circuit’s holding); Eric Lichtblau, *Court Bars Secret Papers in Eavesdropping Case*, N.Y. TIMES, Nov. 17, 2007, at A12 (same).

314. *Al-Haramain Islamic Found.*, 507 F.3d at 1204.

315. *See id.* at 1205.

316. *See id.* at 1193, 1205-06; Eggen, *supra* note 312; Green, *supra* note 313; Lichtblau, *supra* note 313.

317. *See* Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY, May 11, 2006, at 1A; *see also* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 988 (N.D. Cal. 2006) (noting effect of *USA Today* story).

318. *See A Note to Our Readers*, USA TODAY, June 30, 2006, at 2A; *see also* Hepting, 439 F. Supp. 2d at 988 (“BellSouth and Verizon both issued statements, of

The newspaper also reported that although Verizon did not participate in the secret NSA program, MCI—which Verizon acquired in January 2006—did participate in the program.³¹⁹

Four days after the initial *USA Today* story, a Chicago attorney filed a class action against AT&T in the United States District Court for the Northern District of Illinois, challenging the “legality of Defendants’ participation in a secret and illegal government program to intercept and analyze vast quantities of Americans’ telephone and Internet communications, surveillance done without the authorization of a court and in violation of federal electronic surveillance and telecommunications statutes, as well as the First and Fourth Amendments to the United States Constitution.”³²⁰

The court assigned the case to United States District Judge Matthew F. Kennelly.³²¹ One week later, the ACLU’s Illinois branch filed a class action against AT&T with broadcaster Studs Terkel and the majority leader of the Illinois House of Representatives among the named plaintiffs.³²² Judge Kennelly took assignment of this case as related to the first case.³²³ Two days later, a third class action against AT&T was filed in the Chicago federal court,³²⁴ it too was assigned to Judge Kennelly as related to the first two actions.³²⁵

In the ACLU action, the plaintiffs filed a motion on June 5, 2006 for a preliminary injunction.³²⁶ AT&T filed a motion to dismiss on June 23.³²⁷ One week later, the Government moved to intervene and dismiss the ac-

which the court takes judicial notice, denying their involvement in the program described in *USA Today*.”)

319. See Susan Page, *Lawmakers: NSA Database Incomplete*, USA TODAY, June 30, 2006, at 2A.

320. Complaint at 1, *Schwarz v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006); see also Amended Complaint, *Schwartz*, No. 1:06-cv-2680 (N.D. Ill. May 22, 2006) (adding other telephone companies and Government as defendants); Second Amended Complaint, *Joll v. AT&T Corp.*, No. 1:06-cv-2680 (N.D. Ill. July 7, 2006) (removing attorney as plaintiff, causing case name to change to *Joll v. AT&T Corp.*, and removing Government as defendant).

321. See Docket Sheet, *Joll*, No. 1:06-cv-2680 (N.D. Ill. May 15, 2006).

322. Complaint, *Terkel v. AT&T Corp.*, No. 1:06-cv-0-2837 (N.D. Ill. May 22, 2006); see also Amended Complaint, *Terkel*, No. 1:06-cv-0-2837 (N. D. Ill. June 5, 2006).

323. See Executive Committee Order, *Terkel*, No. 1:06-cv-0-2837) (N. D. Ill. June 2, 2006).

324. See Complaint, *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006).

325. See Executive Committee Order, *Waxman*, No. 1:06-cv-2900 (N.D. Ill. June 12, 2006).

326. See Plaintiffs’ Motion for a Preliminary Injunction, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 5, 2006).

327. See Defendant’s Motion to Dismiss, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 23, 2006); *Terkel*, 441 F. Supp. 2d at 901-02.

tion on state-secrets grounds.³²⁸ To support its motion to dismiss, the Government submitted both unclassified and classified briefs and declarations.³²⁹

An information security specialist in the Justice Department's Litigation Security Section delivered the classified materials to Judge Kennelly's chambers, where the judge reviewed the materials in private without the assistance of law clerks.³³⁰ When Judge Kennelly had finished reviewing the materials, the security specialist took the materials and Judge Kennelly's notes and stored them in the United States Attorney's SCIF in the same building.³³¹ When Judge Kennelly needed to review the documents again, a security specialist for the United States Attorney's office delivered and retrieved them.³³²

In order to obtain additional information from the Government, Judge Kennelly conducted a secure *ex parte* hearing with government counsel in his chambers.³³³

We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera, ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The Court asked the government to provide further information about certain matters in the classified materials; this information was thereafter produced for *in camera, ex parte* inspection as well.³³⁴

On July 25, 2006, Judge Kennelly granted the Government's motion to dismiss the complaint, but allowed the plaintiffs to amend it,³³⁵ which

328. See *Terkel*, 441 F. Supp. 2d at 900-02; Government Motion to Dismiss or for Summary Judgment, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 30, 2006); Motion to Intervene by the United States of America, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 30, 2006); Rudolph Bush, *U.S. Secrets Privilege Invoked*, CHI. TRIB., July 14, 2006, Business, at 3.

329. See *Terkel*, 441 F. Supp. 2d at 902, 910; Government Memorandum Supporting Motion to Dismiss or for Summary Judgment, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 5, 2006); Notice of Lodging, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. June 5, 2006); Bush, *supra* note 328.

330. See Interview with the Honorable Matthew F. Kennelly, Judge, United States Dist. Court, N. Dist of Ill. (May 24, 2007) [hereinafter Interview with the Honorable Matthew F. Kennelly]; see also *Terkel*, 441 F. Supp. 2d at 902 ("The Court thoroughly reviewed the classified materials in chambers under carefully controlled security.").

331. See Interview with the Honorable Matthew F. Kennelly, *supra* note 330; *Terkel*, 441 F. Supp. 2d at 902.

332. See Interview with the Honorable Matthew F. Kennelly, *supra* note 330.

333. See Bush, *supra* note 328, at A3.

334. *Terkel*, 441 F. Supp. 2d at 902 n.2.

335. See *id.* at 901, 908-20; John Bacon, *Judge Rejects Lawsuit over Phone Records*, USA TODAY, July 26, 2006, at 3A; Jeff Coen, *Phone Records Lawsuit Dismissed*, CHI. TRIB., July 26, 2006, Business, at 3; Eric Herman, *Studs Terkel's Suit over Phone*

they did on July 31.³³⁶ Unlike the Government's acknowledgment of warrantless wiretaps of international communications, the court noted that "there have been no public disclosures of the existence or non-existence of AT&T's claimed record turnover—the sole focus of the current complaint in the present case—that are sufficient to overcome the government's assertion of the state secrets privilege."³³⁷ In addition to issuing a published opinion granting the Government's motion to dismiss, Judge Kennelly issued a secret opinion commenting on the Government's classified 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.³³⁸

D. *Actions Against Warrantless Wiretaps Are Consolidated in the Northern District of California*

One suit filed against AT&T predated the May 2006 *USA Today* article by over three months. The Electronic Frontier Foundation filed a class action complaint on behalf of AT&T customers on January 31, 2006, in the United States District Court for the Northern District of California.³³⁹ The suit was based in part upon information provided by Mark Klein, a retired AT&T technician who had observed unusual modifications to AT&T's facility on Folsom Street in San Francisco. According to Klein, NSA had constructed a secret room at the AT&T facility so that all communications could be routed through data-mining computers.³⁴⁰

Records Thrown Out, CHI. SUN-TIMES, July 26, 2006, News, at 24; Adam Liptak, *Judge Rejects Customer Suit over Records from AT&T*, N.Y. TIMES, July 26, 2006, at A13; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, WASH. POST, July 26, 2006, at A6.

336. See Second Amended Class Action Complaint, *Terkel*, No. 1:06-cv-02837 (N.D. Ill. July 31, 2006).

337. *Terkel*, 441 F. Supp. 2d at 901, 913 ("[N]either AT&T nor the government has made any statements confirming or denying AT&T's participation in the particular program alleged in this case.").

338. *Id.* at 902.

339. See Docket Sheet, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Jan. 30, 2006) [hereinafter *Hepting* N.D. Cal. Docket Sheet]; John Markoff, *AT&T Is Accused in Eavesdropping*, N.Y. TIMES, Feb. 1, 2006, at A20; see also Amended Complaint, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Feb. 22, 2006).

340. See Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, S.J. MERCURY NEWS, May 14, 2006, at A1; Justin Scheck, *NSA's Wiretaps Face Scrutiny in S.F. Courtroom*, S.F. RECORDER, Apr. 10, 2006, at 1.

In a public statement, Klein explained that while working at an AT&T office in San Francisco in 2002, “the site manager told me to expect a visit from a National Security Agency agent, who was to interview a management-level technician for a special job.” While touring the Folsom Street AT&T facility in January 2003, Klein “saw a new room being built adjacent to the 4ESS switch room where the public’s phone calls are routed” and “learned that the person whom the NSA interviewed for the secret job was the person working to install equipment in this room.” (citation omitted) (“The NSA agent came and met with [Field Support Specialist (FSS)] # 2. FSS # 1 later confirmed to me that FSS # 2 was working on the special job.”) (citation omitted); (“In the Fall of 2003, FSS # 1 told me that another NSA agent would again visit our office * * * to talk to FSS # 1 in order to get the latter’s evaluation of FSS # 3’s suitability to perform the special job that FSS # 2 had been doing. The NSA agent did come and speak to FSS # 1.”). Klein then learned about the AT&T documents in October 2003, after being transferred to the Folsom Street facility to oversee the Worldnet Internet room. One document described how “fiber optic cables from the secret room were tapping into the Worldnet circuits by splitting off a portion of the light signal.” The other two documents “instructed technicians on connecting some of the already in-service circuits to [a] ‘splitter’ cabinet, which diverts some of the light signal to the secret room.” Klein noted the secret room contained “a Narus STA 6400” and that “Narus STA technology is known to be used particularly by government intelligence agencies because of its ability to sift through large amounts of data looking for preprogrammed targets.” Klein also “learned that other such ‘splitter’ cabinets were being installed in other cities, including Seattle, San Jose, Los Angeles and San Diego.”³⁴¹

The court assigned the case to United States District Judge Vaughn R. Walker, the district’s chief judge.³⁴² The plaintiffs moved for a preliminary injunction on March 31.³⁴³ In support of their motion, the plaintiffs lodged with the court declarations by the technician and a telecommunications expert.³⁴⁴ Attached to the technician’s declarations were three documents that “allegedly demonstrate[d] how AT&T [had] implemented a warrantless surveillance system on behalf of the NSA at a San Francisco

341. *Hepting*, 439 F. Supp. 2d at 989.

342. *See* Reassignment Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Jan 31, 2006).

343. *See* Preliminary Injunction Motion, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Mar. 31, 2006).

344. *See* Klein Declaration, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Apr. 5, 2006); Marcus Declaration, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Mar. 29, 2006).

AT&T facility.”³⁴⁵ Plaintiffs lodged—rather than filed—the declarations to afford AT&T an opportunity to move for their sealing.³⁴⁶ AT&T responded by filing a sealed motion to recover the documents attached to its former employee’s declaration.³⁴⁷ Judge Walker ruled that the proprietary documents be protected by a protective order.³⁴⁸

On April 28, AT&T moved to dismiss the action,³⁴⁹ and the Government filed a statement that it intended to seek dismissal on state-secrets grounds.³⁵⁰ The Government filed its dismissal motion on May 13.³⁵¹ Once again, in addition to the publicly filed brief and declarations, the Government lodged more complete classified versions.³⁵²

Instead of reviewing the classified submissions, Judge Walker ordered the parties to brief him on whether the case could proceed without reviewing the documents.³⁵³ Judge Walker subsequently concluded that he had to review the classified submissions to determine the extent of the state-secrets privilege in the case.³⁵⁴ Judge Walker ordered the Government to provide him with the classified submissions for review by himself “and by any chambers personnel that he so authorizes.”³⁵⁵

The Government permitted only Judge Walker to review the classified submissions.³⁵⁶ The *New York Times* has reported that the President per-

345. *Hepting*, 439 F. Supp. 2d at 979.

346. See Motion to Lodge, *Hepting*, No. 3:06-cv-672 (N.D. Cal.) .

347. See *Hepting* N.D. Cal. Docket Sheet, *supra* note 339.

348. See Minute Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006) [hereinafter *Hepting* Minute Order]; see also *Hepting*, 439 F. Supp. 2d at 989 (“Although the government does not claim that the AT&T documents obtained by Mark Klein or the accompanying declarations contain classified information, those papers remain under seal because AT&T alleges that they contain proprietary and trade secret information.”).

349. AT&T Motion to Dismiss, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Apr. 28, 2006); *Hepting*, 439 F. Supp. 2d at 979.

350. See Government Statement of Interest, *Hepting*, No. 3:06-cv-672 (N.D. Cal. Apr. 28, 2006); John Markoff, *U.S. Steps into Wiretap Suit Against AT&T*, N.Y. TIMES, Apr. 29, 2006, at A9.

351. Government Motion to Dismiss, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); *Hepting*, 439 F. Supp. 2d at 979; Carey, *supra* note 340; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. TIMES, May 14, 2006, Main News, at 4.

352. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); *Hepting*, 439 F. Supp. 2d at 979; Carey, *supra* note 340; Bob Egelko, *U.S. Opens Assault on Wiretap Suit*, S.F. CHRON., May 16, 2006, at A1.

353. See *Hepting* Minute Order, *supra* note 348; *Hepting*, 439 F. Supp. 2d at 979.

354. Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 6, 2006) [hereinafter *Hepting* June 6, 2006 Order]; *Hepting*, 439 F. Supp. 2d at 979–80; Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. CHRON., June 8, 2006, News, at A4; Justin Scheck, *Walker Agrees to View Secret Wiretap Docs*, S.F. RECORDER, June 8, 2006, at 5.

355. *Hepting* June 6, 2006 Order, *supra* note 354, at 7.

356. See Interview with the Honorable Vaughn R. Walker, Judge, U.S. Dist. Court, N. Dist. Of Cal. (Feb. 15, 2007) [hereinafter Interview with the Honorable Vaughn R. Walker].

sonally decides who is cleared to receive protected information about the warrantless surveillance program.³⁵⁷ A Litigation Security Section specialist delivered the classified materials to Judge Walker's chambers for his private review.³⁵⁸ The security specialist removed the materials and Judge Walker's notes after the review.³⁵⁹

On July 20, Judge Walker denied the motions to dismiss.³⁶⁰ "Because of the public disclosures by the government and AT&T, the court cannot conclude that merely maintaining this action creates a 'reasonable danger' of harming national security."³⁶¹ Both the Government and AT&T sought interlocutory appeals, which the court of appeals granted.³⁶² The appeals were heard with the interlocutory appeal of Judge King's decision in the Portland case, and a decision is pending.³⁶³

Meanwhile, all pending civil actions related to the warrantless surveillance reported by the *New York Times* on December 16, 2005, and *USA Today* on May 11, 2006, were consolidated for pretrial purposes before Judge Walker by the Judicial Panel on Multidistrict Litigation.³⁶⁴ Four ac-

357. See Eric Lichtblau, *Wiretap Issue Leads Judge to Warn of Retrial in Terror Case*, N.Y. TIMES, Nov. 21, 2007, at A24.

358. See Interview with the Honorable Vaughn R. Walker, *supra* note 356.

359. See *id.*

360. See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); Bob Egelko, *Spying Suit Against AT&T Moves Forward*, S.F. CHRON., July 21, 2006, at B1; John Markoff, *Judge Declines to Dismiss Privacy Suit Against AT&T*, N.Y. TIMES, July 21, 2006, at A13; Joseph Menn, *U.S. Loses Bid to Dismiss AT&T Surveillance Suit*, L.A. TIMES, July 21, 2006, Main News, at 28; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, WASH. POST, July 21, 2006, at A9.

361. *Hepting*, 439 F. Supp. 2d at 994.

362. See Docket Sheet, *Hepting*, No. 06-80110 (9th Cir. Aug. 1, 2006) (petition by AT&T); Docket Sheet, *Hepting*, No. 06-80109 (9th Cir. Aug. 1, 2006) (petition by Government).

363. See Docket Sheet, *Hepting*, No. 06-17137 (9th Cir. Nov. 8, 2006) (appeal by Government); Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006) (appeal by AT&T); Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. TIMES, Aug. 16, 2007, at A13; Vick, *supra* note 309.

364. Conditional Transfer Order 6, *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007) (transferring one action against telephone company), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Apr. 17, 2007); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Feb. 15, 2007) (transferring actions by federal government against states), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007) (transferring actions by federal government against states); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006) (transferring three actions against government and one action against telephone companies), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006) (transferring three actions against Government and one action against telephone companies); Conditional Transfer Order 5, *In re NSA*, No. M:06-cv-1791 (transferring one action against telephone company); Conditional Transfer Order 2, *In re NSA*, No. 1791 (J.P.M.L. issued Sept. 11, 2006, final Sept. 27, 2006) (transferring one action against a telephone company), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 4, 2006) (transferring one action against telephone company); Conditional Transfer Order 1, *In re NSA*, No. 1791 (J.P.M.L. issued Aug. 31, 2006, final Sept. 18, 2006) (transferring one action against the government and 15 actions against telephone companies), filed in *In re NSA*, No.

tions against telephone companies filed in the Northern District of California had already been assigned to Judge Walker as related to the action against AT&T based on a former employee's information.³⁶⁵

On May 12, 2006, the day after the *USA Today* article appeared, six actions against telephone companies were filed elsewhere: the Southern District of California,³⁶⁶ the Eastern District of Louisiana,³⁶⁷ the District of Montana,³⁶⁸ the Southern District of New York,³⁶⁹ the District of Oregon³⁷⁰ and California Superior Court for the County of Fresno (that case was subsequently removed to the Eastern District of California).³⁷¹ Verizon was a defendant in all but the action in the Southern District of California. On May 24, Verizon filed a motion with the Judicial Panel on Multidistrict Litigation to consolidate for pretrial purposes all related actions against telephone companies, by which time Verizon had identified twenty as pending.³⁷²

On August 9, the panel granted Verizon's motion and selected Judge Walker's court as the transferee court, because that is where the first case against telephone companies was filed.³⁷³ The transfer included Judge

M:06-cv-1791 (N.D. Cal. Sept. 25, 2006) (transferring one action against Government and fifteen actions against telephone companies); Order, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 31, 2006) (consolidating for pretrial purposes all cases already before Judge Walker); *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial Aug. 9, 2006, transfer order transferring 17 actions against telephone companies, one transfer of which later was vacated because case already was dismissed); *see also* Docket Sheet, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006).

365. *See* Docket Sheet, *Spielfogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, *Campbell v. AT&T Commc'ns of Cal.*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); Docket Sheet, *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006); Docket Sheet, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

366. *See* Complaint, *Souder v. AT&T Corp.*, No. 3:06-cv-1058 (S.D. Cal. May 12, 2006).

367. *See* Complaint, *Herron v. Verizon Global Networks, Inc.*, No. 2:06-cv-2491 (E.D. La. May 12, 2006).

368. *See* Complaint, *Fuller v. Verizon Commc'ns, Inc.*, No. 9:06-cv-77 (D. Mont. May 12, 2006).

369. *See* Complaint, *Mayer v. Verizon Commc'ns Inc.*, No. 1:06-cv-3650 (S.D.N.Y. May 12, 2006).

370. *See* Amended Complaint, *Hines v. Verizon Northwest, Inc.*, No. 3:06-cv-694 (D. Or. June 2, 2006); Complaint, *Hines*, No. 3:06-cv-695 (D. Or. May 12, 2006).

371. *See* Complaint, *Conner v. AT&T*, No. 06 CE CG 01557 (Cal. Super. Ct. Fresno May 12, 2006); Notice of Removal, *Conner*, No. 1:06-cv-632 (E.D. Cal. May 23, 2006).

372. *See* Transfer Motion, *In re NSA Telecomm. Records Litig.*, No. 1791 (J.P.M.L. May 24, 2006); filed in *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 15, 2006); *see* Ashbel S. Green, *Feds Seek to Move NSA Suits to D.C.*, *THE OREGONIAN*, June 21, 2006, at A1 (reporting that Government joined Verizon's motion).

373. *See In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006); Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, *S.J. MERCURY NEWS*, Aug.

Kennelly's cases.³⁷⁴ The panel subsequently transferred to Judge Walker pending actions against the Government, including the action before Judge King in Portland,³⁷⁵ and actions related to the federal government's efforts to prevent state governments from investigating telephone companies' cooperation with warrantless surveillance.³⁷⁶ The action before Judge Taylor in Detroit was not transferred because Judge Taylor had already resolved the case when cases against the Government were transferred as tag-alongs to the original consolidation of cases against telephone companies. As of January 2008, the consolidation included forty-eight cases.³⁷⁷

11, 2006, at A12; Claire Cooper, *Court Panel Assigns Telecom Privacy Cases to S.F. Judge*, SACRAMENTO BEE, Aug. 11, 2006, at A4; *Spying Lawsuits Are Consolidated*, N.Y. TIMES, Aug. 11, 2006, at A13.

374. See *In re NSA Telecomm. Records Litig.*, 444 F. Supp. 2d at 1336.

375. See Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006), filed in *In re NSA Telecomm. Records Litig.*, No. M:06-cv-1791 (N.D. Cal. Dec. 19, 2006); Conditional Transfer Order 1, *In re NSA*, No. 1791 (J.P.M.L. issued Aug. 31, 2006, final Sept. 18, 2006), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Sept. 25, 2006).

376. See Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Feb. 15, 2007), filed in *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 21, 2007); see also Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, PORTLAND PRESS HERALD, Aug. 22, 2006, at A1 (reporting on effort to stop Maine's investigation); Judy Harrison, *Wiretaps Lawsuit Moved to California Judges Combine Maine Case, Others*, BANGOR DAILY NEWS, Feb. 17, 2007, at 1 (reporting on effort to stop investigations in Connecticut, Maine, Missouri, New Jersey, Vermont); Rick Hepp, *ACLU Petitions for Probe of Phone-Record Access*, NEWARK STAR-LEDGER, June 16, 2006, News, at 43 (reporting on effort to stop New Jersey's investigation); Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, K.C. DAILY RECORD, July 31, 2006 (reporting on effort to stop Missouri's investigation).

377. See Docket Sheet, *Jacobs v. AT&T Corp.*, No. 3:07-cv-2538 (N.D. Cal. May 14, 2007), originally filed as No. 0:07-cv-60365 (S.D. Fla. Mar. 14, 2007); Docket Sheet, *Mayer v. Verizon Commc'ns, Inc.*, No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007), originally filed as No. 1:06-cv-3650 (S.D.N.Y. May 12, 2006); Docket Sheet, *United States v. Volz*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007), originally filed as No. 2:06-cv-188 (D. Vt. Oct. 2, 2006); Docket Sheet, *United States v. Adams*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007), originally filed as No. 1:06-cv-97 (D. Me. Aug. 21, 2006); Docket Sheet, *United States v. Palermino*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007), originally filed as No. 3:06-cv-1405 (D. Conn. Sept. 6, 2006); Docket Sheet, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007), originally filed as *United States v. Farber*, No. 3:06-cv-2683 (D.N.J. June 14, 2006); Docket Sheet, *Roche v. AT&T Corp.*, No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007), originally filed as No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006); Docket Sheet, *United States v. Gaw*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007), originally filed as No. 4:06-cv-1132 (E.D. Mo. July 25, 2006); Docket Sheet, *Clayton v. AT&T Commc'ns of the Southwest Inc.*, No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007), originally filed as *Gaw v. AT&T Commc'ns of the Southwest Inc.*, No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006); Docket Sheet, *Ctr. for Constitutional Rights v. Bush*, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007), originally filed as No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *Shubert v. Bush*, No. 3:07-cv-693 (N.D. Cal. Feb. 2, 2007), originally filed as No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006); Docket Sheet, *Lebow v. BellSouth Corp.*, No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007), originally filed as No. 1:06-cv-1289 (N.D. Ga. May 25, 2006); Docket Sheet, *Al-Haramain Islamic Found. v. Bush*, No. 3:07-cv-109 (N.D. Cal. Jan. 9, 2007), originally filed as No. 3:06-cv-274 (D. Or. Feb. 28,

2006); Docket Sheet, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 3:06-cv-7934 (N.D. Cal. Dec. 29, 2006), *originally filed as* No. 4:06-cv-1113 (E.D. Mo. July 20, 2006); Docket Sheet, Hardy v. AT&T Corp., No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006), *originally filed as* No. 2:06-cv-2853 (E.D. La. May 30, 2006); Docket Sheet, Chulsky v. Celco P'ship, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006), *originally filed as* No. 2:06-cv-2530 (D.N.J. June 6, 2006); Docket Sheet, Payne v. Verizon Commc'ns, Inc., No. 3:06-cv-6435 (N.D. Cal. Oct. 16, 2006), *originally filed as* No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006); Docket Sheet, Basinski v. Verizon Commc'ns Inc., No. 3:06-cv-6434 (N.D. Cal. Oct. 16, 2006), *originally filed as* No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006); Docket Sheet, Dubois v. AT&T Corp., No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006), *originally filed as* No. 5:06-cv-85 (W.D. Mich. June 12, 2006); Docket Sheet, Fortnash v. AT&T Corp., No. 3:06-cv-6385 (N.D. Cal. Oct. 12, 2006), *originally filed as* No. 0:06-cv-60828 (S.D. Fla. June 12, 2006); Docket Sheet, Solomon v. Verizon Commc'ns, Inc., No. 3:06-cv-6388 (N.D. Cal. Oct. 12, 2006), *originally filed as* No. 2:06-cv-2193 (E.D. Pa. May 24, 2006); Docket Sheet, Bready v. Verizon Md. Inc., No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006), *originally filed as* No. 1:06-cv-2185 (D. Md. Aug. 23, 2006); Docket Sheet, Suchanek v. Sprint Nextel Corp., No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006), *originally filed as* No. 1:06-cv-71 (W.D. Ky. May 18, 2006); Docket Sheet, Waxman v. AT&T Corp., No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006), *originally filed as* No. 1:06-cv-2900 (N.D. Ill. May 24, 2006); Docket Sheet, Crockett v. Verizon Wireless LLC, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006), *originally filed as* No. 1:06-cv-345 (D. Haw. June 26, 2006); Docket Sheet, Derosier v. Cingular Wireless LLC, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006), *originally filed as* No. 2:06-cv-917 (W.D. Wash. June 28, 2006); Docket Sheet, Cross v. AT&T Commc'ns, Inc., No. 3:06-cv-6224 (N.D. Cal. Oct. 3, 2006), *originally filed as* No. 1:06-cv-932 (S.D. Ind. June 14, 2006); Docket Sheet, Guzzi v. Bush, No. 3:06-cv-6225 (N.D. Cal. Oct. 3, 2006), *originally filed as* No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006); Docket Sheet, Cross v. AT&T Commc'ns, Inc., No. 3:06-cv-6222 (N.D. Cal. Oct. 3, 2006), *originally filed as* No. 1:06-cv-847 (S.D. Ind. May 25, 2006); Docket Sheet, Conner v. AT&T, No. 3:06-cv-5576 (N.D. Cal. Sept. 12, 2006), *originally filed as* No. 1:06-cv-632 (E.D. Cal. May 23, 2006); Docket Sheet, Joll v. AT&T Corp., No. 3:06-cv-5485 (N.D. Cal. Sept. 7, 2006), *originally filed as* Schwarz v. AT&T Corp., No. 1:06-cv-2680 (N.D. Ill. May 15, 2006); Docket Sheet, Harrington v. AT&T, Inc., No. 3:06-cv-5452 (N.D. Cal. Sept. 6, 2006), *originally filed as* No. 1:06-cv-374 (W.D. Tex. May 18, 2006); Docket Sheet, Herron v. Verizon Global Networks, Inc., No. 3:06-cv-5343 (N.D. Cal. Aug. 30, 2006), *originally filed as* No. 2:06-cv-2491 (E.D. La. May 12, 2006); Docket Sheet, Hines v. Verizon Northwest, Inc., No. 3:06-cv-5341 (N.D. Cal. Aug. 30, 2006), *originally filed as* No. 3:06-cv-694 (D. Or. May 12, 2006); Docket Sheet, Terkel v. AT&T Corp., No. 3:06-cv-5340 (N.D. Cal. Aug. 30, 2006), *originally filed as* No. 1:06-cv-2837 (N.D. Ill. May 22, 2006); Docket Sheet, Dolberg v. AT&T Corp., No. 3:06-cv-5269 (N.D. Cal. Aug. 28, 2006), *originally filed as* No. 9:06-cv-78 (D. Mont. May 15, 2006); Docket Sheet, Fuller v. Verizon Commc'ns, Inc., No. 3:06-cv-5267 (N.D. Cal. Aug. 28, 2006), *originally filed as* No. 9:06-cv-77 (D. Mont. May 12, 2006); Docket Sheet, Trevino v. AT&T Corp., No. 3:06-cv-5268 (N.D. Cal. Aug. 28, 2006), *originally filed as* No. 2:06-cv-209 (S.D. Tex. May 17, 2006); Docket Sheet, Bissitt v. Verizon Commc'ns, Inc., No. 3:06-cv-5066 (N.D. Cal. Aug. 22, 2006), *originally filed as* No. 1:06-cv-220 (D.R.I. May 15, 2006); Docket Sheet, Mahoney v. AT&T Commc'ns, Inc., No. 3:06-cv-5065 (N.D. Cal. Aug. 22, 2006), *originally filed as* No. 1:06-cv-223 (D.R.I. May 15, 2006); Docket Sheet, Mahoney v. Verizon Commc'ns, Inc., No. 3:06-cv-5064 (N.D. Cal. Aug. 22, 2006), *originally filed as* No. 1:06-cv-224 (D.R.I. May 15, 2006); Docket Sheet, Marck v. Verizon Commc'ns, Inc., No. 3:06-cv-5063 (N.D. Cal. Aug. 22, 2006), *originally filed as* No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006); Docket Sheet, Souder v. AT&T Corp., No. 3:06-cv-5067 (N.D. Cal. Aug. 22, 2006), *originally filed as* No. 3:06-cv-1058 (S.D. Cal. May 12, 2006); Docket Sheet, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006); Docket Sheet, Spielfogel-Landis v. MCI, LLC, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, Campbell v. AT&T Commc'ns of Cal., No. 3:06-cv-3596 (N.D.

Since his denial of the Government's state-secrets motion, the Government has lodged classified information requests for Judge Walker's benefit nine times.³⁷⁸ On at least one occasion, Judge Walker reviewed a classified submission in Washington, D.C., while he was there for a meeting of chief district judges.³⁷⁹

III. CONCLUSION

The foregoing are illustrative accounts of how federal judges have been protecting the secrecy of classified information in the public litigation of criminal and civil cases. The accounts demonstrate a very serious effort by the judges to balance the government's need to keep secrets with the parties' and the public's need to know how cases are resolved.

Cal. June 6, 2006); Docket Sheet, *Riordan v. Verizon Commc'ns, Inc.*, No. 3:06-cv-3574 (N.D. Cal. June 5, 2006); Docket Sheet, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006); *Hepting* N.D. Cal. Docket Sheet, *supra* note 339.

378. See Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Oct. 25, 2007); Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. June 8, 2007); Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. May 25, 2007); Notices of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 21, 2007); Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Apr. 9, 2007); Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Mar. 13, 2007); Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Feb. 22, 2007); Notice of Lodging, *In re NSA*, No. M:06-cv-1791 (N.D. Cal. Jan. 13, 2007); Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

379. See Interview with Staff, Dep't of Justice Litig. Sec. Section (Apr. 24, 2007); see also *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006) (noting that Judge Walker would be willing to review classified submissions while in Washington, D.C. for other reasons).