Terrorism-Related Cases: Special Case-Management Challenges

Problems and Solutions

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Introduction

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

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

Challenges and their solutions are summarized in this "Problems and Solutions" document. A separate "Case Studies" document includes background factual information about the cases. The information presented is based on a review of case files and news media accounts and on interviews with the judges.

Attorney–Client Contacts

Pretrial detention restrictions on defendants deemed very dangerous often impair the defendants' contacts with their attorneys.

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

Because the defendants were regarded as very dangerous, while they were detained pending trial they were cut off from virtually all communications. They were permitted to meet with their attorneys, but the attorneys were prohibited from sharing anything said in the meetings with investigators or experts, which seriously hampered the preparation of a defense. Attorney–client communications also were impaired by the fact that defense counsel could not discuss classified evidence with their clients because the defendants did not have security clearances.

Solutions

1. Judge Sand ruled that prohibiting defense counsel from discussing classified evidence with defendants did not violate the defendants' Sixth Amendment rights.

   Opinion: United States v. Bin Laden, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001).
2. In response to complaints by defense attorneys, Judge Sand visited the jail and approved the detention conditions, except that he ordered that the defendants be permitted to call their families three times a month instead of once.

   Appellate Opinion Affirming Judge Sand's Approving Conditions of Confinement: United States v. El-Hage, 213 F.3d 74, 77 (2d Cir. 2000).

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Cabinet Officer Considerations

Whether they are a party or a potential witness, members of the President's cabinet often require special consideration.

Sanctioning a Cabinet Officer

Imposing sanctions on top government officials requires special care, and perhaps unusual procedures.

Case: Overturned Convictions in Detroit

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

Because the prosecutor withheld from the defendants great quantities of exculpatory and impeaching evidence, convictions were dismissed in the first federal terrorism prosecution since the September 11, 2001, attacks. In addition to remedying prosecutorial misconduct, the judge had to remedy the Attorney General's violation of a stipulated gag order.

Problem

The U.S. Attorney General violated a stipulated gag order by (1) incorrectly stating at a press conference that the defendants in the case were suspects in the September 11, 2001, attacks, and (2) commenting favorably on a cooperating witness's testimony during trial at another press conference.

Solution

The court responded to a motion for contempt by (1) holding the motion in abeyance until after the trial was over and (2) issuing after the trial was over an order to show cause why the Attorney General should not provide testimony in his defense. The Attorney General submitted a letter of apology expressing regret for the violation of the order and stating that the error was inadvertent.

Judge Rosen decided against civil contempt, because the trial was over, and against criminal contempt, because the transgression was inadvertent. Judge Rosen did, however, issue "a public and formal judicial admonishment of the Attorney General."

Attorney General Sanction: United States v. Koubriti, 305 F. Supp. 2d 723 (E.D. Mich. 2003).

Docket

United States v. Koubriti, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001).

Subpoenaing a Cabinet Officer

Sometimes parties try to prove their cases by seeking to compel testimony from very important persons.

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

Al-'Owhali's attorneys wanted to question Secretary of State Madeleine Albright about harms to citizens of other countries resulting from United States policies.

Solutions

1. Judge Sand agreed to sign a subpoena for testimony from Secretary Albright, but on the government's motion he quashed it.
2. Al-'Owhali presented at trial as a substitute for Secretary Albright's live testimony a *60 Minutes* interview with her. And al-'Owhali presented similar evidence through a willing witness, former Attorney General Ramsey Clark.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: Giving State Secrets to Lobbyists

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

Pending is a prosecution of two former employees of the American Israel Public Affairs Committee for conspiracy to give national defense information to persons not authorized to receive it.

Problem

The defendants requested that subpoenas be issued to 20 current and former high-ranking government officials, including Secretary of State Condolezza Rice, because of her former position as National Security Advisor. Judge Ellis sealed specific reasons for his ruling on each requested subpoena.

Solution

Judge Ellis overruled the government's objection as to Secretary Rice and several others.

Subpoena Opinion: United States v. Rosen, 502 F. Supp. 2d 802 (E.D. Va. 2007).

Docket

United States v. Franklin, No. 1:05-cr-225 (E.D. Va. May 26, 2005).

Foreign Evidence

Cases related to terrorism often involve foreign evidence.

Examination of Foreign Witnesses

Examination of witnesses unable to travel to the courthouse may be done by a two-way video link with attorneys for both sides in both locations.

Case: A Plot to Kill President Bush

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

Ahmed Omar Abu Ali was convicted on November 22, 2005, of plotting to kill President George W. Bush and aiding al-Qaeda. The defendant was originally arrested in Saudi Arabia. Pending is an appeal of the district court's determination that his confession was not coerced by torture.

Problem

To decide whether Abu Ali's confession should be suppressed as coerced by torture, the court needed testimony from the defendant's Saudi Arabian prison guards. However, the identities of prison guards in Saudi Arabia are classified, so the Saudi Arabian government would not permit the guards to come to the United States to testify.

Solution

The court arranged for video depositions of the prison guards. The judge, the defendant, attorneys for both sides, and the court reporter were in Virginia and connected by live video feed to the witnesses, additional attorneys for both sides, an interpreter, and a camera operator in Saudi Arabia. The image was constructed as a split screen with the defendant on one side and the witness on the other, so that the defendant could see the witness and the witness could see the defendant.

The video depositions were logistically and technically difficult for several reasons: (1) the time-zone difference between Virginia and Saudi Arabia, (2) the difficulty of maintaining a secure communication line, (3) the impact of Saudi Arabia's heat on the equipment, and (4) the court's not sending enough interpreters to provide for rest breaks.

Opinion and Order: United States v. Abu Ali, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005); Order at 2, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005).

Docket

United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005).

Foreign Government Evidence

Evidence from foreign witnesses can be obtained using letters rogatory.

Case: **Hamas Funding**

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of obstructing justice and convicted Ashqar of criminal contempt as well. Salah argued that a confession was obtained through torture by Israeli secret police officers.

Problem

Salah sought to discover Israeli police documents to support his torture claim.

Solution

Judge St. Eve suggested that Salah follow rogatory letter procedures, but Salah ultimately relied on testimony from police officers, whom the Israeli government permitted to testify.

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Information Protection

Although court proceedings are presumptively open, courts often maintain private information under seal. But protecting classified information often requires even greater information-security measures.

Classified Arguments

The presentation of classified arguments to judges often requires extraordinary security measures that may prohibit even secured law clerks from seeing the arguments. Sometimes, however, merely keeping classified documents in a safe will suffice.

Case: Twentieth Hijacker

United States v. Moussaoui (William W. Wilkins, Karen J. Williams, and Roger L. Gregory, 4th Cir., and Leonie M. Brinkema, E.D. Va.)

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending.

Problems

1. For a substantial portion of the case, the defendant appeared pro se. He did not have a security clearance, but his standby counsel did. The court needed to ensure that the defendant and standby counsel did not put classified information into the public record.
2. The court of appeals had very little experience with classified information in its case records, but it knew that Moussaoui's prosecution involved a considerable amount of classified information and an appeal would likely eventually be filed.

Solutions

1. The defendant and standby counsel filed documents with the court security officer instead of with the court.
    a. For documents filed by defense counsel, within 48 hours the security officer identified any classified information that had to be redacted from the public record. Only redacted filings were shared with the defendant.
    b. The pro se defendant submitted filings to the jail, which forwarded them to the court security officer for classification review before public filing.
    c. The government was responsible for classification reviews of its fillings.
2. The court of appeals' clerk's office created a Sensitive Compartmented Information Facility (SCIF) to store classified documents, and several of its staff members sought security clearances.
    a. The court's judges meet in Richmond at least six times per year; while in Richmond, cleared clerk's office staff members could provide the judges with classified documents stored in the court's SCIF.

b. Judge Gregory's chambers are in Richmond, so cleared clerk's office staff members can bring him classified documents from the SCIF at any time. Judge Wilkins chambers are in Greenville, South Carolina, where there is a SCIF. Judge Williams chambers are in Orangeburg, South Carolina, which is approximately 50 miles outside of Columbia; either court security officers bring classified documents to her in Orangeburg or she travels to Columbia, where there is a SCIF.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

Case: Mistaken Rendition

El-Masri v. Tenet (Robert B. King, Dennis W. Shedd, and Allyson K. Duncan, 4th Cir., and T.S. Ellis III, E.D. Va.)

A German citizen filed a civil lawsuit claiming that the CIA abducted him on New Year's Eve, 2003, while he was on vacation in Macedonia, and imprisoned him for five months as part of its extraordinary rendition program before abandoning him in Albania after realizing that it had apprehended the wrong person. On March 2, 2007, the court of appeals affirmed Judge Ellis's dismissal of the suit as precluded by the state-secrets privilege.

Problem

The government supported its invocation of the state-secrets privilege with classified submissions.

Solutions

1. The classified submissions were delivered to District Judge Ellis by a court security officer, who took responsibility for their storage when the judge was not privately reviewing them. Even Judge Ellis's law clerk, who had a top-secret security clearance, was not permitted to see the submissions.

   Opinion: El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).
2. A deputy clerk for the court of appeals, who was cleared to handle Sensitive Compartmented Information, a security clearance above top secret, brought the classified submissions to the circuit judges in their Richmond chambers in advance of oral argument. The submissions were otherwise stored in the court of appeals' Sensitive Compartmented Information Facility (SCIF) in Richmond, Virginia.

   Opinion: El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

Dockets

El-Masri v. Tenet, No. 06-1667 (4th Cir. June 14, 2006); El-Masri v. Tenet, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005).

Case: Hamas Funding

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of

obstructing justice and convicted Ashqar of criminal contempt as well. Salah argued that a confession was obtained through torture by Israeli secret police officers.

Problem

The government moved for secrecy in the taking of testimony from the secret police officers. To support its motion, the government presented a classified affidavit from the FBI's Assistant Director for Counterintelligence.

Solution

Judge St. Eve stored the affidavit in a safe kept in her chambers.

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Case: Warrantless Wiretaps

Hepting v. AT&T and In re NSA Telecommunication Records Litigation (Vaughn R. Walker, N.D. Cal.), ACLU v. NSA (Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons, 6th Cir., and Anna Diggs Taylor, E.D. Mich.), Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.), Terkel v. AT&T (Matthew F. Kennelly, N.D. Ill), and Center for Constitutional Rights v. Bush (Gerard E. Lynch, S.D.N.Y.)

Lawsuits challenging warrantless surveillance of international communications between persons in the United States and persons suspected of having ties to terrorists were filed against the government and telephone companies in several U.S. district courts beginning in January 2007. Most of these actions were consolidated before Judge Walker in the Northern District of California.

Problem

The government argued that the state-secrets privilege bars these actions and has presented to the courts briefs and declarations that are so classified only judges may see them. Neither the plaintiffs nor the judges' law clerks are permitted to see them.

Solutions

1. The government presented classified arguments to judges in four different districts in slightly different ways.
    a. In an action before Judge King in Portland, Oregon, the government deposited classified briefs and declarations in a locked bag in a Sensitive Compartmented Information Facility (SCIF) maintained by the FBI in Portland. Only Judge King and a government security officer—not the FBI, who is a defendant in the action—have a key to the locked bag. Whenever Judge King needed to review the contents of the bag, an agent brought the bag to his chambers and Judge King reviewed the contents in private. The agent returned the bag to the SCIF when the judge completed his review.
    b. In an action before Judge Taylor in Detroit, Michigan, the government stored the classified briefs and declarations in Washington, D.C. Whenever Judge Taylor needed to review the classified documents, a security

officer brought them to her chambers and she reviewed them in her office under the watch of the security officer without anyone else present. The security officer said that any notes Judge Taylor took would have to go back with the security officer, so the judge took no notes.

c. In an action before Judge Kennelly in Chicago, Illinois, a security officer brought Judge Kennelly classified briefs and declarations from Washington, D.C. Judge Kennelly reviewed the documents privately while the security officer waited outside his office. After the judge reviewed the documents, they were stored in the U.S. Attorney's SCIF in the same building. Whenever Judge Kennelly needed to review the documents or his notes, a security officer for the U.S. Attorney brought them to his chambers. Once, on a weekend, the judge was required to review the documents in the U.S. Attorney's SCIF. To ask the government followup questions, on one occasion a secure closed ex parte hearing was held in the judge's chambers, and on another occasion the judge made a secure telephone call from the U.S. Attorney's SCIF.

   Opinion Describing Review of Documents: Terkel v. AT&T, 441 F. Supp. 2d 899, 902 & n.2 (N.D. Ill. 2006).

d. In actions before Judge Walker in San Francisco, California, the usual procedure for Judge Walker's review of classified briefs and declarations was for a security officer to bring them to his chambers and for him to review the classified materials in private while the security officer waited outside his office. Judge Walker took some notes, which the security officer took back with the classified briefing materials. On one occasion, perhaps because of time constraints, instead of bringing classified materials to Judge Walker, an agent took Judge Walker to a secure location, where the judge received a secure fax of classified briefing materials. After reviewing the classified materials at the secure location, Judge Walker shredded the materials and returned to his chambers. On another occasion, Judge Walker reviewed classified information in Washington, D.C., where the materials were lodged, while he was in Washington on other court-related business.

   Two of Judge Walker's law clerks are in the process of obtaining security clearances, but the government has told Judge Walker that there are some materials in this litigation that are so secret even law clerks with security clearances will not be permitted to see them.

2. The government presented classified arguments to an appellate panel on four occasions in advance of the appeal's decision.

   a. Security officers brought to each judge's chambers unredacted and classified versions of the government's briefs and additional materials concerning intervening events. The judges reviewed the documents privately in chambers. On the day of the hearing and twice thereafter, security officers delivered to the judges for private review additional submissions.

b. To help segregate the influence of classified information on their consideration of the appeal, the judges reviewed all of the public portions of the briefs and record before reviewing classified portions.
c. Because review of classified information in an appeal was so unusual, the judges met with counsel for both sides to discuss in advance how the judges would review the classified information. A transcript of the meeting was sealed.

3. Judges employed at least two different methods of ensuring they would not leak classified information during a public hearing.
   a. In the action before Judge Kennelly, the judge carefully prepared in advance the questions he would ask at the hearing. When the government's attorney thought that Judge Kennelly was about to inadvertently reveal classified information, the attorney instructed the judge not to.
   b. In an action before Judge Lynch in Manhattan, the judge decided not to review the classified documents lodged in support of the government's motion to dismiss until after the hearing on the motion. The case was included in a multidistrict consolidation before Judge Lynch ruled on the motion, and he never did review the classified documents.

Dockets

ACLU v. NSA, Nos. 06-2095 & 06-2140 (6th Cir. Aug. 17 & 30, 2006); ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); *In re* NSA Telecommunications Records Litigation, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006); Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006); Al-Haramain Islamic Foundation v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006); Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006); Center for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006).

Classified Evidence

Classified evidence often must be stored in a Sensitive Compartmented Information Facility (SCIF). Courts must be sure that classified evidence is seen only by persons cleared to see it.

Case: First World Trade Center Bombing

United States v. Abdel Rahman (Michael B. Mukasey, S.D.N.Y.)

On October 1, 1995, a jury convicted Sheik Omar Abdel Rahman, Sayyid Nosair, Ibrahim El-Gabrowny, Clement Hampton-El, Amir and Fadil Abdelgani, Fares Khallafalla, Tarig Elhassan, Mohammed Saleh, and Victor Alvarez of seditious conspiracy to conduct a campaign of urban terrorism, including participation in the 1993 bombing of the World Trade Center; the murder of Rabbi Meir Kahane, a "militant Zionist" and former member of the Israeli parliament; a plot to assassinate President Mubarak of Egypt; and plans to bomb New York landmarks. Judge Mukasey sentenced each of the defendants to terms ranging from 25 years to life.

Problem

Pursuant to the Classified Information Procedures Act (CIPA), the government presented ex parte to Judge Mukasey six classified exhibits for the judge to decide which, if any, had to be produced to the defendants.

Solution

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

Classified Information Production Order: United States v. Rahman, 870 F. Supp. 47 (S.D.N.Y. 1994).

Docket

United States v. Abdel Rahman, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993).

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

In order to have access to classified evidence, defense counsel had to have security clearances. Initially the attorneys objected to their adversaries' invading their privacy with background checks, but the government assured the attorneys and the court that background information would not be shared with prosecutors in the case.

Solutions

1. Judge Sand ruled that a security clearance requirement did not violate the defendants' Sixth Amendment right to counsel.

   Security Clearance Rulings: United States v. Bin Laden, 58 F. Supp. 2d 113 (S.D.N.Y. 1999) (holding that security clearances would not violate the Sixth Amendment); United States v. Bin Laden, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001) (holding Classified Information Procedures Act constitutional).
2. Judge Sand's law clerks had security clearances.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: A Would-Be Spy

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

On February 20, 2003, a jury convicted Brian Patrick Regan of trying to sell secrets to Iraq and China. Regan agreed to a life sentence in exchange for the gov-

ernment's not prosecuting his wife and allowing her to keep part of his military pension.

Problems

1. The case involved classified evidence.
2. It was necessary to investigate whether the defendant was improperly exploiting his access to a court computer to prepare coded messages to his wife.

Solutions

1. The defendant and his attorneys were given access to classified information and a computer in the courthouse's Sensitive Compartmented Information Facility (SCIF) for defendants. (The court maintains a separate SCIF for the government.) Defense experts were required to obtain security clearances to examine classified documents. Judge Lee requires all of his law clerks to obtain security clearances because classified materials frequently appear in cases in his district, which includes the Pentagon and the Central Intelligence Agency.
2. The government sought permission to search the defendant's SCIF computer to see if he used it to prepare letters to his wife and children and a page of code that appeared to concern the locations of classified documents the defendant had planned to sell to foreign governments. To protect the attorney–client privilege and defense counsel's work product, the court ordered that the search not be conducted by the government, but by a court-selected neutral computer expert with proper security clearances under the supervision of a magistrate judge. At the conclusion of the trial, the government could seek permission to conduct an additional search.

   Search Procedures Order: United States v. Regan, 281 F. Supp. 2d 795 (E.D. Va. 2002).

Docket

United States v. Regan, No. 1:01-cr-405 (E.D. Va. Oct. 23, 2001).

Case: Overturned Convictions in Detroit

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

Because the prosecutor withheld from the defendants great quantities of exculpatory and impeaching evidence, convictions were dismissed in the first federal terrorism prosecution since the September 11, 2001, attacks.

Problem

In order to determine whether the prosecution's withholding of evidence was unconstitutional, the judge had to review all of the prosecution's evidence, much of which was classified, and some of which was so sensitive that it could not be moved from CIA headquarters.

Solutions

1. Judge Rosen negotiated with the CIA's general counsel for a protocol that allowed Judge Rosen to review the CIA's evidence at CIA headquarters.

2. The court worked with security officers for the Justice Department to create a Sensitive Compartmented Information Facility (SCIF) in the courthouse.
3. All of the judge's staff—his law clerks, secretary, court reporter, and courtroom deputy—obtained security clearances. Defense counsel also obtained security clearances.

Docket

United States v. Koubriti, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001).

Case: Twentieth Hijacker

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

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending.

Problems

1. The prosecution was based, in part, on classified information.
2. Classified information was inadvertently produced to the defendant, who did not have a security clearance, during a period in which he was acting pro se.

Solutions

1. Classified materials require extraordinary procedures.
    a. Judge Brinkema tries to keep procedures as normal as possible.
    b. Judge Brinkema issued a protective order that provided that access to classified information by standby defense counsel would require appropriate security clearances and the signing of a memorandum of understanding requiring that classified secrets be kept secret forever. The defendant was not granted access to classified information.

        Protective Documents: Protective Order & Mem. of Understanding, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002).
    c. Judge Brinkema requires all of her law clerks and other staff members to qualify for top-secret security clearances.
2. To preserve the confidentiality of the pro se defendant's work product, Judge Brinkema permitted the Marshal's Service, but not the FBI, to search the defendant's cell for the inadvertently produced documents.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

Case: American Taliban

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

An American citizen pleaded guilty to fighting in the fall of 2001 for the Taliban and was sentenced to 20 years in prison.

Problem

In order to determine what evidence the government had to produce to the defendant, Judge Ellis had to review a substantial amount of classified material.

Solutions

1. The classified material was stored in the court's Sensitive Compartmented Information Facility (SCIF).
2. Judge Ellis's career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.
3. The chambers has a rule requiring classified documents to be within eyesight at all times. Classified materials are *never* taken home.

Docket

United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002).

Case: Lackawanna Terrorists

United States v. Goba (H. Kenneth Schroeder, Jr., W.D.N.Y.)

Six American citizens of Lackawanna, New York, pleaded guilty in 2003 to attending a terrorist training camp in 2001.

Problem

It was contemplated that the detention hearing, which was presided over by a magistrate judge, might involve classified evidence, but magistrate judges are not automatically cleared to see classified information as Article III judges are.

Solution

Court security officers discreetly coordinated a background check on Magistrate Judge Schroeder.

Docket

United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Oct. 21, 2002).

Case: A Plot to Kill President Bush

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

Ahmed Omar Abu Ali was convicted on November 22, 2005, of plotting to kill President George W. Bush and aiding al-Qaeda. Pending is an appeal of the district court's determination that his confession was not coerced by torture.

Problem

The case involved classified evidence.

Solutions

One of the defendant's attorneys, but not the defendant, was given access to classified information and a computer in the courthouse's Sensitive Compartmented Information Facility (SCIF) for defendants. (The court maintains a separate SCIF for the government.) The defendant's first attorney was denied a security clearance, so he hired an attorney who already had one. Judge Lee requires all of his law clerks to obtain security clearances because classified materials frequently

appear in cases in his district, which includes the Pentagon and the Central Intelligence Agency.

Docket

United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005).

Case: Hamas Funding

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of obstructing justice and convicted Ashqar of criminal contempt as well. Salah argued that a confession was obtained through torture by Israeli secret police officers.

Problem

1. The case involved a substantial amount of classified evidence.
2. Defense counsel elected not to seek security clearances.
3. Pursuant to the Classified Information Procedures Act (CIPA), the government submitted five admissions in lieu of classified evidence.

Solutions

1. Classified documents were stored in a safe in Judge St. Eve's chambers, to which only the judge and a cleared court reporter had the combination. For hearings concerning classified documents, the court reporter used a laptop provided by the government, which was also stored in the safe. Marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.

   Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances. But the clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law-clerk assistance.
2. Judge St. Eve resolved evidentiary issues by holding ex parte conferences with defense counsel to determine their defense needs and ex parte conferences with government counsel to determine what classified information the government held.
3. 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.

   Evidence Substitution Jury Instruction: United States v. Salah, 462 F. Supp. 2d 915, 924 (N.D. Ill. 2006).

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Case: Giving State Secrets to Lobbyists

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

Pending is a prosecution of two former employees of the American Israel Public Affairs Committee for conspiracy to give national defense information to persons not authorized to receive it.

Problem

Prosecution of this case involves a large amount of classified information.

Solution

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the "silent witness rule." The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public. The identities of persons and countries, for example, are withheld by referring to them by codes known only to the judge, the jury, the parties, and the witness, such as "person 1" or "country A." Judge Ellis sealed a more specific order stating how the silent witness rule would be applied.

Silent Witness Rule Opinion: United States v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007).

Docket

United States v. Franklin, No. 1:05-cr-225 (E.D. Va. May 26, 2005).

Case: Lodi Terrorists

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

A father and his son were prosecuted for the son's having attended a terrorist training camp and their both having lied about it. The son was convicted on April 25, 2006, and his sentencing is pending. The father's jury failed to reach a verdict, and the father pleaded guilty on May 31, 2006, to unrelated charges to avoid further prosecution.

Problem

The admissibility foundation for some government evidence was classified, but the defendants' attorneys did not want to undergo the process of obtaining security clearances.

Solution

The defendants stipulated to the admissibility of the evidence, but Judge Burrell (1) strove to ensure that the stipulation was knowing and voluntary, and (2) prepared to appoint counsel who already had security clearances to assist in the defense if necessary.

Docket

United States v. Hayat, No. 2:05-cr-240 (E.D. Cal. Feb. 1, 2006).

Case: Warrantless Wiretaps

Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.)

Attorneys who represented an Islamic charity in an asset-freezing proceeding filed a challenge in the District of Oregon on February 28, 2006, to the United States' program of warrantless monitoring of international communications between persons in the United States and persons suspected of having ties to terrorists. The suit was based on inadvertently produced classified records of the monitoring of the attorneys' communications.

Problems

1. The plaintiffs attempted to file a copy of the classified evidence under seal, but the government determined that the document required more security than would be provided by a sealed court document—it had to be stored in a Sensitive Compartmented Information Facility (SCIF), and all other copies of the document had to be destroyed or returned to the government.
2. The only SCIFs in the region were a SCIF maintained by the FBI in Portland and a SCIF maintained by the U.S. Attorney's Office in Seattle, but because the FBI was a defendant in the action, the plaintiffs objected to the document's being stored in the local FBI SCIF.
3. The contents of the document are highly classified, and neither plaintiffs nor their attorneys are permitted to have access to the document.
4. Even recollections of the document's contents by the plaintiffs or their attorneys are highly classified, and the government will not disclose even to the judge which government attorneys are cleared to read them.

Solutions

1. The only copy of the document delivered to the court was delivered to the chambers of Judge King in a sealed envelope, and no one at the court saw the document before a government security officer examined it and determined it to be highly classified.
2. Initially the document was transported to the Western District of Washington's U.S. Attorney's SCIF in Seattle until a procedure for storing the document in Portland could be worked out. Ultimately it was decided that the document would be stored in a locked bag at the FBI's SCIF in Portland, and only Judge King and a government security officer—not the FBI—would have keys to the bag. Whenever Judge King needed to see anything in the bag, which also was used to store classified briefing materials, an agent would bring the bag to Judge King's chambers, Judge King would review the contents of the bag in private, and the agent would return the locked bag to the FBI's SCIF in Portland.
3. Judge King authorized the plaintiffs to lodge declarations of their memories of the contents of the classified document.
4. The government provided the court and the attorneys with a secure fax number to which any descriptions of the contents of the classified document could be faxed. The government would ensure that only persons cleared with respect to the contents of the document would receive any faxes at that number.

Opinion: Al-Haramain Islamic Foundation v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006).

Docket

Al-Haramain Islamic Foundation v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006).

Classified Orders and Opinions

The hallmark of the judicial branch is its publicly reasoned resolutions of cases. But sometimes dispositions of motions or cases require references to classified information, which cannot be public.

Case: Hamas Funding

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of obstructing justice and convicted Ashqar of criminal contempt as well. Salah argued that a confession was obtained through torture by Israeli secret police officers.

Problem

Judge St. Eve's opinion denying Salah's motion to suppress his Israeli confession discusses some classified information.

Solution

The 138-page public opinion occupies 70 pages of the *Federal Supplement*. Nineteen portions of the opinion are redacted. The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.

Opinion: United States v. Marzook, 435 F. Supp. 2d 778, 708–77 (N.D. Ill. 2006).

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Case: Warrantless Wiretaps

Terkel v. AT&T (Matthew F. Kennelly, N.D. Ill)

Plaintiffs sued a telephone company for its assistance to the government in warrantless surveillance of international communications between persons in the United States and persons suspected of having ties to terrorists. Judge Kennelly granted the government's motion to dismiss the action on state-secrets grounds, but gave the plaintiffs leave to amend the complaint, which they did. The action subsequently was transferred to the Northern District of California as part of multidistrict consolidation.

Problem

Judge Kennelly wished to comment on material presented in the government's classified ex parte submissions.

Solution

Judge Kennelly issued a classified opinion.

1. The government required Judge Kennelly to compose the opinion on a "clean" laptop computer provided by the court security officer and stored in the U.S. Attorney's Sensitive Compartmented Information Facility (SCIF) when Judge Kennelly was not using it.
2. As Judge Kennelly was preparing the classified opinion, he had additional questions for the government, which he was permitted to ask on a "secured telephone unit" in the U.S. Attorney's SCIF.
3. Judge Kennelly filed the opinion with the court security officer.

Public Opinion Describing Classified Opinion: Terkel v. AT&T, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

Docket

Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006).

Closed Proceedings

Closed proceedings in district courts are not common, but they do occur, especially in cases involving classified information. Closed proceedings in appellate courts are more rare.

Case: Twentieth Hijacker

United States v. Moussaoui (William W. Wilkins, Karen J. Williams, and Roger L. Gregory, 4th Cir.)

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending. Earlier the court of appeals heard interlocutory appeals of the district judge's order that a witness be produced for examination by the defendant and a sanction for the government's refusal to comply with the order.

Problem

Oral arguments of the appeals might have touched on classified information.

Solutions

1. Initially, the court agreed to seal oral arguments, but on a motion by news media for public arguments the court decided to hold public oral arguments followed by closed oral arguments concerning classified information.
2. Within 24 hours of the argument, the court reporter submitted for classification review a transcript of the closed arguments, and within five business days of that the government publicly released a redacted transcript.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

Court-Appointed National Security Expert

In a multidistrict consolidation in which the government argued that the state-secrets privilege requires dismissals of the actions, Judge Vaughn R. Walker, of the Northern District of California, considered whether he should appoint a national security expert, such as a former CIA director, to help him evaluate the privilege claim.

Case: Warrantless Wiretaps

Hepting v. AT&T and In re NSA Telecommunication Records Litigation (Vaughn R. Walker, N.D. Cal.)

Actions challenging the government's warrantless surveillance of international communications between persons in the United States and persons suspected of ties to terrorists, and actions challenging telephone companies' assistance with the surveillance, were consolidated in the Northern District of California before Judge Walker.

Problem

The government presented to the court briefs and declarations that are so secret neither the plaintiffs nor the judge's law clerks may see them.

Solution

Judge Walker asked the parties for advice on whether he should name a neutral court-appointed national security expert to assist the court in assessing security risks posed by the litigation. Judge Walker suggested a former CIA director as a possible candidate, but some of the plaintiffs objected that the former director already publicly opined about the litigation. Judge Walker decided not to appoint such an expert, at least not yet.

Opinion: Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1010–11 (N.D. Cal. 2006).

Dockets

In re NSA Telecommunications Records Litigation, No. M:06-cv-1791 (N.D. Cal. Aug. 14, 2006); Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006).

Discovery of Sensitive Security Information

Sensitive security information (SSI) is secret information related to transportation security. The Transportation Security Administration (TSA) strictly limits release of this information.

Case: Actions for September 11 Damages

In re September 11 Litigation and related actions (Alvin K. Hellerstein, S.D.N.Y.)

Beginning in December 2001, survivors of the September 11, 2001, attacks on the United States began filing lawsuits against airlines, airline security companies, and owners and operators of the World Trade Center to recover damages for deaths and injuries.

Problem

Litigation claiming inadequate airline security required discovery concerning security procedures. But the government decided that the Transportation Security Administration (TSA) should screen discovery for "sensitive security information" (SSI), which is secret information related to transportation security.

Solutions

1. Judge Hellerstein ruled that the airline defendants would not have to assume TSA's responsibility for deciding what information could be shared with plaintiffs.

   SSI Deposition Orders: In re September 11 Litigation, 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006); *In re* September 11 Litigation, 236 F.R.D. 164, 169 (S.D.N.Y. 2006).
2. Judge Hellerstein attempted to satisfy TSA's concerns about having too many attorneys present at depositions concerning SSI—all of whom would have to be cleared—by having the plaintiffs' attorneys select representatives, but the attorneys were unwilling to be represented by other parties' attorneys. Depositions were able to proceed when TSA relaxed its restrictions on participation.

   SSI Representative Order: Order, *In re* September 11 Litigation, No. 1:21-mc-97, at 1 (S.D.N.Y. June 5, 2006).

Dockets

In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation, No. 1:21-mc-103 (S.D.N.Y. Mar. 28, 2007); *In re* World Trade Center Lower Manhattan Disaster Site Litigation, No. 1:21-mc-102 (S.D.N.Y. Aug. 9, 2005); *In re* September 11 Property Damage and Business Loss Litigation, No. 1:21-mc-101 (S.D.N.Y. Mar. 21, 2005); *In re* World Trade Center Disaster Site Litigation, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); *In re* September 11th Liability Insurance Coverage Cases, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003); *In re* September 11 Litigation, No. 1:21-mc-97 (S.D.N.Y Nov. 1, 2002).

Interviewing Guantánamo Bay Detainees

Defense attorneys were not permitted to interview directly potential witnesses held in detention at Guantánamo Bay, Cuba, but they were permitted to submit questions to "firewall attorneys," who submitted the questions to interrogators but who did not work with attorneys representing the government in this case.

Case: **American Taliban**
United States v. Lindh (T.S. Ellis III, E.D. Va.)

An American citizen pleaded guilty to fighting in the fall of 2001 for the Taliban and was sentenced to 20 years in prison.

Problem

Defense counsel sought to interview detainees held at Guantánamo Bay, Cuba.

Solutions

Judge Ellis denied face-to-face access to the detainees, but established a procedure allowing counsel to submit questions to "firewall" attorneys, who passed them on to the detainees.

1. The firewall attorneys included attorneys from the Department of Justice, the Department of Defense, and a neighboring U.S. Attorney's office, but were separate and independent from the attorneys representing the government in the case.
2. Defense counsel submitted questions to the firewall attorneys.
3. The firewall attorneys could object to the questions, and Judge Ellis resolved any disputes.
4. Approved questions were included in interrogations of the detainees.
5. Firewall attorneys prepared written summaries and video recordings.
6. Defense counsel could submit follow-up questions.

Opinion on Detainee Interviews: United States v. Lindh, No. 1:02-cr-37, 2002 WL 1298601 (E.D. Va. May 30, 2002).

Docket

United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002).

Protected National Security Information

Sometimes procedures to protect the security of national security information are required, even if the information is not classified.

Case: **American Taliban**
United States v. Lindh (T.S. Ellis III, E.D. Va.)

An American citizen pleaded guilty to fighting in the fall of 2001 for the Taliban and was sentenced to 20 years in prison.

Problem

The government determined that it had to disclose to the defendant reports, unclassified but vital to national security, of interviews of detainees at Guantánamo Bay, Cuba.

Solutions

1. The government submitted to the court ex parte and in camera both an unredacted set of reports and a set with proposed redactions.
2. Judge Ellis granted the government's motion for a protective order.

3. Judge Ellis rejected the government's proposal that defense investigators and expert witnesses be pre-screened before information contained in the redacted reports could be disclosed to them, determining that having investigators and witnesses sign a memorandum of understanding would suffice. The parties subsequently agreed to a brief background investigation performed by law enforcement personnel independent of the prosecution team and reporting directly to the court security officer.

Opinion on Protected National Security Information: United States v. Lindh, 198 F. Supp. 2d 739, 741–44 (E.D. Va. 2002).

Docket

United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002).

Redacting Secrets

With electronic filing, it is important to make sure that redacted material cannot be recovered electronically by the public.

Case: Warrantless Wiretaps

Hepting v. AT&T (Vaughn R. Walker, N.D. Cal.)

Plaintiffs filed an action against AT&T alleging that the telephone company improperly assisted the government with warrantless surveillance of international communications between persons in the United States and persons suspected of having ties to terrorists.

Problem

In the course of litigation, AT&T electronically filed a brief with several lines redacted. Unfortunately, because AT&T filed an electronic text file, it was possible for a person in the public to recover the redacted text electronically.

Solution

The redacted brief was replaced with an electronic *image* file, so the redacted text could not be recovered.

Docket

Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006).

Mental Deterioration During Detention

A court must sometimes determine whether pretrial conditions of confinement are so onerous as to seriously impair the mental health of a defendant.

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problems

1. After several months of restrictive confinement, el-Hage angrily criticized Judge Sand during a hearing for not reading a letter el-Hage had prepared that proclaimed his innocence and contended that the United States could have prevented the embassy bombings. Marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge the judge. Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.
2. After a co-defendant who has not yet been tried for the bombing stabbed a prison guard—an incident not involving el-Hage—the prison removed el-Hage's possessions and privileges. According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.

Solutions

1. The government agreed to give el-Hage a cell mate, but the court ruled that his conditions of confinement were largely proper, and el-Hage complained that the cell mate made his cell too crowded.
2. Two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness. Judge Sand decided that the expert opinions were well founded and that el-Hage was competent to stand trial.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Physical Security

In terrorism cases, courts are sometimes faced with special concerns about physical security. Often courts will consider using an anonymous jury or having jurors transported to and from the courthouse in secret. Sometimes courts and the marshals will consider additional measures to secure the courtroom. Occasionally, courts will use special measures to protect the security of certain witnesses.

Court Security

Terrorism prosecutions often require extra measures to secure the courtroom, but judges must take care that security measures not prejudice the jury against the defendants.

Case: First World Trade Center Bombing

United States v. Salameh (Kevin Thomas Duffy, S.D.N.Y.)

On March 4, 1994, a jury convicted Mohammad Salameh, Nidal Ayyad, Mahmoud Abouhalima, and Ahmad Ajaj of bombing the World Trade Center on February 26, 1993. Judge Duffy sentenced each of the defendants to more than 100 years in prison.

Problem

Tight security in a criminal prosecution sends a message to the jury that the defendants might be dangerous.

Solution

Judge Duffy dismissed prospective jurors, including the first 75, who indicated that they would be influenced by heavy court security.

Docket

United States v. Salameh, No. 1:93-cr-180 (S.D.N.Y. Mar. 17, 1993).

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

Terrorism prosecutions often require additional security measures in the courtroom, but tight security in a criminal prosecution sends a message to the jury that the defendants might be dangerous.

Solutions

1. Persons entering the courtroom had to pass through a metal detector and sign a log book stating their purpose in attending the trial.
2. Judge Sand tried to conceal as much as possible any extraordinary security measures. Because a co-defendant—who has not yet been tried for the bomb-

ings—stabbed a prison guard, the defendants were shackled to the floor under the table. To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out. And, for this trial, there was no "all rise" when the judge entered.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: Twentieth Hijacker

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

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending.

Problem

A high-profile terrorism prosecution required extra security measures.

Solution

The courthouse in Alexandria, Virginia, never before had the level of security that was put in place for Moussaoui's prosecution. At his January 2, 2002, arraignment, he was brought to the courthouse before sunrise, marshals surrounded the courthouse, and extra metal detectors were stationed at the courtroom. Although the weather was frigid, the public was not allowed into the building until shortly before the hearing.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

Case: Lackawanna Terrorists

United States v. Goba (William M. Skretny, W.D.N.Y.)

Six American citizens of Lackawanna, New York, pleaded guilty in 2003 to attending a terrorist training camp in 2001.

Problem

A high-profile terrorism prosecution required extra security measures.

Solution

The marshals established extra security at the courthouse doors. The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog. During the days of proceedings, armed surveillance officers were posted at the windows in Judge Skretny's chambers.

Docket

United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Oct. 21, 2002).

Jury Security

In cases in which the safety of jurors is a concern, the court may consider using an anonymous jury and having jurors assemble in a secret location for secure transportation to the courthouse.

Case: First World Trade Center Bombing

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

On March 4, 1994, a jury convicted Mohammad Salameh, Nidal Ayyad, Mahmoud Abouhalima, and Ahmad Ajaj of bombing the World Trade Center on February 26, 1993. Judge Duffy sentenced each of the defendants to more than 100 years in prison.

On October 1, 1995, a jury convicted Sheik Omar Abdel Rahman, Sayyid Nosair, Ibrahim El-Gabrowny, Clement Hampton-El, Amir and Fadil Abdelgani, Fares Khallafalla, Tarig Elhassan, Mohammed Saleh, and Victor Alvarez. of seditious conspiracy to conduct a campaign of urban terrorism, including participation in the 1993 bombing of the World Trade Center; the murder of Rabbi Meir Kahane, a "militant Zionist" and former member of the Israeli parliament; a plot to assassinate President Mubarak of Egypt; and plans to bomb New York landmarks. Judge Mukasey sentenced each of the defendants to terms ranging from 25 years to life.

On September 5, 1996, a jury convicted Ramzi Yousef, Abdul Murad, and Wali Shah of conspiracy to bomb U.S. airliners in Asia. On November 12, 1997, a jury convicted Yousef and Eyad Ismoil of driving the bomb to the World Trade Center in 1993. Judge Duffy sentenced each of the defendants to terms ranging from life to 240 years.

Problem

Citizens were asked to serve in high-profile terrorism prosecutions.

Solutions

1. Both Judge Duffy and Judge Mukasey used anonymous juries. When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.
2. To protect the jurors' safety and anonymity, they did not report directly to the courthouse but to secret locations from which marshals transported them to court.
3. Because of the anticipated lengths of the trials, Judge Duffy did not sequester the jurors. Judge Mukasey did not sequester the jurors during his trial until it was time to deliberate, at which time Judge Mukasey moved from a schedule of four days per week to seven days per week.
4. Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.

Dockets

United States v. Abdel Rahman, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993); United States v. Salameh, No. 1:93-cr-180 (S.D.N.Y. Mar. 17, 1993).

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

Citizens were asked to serve in a high-profile terrorism prosecution.

Solutions

Judge Sand closed jury selection and used an anonymous jury. He did not sequester the jury, but he had them meet at a secret location, from which they were driven by marshals to the courthouse. The jury room was guarded by marshals and checked each morning by bomb-sniffing dogs.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: Overturned Convictions in Detroit

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

Because the prosecutor withheld from defendants great quantities of exculpatory and impeaching evidence, convictions were dismissed in the first federal terrorism prosecution since the September 11, 2001, attacks.

Problem

Citizens were asked to serve in a high-profile terrorism prosecution.

Solutions

1. The court implemented "soft sequestration," in which the jurors were permitted to reside at home, but they did not report directly to the courthouse each morning. Instead they reported to a secret alternative location, from which marshals transported them to the courthouse by van. Unfortunately, someone found out about the secret location and called the jury room with a death threat. The marshals changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for the courtroom.
2. The court used an anonymous jury. Jury selection was conducted behind closed doors, but the court released a redacted transcript of voir dire after the trial was over. The judge made sure that the jury clerk understood that the names and addresses of the jurors were confidential.

   Opinion Denying Opposition to Anonymous Jury: United States v. Koubriti, 252 F. Supp. 2d 418 (E.D. Mich. 2002).

Docket

United States v. Koubriti, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001).

Case: Twentieth Hijacker

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

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending.

Problem

Citizens were asked to serve in a high-profile terrorism prosecution.

Solutions

1. Judge Brinkema used an anonymous jury.

   Anonymous Jury Order: Trial Conduct Order 1, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006).
2. Jurors assembled in a secret location and were driven to the courthouse. The court set up a special room for the jurors to eat lunch away from the public. They were never permitted to be in the building unsupervised.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

Case: Hamas Funding

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of obstructing justice and convicted Ashqar of criminal contempt as well.

Problem

To protect jurors' safety, the government moved for an anonymous jury. But defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.

Solution

Observing that the defendants were not in custody, had strictly adhered to the terms of their release, and otherwise posed no danger, Judge St. Eve denied the government's motion for an anonymous jury.

Order Denying Anonymous Jury: Minute Entry, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006).

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Witness Security

When the safety of witnesses is an issue, courts endeavor to protect the witness's identity while protecting as much as possible the defendants' and the public's rights to open proceedings.

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problem

The first witness to testify at the trial needed special protection. He was once a payroll manager for Osama bin Laden, and the government identified him prior to his testimony, even to defense counsel, only as CS-1, which stood for "confidential source one." He was reported to have embezzled more than $100,00 from one of Bin Laden's companies. He had been under U.S. protection in an undisclosed location for five years after pleading guilty to a conspiracy charge in a secret proceeding in the Southern District of New York.

Solution

The witness's identity was not revealed to defense counsel until four days before his scheduled testimony, and a protective order forbade counsel from revealing his identity to their clients until the day before the witness appeared in court. Judge Sand forbade courtroom artists from sketching the witness's face.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: American Taliban

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

An American citizen pleaded guilty to fighting in the fall of 2001 for the Taliban and was sentenced to 20 years in prison.

Problem

To resolve a motion to suppress the defendant's confession as obtained with torture, the court needed to hear testimony from a covert government agent.

Solutions

Judge Ellis had draperies and screens installed in the courtroom to shield the witness from public view. Before the hearing commenced, the defendant announced that he had reached a plea agreement with the prosecution, so the testimony was never heard.

1. The defendant and his counsel were going to sit in the jury box so that they could see the witness.

2. The courtroom was equipped with electronic equipment to distort the witness's voice, but the public would have been able to hear the witness's words.
3. The witness was to have been brought in and out of the courtroom through the tunnel used for prisoners, and the door to the tunnel was screened off from public view.

Docket

United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002).

Case: A Plot to Kill President Bush

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

Ahmed Omar Abu Ali was convicted on November 22, 2005, of plotting to kill President George W. Bush and aiding al-Qaeda. Because the defendant claimed that his confession was coerced by torture, he sought to present to the jury video-recorded depositions of prison guards in Saudi Arabia, where he was originally held. Pending is an appeal of the district court's determination that his confession was not coerced.

Problem

The identities of prison guards in Saudi Arabia are classified, so they may not provide testimony in a way that would reveal their identities.

Solution

The prison guards were identified at trial by pseudonyms. Their video depositions were presented at trial so that the video could be seen by the judge, the participants, and the jury, but not by the spectators.

Video Deposition Presentation Order: Order, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005).

Docket

United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005).

Case: Hamas Funding

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

On February 1, 2007, a jury acquitted Muhammad Salah and Abdelhaleem Ashqar of aiding terrorists by helping to fund Hamas, but convicted the defendants of obstructing justice and convicted Ashqar of criminal contempt as well. Salah argued that a confession was obtained through torture by Israeli secret police officers.

Problem

To prove that Salah's Israeli confession was obtained by torture and coercion, Salah sought testimony from two agents of the Israel Security Agency (ISA). Although it was unprecedented for such officers to provide testimony outside of Israel, the Israeli government permitted them to travel to the United States to testify.

Solutions

1. Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified. The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah. All other persons in court during the testimony had security clearances.

   To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom. The agents and their Israeli attorneys were identified in court documents by code names. But Judge St. Eve denied a request that they testify in "light disguise," because Salah had already seen them, the public would not see them, and the government had presented no evidence of security concerns respecting the attorneys and court staff who would see them.

   Hearing Testimony Order: United States v. Abu Marzook, 412 F. Supp. 2d 913, 916 (N.D. Ill. 2006).
2. For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom. Again Judge St. Eve permitted the witnesses to use private entrances. She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony. Because of the presence of the family members and the jury, Judge St. Eve agreed to let the agents testify in light disguise, so long as the disguise did not interfere with the jurors' ability to judge their credibility. But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them. The rest of the trial was public.

   Judge St. Eve undertook measures to keep the closed portion of the trial as open as possible. First, she established a live video and audio feed to another courtroom where spectators could listen to the closed session and see those in the courtroom, except for the witnesses. Second, to disguise from the jury that the courtroom was closed, Judge St. Eve told the jurors that the camera was a precaution in case of an overflow crowd and allowed the witnesses to use the private entrance before the jury was brought in.

Docket

United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003).

Religious Accommodation

Because participants in court proceedings are more frequently Muslims, courts are expanding their religious accommodation. This includes timing proceedings to accommodate daily prayers and religious holidays and taking testimony by affirmation rather than by oath.

Case: American Embassy Bombings in Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, S.D.N.Y.)

On May 29, 2001, a jury convicted Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Mohamed of bombing American embassies in Kenya and Tanzania on August 7, 1998. Each was sentenced to life in prison.

Problems

1. Muslims pray several times a day, and the Muslim defendants' entry to and exit from the courtroom was made cumbersome by their hidden shackles.
2. When a defendant mentioned to his attorney that he believed a martyr would be rewarded with thirteen virgins, the attorney suggested that having thirteen fathers-in-law would be more of a punishment.

Solutions

1. Judge Sand carefully timed breaks in the trial to permit prayer at the appropriate times by the Muslim defendants.
2. Judge Sand dismissed the attorney.

Docket

United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Case: Lackawanna Terrorists

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

Six Muslim American citizens of Lackawanna, New York, pleaded guilty in 2003 to attending a terrorist training camp in 2001.

Problems

1. Muslims pray several times a day, and Muslims observe religious holidays not traditionally accommodated by courts.
2. Muslims cannot take an oath by swearing on a Bible.

Solutions

1. The court timed hearings to accommodate both daily prayers and religious holidays for the Muslim defendants.
2. All testimony at the detention hearing before Magistrate Judge Schroeder was taken from government witnesses under oath, but the defendants' pleas before District Judge Skretny were taken by affirmation.

Docket

United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Oct. 21, 2002).

Case: **Paintball Terrorists**

United States v. Royer and United States v. Al-Timimi (Leonie M. Brinkema, E.D. Va.)

Several men who played paintball in suburban Virginia were convicted in 2003 and 2004 of conspiracy to support terrorism.

Problem

Judge Brinkema was concerned about possible jury bias against witnesses depending upon whether they swore on a Bible or a Quran before they offered testimony to a jury.

Solution

Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.

Dockets

United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004); United States v. Royer, No. 1:03-cr-296 (E.D. Va. June 25, 2003).

Terrorist Contacts

Contacts with terrorists pose special problems. Service of process on terrorists can be dangerous, and the government may be concerned that terrorism defendants will use public court records to further terrorism conspiracies.

Service of Process on International Terrorists

Service of process on international terrorists can be both difficult and dangerous.

Case: Actions for September 11 Damages

In re Terrorist Attacks on September 11, 2001 (Richard Conway Casey, S.D.N.Y.)

Beginning in September 2002, survivors of the September 11, 2001, attacks on the United States began filing lawsuits against persons all over the world who are alleged to have provided assistance to the terrorists.

Problem

Many defendants are considered terrorists, and the locations for many are unknown.

Solutions

1. Judge Casey ruled that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.
2. The government agreed to facilitate service on defendants it had publicly acknowledged having in custody, but the government objected to serving defendants it had not publicly acknowledged holding. Judge Casey agreed that the government's service on defendants in its custody would be effective, but he declined to order the government to facilitate service, and he agreed that the government need not disclose whether it had in custody those defendants it had not publicly acknowledged holding. Judge Casey ruled that service by publication would be effective for those individuals whom the government did not serve.
3. Judge Casey ruled that foreign justice ministries could accept service on behalf of defendants in their custody, and Judge Casey agreed to request the foreign ministries to accept service, but he declined to order them to do so.
4. At least one process server was killed trying to serve process in Saudi Arabia.

Opinion: In re Terrorist Attacks on September 11, 2001, No. 1:03-md-1570, 2004 WL 1348996 (S.D.N.Y. June 14, 2004).

Docket

In re Terrorist Attacks on September 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003).

Terrorist Contacts

Courts may be called upon to ensure that terrorism defendants do not use the courts' public records to further terrorism conspiracies.

Case: Twentieth Hijacker

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

Zacarias Moussaoui—who was once described as intended to be the twentieth hijacker on September 11, 2001—was sentenced on May 4, 2006, to life in prison on a plea of guilty to conspiracy with al-Qaeda to kill Americans (but a denial of involvement with the attacks of September 11). His appeal of the district court's denial of his motion to retract his guilty plea is pending.

Problem

For a substantial portion of his prosecution, the defendant proceeded pro se and filed numerous handwritten documents with the court. The government was concerned that these documents might include coded messages to confederates.

Solutions

1. Judge Brinkema ordered that pleadings "containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language will be filed and maintained under seal."

   First Pro Se Filings Sealing Order: Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), available at 2002 WL 1990900.
2. On a motion from the news media to unseal the defendant's filings, and after observing that the defendant's filings had become more appropriate, Judge Brinkema modified her order so that his filings would be sealed for 10 days to permit the government to notify the court that they should remain sealed.

   Second Pro Se Filings Sealing Order: Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Sept. 27, 2002), available at 2002 WL 32001783.

Docket

United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001).

The Federal Judicial Center

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