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Threats Against America: The Second Circuit as Arbiter of National Security Law

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THREATS AGAINST AMERICA: THE SECOND CIRCUIT AS ARBITER OF NATIONAL SECURITY LAW

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INTRODUCTION

For nearly 100 years, the U.S. Court of Appeals for the Second Circuit has been a leading force in defining and resolving the uniquely thorny issues that arise at the intersection of individual liberty and national security. The court's decisions in this arena are characterized by its willingness to tackle difficult questions and its skill in balancing the needs of the government with the rights of the accused to ensure fundamental fairness in the ages of espionage and terror.

I. THE ESPIONAGE PROBLEM AND THE RISE OF THE COLD WAR STATE

In 1917, soon after the United States entered World War I, Congress passed the Espionage Act.[1] The new law strengthened existing prohibitions on actions harmful to the national defense and, most notably, authorized the death penalty for anyone convicted of sharing information with the intent to harm U.S. military efforts or to aid the nation's enemies.[2]

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1. Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 792–799 (2012)).

2. *See* 18 U.S.C. § 794(a).

The New York office of the Federal Bureau of Investigation (FBI) quickly emerged as the hub of the federal counterintelligence effort, investigating and pursuing both foreign and domestic threats to the war effort. The resulting prosecutions defined the era and remain household names today: the Duquesne Spy Ring, the Rosenbergs, Alger Hiss, Rudolph Abel, and more, which are discussed below.

A. The Espionage Cases

In each of these cases, the Second Circuit shaped the nation's evolving understanding of the rule of law during an era of ever-increasing threats to national security.

1. *United States v. Heine*

Edmund Carl Heine was a German immigrant who came to the United States in 1914 and became an American citizen in 1920.[3] An auto mechanic by trade, he rose to become a factory manager and superintendent, working for the Ford Motor Company throughout the 1920s and early 1930s, and then for the Chrysler Corporation in the late 1930s.[4] During this period, Heine was recruited by Volkswagenwerk,[5] at that time a fledgling automobile company controlled by Adolf Hitler's Third Reich, to join a German espionage network that came to be known as the Duquesne Spy Ring.[6] Heine's task was to obtain information concerning the American aviation and automotive industries to assist in the Third Reich's preparations for war against the United States.[7] For several years, Heine passed along what information he could glean from publicly available sources, such as magazines, newspapers, catalogues, and correspondence with manufacturers.[8]

In 1940, the FBI penetrated the Duquesne Spy Ring with the help of a double agent named William Sebold—another naturalized American citizen of German origin who was coerced into joining the network during a return visit to Germany in 1939.[9] Unwilling to spy against the United States, Sebold notified the American consulate of his recruitment and agreed to help the FBI infiltrate the ring.[10] For the next sixteen months, the FBI used Sebold to identify German spies on American soil and to transmit misinformation to the German regime.[11]

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3. *See* United States v. Heine, 151 F.2d 813, 814 (2d Cir. 1945).
4. *See id.*
5. *See id.*
6. *See id.* at 815; *see also The 33 Members of the Duquesne Spy Ring*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/history/famous-cases/the-duquesne-spy-ring/33-members (last visited Sept. 6, 2016) [perma.cc/Y7JL-GWXT].
7. *See Heine*, 151 F.2d at 814.
8. *See id.* at 815.
9. *See The 33 Members of the Duquesne Spy Ring*, *supra* note 6.
10. *See id.*
11. *See id.*

On December 13, 1941, all thirty-three members of the Duquesne Spy Ring were convicted under the Espionage Act and sentenced to a total of more than 300 years in prison.[12] Heine was convicted of violating the Act's prohibition on transmitting information "intended to be used 'to the injury of the United States' [or] 'to the advantage of a foreign nation.'"[13] He appealed his conviction to the Second Circuit.

In a 1945 opinion, authored by the legal giant Judge Learned Hand, the court reversed Heine's Espionage Act conviction, holding that the Act's prohibitions could properly apply only to secrets closely guarded by the government.[14] In language that foreshadows current debates about bulk data collection in the service of counterterrorism, the court pointed out that in wartime, any information may be relevant to the national defense:

> It seems plain that the [Espionage Act] cannot cover information about all those activities which become tributary to the "national defense" in time of war; for in modern war there are none which do not. The amount of iron smelted, of steel forged, of parts fabricated; the number of arable acres, their average yield; engineering schools, scientific schools, medical schools, their staffs, their students, their curriculums, their laboratories; metal deposits; technical publications of all kinds; such nontechnical publications as disclose the pacific or belligerent temper of the people, or their discontent with the government: every part in short of the national economy and everything tending to disclose the national mind are important in time of war, and will then "relate to the national defense."[15]

The court thus reasoned that construing the statute as forbidding the sharing of publicly available information would improperly impute to Congress "an assertion of national isolationism."[16] Instead, the Second Circuit read the statute to permit the transmission of information that the armed services have not sought to keep secret:

> likeservices must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power. "Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the [Espionage Act's purview].[17]

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12. *See id.*

13. *Heine*, 151 F.2d at 815 (quoting 50 U.S.C. § 32 (1944)). Heine also was convicted of violating 22 U.S.C. § 233, which makes it a crime for an agent of a foreign government to fail to register as such with the Secretary of State. *See Heine*, 151 F.2d. at 814.

14. *See Heine*, 151 F.2d. at 817.

15. *Id.* at 815.

16. *Id.* at 816.

17. *Id.*

The court noted that this reading was consistent with the U.S. Supreme Court's prior statement in *Gorin v. United States*,[18] to the effect that, where a report "relating to national defense" is published by the military or by Congress, "there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government."[19]

The *Heine* decision sent a strong and unmistakable message to the law enforcement community, one that the court would have occasion to repeat in the coming years: even in wartime, and even under the most unsympathetic circumstances, the Second Circuit would not bend the law to elevate prosecutorial interests over the rights of individual defendants. Other circuit courts have relied on and followed *Heine* in delineating the government's power to prosecute alleged spies for transmitting publicly available information.[20] The *Heine* opinion was also cited, more than thirty years after it was issued, by one of the architects of the Foreign Intelligence Surveillance Act of 1978[21] (FISA), Christopher H. Pyle, in his testimony to Congress:

> I agree with the courts; future Heines ought to be free of electronic surveillance until they conspire to steal classified information. The ACLU argues for an impermissibly indeterminate criminal law; the Justice Department assumes, as Judge Learned Hand put it so well in the *Heine* case, "that there are some kinds of information 'relating to the national defense' which must not be given to a friendly power, not even an ally, no matter how innocent, or even commendable the purpose of the sender may be." Writing for a unanimous panel Judge Hand added with characteristic understatement, "Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result."[22]

Thus, *Heine* can fairly be said to have helped shape the system of judicial review that governs American counterintelligence efforts to this day.

2. *United States v. Coplon*

Five years after the *Heine* appeal, the Second Circuit was again called upon to balance the constitutional rights of a defendant against the government's interest in prosecuting a suspected spy. This time, the alleged mole was a Justice Department analyst named Judith Coplon, who was

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18. 312 U.S. 19 (1941).

19. *Heine*, 151 F.2d at 817 (quoting *Gorin*, 312 U.S. at 28).

20. *See, e.g.*, United States v. Squillacote, 221 F.3d 542, 576–77 (4th Cir. 2000) (affirming espionage conviction over defendant's objection to the definition of "publicly available information," and explaining that "under *Gorin* and *Heine*, the central issue is the *secrecy* of the information, which is determined by the government's actions").

21. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885 (2012)).

22. *Foreign Intelligence Surveillance Act of 1978: Hearings Before the Subcomm. on Intelligence & the Rights of Ams. of the S. Select Comm. on Intelligence*, 95th Cong. 94 (1978) (statement of Christopher H. Pyle, Professor, Mt. Holyoke College) (quoting *Heine*, 151 F.2d at 815).

suspected of funneling information to the Soviets.[23] In 1949, the FBI placed wiretaps on Coplon's home and office telephones and subsequently arrested her, without a warrant, during a rendezvous with a suspected KGB agent.[24] At the time of her arrest, Coplon was carrying incriminating documents that she apparently intended to hand over to the Soviets.[25] She was convicted on several counts, including attempt to deliver national defense information and conspiracy to defraud the United States.[26]

The Second Circuit, in another opinion authored by Judge Hand, reversed the convictions on two grounds. Principally, the court found that the convictions were impermissibly based on the "fruit of the poisonous tree"[27]—namely, evidence derived from illegal wiretaps and a warrantless arrest, all of which violated Coplon's Fourth Amendment protection against unreasonable searches and seizures.[28] The decision added teeth to the evolving legal principle known as the "exclusionary rule," then only a few decades old, which forbade the use of evidence gathered in violation of the U.S. Constitution.[29] In its decision, the Second Circuit emphasized that exclusion of the fruits of illegal searches and arrests "is the only tolerable result" where, as in Coplon's case, "the head of the same department of a government which has charge of the prosecution has directed the unlawful acquisition of the information."[30]

The harshness of the reversal was not lost on the court. Judge Hand opined that "perhaps the doctrine should be modified" insofar as it imputes the wrongdoing of all government agencies and employees to any prosecutor who seeks to use the fruits of their activities.[31] He suggested that "perhaps it would be desirable to set limits—as, for example, in cases of espionage, sabotage, kidnapping, extortion and in general investigations involving national security and defen[s]e—to the immunity from 'wiretapping' of those who are shown by independent evidence to be probably engaged in crime."[32] But, in the end, the court conceded that it had "no power to deal" with such matters but was, instead, bound to "take the law as we find it."[33] The comments foreshadowed future decisions of the Supreme Court that carved significant exceptions into the exclusionary rule.[34]

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23. *See* United States v. Coplon, 185 F.2d 629, 631–32 (2d Cir. 1950).
24. *See id.*
25. *See id.* at 632.
26. *See id.* at 631.
27. Nardone v. United States, 308 U.S. 338, 341 (1939).
28. *See id.*; *see also Coplon*, 185 F.2d at 640.
29. At the time, the exclusionary rule was only applied in the federal courts; it would not become mandatory in state tribunals until the Supreme Court's landmark ruling in *Mapp v. Ohio*, 367 U.S. 643 (1961).
30. *Coplon*, 185 F.2d at 640.
31. *Id.*
32. *Id.*
33. *Id.*
34. For example, in 1963, the Supreme Court revitalized the notion that the "taint" associated with illegally obtained evidence, and the need to exclude it, could dissipate over time. *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963). In 1984, the Supreme

The court's second concern with Coplon's convictions related to the government's invocation of the "state secrets" privilege as a basis to litigate the legitimacy of the wiretaps before the court, ex parte, without disclosing the underlying materials to Coplon.[35] Without dismissing the sensitive nature of the information before the court, or any other information that, if divulged, could "imperil" national security, the court held that the government may not simultaneously withhold such evidence from a defendant and use the evidence against that defendant.[36] According to the court, the defendant's right to mount an effective defense would not take a backseat to even the most potent of national security claims. If the material would be helpful to the defense, the government would have to either disclose the material or abandon the prosecution.[37] The concept, embraced several years later by the Supreme Court in *Roviaro v. United States*,[38] is now fundamental to all cases in which the government seeks to avoid the disclosure of sensitive information, whether it is the identity of a police informant or highly classified sources and methods of gathering foreign intelligence.[39]

After the reversal of her conviction, Judith Coplon was never retried: evidentiary issues arising from the suppression ruling made another criminal trial nearly impossible, and the indictment against her was dropped two decades later.[40] She married her lawyer, Albert Socolov, they raised four children together, and in 2011, Coplon died at age eighty-nine.[41]

3. *United States v. Hiss*

Two days after striking down Coplon's conviction, the Second Circuit issued its famous decision in *United States v. Hiss*.[42]

Alger Hiss was the former Director of the State Department's Office of Special Political Affairs, Secretary General of the 1945 United Nations Charter Conference, and had attended the 1945 Yalta Conference with then-President Franklin D. Roosevelt.[43] In 1948, a magazine editor named

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Court created the inevitable discovery exception to the exclusionary rule, which permitted the use of information derived from "tainted" evidence upon a showing that it eventually would have been found through legitimate channels. *See* Nix v. Williams, 467 U.S. 431, 450 (1984). In 1988, the Supreme Court added the "independent source doctrine," which validated the use of "tainted" evidence when it could be shown that it was acquired by a second source, independent of the offending conduct. *See* Murray v. United States, 487 U.S. 533, 537–38 (1988).

35. *See Coplon*, 185 F.2d at 637–38.

36. *See id.*

37. *See id.* at 638.

38. 353 U.S. 53 (1957).

39. *See id.* at 60–61 & n.10.

40. *See* Sam Roberts, *Judith Coplon, Haunted by Espionage Case, Dies at 89*, N.Y. TIMES (Mar. 1, 2011), http://www.nytimes.com/2011/03/02/us/02coplon.html [perma.cc/5RYE-WAKG].

41. *See id.*

42. 185 F.2d 822 (2d Cir. 1950).

43. *See The Alger Hiss Case*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a01p.htm (last visited Sept. 6, 2016) [perma.cc/E6QD-VUHY].

Whittaker Chambers testified before the U.S. House of Representatives Committee on Un-American Activities (HUAC) that both he and Hiss had been members of the Communist Party since the mid-1930s and had participated in a Communist group whose goal was the infiltration of the U.S. government.[44]

Upon learning of this accusation, Hiss demanded an opportunity to give his own testimony before HUAC, where he denied under oath that he had ever been a Communist Party member or sympathizer, or that he knew anyone named Whittaker Chambers.[45] When, during his testimony, Hiss was shown a photograph of Chambers, he stated that he did not recognize the man pictured and demanded the opportunity to confront his accuser.[46] Several weeks later, a freshman Congressman named Richard M. Nixon arranged for both Chambers and Hiss to appear before HUAC simultaneously, at which time Hiss acknowledged that he had known Chambers (albeit under the name George Crosley) and, indeed, had sublet an apartment to Chambers and lent him a car.[47] Hiss continued, however, to deny Chambers' allegations, and he challenged Chambers to repeat them outside the privileged forum of the committee hearing, where Chambers was immune from libel charges.[48]

Chambers accepted Hiss's challenge by repeating the allegations during a subsequent appearance on the then-radio show "Meet the Press," and Hiss responded by filing a libel suit in federal court.[49] In the course of discovery in that action, Chambers testified for the first time that Hiss was not only a Communist but also a Soviet spy, and Chambers produced various documents corroborating the claim.[50] HUAC then issued a subpoena to Chambers demanding that he turn over any other such materials, and Chambers complied by surrendering several rolls of microfilm that he had hidden in a hollowed out pumpkin on his Maryland farm, containing images of confidential State Department documents that, along with the previously produced materials, became known as the "Pumpkin Papers."[51]

Although the ten-year statute of limitations period for an espionage charge had expired, both Chambers and Hiss were called before a federal grand jury in New York City where Chambers repeated his allegations and Hiss repeated his denials.[52] Hiss was then indicted and, after his first trial ended in a hung jury, was eventually convicted at a second trial on two counts of perjury.[53]

Hiss appealed to the Second Circuit on the ground that there was insufficient evidence to support his convictions, citing the rule that a perjury

44. *See Hiss*, 185 F.2d at 824.
45. *See id.* at 824–25.
46. *See id.* at 825.
47. *See id.* at 825–26.
48. *See id.* at 828.
49. *See id.*; *see also The Alger Hiss Case*, *supra* note 43.
50. *See Hiss*, 185 F.2d at 828.
51. *See id.*; *see also The Alger Hiss Case*, *supra* note 43.
52. *See Hiss*, 185 F.2d at 828.
53. *See id.* at 828–29.

conviction cannot be based solely on one witness's uncorroborated testimony.[54] The panel of Judges Harrie Chase, Thomas Swan, and Augustus Hand unanimously affirmed Hiss's conviction, holding that the documentary evidence provided by Chambers was sufficient to corroborate Chambers's testimony that Hiss had been a Communist and a Soviet agent.[55] The Supreme Court subsequently declined to review the decision.[56]

Hiss ultimately served three years and eight months of his five-year prison term and was released in 1954. Three years later, he published a book in which he detailed the flaws in the prosecution's case against him.[57] In 1975, Hiss was readmitted to the Massachusetts Bar, which had disbarred him at the time of his conviction.[58] He later published an autobiography in which he once again challenged his perjury conviction.[59] Hiss continued to maintain his innocence until his death in 1996.[60]

The *Hiss* case is notable not only for the prosecution's use of perjury charges to overcome the statute of limitations problem—which became a tool for the pursuit of retired spies throughout the Cold War[61]—but also for the Second Circuit's dispassionate application of the law, notwithstanding the strong political forces at work on both sides of the case. The case is also noteworthy for the central role Richard Nixon played in procuring Hiss's original committee testimony and the grand jury transcripts (which were unsealed by court order in 1999) showing that Nixon was influential in obtaining the perjury indictment.[62] Additionally, the pro-Hiss camp included prominent figures of its own: two Supreme Court justices, Felix Frankfurter and Stanley Reed, testified as character witnesses for Hiss at his first trial,[63] and then-President Harry S. Truman publicly characterized the Hiss prosecution as a "red herring."[64]

Given the intensity of opinions on both sides of the case, it is perhaps unsurprising that controversy over Hiss's guilt has persisted long after his conviction. World War II-era Soviet cables, decrypted during the government's "Venona Project" in the 1940s and publicly released by the

54. *See id.* at 824.
55. *See id.* at 824, 833.
56. *See* Hiss v. United States, 340 U.S. 948 (1951).
57. *See* ALGER HISS, IN THE COURT OF PUBLIC OPINION (1957).
58. *See* Daniel Q. Haney, *Alger Hiss Is Readmitted to Mass. Bar*, GETTYSBURG TIMES, Aug. 8, 1975, at 13.
59. *See* ALGER HISS, RECOLLECTIONS OF A LIFE (1988).
60. *See* Janny Scott, *Alger Hiss, Divisive Icon of the Cold War, Dies at 92*, N.Y. TIMES (Nov. 16, 1996), http://www.nytimes.com/1996/11/16/nyregion/alger-hiss-divisive-icon-of-the-cold-war-dies-at-92.html?pagewanted=all [perma.cc/9CJT-GNMH].
61. *See, e.g.*, United States v. Zborowski, 271 F.2d 661 (2d Cir. 1959).
62. *See The Alger Hiss Case*, *supra* note 43.
63. *See* Willard Edwards, *2 Justices Testify in Hiss' Defense*, CHI. DAILY TRIB., June 23, 1949, at 1.
64. *See* Walter Trohan, *Record Shows Truman Used "Red Herring,"* CHI. DAILY TRIB., Jan. 9, 1954, at pt. 1–5.

Central Intelligence Agency and National Security Agency in 1995, appear to bolster the case against Hiss.[65]

4. *United States v. Zborowski*

In 1959, the Second Circuit heard another challenge to a perjury conviction of an accused Soviet spy.[66] Mark Zborowski was an anthropologist and an admitted former covert operative for the Soviet national police force, the NKVD, who had infiltrated the Trotskyite organization in Paris in the 1930s and may have been involved in the assassinations of various members of that organization, including Leon Trotsky's son, Lev Sedov.[67] Zborowski claimed, however, that he had not worked for the NKVD since immigrating to the United States in 1941, contradicting statements by a man named Jack Soble, who claimed to have operated as Zborowski's Soviet handler in New York during the 1940s.[68]

Called to testify before a grand jury in 1957, Zborowski specifically denied knowing Soble.[69] Because the limitations period for an espionage charge had expired, Zborowski was indicted on perjury charges stemming from his grand jury testimony.[70] Soble was the government's principal witness at the trial, which ended in Zborowski's conviction.[71]

Zborowski appealed, arguing that the trial court had wrongly denied his request for the transcript of Soble's grand jury testimony, thereby depriving him of the opportunity to impeach Soble with inconsistencies in Soble's sworn statements.[72] The Second Circuit panel, comprised of Judges Joseph Lumbard, Sterry Waterman, and Henry Friendly, agreed, reversing the conviction and remanding the case for a new trial.[73] In its opinion, authored by Judge Lumbard, the court emphasized the prosecutor's obligation to further the pursuit of truth, even at the possible expense of the government's case:

> The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction.[74]

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65. *See* Doug Linder, *The VENONA Files & the Alger Hiss Case*, THE TRIALS OF ALGER HISS (Mar. 30, 2016), http://law2.umkc.edu/faculty/projects/ftrials/hiss/hissvenona.html [perma.cc/4Z7K-PRDK].

66. *See Zborowski*, 271 F.2d 661.

67. *See* JOHN EARL HAYNES & HARVEY KLEHR, EARLY COLD WAR SPIES: THE ESPIONAGE TRIALS THAT SHAPED AMERICAN POLITICS 212 (2006).

68. *See Zborowski*, 271 F.2d at 663–64.

69. *See id.*

70. *See id.* at 664.

71. *See id.* at 663.

72. *See id.* at 664–65.

73. *See id.* at 663, 668.

74. *Id.* at 668.

The court thus made clear that, while it would permit the government to use perjury charges to pursue spies who were otherwise beyond the reach of the law, it would not countenance prosecutorial misbehavior in furtherance of those efforts. Or, as stated a different way by one district court applying *Zborowski*: the case demonstrated the Second Circuit's "inclination to strive for as many safeguards as possible in criminal prosecutions in this circuit[,] in order that truth may be ascertained as fully as humanly possible."[75]

After a retrial, Zborowski was again convicted and sentenced to four years in prison.[76] Upon his release, he resumed his academic pursuits, focusing on research into the science behind pain responses.[77] Zborowski eventually became the Director of the Pain Institute at the Mount Zion Hospital in San Francisco and died in 1990 at age eighty-two.[78]

5. *United States v. Rosenberg*

Perhaps the most famous espionage case of all was that of Julius and Ethel Rosenberg, who were convicted in 1951 of providing U.S. military secrets, including information about the construction of nuclear weapons, to the Soviet Union.[79] Indeed, as the *New York Times* recently noted, even six decades later, the prosecution of the Rosenbergs still "remains one of America's most controversial criminal cases."[80]

The principal witness against the Rosenbergs was Ethel Rosenberg's brother, David Greenglass, who cooperated with the prosecution in exchange for a reduced sentence for himself and dismissal of espionage charges against his wife.[81] Greenglass testified that, while he was stationed as a soldier at the Los Alamos atomic experimental station in New Mexico, Julius Rosenberg had recruited him to procure nuclear and other secrets for transmission to the Soviet government.[82] According to Greenglass, Ethel Rosenberg typed up this information, as well as secrets provided by others in the spy ring, and also participated in Julius's recruitment of new members.[83]

Another prominent witness in the Rosenberg trial was Elizabeth Bentley, an American who had worked for many years as a high-level source for the

75. United States v. Eissner, 206 F. Supp. 103, 105 (N.D.N.Y. 1962).

76. *See* JOHN EARL HAYNES & HARVEY KLEHR, VENONA: DECODING SOVIET ESPIONAGE IN AMERICA 258 (1999).

77. *See, e.g.*, MARK ZBOROWSKI, PEOPLE IN PAIN (1969).

78. *See* BORIS VOLODARSKY, STALIN'S AGENT: THE LIFE & DEATH OF ALEXANDER ORLOV 409 (2015).

79. *See* United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

80. Sam Roberts, *Brother's Secret Grand Jury Testimony Supporting Ethel Rosenberg Is Released*, N.Y. TIMES, July 16, 2015, at A20.

81. *See id.*; *see also Rosenberg*, 195 F.2d at 588.

82. *See Rosenberg*, 195 F.2d at 588–89.

83. *See id.* at 589.

Soviet Union in New York before defecting to the United States in 1945.[84] Bentley testified that a man named Julius had telephoned her on various occasions to provide information that she in turn passed on to her superior in the Soviet spy organization.[85] Lastly, a Navy engineer named Max Elitcher also testified that Julius Rosenberg had solicited secrets from him concerning antiaircraft weapons and other defensive systems.[86]

Both Rosenbergs took the stand in their own defense, and both categorically denied all allegations of espionage.[87] The jury nonetheless found them guilty under the Espionage Act, and District Judge Irving Kaufman—who would later be elevated to the Second Circuit, where he would ultimately become Chief Judge—sentenced both Rosenbergs to die in the electric chair.[88]

The Rosenbergs appealed on constitutional grounds, arguing, among other things, that the indictment violated the Sixth Amendment for vagueness by failing to specify that the information at issue was nonpublic (as they claimed was required by the *Heine* precedent) and that the Espionage Act violated the First Amendment in restricting their freedom of speech.[89]

In an opinion authored by Judge Jerome Frank, the Second Circuit rejected both arguments.[90] In denying the Sixth Amendment challenge, the court observed that the Supreme Court had rejected a nearly identical vagueness challenge under the Due Process Clause of the Fifth Amendment in *Gorin v. United States*,[91] and concluded that the *Gorin* ruling defeated the Rosenberg's argument.[92] Regarding the First Amendment issue, the court stated that "[t]he communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First-Amendment protected free speech," and opined that the true gravamen of the Rosenbergs' argument on this point was the same as that underlying their Sixth Amendment argument—namely, vagueness—and was thus similarly barred by *Gorin*.[93]

The Supreme Court denied the Rosenbergs' petition for certiorari in November 1952.[94] On June 17, 1953, Justice William Douglas granted them a stay of execution, but the full Supreme Court met in a special

84. *See* Jacob Weisberg, *Cold War Without End*, N.Y. TIMES (Nov. 28, 1999), http://www.nytimes.com/1999/11/28/magazine/cold-war-without-end.html?pagewanted=all [perma.cc/M6JN-LLZV].
85. *See Rosenberg*, 195 F.2d at 596.
86. *See id.* at 596–97.
87. *See id.* at 590.
88. *See id.* at 603.
89. *See id.* at 591–92.
90. *See id.* at 611.
91. 312 U.S. 19 (1941).
92. *See Rosenberg*, 195 F.2d at 591.
93. *Id.* at 591–92.
94. *See* Rosenberg v. United States, 344 U.S. 889 (1952).

session two days later, on June 19, and vacated the stay.[95] The death sentences were carried out a few hours after the Supreme Court handed down its order,[96] making Julius and Ethel Rosenberg the only U.S. citizens to be executed under the Espionage Act during the Cold War.

In a subsequent appeal by one of the Rosenbergs' coconspirators, Martin Sobell, the Second Circuit rejected several arguments that prosecutorial misconduct had tainted the Rosenberg trial.[97] In an opinion authored by Judge Henry Friendly, the court held that even if the prosecution had erred in questioning Ethel Rosenberg about possible contradictions between her trial testimony and her invocation of the Fifth Amendment under questioning before the grand jury, that error had not violated Sobell's constitutional rights.[98] The court further ruled that Sobell could not argue on appeal that he had joined the conspiracy only after the war had ended, and thus was not properly subject to an enhanced sentence under the Espionage Act for misconduct "in time of war," because he had not advanced that argument in the trial court.[99]

The Rosenberg case divided the country, with many believing that the Rosenbergs were innocent victims of a national security state run amok.[100] Rallies were held to protest their executions, and the Pope even made an (ultimately fruitless) appeal to President Eisenhower to grant them clemency.[101]

Subsequent confessions by their codefendants and recently declassified documents have conclusively established that Julius Rosenberg was indeed a Soviet spy.[102] Ethel Rosenberg's guilt, however, is far from certain: David Greenglass admitted in 2001 that he had testified falsely against his sister, Ethel, to save his own wife from prosecution.[103] Grand jury transcripts from the testimony of other witnesses, which were unsealed in 2008, also appear to support Ethel Rosenberg's denials of any participation in Soviet espionage.[104]

David Greenglass died in 2014, and a year later his grand jury testimony was unsealed (over the objections of both Greenglass's family and the U.S. government). The transcript revealed that until the *Rosenberg* trial,

95. *See* Linda Greenhouse, *Guilt or Innocence Aside*, N.Y. TIMES (Aug. 6, 1989), http://www.nytimes.com/1989/08/06/books/guilt-or-innocence-aside.html [perma.cc/3JMX-9X8V].

96. *See id.*

97. *See* United States v. Sobell, 314 F.2d 314 (2d Cir. 1963).

98. *See id.* at 324–25.

99. *See id.* at 331–32.

100. *See generally* JOHN F. NEVILLE, THE PRESS, THE ROSENBERGS, AND THE COLD WAR (1995).

101. *See id.* at 105.

102. *See, e.g.*, Sam Roberts, *57 Years Later, Figure in Rosenberg Case Says He Spied for Soviets*, N.Y. TIMES, Sept. 11, 2008, at A1.

103. *See id.*

104. *See id.* The New York federal district judge unsealed the grand jury transcripts of testimony by all witnesses in the *Rosenberg* case who (1) were deceased, (2) had consented, or (3) had demonstrated their indifference by failing to object. The judge maintained the seal on testimony by three then-living objectors: David Greenglass, Max Elitcher, and William Danziger.

Greenglass had consistently denied having ever spoken to Ethel Rosenberg on the subject of espionage.[105] Had that information been disclosed to the Rosenbergs' defense counsel, it could have been used to attack Greenglass's credibility, perhaps changing the outcome of the case.

6. *United States v. Drummond*

Nelson Drummond was recruited by Soviet agents while stationed at the U.S. Naval Headquarters in London in the late 1950s.[106] For at least five years, he passed highly classified documents to his Soviet handlers in exchange for tens of thousands of dollars.[107] When the FBI arrested him during a rendezvous with his Russian contact, Drummond was carrying classified documents concerning antisubmarine guided missiles, electric bomb fuses, and aircraft bombs.[108] At trial, Drummond admitted passing documents to the Soviets in exchange for large cash payments.[109] He was convicted of conspiracy under the Espionage Act and sentenced to life in prison.[110]

On appeal, Drummond argued that he had effectively been charged with treason[111] and thus should have been afforded the protection of Article III, Section 3 of the Constitution, which provides that a treason conviction requires the testimony of two witnesses to the same overt act.[112] The Second Circuit, sitting en banc, rejected that argument, pointing out that the Espionage Act prohibits actions that do not constitute treason under the Constitution[113]—specifically, a defendant may be convicted under the Espionage Act for activities that he has "reason to believe" will have the effect of aiding a foreign nation (whether or not that nation is an adversary of the United States).[114] Treason, in contrast, requires intent—not merely reason to believe—that a defendant's actions will harm the United States or aid a foreign enemy of the nation.[115]

As the opinion, written by Judge Irving Kaufman, explained, "[t]he differences may not be very great between intent and reason to believe, or between injuring our country and aiding our adversaries. But the Supreme Court plainly regards them as sufficient to make the two-witness rule inapplicable."[116] In so holding, the court once again reaffirmed the vitality and flexibility of the Espionage Act as a tool to be used against leakers of

105. *See* Roberts, *supra* note 80.
106. *See* United States v. Drummond, 354 F.2d 132, 138 (2d Cir. 1965).
107. *See id.* at 138–39.
108. *See id.* at 139–40.
109. *See id.* at 140.
110. *See id.* at 138.
111. *See id.*
112. *See* U.S. CONST. art. III, § 3.
113. *See Drummond*, 354 F.2d at 138, 152–53.
114. *See* 18 U.S.C. § 794(a) (2012).
115. *See Drummond*, 354 F.2d at 152–53.
116. *Id.* at 152.

classified information—a purpose that it continues to serve five decades later.[117]

B. Use of Immigration Controls to Combat Espionage

After World War II ended, the Immigration and Naturalization Service (INS) assumed a major role in preventing spies and other enemy undesirables from harming America. Accordingly, the Second Circuit was once again called upon to evaluate the legitimacy of the government's tactical use of immigration law to combat national security threats.

1. *Bejeuhr* and *Willumeit*

In 1949, the Second Circuit issued two decisions upholding the use of immigration controls as a tool to prevent German spies from remaining in the country after the end of open hostilities.

In *United States ex rel. Bejeuhr v. Shaughnessy*,[118] a German-born resident alien, Walter Bejeuhr, challenged his deportation as an "alien enemy."[119] Bejeuhr argued that neither the applicable statute nor the Presidential Proclamation authorizing the deportation of enemy aliens was still valid because the United States was no longer at war with Germany, and the Third Reich had been replaced by a government friendly to the United States.[120] The Second Circuit panel, comprising Judges Harrie Chase, Jerome Frank, and August Hand, rejected Bejeuhr's argument in favor of a broader view of the Executive's war powers, citing a prior decision "that the power of the Attorney General to deport resident alien enemies [is] not limited to 'times of active hostilities' but continue[s] . . . until peace [i]s formally made."[121] Because the United States and Germany had yet to sign a peace treaty, the court held that the Attorney General (and thus the INS) had the power to order Bejeuhr's deportation.[122]

In *United States ex rel. Willumeit v. Watkins*,[123] decided the same year, German Bund[124] leader Otto Willumeit challenged his deportation as an enemy alien. Willumeit was a naturalized American citizen when he was convicted under the Espionage Act in 1942.[125] While serving his five-year

117. *See, e.g.*, United States v. Kim, 808 F. Supp. 2d 44, 49 (D.D.C. 2011) (noting that "[i]f [d]efendant's interpretation of the Treason Clause were correct, the prosecutions in these cases would have been declared unconstitutional," and rejecting an identical challenge to the Espionage Act on the basis of the Supreme Court's opinion in *Cramer v. United States*, 325 U.S. 1 (1945), and *Drummond*, 354 F.2d 132).

118. 177 F.2d 436 (2d Cir. 1949).

119. *Id.* at 437.

120. *See id.*

121. *Id.* (quoting United States *ex rel.* Kessler v. Watkins, 163 F.2d 140 (2d Cir. 1947)).

122. *See id.* The Supreme Court subsequently denied Bejeuhr's petition for certiorari. *See* Bejeuhr v. Shaughnessy, 338 U.S. 948 (1950).

123. 171 F.2d 773 (2d Cir. 1949).

124. The Bund was an organization of German-born immigrants dedicated to advancing the aims of the Nazi Party in America.

125. *See Willumeit*, 171 F.2d at 774.

sentence on that charge, he had consented to the revocation of his U.S. citizenship on the ground that he had never intended to renounce allegiance to the German Third Reich.[126] Upon his release from prison, the INS ordered Willumeit's deportation as an enemy alien.[127] He contested the order, arguing that the applicable statute only authorized the deportation of enemy aliens convicted of violating the Espionage Act. Therefore, Willumeit argued, the INS was powerless to deport him because he was a U.S. citizen at the time of his conviction.[128]

The Second Circuit rejected Willumeit's argument. In an opinion authored by Judge Thomas Swan, the court concluded that Congress had intended to authorize the deportation of persons such as Willumeit and declared: "The [Espionage] Act is concerned with the deportation of 'undesirable' aliens; [Willumeit] is an alien, and by reason of his conviction may be found to be an 'undesirable resident' of the United States whether he was an alien or a citizen when the crime was committed."[129]

Willumeit appealed to the Supreme Court, which affirmed the Second Circuit's ruling, holding that "[t]here is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct. That is what Congress did in [the statute at issue here], and there is no occasion to restrict its language so as to narrow its plain meaning."[130]

With the *Bejeuhr* and *Willumeit* opinions, the Second Circuit made clear that spies for foreign governments could not rely on technicalities to escape deportation. The court would soon issue a similar ruling regarding evidence seized by the INS in arresting a spy.

2. *United States v. Abel*

Rudolf Abel was a colonel in the KGB, the espionage agency of the Soviet Union.[131] He entered the United States illegally by crossing the Canadian border in 1948 and spent the next ten years spying for the Soviet Union inside the United States.[132] In 1957, one of his coconspirators defected to the United States and identified Abel to the FBI as a Soviet spy.[133] The defector refused to testify against Abel, however, and so the FBI, lacking sufficient evidence to prosecute Abel for espionage, notified the INS that he was in the country illegally.[134] FBI and INS agents assembled at the New York hotel where Abel was staying and, after a brief period of questioning by the FBI during which Abel refused to cooperate, the INS arrested him.[135]

126. *See id.*
127. *See id.*
128. *See id.* at 775.
129. *Id.*
130. Eichenlaub v. Shaughnessy, 338 U.S. 521, 529 (1950).
131. *See* United States v. Abel, 258 F.2d 485, 487–88 (2d Cir. 1958).
132. *See id.* at 488–92.
133. *See id.* at 489.
134. *See id.* at 490–91.
135. *See id.* at 490–92.

The INS agents conducted a search incident to arrest, seizing various documents pertaining to Abel's citizenship: a birth certificate, a passport, and the like.[136] The agents then offered Abel the opportunity to pack anything he wished to take with him and to check out of the hotel.[137] Abel agreed and, as he was packing, the agents caught him trying to slip three pieces of paper into his sleeve.[138] The agents promptly seized the papers he was attempting to hide.[139] They then helped Abel check out of the hotel, whereupon they transported him to INS headquarters.[140] The FBI subsequently searched Abel's vacated hotel room and found two items in a trash can that turned out to be espionage tools: a hollowed-out pencil containing microfilm and a block of wood containing a cipher pad.[141]

Abel was subsequently charged with violating the Espionage Act.[142] At his trial, the government introduced one of the pieces of paper that Abel had tried to hide on his person, which bore a coded message, as well as the two items that the FBI had retrieved from the trash can.[143] Abel was convicted and sentenced to thirty years in prison. He appealed his conviction, arguing that the INS had illegally searched his hotel room for evidence of espionage, when they were merely permitted to search for weapons that might endanger their safety or evidence of Abel's alienage status, the only issue properly within the INS's purview.[144] In effect, Abel argued that the government had used the INS to circumvent the criminal warrant requirements that would have applied to an FBI search for evidence of espionage.

The Second Circuit panel of Judges Charles Clark, Joseph Lumbard, and Sterry Waterman rejected Abel's argument.[145] As a threshold issue, the court held that the INS had the power to conduct a search incident to arrest even though its arrest warrant was administratively issued by the INS Commissioner rather than by a judge.[146] The court went on to hold that the INS agents had acted in good faith by searching only for documents relevant to the alienage question.[147] As to the three pieces of paper that Abel had actively tried to conceal from the agents, those documents were not mere evidence of a crime, but rather, the very "instrumentalities and means" by which Abel was committing the crime of espionage.[148] As the court pointed out, federal agents are empowered to seize such

136. *See id.* at 492.
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.* at 487.
143. *See id.* at 487, 492.
144. *See id.* at 490.
145. *See id.* at 502.
146. *See id.* at 492–94.
147. *See id.* at 494.
148. *Id.* at 496–97.

instrumentalities and means when discovered in the course of a search incident to arrest.[149]

Abel appealed to the Supreme Court, which affirmed the Second Circuit's ruling, observing that to do otherwise would be to unduly hamper government agencies' ability to cooperate in the prosecution of violations of law. Specifically, the Court held that the Second Circuit was "justified in not finding[] that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding."[150]

While Abel's capture and conviction were major media and propaganda events during the Cold War, Abel only served a short portion of his criminal sentence before being released to the Soviets in a prisoner exchange for downed U-2 pilot Francis Gary Powers.[151]

In its postwar opinions delineating the scope and limitations of the Espionage Act and of the federal government's power to use immigration statutes to prosecute suspected spies, the Second Circuit struck a vital balance between the government's national security mandate and the fundamental rights of individuals accused of crimes against the United States. In so doing, the court set a powerful example of courage and integrity in the face of intense public and political pressure.

II. THE RESPONSE TO GLOBAL TERRORISM

Decades after the Second Circuit's landmark espionage decisions, a new threat emerged. On September 1, 1992, two men identifying themselves as Ramzi Ahmed Yousef and Ahmad Mohammad Ajaj arrived at New York's John F. Kennedy International Airport from Karachi, Pakistan.[152] Less than six months later, Yousef and others attacked the World Trade Center by igniting a massive bomb that they had hidden in a van and parked in the complex's underground garage.[153] The detonation occurred on an otherwise normal Friday, at 12:18 p.m. on February 26, 1993, as tens of thousands of people were going about their business or enjoying the lunch hour.[154] As the explosion echoed through the caverns of Lower Manhattan, the blast ripped through the thick walls and girders that supported Tower One, the northernmost of the pair, and sent billows of white smoke into the thin winter air.[155] Six victims were murdered in the attack, more than 1,000 were injured, and the nation was traumatized.[156]

149. *See id.*
150. Abel v. United States, 362 U.S. 217, 230 (1960).
151. The Abel-Powers prisoner swap is the subject of the 2015 film *Bridge of Spies*, directed by Steven Spielberg and starring Tom Hanks as Abel's defense counsel, who played a central role in negotiating the exchange. *See* BRIDGE OF SPIES (DreamWorks Pictures 2015).
152. *See* United States v. Salameh, 152 F.3d 88, 107 (2d Cir. 1998) (per curiam).
153. *See id.* at 108.
154. *See id.*
155. *See id.*
156. *See id.*

More terror would follow. Months after the bombing, the FBI arrested a team of jihadists, led by a blind Islamic cleric named Sheikh Omar Abdel Rahman, for planning even more colossal attacks on New York City landmarks and infrastructure.[157] Meanwhile, less than two years after the World Trade Center bombing, on the other side of the globe, authorities in the Philippines thwarted a meticulous plot to bomb a dozen U.S. commercial jets flying over Southeast Asia.[158] The plot's ringleader turned out to be Yousef, who had fled New York after the World Trade Center attack.[159]

Inspiring all of this destruction was a Saudi named Usama Bin Laden who, through an organization he had created called al Qaeda, had taught Yousef and Ajaj how to make the World Trade Center bomb, had sent Rahman to America, and by February 1998 was publicly calling on all Muslims to murder U.S. civilians around the world.[160] Later that year, al Qaeda attacked the U.S. embassies in Kenya and Tanzania, murdering 224 people; it bombed the U.S.S. *Cole* in Yemen's Aden Harbor in October 2000, killing seventeen U.S. service members; and on September 11, 2001, al Qaeda returned to Yousef's original target and carried out the most murderous terrorist attack in history.[161] The mastermind of the September 11, 2001 attacks was Yousef's uncle, Khalid Sheikh Mohammed—the two had worked together in the Philippines on the foiled airplane plot.[162]

Against this harrowing backdrop of mass murder, one convicted terrorist after another appeared before the Second Circuit. In all, more than twenty-five of the world's most notorious terrorists sought relief from the court. First came four of Yousef's confederates in the 1993 World Trade Center attack.[163] Next, it was Rahman and nine of his followers for the plot against other New York City targets.[164] Yousef and two others followed for their roles in attacking the World Trade Center in 1993 and the airplanes plot in the Philippines.[165] Then came the appeals of those involved in the attacks of the embassies in East Africa.[166] Many more would follow.

Given this docket, it is tempting to define the Second Circuit's jurisprudence in the sphere of terrorism by reference to the sheer magnitude of the cases heard, the notoriety of the terrorist appellants, and the death and destruction that occurred or was planned by the defendants in these cases. Indeed, no other court in the nation's history has brought finality to as many

157. *See* United States v. Rahman, 189 F.3d 88, 103–04 (2d Cir. 1999) (per curiam).
158. *See* United States v. Yousef, 327 F.3d 56, 81–82 (2d Cir. 2003).
159. *See id.* at 81.
160. *See* LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11, at 4 (2006).
161. *See id.* at 266–68, 306–08, 360–61.
162. *See id.* at 266.
163. *See* United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (per curiam).
164. *See* United States v. Rahman, 189 F.3d 88, 103–04 (2d Cir. 1999) (per curiam).
165. *See* United States v. Yousef, 327 F.3d 56, 81–82 (2d Cir. 2003).
166. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93 (2d Cir. 2008) (*In re Terrorist Bombings I*).

vitally important terrorism cases. Deeper examination, however, reveals a legacy that is even more profound.

Two characteristics stand out: First, the manner in which the court resolved these appeals was consistently brilliant in its understatement.[167] As the nation waged controversial wars, as the threat of Islamic terrorism was by turns underplayed and overplayed, and as politics clouded policy making, the court methodically addressed each claim of every convicted terrorist that came before it in such painstaking detail that the opinions it produced represent a triumph of sober legal analysis over external influence of any sort.[168] The decisions allow the magnitude of the facts to speak for themselves, neither exaggerating the drama and emotion of the subject matter nor eliding the gravity of the allegations. No convictions were overturned, but each decision found its conclusions along a path of unwavering fairness, administering justice in the highest traditions of the bench, and announcing to the parties—indeed, to the world—that even in the most odious of cases, the rule of law still prevails.

Second, the legal guidance drawn from these opinions has far-reaching practical significance of enduring value.[169] These were a new and different breed of national security cases, presenting a bevy of novel legal issues relating to the nature and scope of the threat and the challenges associated with countering it. The cases involved conduct planned or carried out overseas, raising questions about the reach of U.S. criminal law and the application of the Constitution and standard U.S. investigatory procedures in foreign lands. The underlying investigative landscape of the cases often saw traditional law enforcement techniques blend with highly secretive methods of intelligence gathering, calling for a delicate calibration of national security interests in light of the trial rights of the accused and the privacy rights of the general public. In resolving these and other issues of first impression, the Second Circuit set precedents for its sister courts, gave law enforcement authorities a roadmap for how terrorism cases should be investigated, signaled to intelligence officials that sensitive sources and methods could be protected in the context of a public trial, and guaranteed to the accused and their counsel that their trials would be fair. As such, the decisions fortified a backbone of federal national security law that would establish Article III courts as the forum of utmost reliability for the prosecution of suspected terrorists.

The Second Circuit's work in resolving the nation's most significant body of terrorism cases reflects a contribution to the principles of national security and the rule of law that is nothing short of monumental. The cases of greatest consequence are highlighted in Part II.A. Part II.B discusses the lasting practical impact of the court's decisions, within the Second Circuit and beyond.

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167. *See infra* Part II.A.
168. *See, e.g.*, *infra* notes 187–94 and accompanying text.
169. *See infra* Part II.B.

A. The Foundational Cases

The Second Circuit's review of the four landmark terrorism prosecutions discussed below established norms for handling such cases through their investigative, trial, and appellate phases.

1. *United States v. Salameh*

Despite the huge crater in the hull of the World Trade Center and the two million gallons of water that gushed from severed pipes into the subgrade levels, not all traces of the 1993 bomb were irretrievably buried beneath the tons of debris.[170] The forensic investigation team found, for example, pieces of a Ford Econoline 350 cargo van with unique explosives damage, showing that it was blown apart in opposite directions and suggesting that it was the vehicle that held the bomb.[171] One of those pieces contained the vehicle identification number (LHA 75633), which the FBI traced to a Ryder truck rental franchise in Jersey City, New Jersey.[172] As it turned out, three days before the bombing, the van was leased to an individual named Mohammed Salameh, who had told the rental agent that he would need it for five days.[173] Salameh left a $400 deposit.[174]

Salameh, a Jersey City resident, was Yousef's contact in the United States.[175] Yousef's travel companion, Ajaj, did not clear customs: he was arrested for passport fraud upon arrival and suspected of worse, given his possession of a then-unexplainable set of bomb-making manuals and handwritten notebooks.[176] Yousef, on the other hand, was permitted to enter the country, and within days had moved in with Salameh.[177] Over the next several months, Yousef and Salameh carried out the plan to attack the World Trade Center, maintaining steady contact with Ajaj through prison visits and calls, and enlisting the assistance of others, including Nidal Ayyad, an Allied Signal engineer, and Mahmoud Abouhalima, an Egyptian who had attended the Khalden terrorist training camp in Afghanistan before returning to New York to drive a taxicab.[178] On February 26, 1993—after acquiring all the necessary bomb components, hiding them in a Jersey City storage shed, and building the bomb in a Jersey City apartment—the terrorists loaded the bomb into the Ryder van, parked it underneath the World Trade Center, and watched the ensuing death and destruction from the Jersey City waterfront.[179] Yousef and Abouhalima left the country

170. *See* United States v. Salameh, 152 F.3d 88, 107–08 (2d Cir. 1998) (per curiam).
171. *See id.* at 113.
172. *See id.*
173. *See id.* at 108.
174. *See* Ralph Blumenthal, *The Twin Towers: The Investigation; Insistence on Refund for a Truck Results in an Arrest in Explosion*, N.Y. TIMES (Mar. 5, 1993), http://www.nytimes.com/1993/03/05/nyregion/twin-towers-investigation-insistence-refund-for-truck-results-arrest-explosion.html?pagewanted=all [perma.cc/P2Q8-XNG3].
175. *See Salameh*, 152 F.3d at 107.
176. *See id.*
177. *See id.* at 107–08.
178. *See id.*
179. *See id.* at 108.

immediately.[180] Salameh planned to do the same, but he decided to do one last thing before departing.[181]

In what the Second Circuit would later describe as a "ludicrous mistake," Salameh returned to the Ryder leasing agent in Jersey City to collect his $400 deposit, claiming that the van had been stolen.[182] The FBI was there to greet him with handcuffs.[183] After Ayyad was also arrested in New Jersey, and Abouhalima was captured in Egypt and sent back to the United States, the two men joined Salameh and Ajaj as the first four defendants tried for the bombing of the World Trade Center.[184] After a six-month trial involving more than 1,000 exhibits and the testimony of more than 200 witnesses, each of the defendants was convicted on all counts and sentenced to life in prison.[185]

The Second Circuit affirmed the convictions on August 4, 1998, three days before al Qaeda would attack the U.S. embassies in East Africa.[186] In the annals of appellate jurisprudence, few appeals have presented, to use the court's words, such a "congeries of arguments."[187] The panel of Judges Thomas Meskill, Joseph McLaughlin, and Guido Calabresi allowed two full days for oral argument, a more than generous allotment for each defendant to voice his myriad claims. The 124-page written opinion, which was issued per curiam,[188] analyzed and disposed of no fewer than fifty-four claims of error, covering virtually every aspect of the long and complicated trial. There were, for example, challenges to how the jury was selected and how it was instructed on the law prior to its deliberations.[189] Each defendant claimed that evidence incriminating him should have been suppressed because it was collected in violation of the Constitution or was unfairly prejudicial.[190] There were challenges to countless evidentiary items and aspects of the testimony.[191] Abouhalima and Ajaj claimed that the evidence against them was insufficient to support the jury's guilty verdicts.[192] Salameh and Abouhalima contended that it was improper for the government to introduce a Jersey City gas station attendant's pretrial identification of them together, filling up a Ryder van with gas hours before the bombing, after the bewildered attendant failed to identify them in the

180. *See id.*
181. *See id.*
182. *Id*.
183. *See id.*
184. *See id.*
185. *See id.*
186. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 101 (2d Cir. 2008) (*In re Terrorist Bombings I*).
187. *Salameh*, 152 F.3d at 105.
188. "Per curiam" means the decision was issued in the name of the entire court, rather than only the judges assigned to the panel. *See Per Curiam*, BLACK'S LAW DICTIONARY (9th ed. 2009).
189. *See Salameh*, 152 F.3d at 120–21.
190. *See id.* at 122–33.
191. *See id.*
192. *See id.* at 151–57.

courtroom.[193] Abouhalima, who alone raised more than two dozen appellate issues, claimed that the statements he made to the FBI suggesting familiarity with Yousef and the bomb plot should have been excluded as the involuntary product of torture by the Egyptian government.[194]

The written opinion marched through every issue, thoroughly deliberating each one as if the appeal concerned it alone. Such attention was arguably undeserved—not because the appellants had committed acts of unfathomable evil, but because so many of the claims plainly lacked merit under the law. A more abbreviated analysis would ordinarily have sufficed for all but a handful of the claims. Nevertheless, the horrific subject matter of the appeal required something more, and, in this sense, the decision's lasting achievement is the extraordinary care with which the court tended to each corner of the vast legal expanse before it, sending a clear message that every defendant—no matter who he is or what he has done—will be accorded the benefits of the rule of law and the protection of the Constitution.

2. *United States v. Rahman*

A year later, on August 16, 1999, the Second Circuit resolved its second monumental terrorism appeal, again in a cogent and comprehensive per curiam written opinion and again after the panel—consisting of Judges Jon Newman, Pierre Leval, and Fred Parker—devoted two full days to oral argument.[195] The appeal presented a litany of claims advanced by ten defendants convicted of participating in a seditious conspiracy to, in the words of the court, "wage a war of urban terrorism against the United States and forcibly to oppose its authority."[196] The FBI disrupted the plot midstream, arresting the group four months after the World Trade Center bombing.[197] By that time, however, the defendants had, either alone or in concert, assisted in the murder of Rabbi Meir Kahane, a former member of the Israeli parliament and founder of the Jewish Defense League; plotted to assassinate Egyptian President Hosni Mubarak during an official visit to New York; provided assistance to Yousef and Salameh in carrying out the World Trade Center bombing; and begun building bombs for attacks on New York City buildings and tunnels.[198] After a nine-month trial, in which the defendants alone called more than seventy witnesses, two of the defendants were sentenced to life imprisonment and the others received prison terms ranging in length from twenty-five to fifty-seven years.[199]

193. *See id.* at 157–58. In a shocking error for the government, the gas station attendant actually pointed out two of the jurors.
194. *See id.* at 117.
195. *See* United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (per curiam).
196. *Id.* at 104.
197. *See id.* at 111.
198. *Id.* at 103–04.
199. *Id.* at 111.

The blind Egyptian cleric Rahman was one of those who received a life sentence.[200] The leader of the conspiracy and central figure in the case, Rahman had achieved prominence in jihadist circles for his denunciation of his homeland's secularism and its ties to "infidel" governments such as the United States.[201] In the 1970s, he had led an Egyptian terrorist organization known as al-Gama'a al-Islamiya ("the Islamic Group" or "al-Gama'a") which, nearly three decades later, would murder fifty-eight tourists in Luxor, Egypt, in a warped bid for Rahman's release from U.S. custody.[202]

In the mid-1980s, Egypt expelled Rahman on suspicion that one of his fatwas had led to the assassination of President Anwar Sadat.[203] Rahman went to Afghanistan, where he forged a close alliance with Bin Laden, eventually becoming heavily involved in al Qaeda's precursor organization, the international recruiting and fundraising outfit known as Maktab al-Khadamat. In 1990, as Bin Laden rose to prominence in Afghanistan, Rahman came to New York to run Maktab al-Khadamat's U.S. franchise in Brooklyn, New York.[204] Awaiting Rahman was a group of followers who had already begun "to organize [a] *jihad* army in New York."[205]

The significance of the Second Circuit's opinion in the case against Rahman and his coconspirators extends beyond the men themselves, as the decision is widely cited by modern courts and academics alike for its holdings on topics ranging from the limits of expert testimony on Islamic law,[206] to regulating the government's use of informants,[207] and even to the scope of the passport fraud statute.[208] The court's affirmance of Rahman's convictions, however, was the apex of its achievement, for while Rahman represented a clear threat to the nation's security, he also mounted a credible constitutional challenge to his conviction.[209] Rahman had led the conspiracy from an elevated position, insulating himself from the day-to-day terrorist planning.[210] The evidence against him therefore consisted largely of his statements to his followers.[211] This gave Rahman an opportunity to argue that he was being punished solely for his speech and ideas, in violation of constitutionally protected freedoms.[212]

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200. *See id.*
201. *See id.* at 127.
202. *See* Douglas Jehl, *70 Die in Attack at Egypt Temple*, N.Y. TIMES (Nov. 18, 1997), http://www.nytimes.com/1997/11/18/world/70-die-in-attack-at-egypt-temple.html [perma.cc/BG7B-9NYH].
203. *See* WRIGHT, *supra* note 160, at 201.
204. *See id.* at 200–05; *see also Rahman*, 189 F.3d at 107.
205. *Rahman*, 189 F.3d at 104.
206. *See, e.g.*, United States v. Amawi, 695 F.3d 457, 504 (6th Cir. 2012) (discussing Islamic law).
207. *See, e.g.*, Sarah L. Harrington, Annotation, *Entrapment to Commit Federal Crimes of Terrorism*, 89 A.L.R. Fed. 2d 215, 225–30 (2014) (discussing informants).
208. *See, e.g.*, United States v. Ryan-Webster, 353 F.3d 353, 363 (4th Cir. 2003) (discussing passport fraud).
209. *See Rahman*, 189 F.3d at 111–18.
210. *See id.* at 123–26.
211. *See id.*
212. *See id.* at 114–16.

The claim required a deep examination of the role of religion in the conspiracy and the significance of Rahman's statements to his followers.[213] The court found the conspiracy to be premised on "jihad," in the sense of a struggle against the enemies of Islam, and saw Rahman's speeches as indicative of this purpose.[214] The court cited, for example, Rahman's instruction that followers were to "do jihad with the sword, with the cannon, with the grenades, with the missile . . . against God's enemies."[215] A follower was told by Rahman to "make up with God . . . by turning his rifle's barrel" on President Mubarak.[216] Statements like these were, in the court's analysis, calls to violence shrouded in religious garb.

Against this backdrop, Rahman's constitutional claims rang hollow, because, as the court explained, freedoms of speech and of religion, while fundamental rights, "do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes."[217] The court went on to offer context:

> Of course, courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible.[218]

Rahman had crossed the line. His "speeches were not simply the expression of ideas" but rather, in some instances, "constituted the crime of conspiracy to wage war on the United States . . . and solicitation of attack on the United States military installations, as well as of the murder of Egyptian President Hosni Mubarak."[219] Given that Rahman was also in constant contact with other members of the conspiracy—including the World Trade Center bombers in the weeks before the 1993 attack—and that Rahman was looked to as a leader, the court found ample basis for affirming his convictions and sentence.[220]

To the extent that Rahman's notoriety remained in question, a sad and gruesome postscript removed any doubt. Lynne Stewart, the lawyer who had represented Rahman through his trial and appeal and a respected member of the bar who had appeared before the Second Circuit regularly as an advocate, was herself convicted of providing material support to a terrorist conspiracy that Rahman supported from prison.[221] The aim of the conspiracy was to incite members of Rahman's Egyptian terrorist group, al-Gama'a, to commit murder overseas. According to many, including the U.S. government, it was this conspiracy that resulted in the massacre at the

213. *See id.* at 117.
214. *See id.* at 116–18.
215. *Id.* at 104.
216. *Id.* at 117.
217. *Id.* at 116–17.
218. *Id.* at 117 (citing United States v. Spock, 416 F.2d 165, 169–71 (1st Cir. 1969)).
219. *Id.*
220. *See id.* at 123–26.
221. United States v. Stewart, 590 F.3d 93 (2d Cir. 2009).

Luxor in November 1997, during which the al-Gama'a terrorists left leaflets on the bodies of the Luxor victims, demanding Rahman's release from custody.[222]

Stewart, as Rahman's counsel, was one of only a handful of people who could communicate with him in prison, and she used that privilege to smuggle messages from Rahman to members of al-Gama'a, communicating Rahman's withdrawal of support for a cease-fire between al-Gama'a and the Egyptian government.[223] In affirming Stewart's conviction, the panel of Circuit Judges Robert Sack, Guido Calabresi, and John Walker found that Rahman's "participation" and "leadership" in the conspiracy would have been impossible without Stewart's support.[224]

3. *United States v. Yousef*

On January 6, 1995, at approximately 10:45 p.m. local time in the Philippines, a security guard at the Josefa apartment complex in Manila noticed Ramzi Yousef and another man, Abdul Hakim Murad, running down the stairs from their sixth-floor apartment carrying their shoes.[225] At the same time, neighbors noticed smoke rising from the windows of unit 603, which Yousef had rented a month earlier using a false name.[226] Local firemen and police were called and determined that the occupants of unit 603 had accidently ignited a fire when mixing bomb-making ingredients in the kitchen sink.[227] The authorities found cartons of chemicals in the apartment, as well as Casio timers, wristwatches with wires attached, and a laptop computer.[228]

Murad was arrested when he returned to the apartment: Yousef had sent him back to retrieve a laptop.[229] When it was clear that Murad would not return, Yousef fled to Pakistan, the same sanctuary he had used after bombing the World Trade Center two years earlier.[230]

A robust international investigation led by the FBI revealed that Yousef had been in Manila since mid-1994 to carry out an elaborate plan to destroy U.S. commercial airliners in midair.[231] The plot, laid out in horrifying detail on the laptop that Yousef had sent Murad to retrieve, called for operatives to place bombs aboard twelve U.S.-flagged airplanes serving routes originating in Southeast Asia.[232] Each of the participants would board a preselected flight and assemble a time bomb during the journey's first leg.[233] After the operative disembarked at a stopover, the bomb would

222. *See* Jehl, *supra* note 202.
223. *See Stewart*, 590 F.3d at 104.
224. *Id.* at 115.
225. *See* United States v. Yousef, 327 F.3d 56, 81 (2d Cir. 2003).
226. *See id.*
227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.* at 81–82.
232. *See id.* at 79.
233. *See id.*

explode during the second leg.[234] The United States was the ultimate destination of eleven of the flights, with each of the targeted planes capable of carrying up to 280 people.[235]

Preparations for the attack were comprehensive and had lethal intentions. Khalid Sheikh Mohammed—Yousef's uncle, who would later supervise the September 11, 2001 attacks—joined Yousef in Manila for two months in mid-1994, and together they mixed bomb-making chemicals and built timing devices.[236] On December 1, 1994, Yousef and a man named Wali Khan Amin Shah conducted a test run by placing a bomb under a patron's seat at a Manila movie theater.[237] It exploded as planned, injuring several people.[238] Ten days later, Yousef tested another bomb on a Philippines Airlines flight from Manila to Tokyo with an intermediate stop in Cebu, Philippines.[239] After Yousef disembarked in Cebu, the bomb went off during the second leg of the flight, killing a Japanese businessman.[240]

The successes of Yousef's trial runs make clear that, if not for the mishap in unit 603, Yousef likely would have accomplished another colossal act of terror. Instead, he was captured a month later in Islamabad, Pakistan, turned over to U.S. authorities, and sent to New York to face charges for both the plot in Manila and the 1993 attack on the World Trade Center.[241] He had two separate trials, in 1996 and 1997, each four months long. Murad and Shah were his codefendants for the first trial, for their involvement in the airline plot; Eyad Ismoil, a Jordanian who drove the Ryder van into the World Trade Center garage, was his codefedant the second.[242] The juries convicted all defendants in both cases, and Yousef received a life sentence plus 240 years.[243]

Yousef's appeal raised so many issues that the government's brief in opposition bulged to an unprecedented 634 pages in length. The Second Circuit responded with a mammoth opinion of its own, determining that the convictions and sentences were all solidly grounded. Anchoring the opinion, jointly authored by Judges Ralph Winter, John Walker, and José Cabranes, was a scholarly account of the legal justification for prosecuting Yousef and Murad in the United States for conduct that took place overseas.[244] Yousef's claims withered under the court's analysis, which

234. *See id.*
235. *See id.*
236. *See id.* at 80–82; WRIGHT, *supra* note 160, at 267.
237. *See Yousef*, 327 F.3d at 79.
238. *See id.*
239. *See id.*
240. *See* WRIGHT, *supra* note 160, at 267. The businessman, Haruki Ikegami, had boarded the flight in Cebu, occupying seat 26K, under which Yousef had left the bomb. The bomb exploded about two hours after takeoff, shattering Ikegami's pelvic area and destroying major arteries in his abdomen. He bled to death within minutes. Other passengers were badly injured. Despite damage to the aircraft, the pilot heroically managed an emergency landing in Okinawa, Japan. *See id.*
241. *See Yousef*, 327 F.3d at 82–85.
242. *See id.* at 80.
243. *See id.*
244. *See id.* at 85–116.

explained why the prosecution was authorized by the relevant statutes and within the bounds of the U.S. Constitution and customary international law. Explaining how the charges did not offend due process, the court stated:

> The defendants conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy, and their attack on the Philippine Airlines flight was a "test-run" in furtherance of this conspiracy. Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair. As a consequence, we conclude that prosecuting the defendants in the United States did not violate the Due Process Clause.[245]

The court dispensed with the remaining claims one after another, dispassionately delving into the facts and applying the law with acuity. The opinion concluded by stating definitively that the "fairness of the proceedings" in the trial court was "beyond doubt."[246] The Supreme Court apparently agreed, denying Yousef's petition for certiorari a few months later.[247]

4. *In re Terrorist Bombings of U.S. Embassies in East Africa*

Mohamed Al-'Owhali, Mohamed Odeh, and Wadih El-Hage, were convicted of crimes related to the August 7, 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania. Their appeal required the Second Circuit to evaluate the prosecution of these three Bin Laden disciples in the context of the government's broader efforts to contain an increasingly brazen terrorist organization that was maturing into a serious threat to America's security.[248]

The six-month trial, held in early 2001, revealed a terrorist conspiracy dating back to the late 1980s, when Bin Laden used al Qaeda to congregate a band of Islamic radicals brimming with enthusiasm over the Afghan *mujahidin*'s victory over the Soviets.[249] Bin Laden rallied the group around

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245. *Id.* at 112. On the question of customary international law, the Second Circuit held that the trial court had erroneously concluded that the acts charged in one of the counts were offenses against the law of nations that supported the exercise of universal jurisdiction. *See id.* at 99. The court ruled that customary international law, at that time, did not provide for the prosecution of "terrorist" acts under the universality principle, in part due to the failure of states to achieve anything like consensus on the definition of terrorism. *See id.* at 103–08. The court nonetheless held that Yousef's prosecution on the count in question was both consistent with and required by the United States's treaty obligations and domestic laws. *See id.* at 108–11.

246. *Id.* at 173.

247. *See* Yousef v. United States, 540 U.S. 933 (2003).

248. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93 (2d Cir. 2008) (*In re Terrorist Bombings I*); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157 (2d Cir. 2008) (*In re Terrorist Bombings II*) (Fourth Amendment challenges); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177 (2d Cir. 2008) (*In re Terrorist Bombings III*) (Fifth Amendment challenges).

249. *See generally* WRIGHT, *supra* note 160, at 152–54.

the pursuit of a global caliphate, or Islamic government. In secret discussions with his team of in-house "clerics," Bin Laden blended violence with religious doctrine, twisting the holiest of Islamic texts into a justification for mass murder.[250] He reached out to like-minded jihadists around the world in early 1998 by publishing a "fatwa" that proclaimed all Muslims had a duty to kill American civilians anywhere they could be found.[251] The first major salvo of Bin Laden's global war came later that year in Africa.[252] As the rubble of the embassies in Kenya and Tanzania still smoldered, al Qaeda claimed responsibility for the attacks as acts in furtherance of Bin Laden's distorted Islamic crusade.[253]

Al-'Owhali, a British-born Saudi from a wealthy family, was dispatched by al Qaeda to Kenya days before the bombing.[254] He had trained for the operation for years in Afghanistan, learning about explosives and urban warfare at the same al Qaeda camp (Khalden) where Yousef, Ajaj, and Abouhalima had trained.[255] On the morning of the attack, Al-'Owhali rode in the passenger seat of the truck that delivered the bomb.[256] Although he had planned to become a martyr in the explosion along with the truck's driver, Al-'Owhali jumped out at the last moment and ran from the scene, suffering only slight injuries from the blast.[257] A few days later, he was arrested at a local hotel, interrogated by Kenyan and American authorities, and eventually sent to the United States for trial.[258] Al-'Owhali was convicted of all counts and was sentenced to life in prison, after the jury failed to reach unanimity on the death penalty.[259]

Odeh, a longstanding al Qaeda member of Palestinian descent, had been in East Africa as part of al Qaeda's team that built the bombs and planned the attacks.[260] He fled to Pakistan the night before the bombings, but was arrested there for traveling under a false name.[261] Odeh was sent back to Kenya a week later, after explosive residue was detected on his clothing and luggage.[262] Upon his return, he was arrested and interrogated by Kenyan and American authorities.[263] A search of his home revealed a crude drawing of the Nairobi embassy depicting a truck at the optimum location

250. *See id.* at 265–66.
251. *See id.*
252. *See id.* at 306–09.
253. *See In re Terrorist Bombings I*, 552 F.3d at 103–05.
254. *See id.* at 105.
255. *See* WRIGHT, *supra* note 160, at 297.
256. *See id.* at 307–08.
257. *See In re Terrorist Bombings I*, 552 F.3d at 105.
258. *See id.* Among Al-'Owhali's confessions to U.S. law enforcement after his arrest were his connections to other al Qaeda terrorists, including an admission that both before and after the bombing of the embassies he placed telephone calls to the father-in-law of Khalid al-Mihdhar, a fellow Saudi who was one of the hijackers of American Airlines Flight 77, which attacked the Pentagon on September 11, 2001.
259. *See id.* at 107.
260. *See id.* at 103–05.
261. *See id.* at 104.
262. *See id.*
263. *See id.*

to deliver the bomb.[264] At his trial in New York, Odeh was also convicted on all counts and sentenced to life in prison.[265]

The third appellant, El-Hage, was a naturalized U.S. citizen and thus presented unique legal questions.[266] Born in Lebanon, El-Hage moved to the United States as a young man and studied urban planning at a college in Louisiana.[267] He veered into radicalism, however, after falling in with Sheikh Rahman's group in Brooklyn.[268] Shortly before the World Trade Center attack, El-Hage left the United States to work for al Qaeda in the Sudan, where he became one of Bin Laden's closest confidants.[269] Though he did not participate in planning the attack on the Nairobi embassy—he had moved back to the United States a year before the bombings—the trial evidence showed that El-Hage joined Bin Laden's conspiracy to kill Americans by, among other things, embracing al Qaeda's violent anti-American agenda, performing essential functions for the organization, and lying about his connections to Bin Laden and al Qaeda during two rounds of testimony before a federal grand jury in New York City.[270] El-Hage was arrested in New York at the conclusion of the second grand-jury session, a month after the embassies were attacked.[271] At trial, he was convicted on all counts (including seventeen counts of perjury) and sentenced to life in prison.[272]

The scope and complexity of the appeals in the embassy cases merited three separate opinions (all authored by Judge José Cabranes), an unprecedented step for the Second Circuit.[273] In the end, the court affirmed all of the convictions and sentences, with the exception of El-Hage's life sentence, which it ordered the trial court to recalculate in light of an intervening change in the law (which nevertheless remained a life sentence upon recalculation).[274]

Apart from the staggering number of issues presented and the depth of the analysis required to resolve them,[275] the court's three opinions

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264. *See id.* at 114.

265. *See id.* at 107.

266. *See id.* at 104.

267. *See* WRIGHT, *supra* note 160, at 275–77.

268. Among other sinister dealings of which El-Hage was suspected during his time with the Brooklyn group was the purchase of the gun that El Sayyid Nosair used to kill Rabbi Meir Kahane. *See generally* United States v. Rahman, 189 F.3d 88, 105 (2d Cir. 1999) (per curiam).

269. *In re Terrorist Bombings I*, 552 F.3d at 104.

270. *See id.* at 104, 107.

271. *See id.* at 104.

272. *See id.* at 107.

273. *See id.*; *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157 (2d Cir. 2008) (*In re Terrorist Bombings II*); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177 (2d Cir. 2008) (*In re Terrorist Bombings III*).

274. *See In re Terrorist Bombings I*, 552 F.3d at 156.

275. The court was required, for example, to wade through nearly forty hours of videotape of the prosecutors' pretrial interviews of their star witness, an al Qaeda defector. The prosecutors did not learn of the tapes' existence until after the trial because the interviews were recorded by the witness's custodians without the prosecutors' knowledge, and thus the prosecutors did not disclose the recordings to the defendants, as is required for

concerning the East Africa embassy bombings charted new territory for federal courts dealing with the increasingly challenging landscape of international terrorism. While the Second Circuit was repeatedly confronted with the exhaustive and heroic efforts of the American national security officials charged with the breathtakingly important mission to stop Bin Laden and al Qaeda, just as vital was the court's responsibility to guard the rights and freedoms of the accused. The opinions honored all of those interests, however much in tension, with equal vigilance.

A perfect example was El-Hage's claim that his constitutional privacy rights were violated by a covert spying operation in Kenya that produced incriminating evidence used against him at trial.[276] El-Hage had a strong argument: he was an American citizen abroad; the surveillance included extensive wiretaps of his phones and a search of his home; and none of it was preauthorized by a court, as would normally be required for searches that produce trial evidence.[277] But the government had its own strong interest: the surveillance of El-Hage was part of a larger operation to gather intelligence on Bin Laden and al Qaeda, an operation so vital to national security that disturbing it to obtain court authorization was thought to be out of the question, even if it meant forgoing trial evidence.[278] The Second Circuit drilled through the competing claims to the principal question of law: whether preauthorization in the form of a court-issued warrant was required for overseas searches targeting U.S. citizens.[279] In resolving this question of first impression, the court mined relevant legal precedent, the history of U.S. diplomatic relations, and the practical realities of overseas evidence collection.[280] The court's resolution struck a careful balance among the competing interests: while the Fourth Amendment's protection against unreasonable searches and seizures does not require the government to obtain a warrant before conducting foreign searches, the searches must be reasonable, upon retrospective review, for the evidence to be used at trial.[281] In El-Hage's case, after carefully examining how the searches were conducted, the court concluded that they were reasonable.[282]

Similarly vexing legal questions permeated other aspects of the appeal, each requiring calibration of the balance between individual rights and national security imperatives. In its concluding thoughts, the court recognized the trial judge's "conscientious efforts to ensure that the rights of [the] defendants and the needs of national security were equally met

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any recorded statement of a witness. Later, when the prosecutors became aware of the tapes and disclosed them to the defendants, El-Hage asked for a new trial, a demand that the trial court rejected after an extensive hearing. In affirming that ruling, the Second Circuit recognized "the liberty interests that El-Hage has at stake" but was able to "state with confidence" that the material on the tapes, whether taken individually or as a whole, would most likely not have changed the result at trial. *Id.* at 146.

276. *See In re Terrorist Bombings II*, 552 F.3d at 167–76.

277. *See id.*

278. *See id.*

279. *See id.* at 165–67.

280. *See id.* at 167–76.

281. *See id.* at 176–77.

282. *See id.* at 177.

during these proceedings."[283] The three comprehensive appellate opinions in the East Africa embassy cases demonstrate that the Second Circuit achieved the same goal.[284]

B. The Resulting Framework for the Prosecution of International Terrorists Consistent with the Rule of Law

The Second Circuit's decisions have reverberated through the nation's most significant terrorism trials—from that of Zacarias Moussaoui, convicted in Virginia of participating in the al Qaeda conspiracy that resulted in the attacks on September 11, 2001; to Jose Padilla, convicted in Miami for his work with al Qaeda; to the accomplices of Najibullah Zazi, convicted in Brooklyn of plotting the September 2009 attack on the New York City subway system; to Sulaiman Abu Ghayth and Khaled al-Fawwaz, convicted in Manhattan for carrying out, in a number of ways, al Qaeda's murderous conspiracy against Americans; and even to Dzhokhar Tsarnaev, convicted of the April 15, 2013 Boston Marathon bombing. The standards set by the Second Circuit have, moreover, regularly factored into the decisions of U.S. policymakers in determining how best to incapacitate threats to the nation without undue risk of disclosing sensitive sources and methods.

In this sense, the legacy of the Second Circuit's monumental early rulings is that they established a playbook for sister courts and generations of participants in the prosecution and defense of accused terrorists.

1. Extraterritorial Acts of Terrorism

United States v. Yousef,[285] for example, is frequently cited by courts[286] and academic commentators[287] grappling with the tricky question of

283. *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 155 (2d Cir. 2008) (*In re Terrorist Bombings I*).

284. The Second Circuit handled two subsequent appeals from the case. The first involved Mamdouh Mahmud Salim, a Sudanese radical Islamist who was a founding member of al Qaeda. *See* United States v. Salim, 549 F.3d 67 (2d Cir. 2008). While Salim was awaiting trial along with El-Hage, Al-'Owhali, and Odeh, he stabbed a corrections officer in the left eye with a sharpened comb. The officer lost his left eye and much of the vision in his right eye, and suffered permanent brain damage that substantially interfered with his ability to speak and write. Salim was convicted of attempted murder of a federal official and initially sentenced to thirty-two years' imprisonment. The Second Circuit reversed the sentence and Salim was ultimately sentenced to life without parole. *See id.* at 79. The other appeal, by Ahmed Khalfan Ghailani, is discussed in Part II.B.5.

285. 327 F.3d 56 (2d Cir. 2003).

286. *See, e.g.*, United States v. Brehm, 691 F.3d 547, 552–53 (4th Cir. 2012) (discussing and applying the Second Circuit's holding in *Yousef*); United States v. Mohammad-Omar, 323 Fed. App'x 259, 261–62 (4th Cir. 2009) (same); United States v. Abu Ali, 528 F.3d 210, 227 (4th Cir. 2008) (same); United States v. Bollinger, 966 F. Supp. 2d 568, 575–76 (W.D.N.C. 2013) (same); United States v. Carvajal, 924 F. Supp. 2d 219, 239–40 (D.D.C. 2013) (same); United States v. Malago, No. 12-20031-CR, 2012 WL 3962901, at *4 (S.D. Fla. Sept. 11, 2012) (same); United States v. Ayesh, 762 F. Supp. 2d 832, 841–42 (E.D.V.A. 2011) (same); United States v. Karake, 443 F. Supp. 2d 8, 52 n.73 (D.D.C. 2006) (same).

287. *See, e.g.*, Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303 (2014); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97

whether U.S. criminal laws apply to conduct occurring abroad, an increasingly common issue in an ever more interconnected world.[288] The basic rule is that U.S. laws are presumed to apply only to domestic conduct unless Congress has said otherwise—and when a law does apply to extraterritorial conduct, the exercise of U.S. jurisdiction must comport with constitutional requirements of due process. Yousef's appeal from his convictions for the airline plot in Southeast Asia presented one of the first challenges to the extraterritorial application of the statutes in question.[289]

Notably, the court's opinion clarified the doctrine with respect to the overseas application of the conspiracy statute, which, on its face, gave no indication of Congress's intent.[290] To resolve the question, the court inferred that, where Congress intended U.S. jurisdiction over a substantive crime (in this case, bombing civilian aircraft), it was "reasonable to conclude that Congress also intended to vest in United States courts the requisite jurisdiction over an extraterritorial conspiracy to commit that crime."[291]

Likewise, courts have followed the Second Circuit's lead in determining what process is due when a defendant is required to answer for overseas conduct in a U.S. court. For example, Monzer Al Kassar, a Spanish arms trafficker long targeted by the international law enforcement community, was finally convicted in New York after agreeing to sell surface-to-air missiles to U.S. Drug Enforcement Administration informants posing as operatives of a Colombian terrorist organization.[292] Kassar claimed on appeal that the statutes under which he was convicted failed to provide sufficient notice that his foreign conduct could be punished in the United States.[293] Second Circuit Judge Dennis Jacobs, writing for the court, agreed that notice was the primary due process requirement but found the requirement satisfied as to Kassar: "Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere."[294] It naturally followed that Kassar had sufficient warning, especially where he had been told by the informants that the weapons

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VA. L. REV. 1019 (2011); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); Anthony E. Giardino, Note, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699 (2007).

288. Most recently, on July 13, 2015, a court in the Eastern District of Virginia relied on this aspect of *Yousef* in declining to dismiss charges against Taliban leader Irek Ilgiz Hamidullin. *See* United States v. Hamidullin, 114 F. Supp. 3d 365, 384 (E.D. Va. 2015).

289. *See Yousef*, 327 F.3d at 85–116.

290. *See id.* at 87–90.

291. *Id.* at 88.

292. *See* United States v. Al Kassar, 660 F.3d 108, 115–17 (2d Cir. 2011).

293. *See id.* at 117.

294. *Id.* at 119.

would be used to destroy U.S. property.[295] The Fourth Circuit and the D.C. Circuit are among the courts that have since embraced this analysis.[296]

Of equal importance, particularly as theaters of war against terrorists dotted the globe with growing regularity, was the Second Circuit's decision not to treat overseas war zones as an exception to the settled principles of extraterritoriality. The issue was first raised before the court by a Pakistani scientist and MIT graduate named Aafia Siddiqui, who attempted to kill U.S. military officers with one of their own rifles as they prepared to interrogate her in Afghanistan.[297] In an opinion authored by Judge Richard Wesley, the court rejected Siddiqui's claim that U.S. criminal law could not reach her "in an active theater of war," finding no logic in the argument.[298] Given that the laws in question were aimed at protecting U.S. officers and employees, the court found that it would be "incongruous" to conclude that they "did not apply in areas of conflict where large numbers of officers and employees operate."[299]

2. Defining the Criminal Implications of al Qaeda Membership

While bedrock constitutional principles guarantee the freedom to associate with any organization, even a criminal one, this protection does not extend to individuals who provide material support to terrorist organizations. Further, when support for a terrorist organization involves agreeing with an organization's objective to murder, and performing acts to advance that objective, the law states—and the Second Circuit has confirmed—that the individual has conspired to commit murder.[300] This was the case for Wadih El-Hage, whose conviction for joining al Qaeda's conspiracy to kill U.S. nationals abroad was affirmed by the Second Circuit.[301] That ruling defined the crime's evidentiary requirements and became an essential guide for distinguishing between participation in a terrorist murder conspiracy (carrying a potential life sentence) and provision of material support to a terrorist organization (which typically carries a sentence of fifteen years' imprisonment).[302]

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295. *See id.* at 118.

296. *See* United States v. Ali, 718 F.3d 929, 945–46 (D.C. Cir. 2013); United States v. Brehm, 691 F.3d 547, 554 (4th Cir. 2012).

297. *See* United States v. Siddiqui, 699 F.3d 690, 696–97 (2d Cir. 2012).

298. *Id.* at 699–700.

299. *Id.* at 701.

300. *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 107, 110–11 (2d Cir. 2008) (*In re Terrorist Bombings I*); United States v. Rahman, 189 F.3d 88, 125 (2d Cir. 1999).

301. *See supra* Part II.A.4.

302. In concluding that El-Hage's conduct met the threshold for conspiracy to commit murder, the court relied on evidence that El-Hage: (1) attended private meetings where Bin Laden and other al Qaeda officials discussed their program of attacks against the United States; (2) served as a financial controller or "paymaster" for Bin Laden's enterprises—a position that involved reviewing al Qaeda personnel files to ascertain which Bin Laden employees were to receive extra pay for their work pursuing activities on al Qaeda's behalf; (3) played a key role in procuring fraudulent travel documents for al Qaeda members; (4)

The court's approval of the charge against El-Hage paved the way for subsequent prosecutions of overseas murder conspiracy charges against al Qaeda members who, like El-Hage, did not themselves carry out any act of violence but actively embraced the organization's murderous agenda. A notable example is Sulaiman Abu Ghaith, who was convicted of murder conspiracy for, among other things, joining Bin Laden (his father-in-law) in an al Qaeda promotional video days after the September 11, 2001 terrorist attacks.[303] Khaled al-Fawwaz, whose many al Qaeda activities included helping disseminate Bin Laden's fatwa calling for the murder of American civilians, also was convicted of the murder conspiracy;[304] as was Mohammed Jabarah, a Kuwaiti al Qaeda member who conducted terrorist planning in Southeast Asia.[305]

The Second Circuit also established limits on the use of the conspiracy charge. There would be no talismanic significance, for instance, to the mere invocation of Bin Laden or the al Qaeda name. Seeing little more than that in the evidence against Yemeni imam Mohammed Al-Moayad, the Second Circuit reversed his convictions and seventy-five year sentence for providing material support to al Qaeda and Hamas.[306] As explained in the court's lengthy analysis, authored by Judge Barrington Parker, the key proof against Al-Moayad consisted largely of testimony from a credibility-challenged informant and of associational links to Bin Laden and Hamas.[307] Those weak connections failed to justify the admission of other highly prejudicial evidence, including testimony about al Qaeda training camps, photos of Bin Laden and other al Qaeda leaders, and testimony from a victim of a Hamas bus bombing in Tel Aviv whose cousin was killed in the attack.[308] Admitting such inflammatory evidence under these circumstances was, in the court's analysis, an error serious enough to have deprived Al-Moayad of a fair trial.[309]

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was a member of al Qaeda's team in Nairobi at a time when al Qaeda members were traveling to Nairobi to conduct surveillance of the U.S. embassy, training in al Qaeda-run military camps, and planning the attack on the embassy; (5) served as the head of the Nairobi al Qaeda cell during a period postdating Bin Laden's public declaration of holy war against the United States; (6) traveled to Afghanistan before the embassy bombings to meet with Bin Laden and Mohamed Atef, al Qaeda's military commander, and returned to Nairobi with a message from Bin Laden directing the Nairobi cell to prepare for military activity; and (7) appeared before a federal grand jury, one month after he met again with Bin Laden and Atef, and testified falsely as to al Qaeda's agenda as well as to the nature and extent of his contacts with Bin Laden and Atef. *See In re Terrorist Bombings I*, 552 F.3d at 113–14. Specifically, El-Hage was asked in the grand jury: "When did you hear [that al Qaeda began to target the United States]?" To which El-Hage responded: "In the latest interview with [U]sama Bin Laden on CNN." *Id.* at 114 n.18.

303. *See* Judgment, United States v. Hage, No. 98 Cr. 1023 (LAK) (S.D.N.Y. Sept. 23, 2014), ECF No. 1726.

304. *See* Judgment, *Hage*, No. 98 Cr. 1023 (LAK), ECF No. 1989.

305. *See* United States v. Jabarah, 292 F. App'x 140 (2d Cir. 2008).

306. *See* United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008).

307. *See id.* at 170–71.

308. *See id.* at 159.

309. *See id.* at 172.

3. Guidance for Overseas Evidence Collection

Two of Judge Cabranes's three opinions in the East Africa embassy bombings appeals added important texture to standards governing the complex landscape of overseas evidence collection. The first dealt with the searches of El-Hage's telephones and residence.[310] The second resolved a host of issues relating to the overseas interrogations of Al-'Owhali and Odeh, which—particularly in the case of Al-'Owhali—yielded devastating admissions about the attack on the embassy in Nairobi.[311]

The heart of the appellants' claims was the assertion that U.S. interrogators did not effectively advise the appellants of their right to counsel, as required by the seminal Supreme Court case *Miranda v. Arizona*.[312] The Second Circuit ultimately rejected those claims, finding that the advice was proper, but in reaching that conclusion, the court offered three vital points of guidance. First, the court examined precedents from other circuits to make clear that *Miranda* applied overseas irrespective of the subject's nationality or who controlled his custody.[313] Thus, U.S. officials were required to provide the *Miranda* warning, even if the subject was in a foreign government's custody, if the subject's statement was to be used as evidence against him at a subsequent trial in the United States.[314]

Second, the court made clear that this rule "in no way" impairs the U.S. government's ability to gather foreign intelligence.[315] By this, the court meant to emphasize that U.S. officials are free to interrogate a subject *without* advising him of his rights, if they believe that the subject possesses important threat information. While proceeding in that manner risks exclusion of the subject's statements from trial (unless they relate to a bona fide matter of "public safety"), the court's clarification of the law provided flexibility for the government to assess that risk against the value of the expected threat information, free of any lingering concern that an interrogation without *Miranda* would per se violate the Constitution (regardless of any subsequent use in a court proceeding of statements made under such interrogation).[316] This guidance became influential among U.S. policymakers involved in subsequent decisions of this sort and thereby had a significant (although, rarely publicly stated) impact on the handling of future overseas interrogations of terrorism subjects.

Third, the court underscored the significance of context in foreign interrogations. Synthesizing precedents from other circuits, the court noted that in the overseas setting, *Miranda* had been "applied in a flexible fashion

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310. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 160 (2d Cir. 2008) (*In re Terrorist Bombings II*); *see also supra* Part II.A.4.

311. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 188 (2d Cir. 2008) (*In re Terrorist Bombings III*).

312. 384 U.S. 436 (1966).

313. *See In re Terrorist Bombings III*, 552 F.3d at 205, 215–16.

314. *See id.* at 205.

315. *Id.* at 203 n.19.

316. *See id.* at 203.

to accommodate the exigencies of local conditions."[317] In this regard, the court envisioned circumstances in which advice of counsel might not be required—for example, where U.S. officials were operating in good faith, but the provision of counsel was impermissible under local law or custom. While stopping short of carving out an overseas exception to *Miranda*, the court's point—that officials need added flexibility abroad—has been instructive for U.S. authorities conducting foreign interrogations and will undoubtedly evolve further as other courts are presented with similar situations.

4. Reconciling National Security Interests and Rights of the Accused

International terrorism cases, like espionage cases, occupy a landscape traditionally presided over by the agencies charged with protecting the nation from foreign threats. The overlap engenders a layer of complexity rarely seen in standard criminal cases, due to the inherent tension between the covert mission of national security agencies, such as the Central Intelligence Agency (CIA), and the hallmark openness of the criminal justice system. The competing interests come to a head when, for example, the government wishes to use at a public trial information gathered in secret by one of the national security agencies. These interests can collide even more sharply when secret information must be disclosed to the defense under standard rules of discovery. Drawing on its experience with espionage cases, the Second Circuit has been a leader in resolving such dilemmas with care and ingenuity. Indeed, it consistently has preserved the central interests of all interested parties, including the national security community, and provided clear guidance to inform future conduct.

For instance, since the 1970s, the Second Circuit has steadfastly protected national security interests by endorsing a practice known as "in camera, ex parte" review of sensitive or classified materials that are relevant to a trial.[318] The practice allows trial judges to assess such sensitive materials in private, without the defense's input, usually to determine whether evidence collected through a covert program should be admitted at trial. While this may at first glance appear unfair to the defense, which will find it difficult to mount an argument to exclude the evidence without access to the justification for its collection, the Second Circuit has also restricted in camera, ex parte review to questions that are, for example, "limited in nature" or capable of fair resolution without the benefit of the adversarial process.[319] This approach makes good sense because it accommodates the government's need for secrecy but only in circumstances that are unlikely to deprive the defense of its right to a fair trial.

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317. *Id.* at 205.

318. *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 165–67 (2d Cir. 2008) (*In re Terrorist Bombings II*).

319. *See* United States v. Ajlouny, 629 F.2d 830, 839 (2d Cir. 1980) (affirming in camera, ex parte review of wiretaps designed to gather intelligence when the fruits of such wiretaps were offered as evidence at trial).

Similarly, the Second Circuit has clarified the law governing the use of classified evidence in public trials, known as the Classified Information Procedures Act of 1980[320] (CIPA). Generally, the statute obligates the defense to identify classified information that it wishes to use and authorizes the trial court to determine, in a nonpublic hearing, whether such evidence should be admitted at trial. The first terrorism prosecution to involve substantial use of CIPA was the case of the East Africa embassy bombing suspects, El-Hage in particular, and it presented a classic issue that would recur in terrorism cases for years to come.[321] El-Hage was entitled under the federal discovery rules to obtain information about how his case had been investigated, but the material was classified and El-Hage, an accused member of al Qaeda, would never be given the requisite security clearance for access. In a ruling that set the standard for resolving such a dilemma, the court endorsed a novel approach that required El-Hage's *counsel* to obtain the necessary security clearance and then, on El-Hage's behalf but without El-Hage's actual participation, review the classified information and litigate through the standard CIPA process what portions of it could be used at trial.[322]

In reaching this solution, the court carefully examined the entire process, including the classified information at issue, and found that El-Hage's personal exclusion from the evidentiary review and argument did not violate his trial rights.[323] At bottom, as the court explained, the subject matter of the material "bore no relationship at all to the question of [El-Hage's] guilt or innocence,"[324] and El-Hage himself "could have done nothing" to advance his own interests had he been personally involved in the process.[325] Numerous courts have since relied on the Second Circuit's approach.[326]

5. Responding to Post-9/11 Executive Branch Counterterrorism Policies

Aggressive executive branch policies adopted in response to al Qaeda's September 11, 2001 attacks have raised moral questions for the nation and challenging legal issues for the courts. Again, the Second Circuit has been at the forefront of the process. Its reconciliation of these policies with

320. Pub. L. No. 96-456, 94 Stat. 2025 (codified as amended at 18 U.S.C. §§ 1–16 (2012)).

321. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 115–23 (2d Cir. 2008) (*In re Terrorist Bombings I*).

322. *See id.* at 128–30.

323. *See id.* at 130.

324. *Id.* (quoting United States v. Bell, 464 F.2d 667, 671 (2d Cir. 1972)).

325. *Id.* (quoting United States v. Gagnon, 470 U.S. 522, 527 (1985)).

326. *See, e.g.*, United States v. El-Mezain, 664 F.3d 467, 518–25 (5th Cir. 2011); United States v. Moussaoui, 591 F.3d 263, 282–83, 288 (4th Cir. 2010); United States v. Lustyik, No. 2:12–CR–645–TC, 2014 WL 994642, at *1 (D. Utah Mar. 13, 2014); United States v. Tounisi, No. 13 CR 328, 2013 WL 5835770, at *1–2 (N.D. Ill. Oct. 30, 2013); United States v. Lahiji, Crim. No. 3:10–506–KI, 2013 WL 550492, at *3–4 (D. Or. Feb. 12, 2013); *cf.* United States v. Brown, No. 5:14–CR–58–FL, 2014 WL 1572553 (E.D.N.C. Apr. 18, 2014).

constitutional principles stands out in five critical respects: (1) the government's use of material witness warrants, (2) the scope of the government's authority to detain "enemy combatants," (3) the constitutional requirements for using information gathered under standards applicable for intelligence collection as evidence in criminal trials, (4) the legality of the government's bulk collection of Americans' telephone records under the USA PATRIOT Act of 2001,[327] and (5) the viability of a criminal prosecution of a detainee who alleges that he was tortured by the United States.

The court was confronted with the government's widespread use of the material witness statute in the wake of the September 11 attacks to arrest and detain individuals who had information of import to a New York City grand jury investigating the attacks. The statute permits the detention of such witnesses, even though they are not accused of committing any crime, if they pose a risk of flight.[328] The Second Circuit examined the legal implications of the policy in the appeal of Osama Awadallah, who was detained for two weeks under the statute after his telephone number was found on paperwork left behind by Khalid al-Mihdhar and Nawaf al-Hazmi, two of the hijackers of American Airlines Flight 77.[329] In a cogent opinion by Judge Dennis Jacobs, in which Judge Chester Straub concurred, the court endorsed the government's use of the statute.[330]

Also in the wake of the September 11 attacks, and in a resounding rejection of executive policymaking, the Second Circuit held that the President lacks the authority to detain an American citizen on American soil as a so-called "enemy combatant."[331] The stakes could not have been higher because the case involved an individual, Jose Padilla, who the government claimed was trained overseas by al Qaeda and sent back to the United States to carry out a "dirty bomb" attack.[332] Based on this information, Padilla was detained upon arrival at Chicago's O'Hare International Airport.[333] He was initially held on a material witness warrant, but, when the government was unable to mount a criminal case against him, the President ordered him detained by the military under the Authorization for the Use of Military Force of 2001[334] (AUMF), a law enacted shortly after the September 11 attacks. The court ordered the government to release Padilla from military custody,[335] finding that the

327. Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 20, 31, 42, 49, 50 U.S.C.).

328. *See* United States v. Awadallah, 349 F.3d 42, 62 (2d Cir. 2003).

329. *See id.* at 45.

330. *See id.* at 75. Specifically, the court found that Congress meant for the statute to apply to grand-jury witnesses as well as trial witnesses and that the statute complied with constitutional requirements because of the various protections that it offered to such witnesses. *See id.* at 52, 75.

331. *See* Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).

332. *See id.* at 701.

333. *See id.* at 699.

334. Pub. L. No. 107-40, 115 Stat. 224.

335. *See Padilla*, 352 F.3d at 724.

detention contravened another law, the Non-Detention Act of 1971,[336] which bars the President from detaining U.S. citizens absent specific congressional authorization. Although the Supreme Court subsequently reversed that decision on a procedural ground,[337] and Padilla remained in military custody, the lasting impact of the Second Circuit's decision can be seen in the government's subsequent decision to try Padilla on criminal charges in Florida,[338] where he was convicted of providing material support to al Qaeda.[339]

The Second Circuit was next called to address two key provisions of the controversial legislation known as the USA PATRIOT Act of 2001. First, it was asked to interpret the provision that changed the threshold requirement for use in a criminal case of evidence obtained from wiretaps under the Foreign Intelligence Surveillance Act of 1978[340] (FISA). The old statute was interpreted to permit use of FISA wiretap information in criminal trials so long as the "primary purpose" of the wiretap was to collect foreign threat information, not to obtain evidence for use in a domestic prosecution. In 1984, the Second Circuit was one of the first courts to endorse the primary purpose requirement as a means of protecting trial defendants from constitutionally unreasonable searches and seizures—mainly because it ensured that collection was aimed at foreign threat information, not a desire to gather trial evidence in circumvention of the more onerous standards governing traditional wiretaps.[341] The USA PATRIOT Act lowered this threshold requirement from a "primary" to a "significant" purpose, and a U.S. citizen and former member of the Navy named Hassan Abu-Jihaad (*né* Paul Raphael Hall) was convicted under the Act of leaking to insurgent forces classified information regarding battle deployments of U.S. ships in the Persian Gulf.[342] On appeal, Abu-Jihaad claimed that the new, lower standard rendered FISA unconstitutional.[343] In a detailed opinion authored by Judge Reena Raggi, the court rejected that challenge, recognizing the government's need to collect information for multiple purposes and concluding that the "significant purpose" requirement was "sufficient to ensure that the executive may only use FISA to obtain a warrant when it is in good faith pursuing foreign intelligence gathering."[344]

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336. Pub. L. No. 92-128, 85 Stat. 347 (codified as amended at 18 U.S.C. § 4001(a) (2012)).

337. *See* Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004).

338. *See* Neil A. Lewis, *Indictment Portrays Padilla as Minor Figure in a Plot*, N.Y. TIMES (Nov. 24, 2005), http://www.nytimes.com/2005/11/24/politics/indictment-portrays-padilla-as-minor-figure-in-a-plot.html [perma.cc/46PF-D5G9].

339. *See* Abby Goodnough, *Jose Padilla Convicted on All Counts in Terror Trial*, N.Y. TIMES (Aug. 16, 2007), http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html [perma.cc/3QYA-9J3L].

340. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended 50 U.S.C. §§ 1801–1855 (2012)).

341. *See* United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984).

342. *See* United States v. Abu-Jihaad, 630 F.3d 102, 123, 143 (2d Cir. 2010).

343. *See id.* at 117–21.

344. *Id.* at 128.

Next, the court recently held that section 215 of the USA PATRIOT Act did not authorize the National Security Agency's (NSA) bulk collection of Americans' telephone records. In *ACLU v. Clapper*,[345] Judge Gerard Lynch, writing for a unanimous panel, found that the program's collection of nearly every American's telephone records was too broad to satisfy section 215's authorization for the collection of information "relevant" to an "authorized investigation."[346] Such widespread collection under the program failed to meet this requirement, in the court's assessment, because it was not tailored to a particular investigation, but instead sought historical information that could be mined in future, unspecified counterterrorism probes.[347] "[S]uch an expansive concept of 'relevance,'" the court held, "is unprecedented and unwarranted."[348] While the court did not order a halt to the program—perhaps because the legislation was already set to expire in a matter of months—its decision undoubtedly impacted Congress's deliberation about whether and how to reformulate section 215. At the time of the decision, Congress was considering three legislative options: (1) to reauthorize the provision without change (which would have permitted the NSA program to continue absent a court injunction); (2) to allow the provision to sunset (which would have left the program unauthorized); or (3) to enact a new law, the USA Freedom Act (which would end the program and create a more focused call-records program in its place). Following the court's decision, Congress enacted the new, more limited law, which confined the program's scope along lines resembling what the Second Circuit envisioned.[349]

Finally, the Second Circuit made clear that some of the extraordinary methods of intelligence gathering used by the executive branch in the wake of the September 11 attacks, including the use of what many describe as torture, would not, without more, serve as a bar to criminal prosecution simply because of the nature of the acts or because of the delay that such acts caused. The test case was that of Ahmed Khalfan Ghailani, a Tanzanian al Qaeda member who was among the operatives who planned the East African embassy bombings.[350] He fled to Pakistan just before those 1998 attacks, but was captured in Afghanistan in 2004 and held for two years in secret CIA custody, where he was subjected to so-called "enhanced interrogation techniques," before being transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, to face a military commission.[351] In 2009, before Ghailani was tried by the military, the Obama administration sent him to New York City, where he was tried and convicted of conspiring to attack the embassy in Tanzania and sentenced to life in prison.[352] On

345. 785 F.3d 787 (2d Cir. 2015).
346. *Id.* at 812 n.5.
347. *See id.*
348. *Id.* at 812.
349. *See generally* Charlie Savage, *No Early End to Collection of Records by the N.S.A.*, N.Y. TIMES, Oct. 30, 2015, at A16.
350. *See* United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013).
351. *See id.* at 38–40.
352. *See id.* at 40–41.

appeal, Judge Cabranes, writing for the court, found that the government had a legitimate basis for placing Ghailani in the CIA interrogation program—namely, a "reasonable belief that he had valuable information essential to combating [a]l Qaeda and protecting national security."[353] For that reason, the court found no basis under the Constitution to bar the prosecution of Ghailani in federal court.[354]

Despite the Second Circuit's ruling and the Obama administration's once-stated plan to try many Guantanamo detainees in the federal courts, as of now Ghailani remains the only detainee to have received such a trial. Facing fierce political opposition, the administration scuttled plans to send the Guantanamo detainees responsible for the September 11 attacks, including the plot's mastermind, Khalid Sheikh Mohammed, to New York City for a trial in federal court. Since that time, however, as military commissions of those detainees and others have languished, federal terrorism cases in New York have repeatedly proceeded efficiently to verdict, leaving little doubt that the federal system is a venue of the utmost reliability for these extraordinarily complex cases. At the core of that system is the Second Circuit's jurisprudence in the terrorism arena, which has provided a time-tested legal foundation. In other words, the Second Circuit's consistent ability to both recognize the government's legitimate interests in preserving the security of the nation, and at the same time adhere to civil liberties and the rule of law, has not only demonstrated in the most profound terms the court's commitment to justice, but it also has

353. *Id.* at 48.

354. The ruling was sensible in that, as the trial court reasoned, there was "no connection" between any CIA mistreatment of Ghailani and his criminal prosecution. *See* United States v. Ghailani, 751 F. Supp. 2d 502, 506 (S.D.N.Y. 2010). Indeed, at trial the government did not use any statements made by Ghailani while in CIA custody, and the implication of the ruling was that a remedy for any mistreatment would have to be "found outside the confines of this criminal case." *Id.* at 506–07. A Second Circuit ruling in another case, however, cast doubt on whether and how readily such remedy would be available. In *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), a Canadian software engineer named Maher Arar was detained at JFK International Airport in New York based on suspected al Qaeda connections as he returned to Canada from visiting his wife's relatives in Tunisia. After nearly two weeks in U.S. immigration custody, he was rendered to his native Syria and held there for a year, subject to harsh prison conditions and physically abusive interrogation. After he returned to Canada, and the basis for the original detention was called into doubt, Arar brought a civil lawsuit alleging civil rights violations against an array of U.S. officials, including the Attorney General and FBI Director. The Second Circuit affirmed the dismissal of Arar's claims on grounds that: (1) his rights were not violated in the United States and (2) Congress had not provided a basis to hold U.S. officials liable for sending him to Syria, even if those officials had expected that he would be mistreated there. Although the Supreme Court declined to review that decision, the result struck many observers as wrong and unfair. Indeed, Arar has never been charged with a crime, and the Canadian government has absolved him of any wrongdoing, paying him a settlement of millions of dollars. The United States, however, has not apologized or offered to compensate Arar, notwithstanding impassioned diplomatic efforts and calls for justice from a vocal international cadre of supporters and religious leaders. *See, e.g.*, Press Release, Amnesty Int'l USA, 60,000 People Demand Apology to Torture Victim Maher Arar from President Obama (May 21, 2012), http://www.amnestyusa.org/news/press-releases/60000-people-demand-apology-to-torture-victim-maher-arar-from-president-obama [perma.cc/LFG6-B73F].

solidified the court's leadership in the field of national security jurisprudence for years to come.

CONCLUSION

For nearly a century, the Second Circuit has confronted cases involving the greatest risks to the nation's security, from the menace of Communism in the 1950s, to the modern threat of international terrorism. These cases have been uniquely complicated in their high-stakes subject matter: politics, foreign policy, and national security itself. Yet the court has consistently cut through the external noise to bear down on the necessary questions of law and fact and has consistently delivered resolutions that are models of justice. At every intersection of individual liberty and national security, the Second Circuit has found the fair and proper balancing points. It thus has fulfilled its mission in the highest traditions of American justice, and the court serves as a shining example for other legal systems in the age of espionage and terror.