MLRC Newsgathering Committee Report

Cases on Government Information Since 9/11

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I. ACCESS TO PROCEEDINGS

A. Material Witness Cases

1. In re application of United States for Material Witness Warrant No. 18 (Higazy), No. 01-1750, 214 F. Supp. 2d 356 (S.D.N.Y. Aug. 5, 2002). Abdallah Higazy was detained on December 17, 2001 after a pilot's radio allegedly was found in his hotel room near the World Trade Center. Higazy denied that the radio was his. The next day, December 18, Judge Jed Rakoff held a closed hearing as to whether Higazy should be held as a material witness to guarantee his appearance before a grand jury, and decided to allow the government to hold him for ten days to two weeks. On December 27, Higazy confessed to being the owner during an FBI polygraph examination. On December 28, Judge Rakoff held a second closed hearing on Higazy's detention, and ordered him held until January 14, 2002. On January 11, the government charged Higazy with lying to investigators in an open court proceeding before Magistrate Judge Frank Maas. In another closed hearing, Judge Rakoff vacated the material witness warrant on January 14, and ordered Higazy held on the criminal complaint. Later that day, however, the actual owner of the radio came to the hotel to retrieve it, which led the guard who had claimed to have found the radio to recant his story. The charges against Higazy were dropped on January 16. On January 18, Judge Rakoff held a closed telephone conference in which he began an inquiry as to whether the government made misrepresentations about Higazy's confession. On March 18, 2002, the court held a closed hearing on the issue. On July 12, the New York Times requested that all documents and transcripts regarding the case be unsealed. On August 5, 2002, the court agreed to unseal most of the records of the case, including both documents and transcripts of the previously closed hearings of December 18, 2001, December 28, 2001, January 14, 2002, January 18, 2002, and March 18, 2002. The court gave the government until August 9 to propose redactions from the documents and transcripts, and unsealed them with several redactions on August 14. The court also ordered the government to conduct an investigation of the confession and submit a written report. The government submitted the report under seal on October 31, 2002. Subsequently, the government agreed to release the report as long as the names of three witnesses were redacted. The court unsealed the report on November 25, 2002.

2. In re Application of United States For A Material Witness Warrant, No. 01-1750, 213 F. Supp. 2d 287 (S.D.N.Y. July 11, 2002). **[Opinion does not address release of documents]**. According to the opinion, "John Doe" was taken into custody as a material witness pursuant to a warrant issued in aid of a grand jury subpoena. The opinion stated that the docket and the record of all appearances were sealed. However, in response to a request of the New York Times, Judge Michael Mukasey released the briefs filed in the case on July 26, 2002, after giving the parties an opportunity to redact information. The government redacted many of its arguments, but "John Doe" did not. See New York Times, July 29, 2002 at B5.

3. U.S. v. Ujaama, No. 02-MC-3C (D. Colo. July 26, 2002 and E.D.Va. Aug. 23, 2002). James Ujaama was arrested in Denver on July 22, 2002 as a material witness, based on the suspicion that he brought computer equipment to an Al Qaeda camp in Afghanistan and that he was part of a plan to set up a terrorist camp in Oregon. The

Denver Post and Rocky Mountain News moved to open a July 26, 2002 hearing on the legality of Ujaama's detention. Specifically, they requested that the judge bifurcate the hearing, with one open part to address whether the material witness statute could legally apply in the grand jury context, and one part to address the application of the statute to the facts of the particular case, for which a redacted transcript would be available. Magistrate Judge Craig Shaffer denied the request on the grounds that Ujaama was also the subject of a grand jury investigation in Virginia. Following the closed hearing, Shaffer ordered Ujaama's case transferred to Virginia. The two Denver newspapers and the Seattle Post-Intelligencer then moved to open an August 23 hearing on Ujaama's detention or to bifurcate it. District Court Judge Bruce Lee originally ordered that the hearing on the media's motion would be closed, but changed his mind. However, following the hearing, he denied access to the hearing on Ujaama's status. On August 28, Ujamma was indicted by a federal grand jury in Seattle on charges that he gave material support to al Qaeda. The indictment was not sealed, and subsequent court proceedings appear to have been public. Ujaama pleaded guilty to a charge of conspiracy to provide goods and services to the Taliban on April 14, 2003. The plea was not sealed.

4. In re Grand Jury Material Witness Detention, No. 3:03-49-misc-cr (D. Ore. April 7, 2003). Maher Mofeid Hawash, a software engineer at the Intel Corporation, was arrested in suburban Portland, Oregon on March 20, 2003 as a material witness in a grand jury investigation believed to be focused on six people accused of conspiring to join the Taliban and al Qaeda. On April 7, 2003, Judge Robert Jones held a closed detention hearing, and released an order finding that the detention hearing needed to be closed because the related grand jury proceedings could be compromised if it was open. However, Judge Jones expressed "regret" that the proceedings were to be conducted in a closed courtroom. In addition, parts of the order in which the judge made findings of fact justifying Hawash's continued detention were redacted. The court ordered the government to present its witnesses to the grand jury by April 25, and scheduled another closed detention hearing for April 29.

B. Deportation Proceedings

1. Detroit Free Press v. Ashcroft, No. 02-CV-70399/02-CV-70340, 195 F. Supp. 2d 937 (E.D. Mich. April 3, 2002) and No. 02-1437, 303 F.3d 681 (6th Cir. Aug. 26, 2002). On September 21, 2001, Chief Immigration Judge Creppy issued a directive (the "Creppy directive" or the "Creppy memorandum") requiring so-called "special interest" cases to be closed to the press and public, with the record of the proceeding available only to the deportee's attorney or representative. On December 19, 2001, an immigration judge closed the deportation hearing of Rabih Haddad, who the government accused of overstaying his tourist visa and suspected of supplying funds to terrorist organizations through a charity he operated. Subsequent hearings on January 2 and 20, 2002 were similarly closed. On January 28, 2002 the Detroit Free Press and the Ann Arbor News filed a lawsuit challenging the closure and seeking access to all future proceedings. On January 29, the Detroit News, the Metro Times, and several other parties filed suit complaining that they had been excluded from the hearings. The two suits were consolidated on March 5. District Court Judge Nancy Edmunds ruled on April 3, 2002 that the blanket closure of deportation hearings was unconstitutional. On August 26, 2002, the Sixth Circuit agreed in a strongly worded opinion. Based on the First Amendment and access cases such as Richmond Newspapers v. Virginia, the court held that even though immigration proceedings are

administrative, they are similar enough to judicial proceedings that constitutional guarantees of openness must be applied. Notably, the court held that the government failed to demonstrate a compelling interest and that the Creppy directive was not narrowly tailored. Based on the opinion, Judge Edmunds ordered on September 17, 2002 that Haddad be given a new deportation hearing – this one open to the public and before a different immigration judge – within 10 days or release him. Most of Haddad's October 1, 2002 detention hearing was open, but the immigration judge closed it after Haddad was questioned and cross-examined. Several Detroit newspapers appealed the closure to Judge Edmunds. Subsequent hearings in which bond was denied (October 24) and asylum was denied (November 22) apparently were open. On January 23, 2003, the Sixth Circuit denied the government's request to rehear the case en banc. The government did not seek Supreme Court review.

2. North Jersey Media Group v. Ashcroft, No.02-967, 205 F. Supp. 2d 288 (D.N.J. May 29, 2002) and No. 02-2524, 308 F.3d 198 (3d Cir. Oct. 8, 2002). On March 6, 2002, the North Jersey Media Group and the New Jersey Law Journal filed a complaint challenging the Creppy memorandum. On May 29, 2002, District Court Judge John Bissell ruled that the blanket closure of immigration proceedings violated the First Amendment. The Third Circuit refused to grant a stay of Judge Bissell's order opening immigration proceedings unless the government showed a need to close them, but the Supreme Court granted the stay on June 28, 2002. Accordingly, all "special interest" hearings remain closed, except in the Sixth Circuit where the Detroit Free Press decision governs. On October 8, 2002, a divided Third Circuit panel reversed Judge Bissell's ruling. The court agreed that First Amendment rights of access could apply to administrative proceedings, but held that "special interest" immigration hearings should be kept closed under the Richmond Newspapers "experience and logic" analysis. Specifically, the court held that many administrative proceedings have been held in private, and that deportation hearings have often been conducted in places nearly inaccessible to the public, although not technically closed. Moreover, the court held that public access does not play a significant positive role in these proceedings in part because terrorists could use information gathered in them to circumvent anti-terror efforts. A petition to rehear the case en banc was rejected by the Third Circuit in a 6-5 vote on December 2, 2002. The Supreme Court denied certiorari on May 27, 2003.

3. Bellahouel v. Wetzel, No. 02cv20034 (S.D. Fla.) and No. 02-11060 (11th Cir. March 5, 2003)). Mohamed Kamel Bellahouel, an Algerian man, was detained by the INS on October 15, 2001. According to an FBI affidavit, Bellahouel may have served two or three of the September 11 hijackers while waiting tables in a Delray Beach, Florida restaurant. Bellahouel was detained for visa violations for several months, and briefly on a material witness warrant. He was released in March 2002. In January 2002, while in federal custody, he apparently filed a habeas corpus petition. The case, assigned to Judge Paul Huck of the Southern District of Florida, was entirely sealed, and was not listed on the court's public docket. Bellahouel apparently appealed Judge Huck's sealing order in February 2002. The 11th Circuit also intended to keep the case sealed and off its docket, but an error by a clerk temporarily disclosed its existence in public court records. The Miami Daily Business Review described the facts of the case, and reported that the 11th Circuit held a closed oral argument on March 5, 2002. The story also reported that the court's public records were altered after officials became aware that Bellahouel's case was listed. In March 2003, the 11th Circuit apparently upheld the district

court's sealing order in a sealed and unpublished decision, but ordered the district court to put the case on its docket. In June 2003, references to the case appeared on the docket of the Southern District of Florida. On July 10, 2003, Bellahouel sought review in the Supreme Court of the lower courts' decisions to seal the case and close the hearing. In accordance with these decisions, the petition for certiorari was heavily redacted.

4. In re Nabil Al-Marabh (Sept. 10, 2003). Nabil Al-Marabh was arrested on September 19, 2001 at a Burbank, Illinois convenience store on suspicion of ties to terrorists. Al-Marabh acknowledged he had attended a training camp in Afghanistan and knew a man convicted of plotting to bomb religious sites and a hotel in Jordan, but the government was unable to charge him with a terrorism-related crime. Al-Marabh pleaded guilty in September 2002 to entering the U.S. illegally, and served an eight-month sentence in federal prison. The government then sought to deport him to Syria, his home country. In August 2003, the government asked that Al-Marabh's deportation hearing before U.S. Immigration Judge Robert Newberry be closed, contending that classified information could be released if it were open. The Detroit News opposed the government's request, based in part on the 6th Circuit's decision in Detroit Free Press v. Ashcroft that the blanket closure of deportation hearings is unconstitutional. A week later, the government dropped most of its request. Most of the September 10, 2003 hearing was open, but Judge Newberry closed a portion of it, saying that there was testimony that could hinder future investigations if made public.

C. Criminal Proceedings

1. U.S. v. Moussaoui, No. 01-455-A (E.D. Va. Jan. 18, 2002). Zacarias Moussaoui was charged on December 11, 2001 with six conspiracy charges related to the September 11 attacks. Court TV moved on December 21, 2001 to televise all pretrial proceedings and the entire trial, excluding any aspect of jury selection. Court TV also offered to obscure the faces of non-party witnesses who did not wish to be identified, at their request. Judge Leonie Brinkema held an open hearing on the motion of January 9, 2002, and denied it on January 18, 2002. Many subsequent hearings have been closed. On February 12, 2003, Judge Brinkema postponed the trial during an interlocutory appeal of her secret order that Moussaoui could have access to Ramzi Bin al-Shibh. No new date has been scheduled.

2. U.S. v. Moussaoui, No. 03-4162, -- F.3d -- (4th Cir. May 13, 2003). The facts of this aspect of the Moussaoui case are not fully clear, but apparently Judge Brinkema decided in late January 2003 and on March 10, 2003 that Moussaoui would be granted access to Ramzi Bin al-Shibh. The government appealed the order to the Fourth Circuit, and concomitantly moved for a writ of mandamus on apparently identical grounds. On March 21 and March 24, the Fourth Circuit ordered that pursuant to the Classified Information Procedures Act, the oral argument would be closed. In addition, most documents related to the appeal were sealed. A group of media intervenors moved on April 11 to reverse that order. On April 15, the Fourth Circuit stayed the appeal temporarily and ordered Judge Brinkema to give the government an opportunity to submit "substitutions" for classified information that it claimed could be revealed in the underlying discovery process at issue. On May 13, the Fourth Circuit partially granted the media intervenors motion, ordering that the oral argument be bifurcated into an open session, and a closed one in which classified

material will be discussed. However, the court ordered transcript of the closed proceedings will be released within five business days of the oral argument. In addition, the court ordered all unclassified documents related to the appeal to be released, and that those containing some classified material be released after being redacted. The bifurcated oral argument was held June 3, 2003, and transcripts were released in accordance with the court's order. The Fourth Circuit denied the government's appeal on jurisdictional grounds on June 26, 2003.

3. U.S. v. Ujaama (D. Wash.). **[As discussed above, this case took place in federal district court in Washington, and appears to have been open.]**

4. U.S. v. Koubriti, et al., No. 01-CR-80778, -- F. Supp. 2d --, 2003 WL 1580645 (E.D. Mich. Mar. 24, 2003). Federal law enforcement agents arrested Karim Koubriti and several other men in the immediate aftermath of the events of September 11. The men had been in possession of a day planner containing sketches of what appeared to be a diagram of an airport flight line, aircraft, and runways, as well as false passports and other documents, and were later charged with conspiracy to provide material support and resources to terrorists. At the beginning of *voir dire*, the court prepared a detailed written questionnaire that each of the 222 potential jurors was required to complete. The responses were not released to the public. After looking at the answers, the court and the parties agreed that it would be necessary to ask follow-up questions of some potential jurors. The defendants moved to close the questioning to the public, which the Detroit News and the Detroit Free-Press opposed. Judge Gerald Rosen granted the defendants' motion on March 23, 2003, holding that their right to a fair trial from an unbiased jury could be jeopardized by opening the questioning to the press and public, and that this compelling interest overrode the media's First Amendment right of access. However, the judge agreed to open *voir dire* during peremptory challenges, and to release a full transcript of the closed questioning after the jury was empaneled.

5. In re Release of Sealed Transcripts in the Matter of Mohammed M. El-Atriss, No. L-917-13 (Passaic County, N.J. Superior Court June 24, 2003). The Passaic County Sheriff's office raided the offices of Mohammed El-Atriss on July 31, 2002 as part of an investigation into fake IDs used in the September 11 hijackings. El-Atriss, who is a joint American and Egyptian citizen, was in Egypt at the time. He voluntarily turned himself into Egyptian authorities, and later to local authorities after flying back to the United States. El-Atriss was charged with 26 counts of conspiracy and creating false identification documents, and was originally held on $250,000 bail. On November 19, 2002, Passaic County Judge Marilyn Clark held a closed bail hearing from which the public, El-Atriss, and his attorney were excluded. The county prosecutor, who presented evidence at the hearing, told Judge Clark that closing it was necessary to protect national security. At the conclusion of the hearing, Judge Clark raised the bail to $500,000, and the prosecutor added a racketeering charge. Two subsequent closed bail hearings were held, one at an unknown date and one on January 8, 2003. El-Atriss filed an emergency appeal with a state appellate court, which in mid-January 2003 held that Judge Clark lacked adequate basis for allowing prosecutors to present secret evidence and ordered her to hold another hearing to explain the secrecy. Before that hearing could be held, El-Atriss pleaded guilty on February 4, 2003 to a single count of selling simulated documents to two of the hijackers. A group of six local and national newspapers sued for access to the transcripts of the hearings. Judge Clark held a hearing on the question on April 29,

2003, and ruled on June 3, 2003 to release the transcripts. The transcripts were released on June 23, 2003. **[Note that all of this information is from press reports.]**

D. Military Proceedings

1. Military Tribunals. On November 13, 2001, President Bush signed a military order authorizing the promulgation of regulations regarding public access to military tribunals. Military Order of November 13, 2001, 66 Fed. Reg. 57831 (2001) § 4(c)(4). Those regulations were released on March 21, 2002 as Military Commission Order No. 1. The rules state that military tribunals should be open, except when the presiding officer closes them to protect classified information, the physical safety of participants, or intelligence or law enforcement sources, methods or activities. Military Commission Order No. 1, §§ 5(O), 6(B)(3), 6(D)(5)(c). Open proceedings are defined to include attendance by the public and press, or the public release of transcripts at the appropriate time. Id. § 6(B)(3). The rules also prohibit photography and video or audio broadcasting of military tribunals. Id. The chief prosecutor and defense counsel appointed to litigate the proceedings each stated separately that the process should be as open as possible while protecting national security.

2. In re Al Halabi, Misc. Dkt. 2003-07 (Air Force Ct. Crim. App. Sept.16, 2003). Ahmad Al Halabi, a senior airman in the U.S. Air Force serving as an Arab-language translator at the military base at Guantanamo Bay, Cuba, was arrested on July 23, 2003 and accused of espionage, aiding the enemy, and disobeying lawful orders by transmitting sensitive documents about detainees and other classified information to Syrian officials and other unauthorized people. The Air Force launched an Article 32 pretrial investigation, which is similar to a grand jury investigation. However, military regulations state that Article 32 investigations should ordinarily be open to the public, although they may be closed if the interest of justice outweighs the public's interest in access. On September 15, 2003, the Air Force officer in charge of Al Halabi's Article 32 investigation ordered the entire investigation closed because most of the evidence involved matters of national security. Al Halabi appealed the order to the Air Force Court of Criminal Appeals. That tribunal reversed the investigating officer's blanket order, holding on September 16, 2003 that the investigation could only be closed "after careful, detailed analysis and based upon specific, articulable reasons, in writing (sealed if necessary)," and that "the scope of any closure must be tailored to achieve the required purposes." The tribunal concluded that closure of some or all of the investigation might be proper, but only on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis."

II. ACCESS TO RECORDS

A. FOIA Litigation

1. Center for National Securities Studies v. Dep't of Justice, No. CIV.A.01-2500 (D.D.C. Aug. 2, 2002) and No. 02-5254, -- F.3d -- (D.C. Cir. June 17, 2003). On October 25, 2001, Attorney General John Ashcroft announced that the nearly 1,000 individuals has been arrested or detained as part of the September 11 investigation. On October 29, a large group of public interest groups filed joint Freedom of Information Act requests with the Department of Justice and the Immigration and Naturalization Service seeking records that would identify the individuals referred to

by Attorney General Ashcroft, including the location where the people were arrested or detained and the location where they were being held, the dates on which they were arrested, detained, and/or released, and the charges brought against them; the identity of their lawyers; the identity of any courts that had been requested to seal proceedings against these individuals and any such orders; and any policy directives regarding public statements about the individual or about sealing the proceedings. On December 5, 2001, the organizations asked the U.S. District Court for the District of Columbia to expedite the release of the records. Judge Gladys Kessler ordered the government on August 2, 2002 to release the names of the detainees, including those held as material witnesses, as well as the names of their lawyers, but held that the government properly withheld the dates and locations of arrest, detention, and/or release. Specifically, she denied that there is a First Amendment or common law right to the dates and locations of arrest, detention, and release. However, Judge Kessler stayed her order on August 15 pending the government's appeal. On June 17, 2003, a divided panel of the D.C. Circuit reversed Judge Kessler's decision. The court held that the government could withhold the names of the arrestees and other information under a FOIA exemption for records or information compiled for law enforcement purposes. The court broadly deferred to the executive branch's expertise in counterterrorism, and accepted its representation that release of the information could be used as a "mosaic" by terrorists to their advantage. The court also refused to extend the First Amendment right of access to these records.

2. ACLU v. County of Hudson, 799 A.2d 629 N.J. Super. Ct. App. Div., June 12, 2002), *cert. denied*, 803 A.2d 1162 (July 9, 2002). Many Immigration and Naturalization Service detainees were held in county jails in Hudson County and Passaic County, New Jersey under a contract between these counties and INS. Those contracts specified that each county agreed to hold INS detainees in accordance with state law. On November 28, 2001, the ACLU of New Jersey requested information on each of the detainees from the two counties under New Jersey's Right to Know Law. The INS subsequently informed the jails that they were not authorized to release any identifying information on the detainees, and in January 2002 the ACLU sued. Judge Arthur D'Italia of the Hudson County Superior Court ruled on March 26, 2002 that the names of the detainees must be disclosed under the Right to Know Law, but stayed his order for 45 days. However, on April 17, 2002, the INS issued an interim rule barring state and local governments housing INS detainees from releasing their names or other information about them. On appeal, the New Jersey Superior Court Appellate Division held that the new regulation preempted the state Right to Know Law, and that therefore information about the detainees would not be released. The New Jersey Supreme Court denied certiorari on July 9, 2002. The INS adopted the interim rule as its final rule on disclosure by state, local, and private detention facilities on January 29, 2003.

3. In re New York Times Co. v. City of New York Fire Department, 754 N.Y.S.2d 517 (N.Y. Sup. Ct. Feb. 3, 2003). Under New York's Freedom of Information Law, the New York Times sought access to: (1) a group of "oral histories" about the experiences of New York City Fire Department personnel on September 11, 2001 compiled by the department; (2) tapes and transcripts of radio communications recorded that day by the FDNY, such as 911 calls, dispatch communications, and reports from units responding to the attacks. In addition, families of several victims sought access to radio communications involving their family members. The department denied most of the request, arguing that the documents were exempt as

law enforcement documents needed to be kept confidential for the prosecution of Zacarias Moussaoui, and that disclosing the documents would violate the privacy of the firefighters and the victims. On February 3, 2003, Judge Richard Braun ordered the FDNY to release many of the documents. He ordered the entire oral histories to be released, except for personal expressions of feelings by FDNY personnel, as well as any opinions and recommendations about the department's response. The 911 calls were kept confidential, except for those requested by the families of the victims. The court ordered the other radio communications to be released, except for those portions that were exempt as inter-agency material. Both sides have appealed the decision.

4. United States v. Moussaoui, No. 01-455-A (E.D. Va. Oct. 4, 2002). Proceeding under New York's Freedom of Information Law, the New York Times sought access to certain documents held by the Port Authority of New York and New Jersey, including: (1) tapes and transcripts of radio communications recorded on September 11, 2001 by the Port Authority; (2) written Port Authority reports about September 11; and (3) daily reports by Port Authority police concerning recovery efforts at the World Trade Center. The Port Authority refused to release the documents, arguing that it had provided them to the prosecution in the Moussaoui case, and that under a February 5, 2002 protective order entered by Judge Brinkema it could not release them. On September 24, 2002, the New York Times asked Judge Brinkema to clarify or modify the protective order, asserting that it did not bar the Port Authority, as a non-party to the case, from releasing records it had provided to the prosecution. Subsequently, the prosecution informed the Port Authority and the court that it did not intend to use most of the records sought by the New York Times and therefore no longer objected to their release. In addition, the parties reached an agreement on a procedure for identifying any documents that the prosecution objected to the Port Authority disclosing. Based on these developments, the New York Times withdrew its motion, and Judge Brinkema denied it as moot on October 4.

5. Electronic Privacy Information Center v. Office of Homeland Security, Civil Action No. 02-620 (D.D.C. Dec. 26, 2002). The Electronic Privacy Information Center filed a FOIA request with the Office of Homeland Security on March 20, 2002 and subsequently filed suit seeking expedited processing of its request. The government moved to dismiss the case or grant summary judgment, arguing that the Office was not an "agency" covered by FOIA. Judge Colleen Kollar-Kotelly denied the motions, holding that the Office must submit to limited discovery regarding its organization and responsibilities so that the court can determine whether or not it is an agency covered by FOIA.

6. Shiller v. INS, 205 F. Supp. 2d 648 (W.D. Tex. 2002) **[not 9/11 related]**. In November and December 2000, the INS arrested twelve immigrants in the San Antonio area as part of a program to deport aliens with criminal records. These aliens had been convicted of sexual offenses. A San Antonio Express-News reporter filed a FOIA request seeking the names, birth dates, and criminal charges of those detained. When the INS refused to disclose the information, the reporter sued. The court held that the information was contained in "law enforcement records" that could be exempted from disclosure under FOIA. Balancing the individual's privacy interest against the public's need to know, the court concluded that identifying information would not shed light on the INS's performance, and denied access.

7. Bloomberg L.P. v. SEC, No. 02-1582 (D.D.C.) **[not 9/11 related]**. Over the course of several months in 2001 and 2002, Bloomberg filed six FOIA requests seeking former SEC Chairman Harvey Pitt's daily calendar and phone message logs, and notes and memoranda of meetings between Pitt and leaders of companies regulated by the SEC. Bloomberg sought the records in connection with investigation into the relationship between SEC officials and companies being investigated for possible accounting and other improprieties. The SEC refused to provide the records, arguing that many of them were Pitt's personal records, not agency records, and that certain records are covered by the deliberative process privilege. In August 2002, Bloomberg filed suit. In December 2002, the SEC filed a motion to dismiss or for summary judgment. The SEC's motion was stayed pending ongoing discovery, and Bloomberg filed a motion to compel discovery in March 2003. This motion is currently pending.

8. Judicial Watch, Inc. v. National Energy Policy Development Group, No. 01-1530, and Sierra Club v. Cheney, No. 02-631 (D.D.C.) (consolidated) and No. 02-5354, -- F.3d --, (D.C. Cir. July 8, 2003) **[not 9/11 related]**. On June 25, 2001, Judicial Watch filed a FOIA request and a request under the Federal Advisory Committee Act ("FACA") with the National Energy Policy Development Group, a task force established by President Bush and headed by Vice President Cheney. On July 16, 2001, Judicial Watch filed suit, seeking documents under FOIA and to stop the task force from meeting under FACA. Separately, the Sierra Club filed suit against Vice President Cheney on January 25, 2002 seeking similar documents under the FACA, and the two cases were consolidated. In a series of rulings over the next year, the court refused to dismiss the suits, and ordered the government to turn over some of the documents in discovery. The government sought a writ of mandamus from the D.C. Circuit, where oral argument was held April 17, 2003. On July 8, 2003, a divided panel of the D.C. Circuit denied the writ and agreed to let the suit go forward, ordering the government to turn over the documents or to invoke executive privilege.

9. Judicial Watch, Inc. v. Dep't of Energy, No. 01-0981, Natural Resources Defense Council v. Dep't of Energy, No. 01-2545, and Natural Resources Defense Council v. Dep't of Interior, No. 02-1330 (D.D.C.) (consolidated) **[not 9/11 related]**. On April 19, 2001, Judicial Watch filed a FOIA request seeking documents regarding the energy task force from nine federal agencies. Only two of the agencies complied with the request. Judicial Watch filed suit under FOIA on May 9, 2001. On March 5, 2002, Judge Paul Friedman ordered the agencies to complete processing the requests and provide a Vaughn index of withheld records by May 15, 2002 (some of the agencies have shorter deadlines). Separately, the Natural Resources Defense Council ("NRDC") filed a FOIA request with the Department of Energy on April 26, 2001, also seeking documents related to the task force. On December 11, 2001, NRDC filed suit. Judge Gladys Kessler ordered DOE to release the bulk of the records by March 25, 2002, and to provide a Vaughn index by April 25, 2002. These cases were consolidated on May 9, 2002. Subsequently, NRDC moved for summary judgment, as have several of the agencies. In addition, the NRDC filed a separate FOIA action against the Department of Interior and the Bureau of Land Management on July 1, 2002, also seeking documents related to the task force. NRDC moved for summary judgment on December 18. This case was consolidated with the other two on January 16, 2003. All of the summary judgment motions are pending.

10. Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. Dec. 9, 2002) **[not 9/11 related]**. At the request of two Democratic congressmen, in May 2001 the General Accounting Office began seeking records from the National Energy Policy Development Group. The GAO sought the identities of people who met with the task force and the dates of those meetings. The administration refused to turn over the information, and the GAO sued on February 22, 2002. Judge John Bates held on December 9, 2002 that the GAO did not have standing to bring the suit because it did not suffer a personal, concrete, and particularized injury. He did not reach the substantive issues raised. On February 7, 2003, the GAO announced that it would not appeal the decision.

11. Judicial Watch, Inc. v. Dep't of Justice, -- F. Supp. 2d --, 2003 WL 1737601, No. 01-639 (D.D.C. March 28, 2003) **[not 9/11 related]**. Judicial Watch filed a FOIA request on February 22, 2001 with the Department of Justice, seeking all documents related to pardon applications considered or granted by former President Clinton. DOJ informed Judicial Watch that it would not be able to complete the request in time, and Judicial Watch filed suit on March 23. Subsequently, DOJ released more than 1,000 pages of documents, but withheld 4,825 pages because they related to the President's constitutional authority to grant pardons, or to protect the privacy of the applicants. On March 28, 2003, Judge Gladys Kessler granted DOJ's motion for summary judgment, holding that most of the records are privileged presidential communications exempted from disclosure. The court also held that DOJ may withhold the other documents on privacy grounds.

B. Court Records

1. United States v. Moussaoui, No. 01-455-A (E.D. Va. Aug. 20, 2002). The government moved on August 8, 2002 for a protective order that would allow it to play, during the trial in open court, the cockpit voice recordings of United Airlines Flight 93, which crashed in rural Pennsylvania on September 11, 2001, but would seal the tapes and any transcripts after they were played. The motion is based on a federal law that prohibits playing cockpit voice recordings outside of a courtroom. USA Today moved to intervene to oppose the government's motion, arguing that, if played in court, the tapes should be made public. On August 20, 2002, Judge Brinkema ruled that USA Today's motion was premature because she had not decided whether to allow the tapes to be played in the first place. After listening to the tapes in camera, Judge Brinkema declared on September 13, 2002 that the tapes had "marginal evidentiary value" and should not be admitted unless the government demonstrated a legitimate reason why the recordings were essential to the case. However, the court does not appear to have made a final ruling on the motion.

2. United States v. Moussaoui, No. 01-455-A (E.D. Va., Sept. 27, 2002 and May 16, 2003). On August 29, 2002, Judge Brinkema ordered that all of Moussaoui's pro se pleadings be sealed because they contained "extensive inappropriate rhetoric." Responding to a motion by a group of media organizations, Judge Brinkema modified the order on September 27, 2002. Under the new order, all of Moussaoui's pro se pleadings are initially filed under seal. The government then has ten days to advise the court if the pleading should remain sealed or be redacted. If the government takes no action, the pleading is unsealed. In the six months following the order, Moussaoui filed forty-five pleadings: nineteen were maintained under seal, fourteen were unsealed, and no action had been taken on twelve. However, in that period, sixty-three other documents filed by Moussaoui initially were sealed,

including motions, responses, memoranda, and transcripts. Some of these documents are believed to be related to Moussaoui's attempts to gain access to Ramzi Bin al-Shibh. There was no notice to the public of the sealing nor any opportunity for the public to be heard. All but four of these documents remained under seal as of April 4, 2003, when the same group of media entities filed another motion asking Judge Brinkema to unseal those pro se pleadings more than ten days old on which no action had been taken, and to unseal the other documents unless she determined that there is a compelling reason to keep them sealed. The government responded by agreeing to unseal many of the pleadings and documents. On May 16, 2003, Judge Brinkema ordered some of the documents to remain under seal, but ordered the government to review a group of others to determine whether they could be unsealed in their entirety or unsealed with redactions.

3. Global Relief Foundation v. O'Neill, No. 02-CV-0674, 205 F. Supp. 2d 885 (N.D. Ill, April 5, 2002) and 207 F. Supp. 2d 779 (N.D. Ill. June 11, 2002), *aff'd*, 315 F.3d 748 (7th Cir. Dec. 31, 2002). The Global Relief Foundation is an Islamic charity that the government suspects has ties to terrorism. On December 14, 2001, the Department of the Treasury froze Global Relief's asserts and, in turn, Global Relief filed an action attempting to force the government to unfreeze the money. The government requested that Judge Wayne Anderson consider certain evidence supporting its opposition to Global Relief's motion in camera and ex parte – that is, in complete secrecy and without allowing Global Relief access to the evidence. Global Relief challenged this procedure as unconstitutional. Judge Anderson agreed to it on April 5, 2002, holding that the procedure is permitted in "extraordinary circumstances" such as this, where the government has declared that it would harm national security to disclose the evidence. In a subsequent decision on June 11, Judge Anderson also rooted his decision to consider the evidence in camera and ex parte in provisions of the Foreign Intelligence Surveillance Act and the USA Patriot Act, and held that doing so did not violate Global Relief's due process rights. The Seventh Circuit upheld the decision on December 31, 2002.

4. United States v. John Doe, [case number unknown] (S.D.N.Y. July 22, 2002). In a material witness case before Judge Michael Mukasey involving a witness who claimed that he should not be held because he only knew of lawful conduct by the subject of the investigation, the New York Times sought and won the release of certain legal briefs.

5. SR Int'l Bus. Ins. Co. v. World Trade Center Properties LLC and World Trade Center Properties LLC v. Allianz Ins. Co., No. 01 Civ. 9291, (S.D.N.Y. October 22, 2002). In the months following the events of September 11, a dispute arose between the primary leaseholder of the World Trade Center and its insurers over whether the attacks was one "occurrence" or two. During this litigation, both sides commissioned experts to prepare detailed engineering studies on the reasons for the collapse of the towers. In September 2002, the New York Times sought these reports from the parties, who responded that they believed that they could not release the studies under the Judge John Martin's protective order. The Times and the parties sought clarification from Judge Martin, who ruled from the bench on October 22, 2002 that there was no order restricting dissemination of the reports. The reports were then released.

6. Hirsch v. Frieden, No. 754000/01, (N.Y. Sup. Ct. N.Y. County March 10, 2003 and August 4, 2003). To expedite issuing the large number of death certificates needed for the victims of the September 11, 2001 attacks, authorities in New York established an accelerated procedure that required family members, employers, and others to submit affidavits to courts. These affidavits were used to determine if a particular missing person had died in the attacks, and also included information needed to issue the death certificate, such as the victim's Social Security number and mother's maiden name. The court initially sealed these records, and the Associated Press intervened. In a March 10, 2003 decision, Justice Eve Preminger divided the records into four categories. First, the court released the orders that found there was an adequate basis for issuing a death certificate. However, the court kept sealed orders that did not find a sufficient basis to issue a death certificate, if prosecutors could show that releasing them might harm ongoing criminal investigations. (Following submissions from the District Attorney and the City of New York, the court decided on August 4, 2003 to keep sealed most of the contents of 58 files.) Second, the court left sealed personal items of the victims in the files, such as Social Security cards, pay stubs, and passports. Third, the court unsealed affidavits from non-family sources used to establish that the particular victim was at the World Trade Towers, after redaction of personal information such as Social Security numbers. Fourth, the court left sealed affidavits of family members that contained "emotional accounts of a last conversation with the victim, and of the poignant efforts of family and friends to locate their loved ones." These statements went beyond what was necessary to establish the presence of the victims at the World Trade Center, and were given without the expectation that they would be made public, the court found.

III. ACCESS TO PLACES

1. Getty Images News Services Corp. v. Dep't of Defense, 193 F.Supp.2d 112 (D.D.C. March 7, 2002). Since late 2001, the government has detained some individuals captured in Afghanistan at the U.S. base at Guantanamo Bay, Cuba. The base is only accessible by military transport. Soon after detainees were brought to Guantanamo, the military began rotating members of the media through the base by flying in groups of about 20 for short stays. These were not press pools – the media representatives could publish and distribute their work as they saw fit. Getty, a news photography agency, was not included in first several flights to Guantanamo. It brought an action on January 31, 2002, requesting that one of its photographers be included on a flight, complaining that the Department of Defense did not have adequate rules and procedures to determine which press representatives were to be sent, and arguing that the government was required to set up a pool. On February 6, 2002, a Getty representative was included in a press flight to Guantanamo. The court denied Getty's motion for a temporary restraining order on February 8. On February 21, the court held a hearing on Getty's motion for a preliminary injunction during which the Department of Defense stated that it used four principles to chose which media representatives to put on the flights to Guantanamo, that these principles had not been published, and that it did not have a formal procedure for gathering information to determine which media organizations satisfied the principles. The court denied Getty's motion for a preliminary injunction on March 7, 2002. It first held that Guantanamo is not a public forum, so any regulations regarding access to it must only be reasonable. Although it found that the Department of Defense needed to have criteria and a way to assess whether the criteria were met, the court held that Getty had not made a strong enough showing that it was likely to succeed on the

merits, and deferred making a decision. The court also held that the government is not required to create a pool whenever access is granted to some members of the press.

2. Flynt v. Rumsfeld, 180 F. Supp. 2d 174 (D.D.C. Jan. 8, 2002) and -- F. Supp. 2d --, 2003 WL 355958 (D.D.C. Feb. 19, 2003). Soon after U.S. troops arrived in Afghanistan, Hustler Magazine sought to accompany them to the battlefield, asserting a First Amendment right of access. On January 8, 2002, the court denied Hustler's motion for a preliminary injunction, holding that it was not likely to suffer irreparable harm, and that the balance of harms and the public interest weighed against granting the motion. However, the court stated there might be a qualified First Amendment right of access to the battlefield. On February 19, 2003, the court granted the defendants' motion to dismiss on standing and ripeness grounds, but reiterated that there could be a qualified right of access to the battlefield.

IV. REPORTERS' SUBPOENAS

1. U.S. v. Lindh, Cr. No. 02-37-A (E.D. Va. July 12, 2002). John Walker Lindh was captured by Northern Alliance forces in Afghanistan in late November 2001. On December 1, 2001, Lindh was brought to a hospital in poor condition. Afghans recognized him as an American, who informed U.S. military personnel of his presence. Robert Pelton, a reporter working for CNN, went with the U.S. military personnel to see Lindh. Pelton then interviewed Lindh in the presence of a U.S. military medic, who was also asking questions. Lindh was charged with conspiracy to murder in January 2002. Lindh subpoenaed Pelton, who moved to quash on July 5, 2002. A long list of media organizations filed an amicus brief in support of Pelton's motion on July 10. Judge Ellis denied Pelton's motion from the bench on July 12, holding that Pelton's newsgathering activities did not protect him from having to testify. Judge Ellis also said that might revisit the issue when Pelton was called to testify. However, Lindh entered a plea agreement on July 15, rendering the subpoena issue moot.

2. No known case name, (July 22, 2002 and Aug. 6, 2002 W.D. Va.). Dr. Tajammul Bhatti was arrested on a sealed warrant in southwestern Virginia on June 20, 2002. Chris Dumond, a reporter for the Bristol Herald Courier, was shown a copy of the warrant by a confidential source and wrote a series of stories about Bhatti's arrest and the sealed warrant over the next several weeks. At a July 22, 2002 hearing to determine whether Bhatti and his attorney were in contempt for violating her gag order, Magistrate Judge Pamela Sargent held Dumond in contempt for refusing to reveal his source. Judge Sargent told Dumond she could jail him for 30 days and fine him $5,000 if he did not name the source, and gave him until August 6 to change his mind. Just before the August 6 hearing, Dumond's source, a friend of Bhatti, released Dumond from his promise of confidentiality. Dumond then revealed the source's name to the court.

V. HABEAS PROCEEDINGS (Enemy combatants)

1. Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003). British, Australian, and Kuwaiti nationals held at Guantanamo Bay brought petitions for writs of habeas corpus. The district court

held, and the appellate court affirmed, that no U.S. court had jurisdiction to consider claims under the Constitution filed by aliens held outside sovereign U.S. territory.

2. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), *on remand*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003). Yaser Esam Hamdi, an American citizen, was captured in Afghanistan and initially detained at Guantanamo Bay. Once his citizenship status was discovered, he was transferred to a navy brig in Norfolk, Virginia. Hamdi filed a petition for a writ of habeas corpus on June 11, 2002. District Court Judge Robert Doumar granted a public defender access to Hamdi, and the Fourth Circuit reversed and remanded on July 12, holding that the district court had not given proper deference to the President and Congress relating to sensitive matters of national security and had failed to properly consider Hamdi's status as an enemy combatant. On remand, Judge Doumar held on August 16 that the government's basis for declaring Hamdi an enemy combatant was insufficient. The Fourth Circuit again reversed and remanded on January 8, 2003, holding that Hamdi's detention was valid and that he could be denied access to a lawyer while detained.

3. Padilla v. Rumsfeld, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). Jose Padilla, an American citizen, was arrested on May 8, 2002 as a material witness. On June 9, President Bush designated Padilla an enemy combatant, based in part on a sealed declaration, and he was transferred to a navy brig in Charleston, South Carolina. The government accused Padilla of trying to build a "dirty bomb" and detonate it in the U.S. Padilla filed a petition for a writ of habeas corpus on June 19. On December 4, 2002, Judge Michael Mukasey ruled that President Bush had the power to detain enemy combatants, but permitted Padilla to consult with counsel for the sole purpose of helping him submit facts to the court in support of his habeas petition. The court deferred making a decision on whether he could use the sealed declaration to decide if he was properly designated an enemy combatant. On April 9, 2003, Judge Mukasey certified the case for appeal to the Second Circuit.

VI. MISCELLANEOUS

1. In July 2002, military authorities at the Pentagon began informing journalists with building passes that their passes would not be renewed, and might be revoked, unless the reporter was physically present in the Pentagon at least twice a week. Reporters without a building pass may only enter the Pentagon at an inconvenient entrance halfway around the building from the Metrorail stop, and must be escorted to and from their scheduled press conference or interview (making it impossible to drop in on a source). Pentagon officials also said they would allow reporters who regularly write stories about defense issues, but are not physically present twice a week, to keep their passes. The officials did not specify the frequency necessary to maintain a pass, but said they would do Lexis/Nexis searches to confirm the number of stories written. The Regional Reporters Association wrote a letter protesting the policy, noting that small bureaus have only one or two reporters to cover the entire federal government and therefore may not be physically present in the Pentagon twice a week.

2. United States v. Moussaoui, No. 01-455-A (E.D. Va.). On February 14, 2002, the Senate and House Intelligence Committees announced they would conduct a joint inquiry into the intelligence community's activities before, during, and after

September 11. On August 19, 2002, prosecutors in the Moussaoui case moved for "clarification" of Judge Brinkema's February 5, 2002 protective order, in effect asking her to prevent any public hearings on Moussaoui at which government witnesses would have to appear or at which sensitive documents could be released until after his trial. Judge Brinkema denied the motion without explanation on August 29, 2002. The joint inquiry subsequently held nine days of public hearings during which FBI Director Robert Mueller and several FBI agents testified.

3. On June 19, 2002, CNN reported that the National Security Agency had intercepted two messages just prior to September 11, 2001 that could have indicated an imminent terrorist attack, but that the messages were not translated from Arabic until September 12. The CNN report came the day after the NSA Director Michael Hayden told the joint inquiry about the messages in a closed hearing. Angered at the leak, Vice President Cheney complained to the chairmen of the House and Senate Intelligence Committees, who decided to request an FBI investigation into it. According to the Washington Post, the FBI questioned all 37 members of the committees and about 60 staff members during the investigation, and asked each if they would be willing to take a polygraph test. Most refused. The FBI also requested that 17 senators turn over phone records, appointment calendars, and schedules. According to Roll Call, most senators quietly complied with the requests, but several balked. It is unclear whether the investigation was ever resolved.

4. In re all matters submitted to the Foreign Intelligence Surveillance Court, No. 02-429, 2002 WL 1949263 (F.I.S.Ct. May 17, 2002) and No. 02-001, 2002 WL 31721766 (F.I.S.Ct. Nov. 18, 2002). The Foreign Intelligence Surveillance Court ("FISC"), created in 1978 to review secret applications for electronic surveillance and physical searches for gathering intelligence on foreign espionage, released its first public opinion in 2002. In response to a request from members of the Senate Judiciary Committee, on August 20, 2002 FISC Presiding Judge Colleen Kollar-Kotelly forwarded them a copy of the May 17, 2002 opinion and noted that the court intended to publish it. Senate Judiciary Chairman Patrick Leahy released the opinion. In substance, the court ruled that the Department of Justice misinterpreted its powers under the U.S.A. Patriot Act passed in the wake of September 11. The government appealed the decision – the first ever appeal of a FISC decision – and the three-member Foreign Intelligence Surveillance Court of Review reversed the decision in a public opinion released on November 18, 2002.

5. Airline lawsuits. In the aftermath of September 11, many victims and others adversely affected by the attacks sued American Airlines and United Airlines, the carriers of the hijacked airlines. Several of the plaintiffs sued anonymously. In Mariani v. United Air Lines, Inc., 2002 WL 1685328 (S.D.N.Y. July 24, 2002), Judge Alvin Hellerstein ordered those suing anonymously to refile their complaints under their own names no later than August 13, 2002. Several of these plaintiffs objected, and sought to hold a closed hearing on the issue. On September 18, 2002, the New York Times objected both to holding a closed hearing and to these plaintiffs remaining anonymous. Judge Hellerstein ruled in favor of the Times from the bench on September 19.