Terrorism Trials and the Article III Courts After *Abu Ali*

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To say that it is difficult to divorce the debate over the suitability of trying terrorism suspects in the Article III courts from the politics of the moment would be an epic understatement. Especially in light of the Obama Administration's decisions to (1) try the "9/11 defendants" in the civilian courts[1] and (2) subject Umar Farouk Abdulmutallab to civilian—rather than military—jurisdiction,[2] recent months have witnessed a renewed barrage of objections to subjecting such extraordinary cases to the ordinary processes of our criminal justice system. These critiques have included claims that such trials make the city in which they occur a target for future attacks; that they provide the defendants with a platform from which to spew anti-American propaganda; that they risk publicly revealing information about intelligence sources and methods; that they are enormously costly both with regard to the security measures they require and the judicial resources they consume; and, most substantively, that they put pressure on the courts to sanction exceptional departures from procedural or evidentiary norms that will eventually become settled as the rule—what we might characterize as either a "distortion effect" or a "seepage problem."[3]

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1. *See, e.g.*, Peter Finn & Carrie Johnson, *Alleged Sept. 11 Planner Will Be Tried in New York*, WASH. POST, Nov. 14, 2009, at A1 (reporting that the "self-proclaimed mastermind of the Sept. 11, 2001[] attacks, and four co-conspirators will be tried in Manhattan federal courthouse"). *But see* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15 & 22, 2010, at 52 (noting the ongoing controversy over whether the 9/11 defendants should be tried in civilian court, and the Obama Administration's reconsideration of its original decision).

2. *See, e.g.*, Letter from Eric Holder, U.S. Attorney General, to Mitch McConnell, U.S. Senator (Feb. 3, 2010), *available at* http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf (explaining the reasons behind the Attorney General's decision to charge Umar Farouk Abdulmutallab in federal court).

3. *See* Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15 (voicing concerns about revealing methods and sources of intelligence, the strain on security and financial resources, and the legal distortions that may occur); Michael B. Mukasey, *Where the U.S. Went Wrong on Abdulmutallab*, WASH. POST, Feb. 12, 2010, at A27 (same); Vincent J. Vitkowsky, *Try Mohammed at Guantanamo*, HUFFINGTON POST, Mar. 19, 2010, http://www.huffingtonpost.com/vincent-j-vitkowsky/try-mohammed-at-guantanam_b_505850.html (arguing that holding 9/11 trials in the United States would provide a forum for defendants to voice anti-American propaganda and make the cities in which the trials are held prone to future terrorist attacks); John Yoo, Op-Ed., *The KSM Trial Will be an Intelligence Bonanza for al Qaeda*,

These arguments are not new.[4] Nevertheless, they do raise fundamental questions about whether the civilian courts are able to effectively function in certain high-profile terrorism cases and to balance the rights of the defendants with the very real practical, logistical, and substantive difficulties that such prosecutions tend to raise. Moreover, the answers may themselves have much to say about the normative desirability of possible alternatives, especially trials by military commission—at least in those cases in which such courts *could* legally exercise jurisdiction.[5]

A series of reports by different institutions and organizations, including the ABA's Standing Committee on Law and National Security,[6] the Center on Law and Security at NYU School of Law,[7] and Human Rights First,[8]

WSJ.COM, Nov. 15, 2009, http://online.wsj.com/article/SB10001424052748704431804574537370665832850.html (arguing that any civilian trials of the 9/11 defendants will likely reveal intelligence sources and methods to al Qaeda). For a broader and more general discussion of the seepage problem, see LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY (2008) (examining how procedural exceptions adopted to deal with extreme cases in the British legal system inexorably became hard-wired into the rules).

4. Several years ago, when proposals for "national security courts" were in vogue, *see, e.g.*, GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR 157–93 (2009) (arguing for the establishment of a national security court system), similar arguments were made about the inability of the Article III courts to handle terrorism prosecutions effectively. I am on record as being a vocal critic of such proposals, for reasons I have articulated elsewhere. *See, e.g.*, Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 523–25 (2009).

5. For a brief survey of some of the military commissions' potential jurisdictional issues, see generally Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172 (2008), http://www.law.northwestern.edu/journals/lawreview/Colloquy/2008/40. The Congressional Research Service has provided a useful comparison of the procedural rights available to defendants under the current military commission system, as compared to trial in civilian criminal court. JENNIFER K. ELSEA, CONG. RESEARCH SERV., COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (2010), *available at* http://www.fas.org/sgp/crs/natsec/R40932.pdf; *see also* Kenneth Jost, *Prosecuting Terrorists: Should Suspected Terrorists Be Given Civil or Military Trials?*, 20 CQ RESEARCHER 217 (2010) (discussing the issues surrounding whether suspected terrorists should be tried by civil or military courts). For a more in-depth analysis of the potential constitutional limits on the jurisdiction of military commissions, see Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y (forthcoming 2010).

6. ASHELY INDERFURTH & WAYNE MASSEY, A.B.A. STANDING COMM. ON LAW & NAT'L SEC. ET AL., TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED (2009), http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf; STEPHEN I. VLADECK, A.B.A. STANDING COMM. ON LAW & NAT'L SEC. ET AL., DUE PROCESS AND TERRORISM (2007), http://www.abanet.org/natsecurity/publications/due_process_and_aba_stcolns_nsf_mtf.pdf.

7. CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD (2010), http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf [hereinafter TERRORIST TRIAL REPORT CARD].

8. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2009), *available at* http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

among others, have offered various quantitative and qualitative assessments of the work of the Article III courts in post-9/11 terrorism cases. Although the reports differ in material ways, they all reflect to some degree a sentiment expressed quite pointedly in the *Terrorist Trial Report Card* prepared by the NYU School of Law's Center on Law and Security, i.e., that "the overwhelming evidence suggests that the structures and procedures, as well as the substantive precedents, provide a strong and effective system of justice for alleged crimes of terrorism."[9]

These reports, though, have all looked at the challenges faced by the Article III courts at the macro level, gathering copious data on the hundreds of terrorism or terrorism-related prosecutions to have taken place since September 11 and drawing conclusions from the aggregated results.[10] In the Article that follows, I attempt a different approach, focusing on the specific procedural and evidentiary issues confronted in one of the more legally significant of the post-9/11 criminal prosecutions completed as of this Article—the trial of Ahmed Omar Abu Ali.[11]

Abu Ali's case is thought-provoking, if not fascinating, on any number of levels,[12] including the strange (and potentially troubling) circumstances in which it began;[13] the uniqueness of the charges against him—which included conspiracy to assassinate the President in addition to a host of more conven-

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9. TERRORIST TRIAL REPORT CARD, *supra* note 7, at iv.

10. One recent exception is a fantastic report put together by the Federal Judicial Center, documenting the particular case-management challenges that individual trial courts have confronted in post-9/11 terrorism cases. ROBERT TIMOTHY REAGAN, FED. JUD. CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/$file/ts100222.pdf.

11. United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008). Perhaps the best indicator of the significance of *Abu Ali* is the fact that the members of the three-judge Fourth Circuit panel that heard the appeal issued a joint, signed opinion affirming Abu Ali's conviction. *Id.* at 220–21; *see also* John Ashcroft, *Reflections on Events and Changes at the Department of Justice*, 32 HARV. J.L. & PUB. POL'Y 813, 828–29 (2009) (referring to *Abu Ali* as one of the Bush Administration's successful terrorist prosecutions). For a cursory summary of the case and the unique issues it raised, see REAGAN, *supra* note 10, at 125–31.

12. There have been other (perhaps *more* significant) terrorism prosecutions since September 11, most notably the prosecution of the alleged "twentieth hijacker," Zacarias Moussaoui. At least as relates to the current project, my own view is that *Abu Ali* is a better case study, if for no other reason than because it, unlike *Moussaoui*, went to trial. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010) (noting Moussaoui pleaded guilty). *Abu Ali* is also a more compelling choice—at least for the moment—than the prosecution of Jose Padilla, whose appeal of his conviction remains pending before the Eleventh Circuit as of this writing. *See* United States v. Hassoun, No. 04-60001 ACR, 2007 WL 4180844 (S.D. Fla. Nov. 20, 2007) (denying Padilla and his co-defendants' post-trial motion for judgment of acquittal); United States v. Hassoun, No. 04-60001 ACR, 2007 WL 4180847 (S.D. Fla. Nov. 20, 2007) (denying the defendants' motion for a new trial).

13. *See* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 31 (D.D.C. 2004) (denying the Government's motion to dismiss Abu Ali's habeas petition, which alleged that he was being held—and tortured—in Saudi Arabia at the behest of U.S. government officers), *dismissed as moot*, 387 F. Supp. 2d 16 (D.D.C. 2005).

tional post-9/11 terrorism counts;[14] the procedural innovations adopted by the district court to allow Saudi intelligence officials to provide remote deposition testimony outside the presence of the defendant (and notwithstanding Rule 15 of the Federal Rules of Criminal Procedure);[15] the thorny question of whether *Miranda*[16] applied to certain statements that Abu Ali gave while in Saudi custody, albeit with American interrogators in the room—the only substantive issue at trial to divide the three-judge panel of the Fourth Circuit on appeal;[17] and the clear violation of the Sixth Amendment's Confrontation Clause at trial, which the Fourth Circuit held to constitute harmless error[18] (a ruling that itself formed the basis for an unsuccessful petition for a writ of certiorari to the Supreme Court).[19]

In short, *Abu Ali* is a microcosm of both the unique difficulties these cases present and the ways in which such issues have generally been resolved by federal trial judges exercising creativity and flexibility. Moreover (and more specifically relevant to this Symposium), *Abu Ali* provides particular proof of the extent to which advancements in courtroom technology may well mitigate at least some of the practical obstacles that courts face in transnational terrorism cases. Finally, whatever difficulties *Abu Ali* may have presented for the civilian criminal justice system, it is difficult to see how the same difficulties wouldn't also be present had Abu Ali been tried in a military commission. The claimed errors at trial that were analyzed by the Fourth Circuit were all constitutionally grounded, and there is little in the way of precedent for the proposition that either the Fifth Amendment's privilege against self-incrimination or the Sixth Amendment's right to confrontation have less force before a military tribunal—especially where the defendant is a U.S. citizen.[20]

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14. *See* Indictment at 13, United States v. Abu Ali, Crim. No. 1:05CR53 (E.D. Va. Feb. 3, 2005), *available at* http://news.findlaw.com/hdocs/docs/terrorism/abuali20305ind.pdf (listing the conspiracy to assassinate charge under count four, "Providing Material Support and Resources to Terrorists").

15. *See* Barry M. Sabin et al., *Proposed Changes to Federal Rule of Criminal Procedure 15: Limitations, Technological Advances, and National Security Cases*, *in* TERRORIST TRIAL REPORT CARD, *supra* note 7, at 34, 34 & n.2 (citing *Abu Ali* as an example where foreign depositions were utilized).

16. Miranda v. Arizona, 384 U.S. 436 (1966).

17. *See* United States v. Abu Ali, 528 F.3d 210, 229–30 & nn.5–6 (4th Cir. 2008) (presenting the competing views for the three-judge panel on the issue of whether the American interrogators' presence constituted a joint venture). Judge Motz's published dissent focused entirely on her disagreement with the majority over Abu Ali's sentencing, *see id.* at 269–82 (Motz, J., dissenting), an issue beyond the scope of this Article.

18. *Id.* at 256–57.

19. *See* Petition for Writ of Certiorari at i, Abu Ali v. United States, 129 S. Ct. 1312 (2009) (No. 08-464) (framing as the sole question presented whether "a Sixth Amendment violation involving the presentation of evidence to the jury in a criminal prosecution, which evidence the defendant is denied the right to see, [can] ever constitute harmless error").

20. *Cf.* United States v. Blazier, 68 M.J. 439, 441–42 (C.A.A.F. 2010) (applying standard Sixth Amendment Confrontation Clause analysis to review a court-martial); United States v. Chatfield, 67 M.J. 432, 439–40 (C.A.A.F. 2009) (applying standard Fifth Amendment self-incrimination analysis

To be sure, like this Article's conclusions, its aim is modest. There are a host of reasons why it would be wrong to draw sweeping lessons from the story of one particular case, no matter how significant that one case may be. In addition, even an assessment of *just* the *Abu Ali* litigation is lacking for any appreciation of the myriad problems that Government or defense counsel likely encountered behind the scenes; the story told here is one reconstructed entirely from the public record, a record that could also be read with a far more skeptical eye.[21] Nevertheless, my hope is that a candid discussion of the *Abu Ali* litigation—including its triumphs and its shortcomings—will add meaningful substantive content to a conversation that, for the moment, seems awash in unsubstantiated (and largely partisan) rhetoric.

To that end, Part I of the Article provides a detailed summary of the litigation, from the habeas proceedings initiated while Abu Ali was still in Saudi custody, to the various pre-trial rulings by Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia, to the trial itself, to Abu Ali's subsequent appeal to the Fourth Circuit, and finally to his (unsuccessful) petition for certiorari.

Part II turns to a brief analysis of the three most prominent issues that arose out of Abu Ali's trial—the improvised deposition procedures employed by the district court, the introduction of un-Mirandized statements made while Abu Ali was still in Saudi custody, and the Confrontation Clause error that was ultimately adjudged to be harmless. As Part II suggests, the first issue shows how the judicious use of courtroom technology can better balance the rights of the defendant with the security and foreign policy concerns of the government in terrorism prosecutions, the second issue highlights the difficulties courts face in applying precedents forged in traditional law enforcement to multinational counterterrorism investigations, and the third issue reinforces the extent to which, even when courts and policy makers *have* attempted to take all relevant concerns into account, honest mistakes will still be made. As harmless error doctrine recognizes, though, our criminal justice system commits any number of decisions to the sound discretion of trial judges, and relief therefore turns not on the existence of error, but on the extent to which the errors prejudice the overall integrity of the trial

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to review a court-martial). It is possible, of course, that constitutional protections enjoyed by court-martial defendants may not be available to non-citizens tried by a military commission, but that is an open question, at the very least (and one that would not be implicated in Abu Ali's case). Moreover, at least one circuit has expressly held that the Fifth Amendment's right against self-incrimination requires the equivalent of *Miranda* warnings even for non-citizens detained outside the territorial United States. *See In re* Terrorist Bombings of U.S. Embassies, 552 F.3d 177, 203–04 (2d Cir. 2008).

21. *See, e.g.*, Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 25–34 (2010) (summarizing—and criticizing—the various discussions of voluntariness by the district court and Fourth Circuit in *Abu Ali*); *see also* Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647 (2008) (using *Abu Ali* to argue for clearer standards for the admissibility of statements obtained via foreign interrogations).

proceedings.[22] And while some may believe that harmless error doctrine has become *too* ubiquitous as a safety valve in contemporary criminal prosecutions, that is hardly a charge that is specific to terrorism trials. In short, *Abu Ali* is a mixed bag, and we would do well to appreciate its positive lessons, to reflect upon its negative lessons, and to accept, perhaps with a grain of salt, the Fourth Circuit's suggestion that *Abu Ali* is a reminder of a familiar principle—"while 'the Constitution entitles a criminal defendant to a fair trial,' it does not guarantee 'a perfect one.'"[23]

I. The *Abu Ali* Litigation

A. Background, Arrest, and the Habeas Petition

Ahmed Omar Abu Ali is a U.S. citizen who was born in Texas and raised in the Virginia suburbs of Washington, D.C.[24] In September 2002, at the age of 21, he left home to study at the Islamic University in Medina, Saudi Arabia.[25] Nine months later, he was arrested by officers of the Mabahith—the counterterrorism security forces of the Saudi Ministry of the Interior—who had come to believe that he was affiliated with the terrorist cell (al-Faq'asi) responsible for the May 12, 2003 suicide attacks in Riyadh that had killed thirty-nine people, including nine Americans, and that he was involved in planning for future al-Faq'asi and al Qaeda attacks on U.S. soil.[26] As subsequent testimony would reveal, a suspect detained in the Mabahith's investigation into the May 12 attacks had identified a photograph of Abu Ali from a Medina University student photo book and informed the Mabahith that the man he identified was a cell member known as "Reda," an American or European citizen of Arabian background.[27] Investigators subsequently identified "Reda" as Abu Ali and orchestrated his capture.[28]

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22. *See* Neder v. United States, 527 U.S. 1, 18–19 (1999) (noting the role played by harmless error doctrine). *See generally* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970) ("Like all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

23. *Abu Ali*, 528 F.3d at 256 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

24. The facts are variously taken from three sources: the district court's decision denying Abu Ali's motion to suppress and motion to dismiss the criminal indictment, United States v. Abu Ali, 395 F. Supp. 2d 338, 343–48 (E.D. Va. 2005); the Fourth Circuit's decision affirming Abu Ali's conviction, *Abu Ali*, 528 F.3d at 221–26; and the D.C. district court's decision denying the Government's motion to dismiss Abu Ali's habeas petition, Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 31–36 (D.D.C. 2004). It bears emphasizing that, at least in the last opinion, the facts alleged in Abu Ali's habeas petition were taken as true in order to resolve the Government's motion to dismiss. *Abu Ali*, 350 F. Supp. 2d at 31 n.1.

25. *Abu Ali*, 528 F.3d at 221.

26. *Abu Ali*, 395 F. Supp. 2d at 343–44.

27. *Id.* at 344.

28. *Id.* at 344–45.

After Abu Ali was arrested by the Mabahith, he was held at first in Medina, and his dorm room was searched by Saudi law enforcement officials.[29] The warden of the facility where he was detained "adamantly denied that Mr. Abu Ali was tortured, beaten, deprived of sleep, or questioned in Medina."[30] Abu Ali, on the other hand, alleged that he was not fed on his first day in custody in Medina and that Saudi officials hit him, "slapp[ed] him, punched him in the stomach, and pulled his beard, ears, and hair" on the night of his arrest.[31] Abu Ali further testified that the beatings continued on his second day in custody but ceased after he agreed to cooperate with the investigation.[32] Contrary to testimony given by Saudi officials, who claimed that he was not interrogated in Medina, Abu Ali maintained that he was interrogated on both the second and third day during which he was held in custody at the facility in Medina.[33]

Several days after his arrest, Abu Ali was transported to a prison in Riyadh, where he made a number of incriminating statements regarding his participation in past and future terrorist plots.[34] His principal interrogators in Riyadh—the brigadier general and the captain of the Mabahith who ran the prison—would later stringently deny that "they directed, participated in, or were aware of any government official torturing Mr. Abu Ali or engaging in any such behavior."[35] The brigadier general would testify that their interrogations began in the evening and continued into the early morning hours but insisted that this was customary in Saudi Arabia because of the country's very hot weather and that the timing of the interrogation was not an attempt to deprive Abu Ali of sleep.[36] He also testified that Abu Ali was granted "breaks, access to food, water, a bathroom, and refreshments during breaks in questioning."[37] Abu Ali himself conceded that "'Riyadh wasn't as bad as Medina'" because he wasn't beaten and the food was much better, though he described his interrogations as "'very intense'" and complained he was placed in solitary confinement and left handcuffed to a chain hanging from the ceiling one night in September 2003, which he assumed was punishment for telling an FBI agent that he was mistreated while in Medina.[38]

On June 15, 2003, at the request of the U.S. government, the Mabahith allowed several officials from the FBI and the Secret Service to observe an

29. *Id.* at 345.
30. *Id.*
31. *Id.* at 367.
32. *Id.* at 368.
33. *Id.* at 346, 368–69.
34. *Id.* at 343. The statements were made on June 11, 12, and 15, and July 24, 2003. *Id.* at 346.
35. *Id.*
36. *Id.*
37. *Id.* at 347.
38. *Id.* at 369–70.

interrogation of Abu Ali through a two-way mirror.[39] The American officials observed while Saudi interrogators asked Abu Ali six of the thirteen questions requested by the FBI and Secret Service.[40] Meanwhile, in the United States, the FBI obtained and executed a search warrant at Abu Ali's home in Virginia on June 16, 2003.[41]

It is undisputed that Abu Ali remained in Saudi custody from the date of his capture—June 8, 2003—until February 21, 2005 and that he was repeatedly interrogated by the Mabahith while in custody—interrogations that included at least some questions provided by the FBI and Secret Service agents who were there to observe.[42] Further, Abu Ali alleged that he was subjected on numerous occasions to torture and other coercive interrogation methods by his Saudi captors, although the bulk of his allegations would eventually be deemed not credible by the trial judge in his criminal case.[43]

Nevertheless, in July 2004, Abu Ali's parents filed a habeas petition on his behalf in the U.S. District Court for the District of Columbia. Although Abu Ali was in Saudi custody, his parents claimed, *inter alia*, that the Saudis were detaining Abu Ali entirely at the behest of the U.S. government (and perhaps even to avoid the oversight of the U.S. courts); that U.S. officials were involved in Abu Ali's interrogation; that the Saudi government would immediately release Abu Ali to American officials upon a formal request from the U.S. government; and that Abu Ali was therefore in the "constructive custody" of the United States sufficient to trigger the jurisdictional provisions of the federal habeas statute.[44] The Government, rather than responding to Abu Ali's claims on the merits, moved to dismiss, arguing that the Supreme Court's 1948 decision in *Hirota v. MacArthur*[45] barred the district court from exercising jurisdiction.[46]

In a thorough opinion handed down in December 2004, the district court denied the Government's motion to dismiss, holding that Abu Ali's

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39. *Id.* at 343. In September 2003, the FBI was given a direct opportunity to interrogate Abu Ali. *Id.* Because none of the statements elicited during the September interview were introduced at trial, it did not factor into subsequent analysis of whether the summer interrogations were a joint venture. *See id.* at 382 (rejecting Ali's contention that the interrogation was a joint venture, partially because the government did not seek to use any of the September statements).

40. *Id.* at 350.

41. United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008).

42. *Id.* at 224–25.

43. *Abu Ali*, 395 F. Supp. 2d at 375–79.

44. Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 30–31 (D.D.C. 2004).

45. 338 U.S. 197 (1948) (per curiam).

46. *Abu Ali*, 350 F. Supp. 2d at 31, 55. For a more thorough treatment of the relationship between *Abu Ali* and *Hirota*, see Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1532–34 (2007). On the jurisdictional issue more generally, see Karen Shafrir, *Habeas Corpus, Constructive Custody and the Future of Federal Jurisdiction After* Munaf, 16 U. MIAMI INT'L & COMP. L. REV. 91, 101–04 (2008) (discussing the district court's approach to habeas jurisdiction vis-à-vis *Hirota*).

allegations, if true, were sufficient to establish jurisdiction.[47] As Judge Bates explained,

> The position advanced by the United States is sweeping. The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad.
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> The Court concludes that a citizen cannot be so easily separated from his constitutional rights. . . . Abu Ali was not captured on a battlefield or in a zone of hostilities—rather, he was arrested in a university classroom while taking an exam. The United States has therefore not invoked the executive's war powers as a rationale for his detention—instead, the United States relies on the executive's broad authority to conduct the foreign affairs of the country as a basis to insulate Abu Ali's detention from judicial scrutiny. There are, to be sure, considerable and delicate principles of separation of powers that dictate caution and will narrow the inquiry in this case. Such principles, however, have never been read to extinguish the fundamental due process rights of a citizen of the United States to freedom from arbitrary detention at the will of the executive, and to access to the courts through the Great Writ of habeas corpus to challenge the legality of that detention.[48]

Judge Bates proceeded to "authorize expeditious jurisdictional discovery . . . to further explore [Abu Ali's] contentions."[49] Such discovery never took place, though. Instead, six weeks after his ruling, on February 3, 2005, a federal grand jury in Alexandria, Virginia, returned an indictment against Abu Ali.[50] Shortly thereafter, Abu Ali was surrendered to U.S. authorities (perhaps vindicating one of the central claims of his habeas petition) and flown back to the United States, appearing in court for the first time on February 22, 2005—the day after he returned.[51] Eventually, he was charged with nine distinct offenses: Conspiracy to Provide Material Support and Resources to a Designated Foreign Terrorist Organization (al Qaeda),[52] Providing Material Support and Resources to a Designated Foreign Terrorist Organization (al Qaeda),[53] Conspiracy to Provide Material Support to Terrorists,[54] Providing Material Support to Terrorists,[55] Contribution of

47. *Abu Ali*, 350 F. Supp. 2d at 45–51; *see also id.* at 55–57 & n.26 (distinguishing *Hirota*).
48. *Id.* at 31 (internal citations omitted).
49. *Id.*
50. Indictment, *supra* note 14.
51. United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008).
52. Indictment, *supra* note 14, at 1.
53. *Id.*
54. *Id.*
55. *Id.*

Services to al Qaeda,[56] Receipt of Funds and Services from al Qaeda,[57] Conspiracy to Assassinate the President of the United States,[58] Conspiracy to Commit Aircraft Piracy,[59] and Conspiracy to Destroy Aircraft.[60]

In light of Abu Ali's transfer to U.S. custody and the indictment unsealed against him in the Eastern District of Virginia, Judge Bates ruled in September 2005 that Abu Ali's habeas petition had become moot.[61] Although his opinion emphasized that "[n]othing in this opinion forecloses Abu Ali from pursuing whatever civil remedies may be available to him under the law for past wrongs,"[62] he nevertheless concluded that Abu Ali no longer had a colorable claim for habeas relief.

B. The Rule 15 Depositions

Shortly after the indictment was filed, in March 2005, the Government moved under Rule 15 of the Federal Rules of Criminal Procedure for an order allowing it to depose Saudi witnesses—in particular Mabahith officers—in Saudi Arabia.[63] Over Abu Ali's objection, such depositions were taken in July 2005 using procedures that, whatever their merits, were certainly novel.[64] As the Fourth Circuit would later summarize,

> As Saudi citizens who reside in Saudi Arabia, the Mabahith officers were beyond the subpoena power of the district court. Given this limitation, the United States government officially inquired into whether the Saudi Arabian government would allow the officers to testify at trial in the United States. The Saudi government denied this request, but permitted the officers to sit for depositions in Riyadh. As represented by counsel for the United States, this was a first in Saudi–American relations: the Saudi government had never before allowed such foreign access to a Mabahith officer.
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> Given the possibility of taking the deposition in Riyadh, the district court found it impractical for Abu Ali to travel to Saudi Arabia for two reasons. First, it would have been difficult for United States Marshals to maintain custody of Abu Ali while in Saudi Arabia . . . . Second, the fact that Abu Ali committed his offenses in Saudi Arabia might subject him to prosecution overseas, complicating—if not precluding—his return to the United States to face trial.[65]

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56. *Id.*
57. *Id.*
58. United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008).
59. *Id.*
60. *Id.*
61. Abu Ali v. Gonzales, 387 F. Supp. 2d 16, 17 (D.D.C. 2005).
62. *Id.* at 20.
63. *Abu Ali*, 528 F.3d at 225.
64. *Id.*
65. *Id.* at 239.

In light of the practical obstacles, the district court sought to create deposition procedures that would protect Abu Ali's rights. Thus,

> [a]t the court's directive, two defense attorneys, including Abu Ali's lead attorney, attended the depositions in Saudi Arabia, while a third attorney sat with Abu Ali in Virginia. Two attorneys for the government and a translator were also present in the room in Saudi Arabia while the Mabahith officers were being deposed.[66]

Moreover, "[a] live, two-way video link was used to transmit the proceedings to a courtroom in Alexandria. This permitted Abu Ali and one of his attorneys to see and hear the testimony contemporaneously; it also allowed the Mabahith officers to see and hear Abu Ali as they testified."[67]

To replicate normal conditions as best as possible, the testimony was transcribed by a court reporter in real time, and separate cameras recorded both the witnesses and Abu Ali, so that the jury could see their reactions.[68] Judge Lee presided from his courtroom in Alexandria, ruling on objections as they arose.[69] Finally, Abu Ali had the ability to communicate with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings via cell phone.[70]

> Having fashioned these procedures, the district court presided over seven days of deposition testimony from several Saudi Mabahith officers involved in the arrest, detention, and interrogation of Abu Ali. The subject matter of the depositions encompassed all aspects of Abu Ali's experience with the Saudi criminal justice system, including the manner of his arrest, the length of his interrogation, the conditions of his confinement, the Mabahith's methods of questioning, and the circumstances surrounding his confessions.
>
> . . . .
>
> Abu Ali's counsel actively participated throughout these depositions, objecting frequently during the government's direct examination and cross-examining each of the witnesses at length. In particular, Abu Ali's counsel were able to question the interrogating officers about Abu Ali's claims that he was tortured and beaten; deprived of sleep, food, and water; and denied use of a bathroom and mattress.[71]

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66. *Id.* Judge Lee would later comment in an interview that, if he had it to do over again, he would have sent more than one translator. REAGAN, *supra* note 10, at 128 & nn.1092–93.

67. *Abu Ali*, 528 F.3d at 239.

68. *Id.* at 239–40.

69. *Id.*

70. *Id.*

71. *Id.* at 240.

C. The Motions to Suppress and Dismiss

Abu Ali next moved to suppress the admission of the Mabahith officers' deposition testimony, along with various of the inculpatory statements he made while in Saudi custody, and for dismissal of the indictment.[72] As the district court summarized the motion,

> In his Motion to Suppress, Mr. Abu Ali asserts two principal arguments. First, he alleges that he was tortured while in Saudi custody and that the statements he allegedly made in detention are, therefore, involuntary and must be suppressed. Second, Mr. Abu Ali contends that the United States and the Saudi Government acted as partners or "joint venturers" in his arrest and lengthy detention in Saudi Arabia. He also argues that the Saudi government's search of his dormitory room in Medina and the search of his residence in Falls Church, Virginia, violated his Fourth Amendment rights against unreasonable searches and seizures. In his Motion to Dismiss, Mr. Abu Ali contends that because his arrest and lengthy detention were at the direction of the United States Government using the Saudi Arabia Government as a partner, joint venturer, or surrogate, the Indictment must be dismissed because the delay in his prosecution violates the Speedy Trial Act and his Sixth Amendment right to speedy trial.[73]

After taking nearly two weeks of testimony in connection with Abu Ali's motions, the district court issued a painstaking 113-page opinion, concluding, in fine, that "the government has met its burden of proving that Mr. Abu Ali's statements were voluntary, and that the alleged defects in the aforementioned searches and Indictment do not violate Mr. Abu Ali's rights under the Fourth or Sixth Amendments."[74]

With regard to Abu Ali's motion to suppress, the district court first concluded that Abu Ali's statements to the Saudi interrogators were voluntary, not the result of "gross abuse" or "inherently coercive conditions."[75] Despite recognizing that the voluntariness of the statements must be determined by the "totality of the circumstances,"[76] the court's discussion focused specifically on whether or not Abu Ali had been tortured.[77]

The district court rested its holding that the statements were voluntary on the following four findings: (1) the Saudi lieutenant colonel, who was the warden at the Medina facility, represented that Abu Ali had not been tortured or questioned coercively in Medina and his testimony was held to be more

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72. United States v. Abu Ali, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005).
73. *Id.*
74. *Id.*
75. *Id.* at 373.
76. *Id.* at 372–73.
77. *Id.* at 386.

credible than Abu Ali's allegations that he had been tortured and abused; (2) the testimony of the Saudi captain and brigadier general, who both asserted that Abu Ali had not been tortured or abused while in custody at Riyadh and that Abu Ali did not appear to have been abused at the time they questioned him, was credible as well; (3) the testimony of both Saudi Arabian and American officials regarding Abu Ali's behavior throughout the period from June 11–15, 2003 was credible and did not coincide with the likely behavior a recently beaten person would exhibit; and (4) the testimony of Saudi and American officials also indicated that Abu Ali was concerned that the United States would find out he was in Saudi custody, and this concern raised serious questions about Abu Ali's claims of torture because "[i]t stretches credibility to think that a United States citizen who had just been beaten and tortured days before by foreign law enforcement officials would *not* want the United States to know that he was in custody abroad and was being tortured."[78]

The court was also skeptical of Abu Ali's own account of his torture; it remarked that some aspects of his testimony "just do not flow logically"[79] and expressed apprehension over its inability to discern "whether Mr. Abu Ali is sincere or just cunning."[80] A particular point of contention was Abu Ali's inability to describe the object that hit him (even though he was blindfolded and chained to the floor), because, Judge Lee remarked, "it seems . . . that he could, at the very least, provide some basic description of what the item might have been based on how it felt to him."[81] And based on its factual findings related to the conclusion that Abu Ali's statements were voluntary, the court further concluded that his treatment did not "shock[] the conscience."[82]

Next, the district court turned to the *Miranda*[83] issue and whether the involvement of FBI and Secret Service agents in parts of Abu Ali's interrogation rendered it a "joint venture" to which *Miranda* would apply.[84]

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78. *Id.* at 374.

79. *Id.* at 378.

80. *Id.*

81. *Id.*

82. One might also view the competing testimony before the district court against the backdrop of the documented history (in U.S. State Department country reports) of abuses of detainees by the Saudi government—and the Mabahith in particular. *See, e.g.*, Said, *supra* note 21, at 25–29 (criticizing the district court's unwillingness to take these reports into account). Even then, it is not at all obvious that the district court would have reached a different credibility determination, or would therefore have found Abu Ali's statements to have been involuntarily given. Nevertheless, in this regard, *Abu Ali* also highlights the difficulties of applying traditional "voluntariness" standards (let alone *Miranda* itself) to interrogations conducted overseas and by foreign officials. *See id.* at 4–7.

83. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that the Fifth Amendment requires notice to the defendant of his right to counsel in a custodial interrogation in order to protect him from self-incrimination).

84. *Abu Ali*, 395 F. Supp. 2d at 381–83. On the joint venture doctrine, see *United States v. Yousef*, 327 F.3d 56, 145–46 (2d Cir. 2003) (requiring the suppression of statements elicited by

Based on the hearing testimony, the court concluded that "(1) U.S. law enforcement officials did not act in a 'joint venture' with Saudi officials in the arrest, detention; or interrogation of the defendant, and (2) Saudi law enforcement officials did not act as agents of U.S. law enforcement officials, and therefore *Miranda* warnings were not required."[85]

In arriving at this holding, the court did not define its understanding of "active" or "substantial" participation nor did it draw on comparisons from relevant case law.[86] Instead, Judge Lee concluded that the evidence clearly demonstrated that Saudi government officials arrested Abu Ali based on their own information and interest in interrogating him as a suspected member of a local terrorist cell, that the U.S. government did not learn of the defendant's arrest until after it occurred, and that FBI agents were not present or involved with any of the interrogations prior to June 15, 2003—"when virtually all of the incriminating statements sought to be suppressed were made"—or on July 18 and 24, when the defendant hand wrote and videotaped his confession.[87]

Although the court acknowledged that FBI and Secret Service agents *were* permitted to observe the June 15 interrogation (in which six out of the thirteen questions the FBI and Secret Service drafted were asked by the Saudi interrogators), it nevertheless concluded that "[t]he FBI and Secret Service were not allowed to determine the content or the form of the questions" asked during the interrogation.[88] And because of its conclusion that the interrogation was not a joint venture, the court similarly concluded that the Fourth Amendment simply did not apply to the search of Abu Ali's dorm room in Medina.[89] As for the search of his parents' home in Falls Church, Judge Lee concluded that the voluntary statements made by Abu Ali in his earlier interrogations provided more than sufficient probable cause.[90]

The same analysis covered most of the grounds invoked by Abu Ali in his motion to dismiss. As for Abu Ali's Speedy Trial Act claim, the court reiterated its finding that Abu Ali was arrested by the Saudi government for its own purposes and that Saudi officials did not act in a joint venture with, or as agents of, U.S. officials.[91] Judge Lee was not persuaded by a U.S. State Department cable reporting a Saudi colonel's statement that "'Abu Ali could be rendered to American authorities at any time if the [U.S. government]

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foreign police operating in the absence of *Miranda* protections where U.S. law enforcement agents actively participate in the questioning). *See also* United States v. Bin Laden, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (recognizing the joint venture exception). *See generally* Said, *supra* note 21, at 10–12 & n.62 (summarizing the doctrine and citing relevant cases).

85. *Abu Ali*, 395 F. Supp. 2d at 381.

86. *Id.* at 381–83.

87. *Id.* at 381–82.

88. *Id.* at 382.

89. *Id.* at 383.

90. *Id.*

91. *Id.* at 384–85.

made a formal request,'"[92] because it "evinces little more than routine prosecutorial cooperation between two sovereigns,"[93] and because there was other evidence demonstrating that U.S. officials "specifically and expressly" requested that the defendant *not* be held merely on behalf of the U.S. government.[94] The court also found that Abu Ali's Sixth Amendment right to a speedy trial did not attach until he was indicted or arrested and that he was not prejudiced by any pretrial delay that had taken place since the time of his indictment on federal charges on February 3, 2005, and his subsequent arrest on February 21, 2005.[95] Thus, the district court denied Abu Ali's motions in their entirety.

D. The CIPA Proceedings, Trial, and Sentencing

At roughly the same time, the district court was also considering the Government's request pursuant to the Classified Information Procedures Act (CIPA)[96] to introduce classified evidence at trial memorializing the communications between Sultan Jubran and Abu Ali.[97] Because Abu Ali's chosen defense counsel did not possess security clearances (and were therefore not authorized to view classified documents), the district court appointed a CIPA-cleared attorney to assist in Abu Ali's defense.[98] The Government first produced copies of the unredacted documents at issue to Abu Ali's CIPA-cleared counsel on October 14, 2005, at which time it also informed her that the Government intended to introduce these documents at trial by proceeding through CIPA to seek "'certain limitations on public disclosure that will be necessary to prevent the revelation of extremely sensitive national security information.'"[99] Three days later, the Government provided Abu Ali's uncleared defense counsel with slightly redacted copies of the classified documents that had been provided to his CIPA-cleared counsel and informed Abu Ali and his counsel that the Government planned to "'offer these communications into evidence at trial as proof that the defendant provided material support to al Qaeda.'"[100] As the Fourth Circuit would later explain, "the declassified versions provided the dates, the opening

92. *Id.* at 385.

93. *Id.*

94. *Id.*

95. *Id.* at 384.

96. *See* 18 U.S.C. app. 3 (2006) (detailing rules and procedures for the use of classified information in federal trials). Although CIPA applies on its face only to criminal trials, it has also been adopted in certain civil proceedings raising comparable considerations, especially habeas petitions arising out of the detention without charges of non-citizen terrorism suspects. *See, e.g.*, Al Odah v. United States, 559 F.3d 539, 544–47 (D.C. Cir. 2009); *In re* Guantanamo Bay Detainee Litig., 634 F. Supp. 2d 17, 24 (D.D.C. 2009).

97. United States v. Abu Ali, 528 F.3d 210, 249 (4th Cir. 2008).

98. *Id.* at 248–49.

99. *Id.* at 249. Both of the communications at issue are excerpted in the Fourth Circuit's opinion. *See id.*

100. *Id.*

salutations, the entire substance of the communications, and the closings, and had only been lightly redacted to omit certain identifying and forensic information."[101]

On October 19, 2005, the Government filed an in camera, ex parte motion pursuant to section 4 of CIPA,[102] seeking a protective order prohibiting testimony and lines of questioning that would lead to the disclosure of classified information contained in the documents memorializing the communications between Sultan Jubran and Abu Ali.[103] The district court curiously ruled that the Government could use the "silent witness" procedure to disclose classified information contained in these communications to the jury at trial,[104] even though Abu Ali himself would only be able to see the redacted version of the documents.[105] Abu Ali responded by filing a motion arguing that the Government must either declassify the documents in their entirety or that the court must order the Government to provide Abu Ali and his uncleared defense counsel the dates and manner in which the communications were obtained by the U.S. government.[106] The purpose of the request was apparently to ascertain whether the Government had discovered the existence of the communications prior to Abu Ali's arrest by Saudi officials—which would presumably strengthen Abu Ali's argument that his confessions to Saudi officials resulted from a "joint venture" with American law enforcement officers.[107]

On October 21, the district court held an in camera CIPA hearing to consider Abu Ali's motion.[108] At the hearing, the Government informed the court that although the communications were obtained prior to Abu Ali's 2003 arrest in Saudi Arabia, they were obtained "'based on intelligence collect[ed] by the United States government with no involvement whatsoever of Saudi authorities.'"[109] The district court concluded as a result that the communications were discovered independently from the Saudi government's investigation (and were therefore not the product of a joint

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101. *Id.*

102. 18 U.S.C. app. 3 § 4 (2006).

103. United States v. Abu Ali, 528 F.3d 210, 249–50 (4th Cir. 2008).

104. Under the "silent witness rule,"

> the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial but the defense would be able to present that classified information to the jury.

Id. at 250 n.18 (quoting United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987)).

105. *Id.* at 250.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

venture) and held that the redacted version of the documents provided to Abu Ali therefore "'me[t] the defense's need for access to the information.'"[110]

During the trial, Abu Ali moved pursuant to section 5 of CIPA to allow his uncleared counsel to question the two witnesses the Government intended to call to introduce into evidence the substance of the classified communications in order to examine them "'about their role in extracting, sharing, transferring, and handling [the] communications.'"[111] The Government opposed the motion, contending that it would lead to the disclosure of classified information.[112] The district court then held another CIPA hearing, after which it concluded that Abu Ali's rights under the Confrontation Clause were not infringed, because Abu Ali and his uncleared counsel "'kn[e]w about and [were] given the substantive contents of the communications'" and would "'have the opportunity to cross-examine the communications carrier representative and the FBI agent regarding the substance of those communications.'"[113]

Otherwise, Abu Ali's trial proceeded largely without incident. On November 22, 2005, the jury returned a verdict convicting him on all charges.[114] Judge Lee subsequently sentenced him to 360 months imprisonment, followed by a term of 360 months of supervised release.[115] Abu Ali appealed his conviction and sentence to the Fourth Circuit; the Government cross-appealed his sentence.[116]

E. Appeal to the Fourth Circuit

On appeal, Abu Ali reiterated many of the claims he had advanced at trial. As relevant here,[117] he first challenged the admission of his statements to the Saudi interrogators on the ground that they were involuntary and, in any event, were taken in violation of *Miranda*.[118] Second, he argued that the Government failed adequately to corroborate his confessions.[119] Third, Abu Ali claimed that the introduction of the Mabahith officials' deposition testimony violated his rights under the Sixth Amendment's Confrontation Clause.[120] Fourth, Abu Ali challenged the Government's introduction of classified evidence at trial (to which he was not privy) as a further violation

110. *Id.*

111. *Id.*

112. *Id.* at 251.

113. *Id.*

114. *Id.* at 226.

115. *See* United States v. Abu Ali, Crim. No. 05-53, 2006 WL 1102835, at *7 (E.D. Va. Apr. 17, 2006).

116. *Abu Ali*, 528 F.3d at 226.

117. For brevity's sake, I have omitted several of Abu Ali's additional claims on appeal that received summary treatment from the Fourth Circuit.

118. *Abu Ali*, 528 F.3d at 226.

119. *Id.* at 234.

120. *Id.* at 238.

of the Confrontation Clause.[121] In an eighty-page, jointly authored opinion,[122] Judges Wilkinson, Motz, and Traxler rejected nearly all of Abu Ali's arguments.[123]

First, with regard to the *Miranda* issue, Judges Wilkinson and Traxler read prior precedent as establishing that "mere presence at an interrogation does not constitute the 'active' or 'substantial' participation necessary for a 'joint venture' but coordination and direction of an investigation or interrogation does."[124] Based on the findings made by the district court, the majority thereby affirmed Judge Lee's conclusion that Abu Ali's interrogation was not a joint venture and that the introduction of his statements at trial was therefore not a violation of *Miranda*.[125] As Judges Wilkinson and Traxler explained,

> the Saudis were always in control of the investigation. It is clear to us, as it was to the district court, that the Mabahith never acted as a mouthpiece or mere conduit for their American counterparts. Based on these findings, we are convinced, as was the district court, that American law enforcement officials were not trying to evade the strictures of *Miranda*, and the June 15 interrogation did not rise to the level of a joint venture.[126]

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121. *Id.* at 254 n.21.

122. The only exceptions are footnotes five and six, the former of which spoke for Judges Wilkinson and Traxler on the *Miranda* joint venture issue, and the latter of which spoke for Judge Motz. *See id.* at 229–31 & nn.5–6.

123. *Id.* at 210–11. Judge Motz filed a separate dissent with regard to the majority's decision to vacate and remand Abu Ali's sentence. *Id.* at 269–82 (Motz, J., dissenting); *see also* Said, *supra* note 21, at 33–34 (noting the similarities between the majority's logic as to sentencing and its approach to the substantive issues Abu Ali raised on appeal).

124. *Abu Ali*, 528 F.3d at 229 n.5.

125. *Id.* at 229.

126. *Id.* at 230 n.5 (quoting United States v. Martindale, 790 F.2d 1129, 1131–32 (4th Cir. 1986)) (citation omitted). As the majority reasoned,

> A determination that the suggestion of questions, without more, constitutes a joint venture would be problematic for at least two reasons. First, such a broad holding would contravene the well-established notion that *Miranda*, which is intended to regulate only the conduct of *American* law enforcement officers, does not apply extraterritorially to foreign officials absent significant involvement by American law enforcement. Second, such a broad per se holding could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope. Both the United States and foreign governments may be hesitant to engage in many forms of interaction if the mere submission of questions by a United States law enforcement officer were to trigger full *Miranda* protections for a suspect in a foreign country's custody and control. To impose all of the particulars of American criminal process upon foreign law enforcement agents goes too far in the direction of dictation, with all its attendant resentments and hostilities. Such an unwarranted hindrance to international cooperation would be especially troublesome in the global fight against terrorism, of which the present case is clearly a part.

Id. (citations omitted).

Judge Motz dissented on this point—the only trial-related issue that divided the otherwise united panel.[127] In her words,

> Whatever else "active" or "substantial" participation may mean, when United States law enforcement officials propose the questions propounded by foreign law enforcement officials, and those questions are asked in the presence of, and in consultation with United States law enforcement officials, this must constitute "active" or "substantial" participation. After all, the purpose of an interrogation is to obtain answers to questions about criminal or otherwise dangerous activity. Drafting the questions posed to a suspect thus constitutes the quintessential participation in an interrogation. It differs in kind from observation of an interrogation, or rote translation of an interrogator's questions and a suspect's responses. Observers and translators undoubtedly gain important information from a suspect's answers as well as from his behavior and demeanor, but those who formulate the questions asked during an interrogation actually direct the underlying investigation.[128]

However, because Judge Motz agreed with Judges Wilkinson and Traxler that any error was harmless beyond a reasonable doubt,[129] the panel unanimously concluded that *Miranda* provided no basis for reversal. Similarly, the panel agreed with the district court that, separate from *Miranda*, Abu Ali had failed to demonstrate that his confessions were involuntary.[130] As such, the panel affirmed the district court's denial of Abu Ali's motion to suppress.[131]

Second, as to the independent corroboration issue, the Fourth Circuit conceded that the Government's other evidence did not independently prove Abu Ali's guilt.[132] Nonetheless, the court explained that corroborating proof was sufficient so long as it "'tend[ed] to establish'—not establish—'the trustworthiness' of the confession."[133] The Government, according to the Fourth Circuit, "offered significant independent circumstantial evidence

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127. *Id.* at 221.

128. *Id.* at 230 n.6 (citations omitted); *see also* Condon, *supra* note 21, at 680–84 (criticizing the narrowness of the *Abu Ali* majority's joint-venture analysis). Although Judge Motz's focus was on whether the interrogations were a "joint venture," a closely related question, albeit one not raised in *Abu Ali*, is whether the traditional standards for "voluntariness" and "joint venture" analysis under *Miranda* should even *apply* where the relevant statements are made to foreign officials while in foreign custody (the *Abu Ali* court assumed without deciding that the answer was yes). For a detailed consideration of this complex issue, especially where non-citizens are concerned, see *In re* Terrorist Bombings of U.S. Embassies, 552 F.3d 177, 198–215 (2d Cir. 2008). *See also* Said, *supra* note 21, at 14–15, 15 n.89 (discussing the Second Circuit's analysis in *In re Terrorist Bombings*).

129. *See Abu Ali*, 528 F.3d at 231 ("Abu Ali had confessed to *each* of the crimes of which he was convicted before the June 15th interrogation took place. As a result, Abu Ali's answers to the questions submitted by the FBI on June 15th were cumulative.").

130. *Id.* at 231–34.

131. *Id.*

132. *Id.* at 236–37.

133. *Id.* at 237 (quoting Opper v. United States, 348 U.S. 84, 93 (1954)).

tending to establish the trustworthiness of Abu Ali's confessions."[134] In support, the court noted that the record included that evidence that an al Qaeda cell member identified Abu Ali as a member of the cell as well as documents containing two of Abu Ali's aliases recovered from the al Qaeda safe house and caches of weapons, explosives, cell phones, computers, and walkie-talkies found in the al Qaeda safe house (all of which Abu Ali had described in his confessions).[135] This evidence, as well as evidence gathered from Abu Ali's dormitory and home in Virginia, were held to corroborate Abu Ali's statements that he had "long wanted to join al Qaeda, to further its goals, and to provide it with support and assistance."[136] Moreover, according to the panel, "[p]erhaps the strongest independent evidence corroborating Abu Ali's confessions were two coded communications: one from him to Sultan Jubran occurring a day after the arrest of other cell members and the other from Sultan Jubran to him several days later."[137]

Third, as to whether the ad hoc procedures devised for taking the deposition testimony of the Mabahith officials violated Abu Ali's Confrontation Clause rights, the Fourth Circuit concluded that the district court's creative approach adequately protected Abu Ali.[138] Relying on the Supreme Court's decision in *Maryland v. Craig*,[139] the court of appeals concluded that the two conditions articulated in *Craig* for admitting testimony taken in the absence of the defendant—that the testimony in the defendant's absence be "'necessary to further an important public policy,'" and that "'the reliability of the testimony is otherwise assured'"—were both met.[140]

As to the first prong, the panel began with the observation that "[t]he prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is . . . just the kind of important public interest contemplated by the *Craig* decision."[141] Moreover, "[i]f the government is flatly prohibited from deposing foreign officials anywhere but in the United States, this would jeopardize the government's ability to prosecute terrorists using the domestic criminal justice system."[142] Thus, because "requiring face-to-face confrontation here would have precluded the government from relying on the Saudi officers' important testimony,"[143] the court held that the admission of the Mabahith officials' deposition testimony satisfied the first prong of *Craig*.

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134. *Id.* at 236.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 238–40.
139. 497 U.S. 836 (1990).
140. *Abu Ali*, 528 F.3d at 240–42 (quoting *Craig*, 497 U.S. at 850).
141. *Id.* at 241.
142. *Id.*
143. *Id.*

With regard to the second part of the *Craig* test, the court of appeals noted in detail the myriad steps the district court undertook to attempt to assure the reliability of the Mabahith officials' testimony:

> First, the Saudi witnesses testified under oath. While the oath used in this case, at the suggestion of defense counsel, was apparently an oath used in the Saudi criminal justice system, we cannot conclude, without more, that such an oath failed to serve its intended purpose of encouraging truth through solemnity. The oath used here was similar in most respects to the oath used in American judicial proceedings, and the appellant raised no objection to the oath in his briefs. Second, as discussed earlier, defense counsel was able to cross-examine the Mabahith witnesses extensively. Finally, the defendant, judge, and jury were all able to observe the demeanor of the witnesses. Both the defendant and the judge were able to view the witnesses as they testified via two-way video link, and the jury watched a videotape of the deposition at trial. This videotape presented side-by-side footage of the Mabahith officers testifying and the defendant's simultaneous reactions to the testimony.[144]

Thus, the panel unanimously concluded that the *Craig* standard was satisfied and that Abu Ali's Confrontation Clause rights were not violated by the introduction at trial of the Mabahith officials' deposition testimony.[145]

Finally, the panel turned to the Confrontation Clause error at trial—the disclosure to the jury via the "silent witness" procedure of classified information (the documents memorializing communications between Sultan Jubran and Abu Ali following the May 2003 Mabahith raids in Medina) where Abu Ali had received only the redacted, unclassified version of the documents.[146] As the court explained,

> The error in the case, which appears to have originated in the October 2005 CIPA proceeding, was that CIPA was taken one step too far. The district court did not abuse its discretion in protecting the classified information from disclosure to Abu Ali and his uncleared counsel, in approving a suitable substitute, or in determining that Abu Ali would receive a fair trial in the absence of such disclosure. But, for reasons that remain somewhat unclear to us, the district court

144. *Id.* at 241–42. For criticism of this analysis, see Said, *supra* note 21, at 31 & n.230.

145. *Abu Ali*, 528 F.3d at 242. In a footnote, the Fourth Circuit distinguished the Eleventh Circuit's recent decision in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc). *Abu Ali*, 528 F.3d at 242 n.12. *Yates* held that a defendant's Confrontation Clause rights were violated when a witness was allowed to testify at trial via a live two-way video link from Australia. 438 F.3d at 1310, 1319. As the *Abu Ali* court explained, "Whatever the merits of the holding in *Yates*, the defendants there were charged with mail fraud, conspiracy to commit money laundering, and drug-related offenses, crimes different in both kind and degree from those implicating the national security interests here." 528 F.3d at 242 n.12 (citation omitted). Moreover, unlike Judge Lee, the district court in *Yates* had failed "to consider potential alternatives that would have enabled the witnesses to testify face-to-face with the defendant." *Id.*

146. *Abu Ali*, 528 F.3d at 244.

> granted the government's request that the complete, unredacted classified document could be presented to the jury via the "silent witness" procedure. The end result, therefore, was that the jury was privy to the information that was withheld from Abu Ali.[147]

Concluding that the silent witness procedure is meant to keep classified information from the *public*, but not the defendant, the panel noted that "CIPA does not . . . authorize courts to provide classified documents to the jury when only such substitutions are provided to the defendant."[148] Moreover, there was no room to "balance a criminal defendant's right to see the evidence which will be used to convict him against the government's interest in protecting that evidence from public disclosure."[149] Instead,

> [i]f the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury.[150]

By so acting, the Government violated Abu Ali's Confrontation Clause rights.[151]

Nevertheless, the panel concluded that the district court's error (and the concomitant violation of the Confrontation Clause) were harmless.[152] Abu Ali and his uncleared counsel were given copies of the declassified versions of the communications well in advance of trial, and there was no information in the classified versions that, according to the court of appeals, they would not have already prepared for in considering the declassified versions.[153] Instead, "the information that had been redacted from the declassified version was largely cumulative to Abu Ali's own confessions and the evidence discovered during the safe house raids, which were presented to the jury."[154]

Having thereby affirmed Abu Ali's conviction, Judges Wilkinson and Traxler turned to the Government's cross-appeal of Abu Ali's sentence, concluding that the district court erred in relying on comparisons to "similar" cases in applying a downward deviation from Abu Ali's presumptive sentence under the Federal Sentencing Guidelines—that Abu Ali's sentence was unreasonably lenient.[155] Although the majority left it up to the district court

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147. *Id.* at 254.

148. *Id.* at 255; *see also id.* ("There is a stark difference between ex parte submissions from prosecutors which protect the disclosure of irrelevant, nonexculpatory, or privileged information, and situations in which the government seeks to use ex parte information in court as evidence to obtain a conviction.").

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 256.

153. *Id.* at 256–57.

154. *Id.* at 257.

155. *Id.* at 261–65, 269.

to resentence on remand, it stressed that the sentence should "reflect the full gravity of the situation before us."[156]

Judge Motz dissented with regard to sentencing, arguing that the majority was misapplying the Supreme Court's recent decisions in *Gall v. United States*[157] and *Kimbrough v. United States*,[158] both of which, in clarifying the proper scope of appellate review after *United States v. Booker*,[159] compelled deference to the district court's reasonable justifications for applying a downward deviation.[160] Instead, Judge Motz concluded, the majority opinion "reject[ed] the central lesson from [these cases] that reviewing courts owe deference to *both* the overall sentence selected by the district court *and* the justifications given for that sentence. Proper application of this deferential abuse of discretion standard requires affirmance."[161]

F. Petition for Certiorari

Notwithstanding the numerous significant legal issues implicated by the district court's and the Fourth Circuit's decisions, Abu Ali's subsequent petition for a writ of certiorari to the Supreme Court raised only the Confrontation Clause error and whether such Sixth Amendment violations could *ever* be harmless.[162] Thus, the petition argued that a "defendant's right to view the prosecution's evidence admitted against him at trial is so fundamental to the Sixth Amendment right to confrontation that it" should not be subject to harmless error review.[163] The Fourth Circuit's reliance on *Delaware v. Van Arsdall*[164] to apply harmless error review, the petition maintained, was inapposite, because "*Van Arsdall* involved a matter the federal rules . . . place firmly within the District Court's discretion—the scope and extent of cross-examination."[165] Here, in contrast, the issue was the trial court's "authority to pick and choose what evidence admitted at trial the defendant will be permitted to see at all" and "not the trial court's discretion to manage cross-examination."[166]

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156. *Id.* at 269.

157. 552 U.S. 38 (2007).

158. 552 U.S. 85 (2007).

159. 543 U.S. 220 (2005).

160. *Abu Ali*, 528 F.3d at 272–73 (Motz, J., dissenting). *See generally* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115 (2008) (summarizing the particular issues raised by appellate review of district court decisions after *Booker*).

161. *Abu Ali*, 528 F.3d at 282 (Motz, J., dissenting).

162. Petition for Writ of Certiorari, *supra* note 19, at i, 23.

163. *Id.* at 17.

164. 475 U.S. 673 (1986); *see also id.* at 681–84 (describing the appropriateness of harmless error review for certain Confrontation Clause errors).

165. Petition for Writ of Certiorari, *supra* note 19, at 22–23.

166. *Id.* at 23. More generally, the petition repeatedly alluded to the point that it was difficult to square at least some of the Fourth Circuit's Confrontation Clause analysis with the Supreme Court's paradigm-shifting decision in *Crawford v. Washington*, 541 U.S. 36 (2004). *See, e.g.*, Petition for Writ of Certiorari, *supra* note 19, at 19 (noting that Abu Ali was denied "'personal

Moreover, the petition argued, CIPA should not have any bearing on the harmless error analysis, because nothing in CIPA "contemplates the government's disclosure of classified information to the jury and not the defendant."[167] Further, allowing harmless error review of the Confrontation Clause violation would place defendants such as Abu Ali in an untenable position: how could one possibly demonstrate prejudice or rebut the Government's claim of harmlessness when he has not seen the evidence in question?[168] Instead, the petition urged the Supreme Court to use *Abu Ali* to create a bright-line rule, arguing that harmless error analysis will produce a case-by-case analysis that will threaten fundamental Sixth Amendment principles and lead to the "incremental but inexorable erosion of the confrontation right."[169]

Without comment or dissent, the Supreme Court denied certiorari on February 23, 2009.[170] On remand to the district court for resentencing, Judge Lee resentenced Abu Ali to life in prison,[171] which Abu Ali has again appealed to the Fourth Circuit.[172] Short of a surprising change of direction from the Court of Appeals on the sentencing issue, however, his legal proceedings are likely to come to a close.

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Before turning to the three hard substantive questions that *Abu Ali* raises with implications for future cases, it is worth pausing for a moment to note the Fourth Circuit's own rhetoric in disposing of Abu Ali's claims on appeal. Although the court at various points relied upon the serious (and terrorism-based) nature of the charges against Abu Ali (as, for example, in its discussion of the policy interest in allowing deposition testimony outside the defendant's presence), it seemed just as sensitive to the significance of civilian criminal process in such cases as a general matter.[173] As the panel noted at the outset of its opinion,

> Unlike some others suspected of terrorist acts and designs upon the United States, Abu Ali was formally charged and tried according to the customary processes of the criminal justice system. Persons of good will may disagree over the precise extent to which the formal criminal justice process must be utilized when those suspected of

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examination' entirely with respect to the redacted portions" of the evidence (quoting *Crawford*, 541 U.S. at 49–50)).

167. Petition for Writ of Certiorari, *supra* note 19, at 24.

168. *Id.* at 26–27.

169. *Id.* at 29.

170. Abu Ali v. United States, 129 S. Ct. 1312 (2009).

171. Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, WASH. POST, July 28, 2009, at A3.

172. *See* Docket Sheet, United States v. Abu Ali, No. 09-4705 (4th Cir. Aug. 3, 2009) (noting oral argument scheduled for May 2010).

173. *See* United States v. Abu Ali, 528 F.3d 210, 256 (4th Cir. 2008) (recognizing that the criminal process focuses on the "fairness of the trial" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

> participation in terrorist cells and networks are involved. There should be no disagreement, however, that the criminal justice system does retain an important place in the ongoing effort to deter and punish terrorist acts without the sacrifice of American constitutional norms and bedrock values. As will be apparent herein, the criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial.[174]

The sentiment is admirable. But the question remains whether the district and circuit courts' adaptations in Abu Ali's case appropriately struck this balance: permitting the civilian courts to function in the post-9/11 world while not coming at the expense of Abu Ali's right to a fair trial. It is to this—harder—matter that this Article now turns.

II. The Three Hard Questions Raised by *Abu Ali*

As noted above, although Abu Ali's trial and appeal raised a number of legal issues, three stand out as particularly interesting and unique: (1) the hybrid and ad hoc procedures that the district court fashioned in order to allow for the deposition testimony of the Mabahith officials, (2) the *Miranda*/"joint venture" question and the Fourth Circuit's divided approach to that issue, and (3) the CIPA/Confrontation Clause error and the question of whether such errors really can be harmless.[175] As the following discussion suggests, what these issues have in common is the extent to which their resolution simultaneously demonstrates the flexibility that federal courts can exercise in these cases and the potential dangers lurking in the background for the rights of defendants.

A. The Mabahith Officials' Deposition Testimony and Rule 15 of the Federal Rules of Criminal Procedure

In its current form, Rule 15 of the Federal Rules of Criminal Procedure requires the presence of a defendant who is "in custody" at any pretrial deposition, except where the defendant waives his right to be present or "persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion."[176] As cases like *Abu Ali* demonstrate, though, it is increasingly likely that circumstances will arise in which it is impossible to simultaneously secure the testimony of individuals outside the United States while guaranteeing the presence of the defendant.[177] Thus, courts have increasingly recognized

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174. *Id.* at 221.

175. *See supra* notes 13–19 and accompanying text.

176. FED. R. CRIM. P. 15(c)(1).

177. *See Abu Ali*, 528 F.3d at 239 (explaining that (1) Mabahith officers were Saudi citizens residing in Saudi Arabia outside the subpoena power of the U.S. district court and were only

circumstances—such as those in *Abu Ali*—where depositions taken outside the defendant's presence do not violate the Confrontation Clause.[178]

Mindful of these concerns, the Advisory Committee on Federal Rules of Criminal Procedure has proposed a revision to Rule 15 that would allow depositions outside the defendant's presence whenever a trial court finds

> (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood the witness's attendance at trial cannot be obtained; (3) the defendant cannot be present at the deposition or it would not be possible to securely transport the defendant to the witness's location for a deposition; and (4) the defendant can meaningfully participate in the deposition through reasonable means.[179]

The proposed revision, though, raises both practical and constitutional concerns, as a trio of Latham & Watkins lawyers have demonstrated in an insightful recent article.[180] In particular, the new rule would run roughshod over the requirement articulated in *Craig* that testimony taken outside the defendant's presence be "necessary to further an important public policy."[181] Although one may well be convinced by the Fourth Circuit's analysis in *Abu Ali* that the ability effectively to prosecute crimes related to transnational terrorism *is* an important public policy that would justify the accommodation,[182] it is not at all clear that the same argument would hold for lesser crimes—even if they are felonies, as the new rule would provide.[183] Indeed, that concern was at the heart of the en banc Eleventh Circuit's decision in the *Yates*

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permitted by the Saudi government to have their depositions taken in Riyadh, not in the United States, and (2) it would be impractical for the defendant to be physically present for Rule 15 depositions taken in Saudi Arabia because "it would have been difficult for United States Marshals to maintain custody of [the defendant] while in Saudi Arabia" and because there was a serious risk that Saudi officials would attempt to prosecute him themselves since the defendant committed his offenses in Saudi Arabia, "complicating—if not precluding—his return to the United States to face trial").

178. *See, e.g.*, *id.* at 238 n.11 (citing federal courts of appeals cases where Rule 15 depositions of foreign witnesses taken when the defendant was not present were allowed into evidence).

179. CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 20–21 (2009).

180. Sabin et al., *supra* note 15, at 35 (suggesting that the proposed rule would be attacked as a violation of the Sixth Amendment's Confrontation Clause, especially as it relates to the cross-examination of foreign witnesses).

181. Maryland v. Craig, 497 U.S. 836, 850 (1990); *see also* Sabin et al., *supra* note 15, at 38 (observing that because "amended Rule 15 would permit foreign deposition testimony for all transnational crimes," it would not be limited to cases involving sufficiently important public policies).

182. Even still, critics have noted that such an accommodation nevertheless removes the possibility of perjury as a counterweight to untruthful testimony, and may therefore render such testimony inherently unreliable. *See, e.g.*, Said, *supra* note 21, at 31 & n.230 (noting the lack of impediments to engage in perjury in Abu Ali's trial).

183. *See* Sabin et al., *supra* note 15, at 38 (contending that "[a]s case law makes clear, national security is a sufficiently important public policy to justify two-way video testimony, but it is a high bar and other policies are likely to fail").

case, cited and distinguished in *Abu Ali*.[184] As the Latham & Watkins lawyers explain, "Unless limitations are placed on this potentially sweeping category of federal crimes, the concerns articulated by the *Yates* court—a lack of specific factual findings and insufficiently important public policies—will be realized."[185] Thus, the authors instead cite with approval Judge Lee's painstaking accommodations in *Abu Ali*, noting both the specific findings of an important public policy and the myriad steps Judge Lee took to preserve the reliability of the testimony.[186] Lee's procedures, they note, are a model in both form and substance, since they recognize the need to accommodate the foreign witnesses while adopting unprecedented protections for the defendant and his counsel.[187]

Equally significant, though, is a separate point made by the Latham & Watkins lawyers in their critique of the proposed revisions to Rule 15: as technology improves, the confrontation issues that such remote and impersonal depositions might raise could largely subside.[188] Thus, as they note with regard to just one example,

> [T]elepresence is a relatively new technology capable of full-duplex, high-definition, immersive video conferencing. The premise behind this new generation of video conferencing is that the experience should emulate as much as possible the experience of sitting across a table from the other party, to the point that some telepresence systems forego a mute button. The picture is 1080p full high-definition, there is little or no sound delay, and it includes the capability to show a document directly to the opposing side in realtime. Telepresence further reduces the distinction between virtual and in-person confrontation. Conversely, video testimony may actually improve other senses by, for example, zooming in on the witness's face or amplifying sounds. As telepresence becomes more accessible and the technology continues to improve, the drawbacks of two-way video depositions decrease significantly.[189]

This point may seem simplistic, but when tied together with *Abu Ali*, it shows how a combination of judicial creativity and technological advancement can help courts strike the balance between the defendant's right to confront the witnesses against him and the unique logistical impediments that can arise when prosecuting complex transnational terrorism cases. *Abu Ali* may well have struck the appropriate balance, but only because of the case-specific accommodations made by the trial court.

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184. United States v. Abu Ali, 528 F.3d 210, 242 n.12 (4th Cir. 2008).

185. Sabin et al., *supra* note 15, at 38.

186. *Id.* at 36–37.

187. *See id.* at 34–37 (arguing that Rule 15 should incorporate the *Abu Ali* procedures since they can be used to satisfy Sixth Amendment Confrontation Clause concerns even when foreign witnesses are unable to travel to the United States).

188. *Id.* at 38.

189. *Id.*

B. The Battle of the Footnotes: Miranda *and the "Joint Venture"*

Perhaps the most controversial aspect of the *Abu Ali* litigation was the joint venture issue—whether U.S. officials were sufficiently involved in Abu Ali's interrogations at the hands of the Mabahith such that *Miranda* should have applied to preclude the admission of Abu Ali's inculpatory statements at trial.[190] Moreover, and unlike the sui generis deposition and CIPA issues that characterized Abu Ali's trial, the question of when and to what extent *Miranda* is triggered by overseas interrogations of individuals in some form of joint custody is likely to be one that will recur time and again in the ensuing years.

To recap, the Fourth Circuit panel in *Abu Ali* split on the substance of this issue, although they agreed that any *Miranda* error was harmless.[191] On the merits, Judges Wilkinson and Traxler concluded that the critical fact was that

> the Mabahith "determined what questions would be asked, determined the form of the questions, and set the length of the interrogation." In fact, the Saudi interrogators refused to ask a majority of the questions submitted by the United States, and asked a number of their own questions during the interrogation.[192]

Thus, "we are convinced, as was the district court, that American law enforcement officials were not trying to 'evade the strictures of *Miranda*.'"[193] Judge Motz, in contrast, believed that the critical fact was that questions presented by U.S. officials were answered by the defendant.[194] Or, as she put it, "when United States law enforcement officers provide the questions to be asked of a suspect by cooperating foreign law enforcement officials, they clearly have engaged in 'active' or 'substantial' participation such that any resultant interrogation becomes a joint venture."[195]

To be sure, it bears emphasizing that the two footnotes are fighting over inches of jurisprudential real estate. But the inches are significant. The question presented in *Abu Ali* was unprecedented, since no prior reported decision involved U.S. officials submitting questions specifically to be asked of U.S. citizens by foreign interrogators on foreign soil.[196] And so the ques-

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190. United States v. Abu Ali, 528 F.3d 210, 228 (4th Cir. 2008) ("The 'joint venture' doctrine provides that 'statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities.'").

191. *Id.* at 229–31 & nn.5–6.

192. *Id.* at 229–30 n.5.

193. *Id.* at 230 n.5.

194. *Id.* at 231 n.6 (stating that drafting the questions to be posed to the suspect during an interrogation "constitutes the quintessential participation" in the interrogation).

195. *Id.*

196. *See id.* at 228 (noting, in review of previous cases involving the joint venture doctrine, none of which are directly on point, that "[o]nly a few cases illuminate what constitutes 'active' or 'substantial' participation").

tion really reduces to formalism versus functionalism—do the U.S. officials actually have to play a formal role in *running* the interrogation to trigger the "joint venture" doctrine or is it enough that the interrogation *includes* questions that, but for the U.S. involvement, the foreign interrogators might not have asked?

To their credit, both sides marshaled forceful policy arguments in support of their view. Thus, Judges Wilkinson and Traxler emphasized that

> such a broad per se holding [requiring *Miranda* protection] could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope. Both the United States and foreign governments may be hesitant to engage in many forms of interaction if the mere submission of questions by a United States law enforcement officer were to trigger full *Miranda* protections for a suspect in a foreign country's custody and control. To impose all of the particulars of American criminal process upon foreign law enforcement agents goes too far in the direction of dictation, with all its attendant resentments and hostilities. Such an unwarranted hindrance to international cooperation would be especially troublesome in the global fight against terrorism, of which the present case is clearly a part.[197]

Not to be outdone, Judge Motz emphasized how the majority's view "permits United States law enforcement officers to strip United States citizens abroad of their constitutional rights simply by having foreign law enforcement officers ask the questions. This cannot be the law."[198]

The answer may well be somewhere in between; a formal rule requiring *Miranda* whenever U.S. officials submit questions to foreign interrogators may well have the chilling effect described by Judges Wilkinson and Traxler, and an equally formal rule *not* requiring *Miranda* unless U.S. officials are actually *running* the interrogation may create the perverse incentives identified by Judge Motz. Instead, the question may well need to turn on the motive of the U.S. officials, notwithstanding the Court's increasing hostility toward subjective tests in the context of criminal procedure jurisprudence.[199]

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197. *Id.* at 230 n.5. Of course, that concern is only raised if and when the United States seeks both (1) to prosecute the detainee and (2) to admit statements made during the overseas interrogation. Obviously, *Miranda* has no bearing on cases where the detainee is never charged in an American court or where, even if he is, his statements while in foreign detention are not introduced at trial. *See* United States v. Francis, 542 U.S. 630, 637–38 (2004) (noting that coverage of the protection afforded by the Fifth Amendment's Self-Incrimination Clause, which the *Miranda* rule is designed to safeguard, is limited to compelled testimony that is used against the defendant in a criminal proceeding).

198. *Abu Ali*, 528 F.3d at 231 n.6.

199. For example, consider the Court's otherwise-fractured decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), in which eight of the nine Justices—all except Justice Kennedy—rejected a focus on the subjective intent of the interrogating officer in deciding the admissibility of statements made after a "midstream" *Miranda* warning.

But either way, perhaps the larger point to take away is that the *Miranda* issue in *Abu Ali* is not unique to terrorism cases. Although it is probably safe to conjecture that a disproportionately high percentage of cases in which this issue arises will involve terrorism-related charges, the merits of the legal question are in no way tied to any consideration of the underlying offense.[200] Put another way, the rhetoric of Judges Wilkinson and Traxler notwithstanding, foreign interrogations of U.S. citizens raise complicated *Miranda* questions (and always have) whether or not the citizen is suspected of terrorism-related offenses. Thus, and unlike the Rule 15 issue presented in *Abu Ali*, which turned to a large degree on the government's case-specific policy interests, the *Miranda* issue is usefully capable of generalization; put differently, whatever the answer, there is less risk of "seepage" here.

C. The Confrontation Clause Error and Its Harmlessness

Last, we come to the one error with regard to which everyone is in agreement: the district court's surprising and unjustified use of the "silent witness" procedure at trial, pursuant to which the jury was privy to classified information even though the defendant had access only to the redacted, declassified version.[201] In one sense, the error was usefully small: the portion of the communications to which Abu Ali lacked access did not go to their substance, but rather to identifying information that may have bolstered Abu Ali's claim that the Government had learned of their existence prior to his arrest, which would further support his "joint venture" argument.[202] Nevertheless, the Fourth Circuit was unequivocal in concluding that the introduction of such evidence was necessarily a violation of Abu Ali's Confrontation Clause rights, albeit one that the other evidence against him rendered harmless.[203]

Unless one is taken by Abu Ali's argument in his petition for certiorari that certain Confrontation Clause claims should not be subject to harmless error analysis—an argument that runs against a substantial body of precedent—the real lesson from this aspect of the *Abu Ali* litigation may just be that while mistakes will be made, the Supreme Court's increasing embrace of harmless error principles heavily mitigates the consequences of

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200. *See, e.g.*, Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 459 (1990) (noting the increasing involvement across the board of U.S. officials in foreign law enforcement investigations, and the potential in those contexts for abuse of traditional constitutional protections).

201. *Abu Ali*, 528 F.3d at 255.

202. As the Government succinctly pointed out in its brief in opposition to certiorari, the error did not in any way advance Abu Ali's claim that there was insufficient evidence to corroborate his confessions, even though the classified communications were "[p]erhaps the strongest independent evidence" thereto. Brief for the United States in Opposition at 17 n.5, United States v. Abu Ali, 129 S. Ct. 1312 (2009) (No. 08-064). After all, the *substance* of the communications was *not* classified; only certain identifying and forensic information was redacted. *Id.*

203. *Abu Ali*, 528 F.3d at 255–56.

those mistakes. Indeed, it was harmless error that created consensus on the *Abu Ali* panel with regard to the *Miranda* issue, and it was harmless error that rendered the Confrontation Clause violation a non-issue as well.[204] In that regard, it is telling that Abu Ali's petition for certiorari did not challenge the Fourth Circuit's conclusion that the Confrontation Clause error *was* harmless; it challenged whether, categorically, it *could* be.[205]

Any number of scholars have wondered whether the Supreme Court in recent years has taken the harmless error doctrine too far.[206] But leaving that debate for another day, it seems clear that, as with the *Miranda* issue in *Abu Ali*, the harmless error question does not in any meaningful way turn on the centrality of terrorism and national security concerns in the litigation. That would change, of course, if the Government's violation of the Confrontation Clause was *not* harmless, but in a way, that proves the point. After all, the flaw in Abu Ali's case with regard to the silent witness procedure was *not* that the law failed to provide adequate means of balancing the government's national security interests with the defendant's right to a fair trial; the flaw was that the trial court, for whatever reason, failed to follow the law.[207]

III. Conclusion: Terrorism Trials After *Abu Ali*

In sum, then, *Abu Ali* emerges as an unvarnished example of how the civilian criminal justice system can handle high-profile criminal terrorism cases raising novel logistical, procedural, and substantive challenges. The thoughtful procedure devised by Judge Lee to allow the Mabahith officials to testify while protecting the defendant's Confrontation Clause rights are a model that courts should follow (and *have* followed[208]), and more generally demonstrates the ways in which courtroom technology and a focus on the specific national security implications of a trial can actually help *cabin* proposed changes to the Federal Rules of Criminal Procedure in a manner that is more protective of individual defendants' rights. The principled disagreement over whether Abu Ali's interrogation constituted a "joint venture" raises an important and contested question of constitutional criminal procedure that turns in no meaningful substantive way on the fact that his was a

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204. *Id.* at 257.

205. *See* Petition for Writ of Certiorari, *supra* note 19, at 29 (arguing that the application of harmless error to the Sixth Amendment violation would allow "incremental but inexorable erosion of the confrontation right through case-by-case analysis").

206. *See, e.g.*, Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 521–28 (1998) (discussing the patchwork development of the harmless error rule and critiquing its application); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 345–46 (2002) (arguing against the current approach and proposing one that is more protective of constitutional and individual rights).

207. *See Abu Ali*, 528 F.3d at 255 ("The error in the case . . . was that CIPA was taken one step too far.").

208. *See, e.g.*, United States v. Ahmed, 587 F. Supp. 2d 853, 854–55 (N.D. Ohio 2008) (endorsing the *Abu Ali* procedure).

terrorism trial, as opposed to a trial for any other offense over which the federal courts have jurisdiction. And the clear Confrontation Clause violation resulting from the trial court's use of the "silent witness" rule shows both the settling effect of harmless error doctrine and the extent to which procedural flaws sometimes derive not from the laws but from the judges who apply them.

None of these points, on their own, do anything conclusively to establish the feasibility of civilian criminal trials for *all* terrorism suspects, including the 9/11 defendants. If *Abu Ali* proves anything, it proves that every case raises its own unique set of practical, procedural, and substantive challenges. But perhaps it proves a bit more: where unique national security concerns are implicated, *Abu Ali* suggests that courts *will* attempt to reach accommodations that take into account both the Government's interest and the fundamental protections to which defendants are entitled, keeping in mind Justice Frankfurter's age-old admonition that "the safeguards of liberty have frequently been forged in controversies involving not very nice people."[209] But even in terrorism cases, *Abu Ali* suggests that courts are also able faithfully to apply extant precedents that *don't* turn on the government's unique interests, even if they disagree about the substantive answer—that some doctrines are usefully insulated from the danger of seepage. And *Abu Ali* reminds us that sometimes, the law *is* set up properly to resolve the tension between the government's interests and the defendant's rights; it is just that the judges get it wrong.

But what *Abu Ali* might drive home the most forcefully is just how seriously Article III judges from across the political spectrum take their responsibility in these cases—not just to the litigants but to their institution and its posterity. I suspect that Judges Wilkinson, Motz, and Traxler meant to pay far more than lip service to this idea in the opening pages of their joint opinion for the Fourth Circuit, where, in one voice, they emphasized that "[t]here should be no disagreement . . . that the criminal justice system does retain an important place in the ongoing effort to deter and punish terrorist acts without the sacrifice of American constitutional norms and bedrock values."[210] Even—if not especially—in such dangerous times, it is the duty of our civilian courts "calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."[211]

209. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

210. *Abu Ali*, 528 F.3d at 221.

211. United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622).