No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

ABCNY believes that the federal system of civilian courts is well-equipped to try individuals such as petitioner who are accused of terrorist activities after being arrested within the United States. ABCNY is deeply concerned about the novel and far-reaching theory of military detention upheld by a bare five-judge majority of the *en banc* Fourth Circuit, which represents a departure from our Nation's longstanding ideals and traditions. ABCNY submits this brief to present this Court with additional information about the capacity of the federal justice system to handle criminal cases against individuals suspected of complicity in terrorism.[1]

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[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than five and a half years ago, petitioner was wrested from the criminal justice system and transferred into military custody in South Carolina, where he remains today. As was the case when Jose Padilla was taken into military custody, petitioner's confinement at the Naval Consolidated Brig in South Carolina raises fundamental legal questions and has spawned conflicting lower-court rulings. An obvious alternative to the military detention of petitioner would be to prosecute him in the criminal justice system—as was ultimately done with Padilla. Below, however, the members of the *en banc* Fourth Circuit disagreed regarding the capability of the civilian justice system to handle terrorism cases such as that of petitioner.

Expressing no qualms about the capacity of the criminal justice system, the Fourth Circuit plurality would have ordered that the writ be granted and that the government proceed with a criminal prosecution of petitioner if it wishes to detain him for a significant period of time. Pet. App. 9a (Motz, J., concurring in judgment). In his separate opinion, however, Judge Wilkinson asserted that "prosecutions of terrorist suspects have frequently proven to be difficult, both as a practical and logistical matter and as a broader gauge of what the judiciary's proper role should be on matters touching quite intimately on the conduct of war." *Id.*, at 220a. Although he acknowledged that the justice system "retains an important place in our constitutional system when handling the terrorist threat" (*id.*, at 207a), Judge Wil-

kinson recited a series of alleged flaws and deficiencies in the capacity of the federal courts to handle terrorism cases. *Id.*, at 211a-216a. Judge Wilkinson argued that Congress was conscious of these alleged inadequacies and that, as a result, it must have intended the AUMF to authorize the military detention of persons such as petitioner whose prosecution, according to Judge Wilkinson's analysis, would be difficult or impossible in federal court. *Id.*, at 216a.

The legislative history surrounding the adoption of the AUMF, however, contains no evidence that Congress considered the adequacy of the criminal justice system as a means of prosecuting alleged terrorists, such as petitioner, who are arrested within the United States. Nor is there any evidence in the legislative history that Congress considered authorizing military detention as an alternative to criminal charge and trial in such circumstances. As petitioner shows, such a departure from our Nation's traditions and precedents raises serious constitutional questions and would require at least a clear statement from Congress.

Further, and contrary to the views of Judge Wilkinson, ABCNY strongly believes that our existing legal system is capable of handling such prosecutions. Indeed, a large body of data from the past two decades demonstrates that terrorism prosecutions in the federal courts have overall led to just, reliable results without security breaches or other problems that threaten our Nation's safety. The need for, or wisdom of, a domestic preventive detention scheme as an alternative to the criminal justice system is a subject of intense public debate. Apart from implicating legal issues, that debate raises issues of policy that

Congress is best suited to resolve. It is implausible that Congress did so in silence and without discussion.

In this brief, we discuss the available data regarding terrorism prosecutions in federal court and describe:

- The broad range of substantive statutes that are available to prosecutors in terrorism cases, see *infra*, at I.B.1;
- The multiple sources of authority, under settled law, to detain suspected terrorists within the civilian justice system, see *infra*, at I.B.2;
- The demonstrated ability of judges and lawyers to preserve the confidentiality of classified information while ensuring fair trials, see *infra*, at I.B.3;
- The practical approaches to evidentiary issues that have been followed in terrorism cases, see *infra*, at I.B.4;
- The tools to protect the safety and security of the participants in the criminal justice system and the public at large, see *infra*, at I.B.5; and
- The ability of prosecutors to develop reliable intelligence information by debriefing cooperating defendants, see *infra*, at 1.B.6.

In our discussion, we point out the many ways in which petitioner's own criminal case—up until the time that he was suddenly removed from civilian custody—illustrates the effectiveness and capability of the justice system.

Of course, this does not mean that the criminal justice system, by itself, is "the answer" to the prob-

lem of international terrorism. ABCNY recognizes that the government must use all lawfully available tools to address the threat that terrorism poses to our Nation. Nevertheless, as the plurality concluded below, if the government wishes to detain petitioner for an extended period of time, he is entitled to the protections of the criminal justice system. Moreover, an extensive body of evidence demonstrates that the criminal justice system has effectively handled terrorism prosecutions.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT THE CRIMINAL JUSTICE SYSTEM IS CAPABLE OF EFFECTIVELY HANDLING TERRORISM CASES

In recent years, many observers have expressed views on the capability of the criminal justice system to handle terrorism cases. Some commentators have argued for novel authority to indefinitely detain terrorism suspects who may not be subject to traditional law-of-war detention but who, it is claimed, cannot prudently be afforded the protections enjoyed by criminal defendants. See, *e.g.*, Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, Wall St. J., Aug. 22, 2007, at A15; Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. Times, July 11, 2007, at A19; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press 2008). Others, including ABCNY, have expressed confidence in the ability of the criminal justice system to handle terrorism cases and have been skeptical about novel claims of authority to de-

tain or try accused terrorists. See Ass'n of the Bar of the City of N.Y., Comm. on Fed. Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror* (Feb. 6, 2004);[2] Kelly Anne Moore, Op-Ed, *Take Al Qaeda to Court*, N.Y. Times, Aug. 21, 2007; David H. Laufman, *Terror Trials Work: Yes, Mr. Mukasey, Courts Can Handle National Security Cases*, Legal Times, Nov. 5, 2007, at 58-59.

In May 2008, two of the authors of this brief prepared *In Pursuit of Justice*, an assessment of the capability of the criminal justice system to handle terrorism cases. See Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008).[3] *In Pursuit of Justice* concluded that while the federal courts are certainly not perfect, and while terrorism cases can present significant challenges, "the criminal justice system is reasonably well-equipped to handle most international terrorism cases." *In Pursuit of Justice*, at 2. In the eight months since *In Pursuit of Justice* was released, new developments in terrorism cases have only reinforced the central thesis of the paper. The following discussion draws heavily on *In Pursuit of Justice* and also, at times, incorporates a discussion of petitioner's own aborted criminal case.

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[2] http://www.abcny.org/pdf/report/1C_WL06!.pdf

[3] www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf

A. The Methodology And Data Underlying Our Empirical Analysis Of Terrorism Cases

Assessing the capability of the criminal justice system in terrorism cases need not be—and in our view should not be—a theoretical or academic exercise, nor should it be skewed by assertions of speculative benefits or hypothetical problems with civilian court prosecutions. Instead, the discussion should be based on actual experience. Over the years, and especially since the early 1990s, the government has brought scores of actual prosecutions in federal court against defendants alleged to be complicit in terrorism. These cases provide a rich set of data that is useful in assessing the adequacy of the justice system.

By any standard, the roster of completed terrorism cases is impressive. It encompasses prosecutions brought before 9/11 against Ramzi Yousef, the mastermind of the first World Trade Center bombing; Sheikh Omar Abdel Rahman, the blind Egyptian cleric who plotted to destroy tunnels and other landmarks in New York City; Wadih el-Hage and other conspirators responsible for the horrific bombings of the U.S. embassies in Kenya and Tanzania in 1998; and Ahmed Ressam, the so-called "Millennium Bomber," who planned to detonate a bomb at Los Angeles International Airport. In the years since 9/11, the government has successfully prosecuted additional high-profile terrorism defendants in federal court, including Zacarias Moussaoui, who was at one time believed to be the "20th Hijacker"; Jose Padilla, the former Chicago gang member and al Qaeda adherent; Richard Reid, the "Shoe Bomber"; John

Walker Lindh, the "American Taliban"; and numerous defendants involved in providing financial or other support for Islamist terrorism.

In Pursuit of Justice examined these and many other terrorism cases and presented statistics about federal-court prosecutions relating to Islamist terrorism in the years since 9/11. The authors identified prosecutions that the Department of Justice or the popular media stated were related to terrorism, consulted lists of terrorism prosecutions compiled by various organizations, and searched electronic collections of federal docket information for indictments charging terrorism offenses. *In Pursuit of Justice*, at 22-23. They looked not only at cases brought under specific terrorism statutes but also at those based on "alternative charges" such as credit card fraud or immigration violations, so long as some aspect of the public record alleged a link to terrorism. *Id.*, at 22. Using these data-collection methods, the paper identified 107 terrorism cases brought between September 2001 and December 2007 charging a total of 257 defendants. *Id.*, at 23, 26.

The statistics on the 257 defendants reveal a system that is well-equipped to detain, convict, and sentence those who are guilty of crimes relating to terrorism. The conviction rate was high—some 91% of defendants were convicted of at least one offense. *Id.*, at 26. About 70% of defendants were held without bail. *Id.*, at 24, 29. Of the 124 defendants in the paper's data set who were convicted and sentenced, 111 were sentenced to some term of imprisonment. *Id.*, at 26. Excluding the five persons who were sentenced to life imprisonment, the average term of im-

prisonment for the other 106 defendants was 100.71 months, or 8.39 years. *Ibid*.

In the eight months since *In Pursuit of Justice* was published, the courts have continued to render judgments in terrorism cases. For example, the Second Circuit recently upheld the convictions of the Embassy Bombers in three unanimous opinions spanning 125 pages. See *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 549 F.3d 146 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fifth Amendment Challenges)*, 548 F.3d 237 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fourth Amendment Challenges)*, 548 F.3d 276 (CA2 2008). In August 2008, a Fourth Circuit panel including Judges Wilkinson and Motz upheld the conviction of Ahmed Omar Abu Ali, a native of Virginia who trained with al Qaeda in Saudi Arabia and who was arrested and interrogated by Saudi authorities before being turned over to the U.S. government for prosecution. See *United States* v. *Abu Ali*, 528 F.3d 210 (CA4 2008). And after a prior trial ended in a hung jury, the government secured guilty verdicts in the *Holy Land Foundation* terrorism-finance case in the Northern District of Texas. See Jury Verdict, *United States* v. *Holy Land Found. for Relief & Dev.*, No. 04-cr-240-P (N.D. Tex. Nov. 24, 2008) (Dkt. No. 1250) ("*Holy Land* Jury Verdict").

B. The Criminal Justice System Has Consistently Exhibited Both The Vitality And The Adaptability To Effectively Handle Terrorism Cases

1. Existing criminal statutes proscribe a broad range of potential terrorist conduct

The robust capability of the criminal justice system to deal with terrorism cases begins with "the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). Of the criminal statutes enacted specifically to combat terrorism, the most oft-used since 9/11 have been the "material support" statutes codified at 18 U.S.C. §§ 2339A and 2339B. See *In Pursuit of Justice*, at 32 (noting that §§ 2239A or 2339B have been charged in almost half of the post-9/11 terrorism cases). Section 2339A, enacted in response to the 1993 World Trade Center bombing, makes it a crime to provide material support with the knowledge or intent that it will be used to further any of a number of specified terrorism-related offenses. 18 U.S.C. § 2339A(a). Meanwhile, § 2339B prohibits material support to any "foreign terrorist organization" if the defendant knows that the organization engages in terrorist activity or has been designated as a foreign terrorist organization. 18 U.S.C. § 2339B(a)(1).

Courts have interpreted "material support" expansively to include a broad range of conduct abetting terrorists. See, *e.g.*, *United States* v. *Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (providing medical services constitutes material support); *United States* v. *Sattar*, 395 F. Supp. 2d 79, 100 (S.D.N.Y. 2005) (conveying messages between terrorists constitutes material support). And prosecutors have taken advantage of the broad scope of these statutes to preempt terrorist attacks by arresting defendants at the early stages of their plotting. See, *e.g.*, Second Superseding Indictment, *United States* v. *Hayat*, No. 05-

cr-240 ("*Hayat* Proceedings") (E.D. Cal. Jan. 26, 2006) (Dkt. No. 162) & Verdict, *Hayat* Proceedings (Apr. 25, 2006) (Dkt. No. 331) (defendant traveled to Pakistan to receive "jihadist training" but was indicted before he could "wage violent jihad against the United States"); Superseding Information & Plea Agreements, *United States* v. *Ahmed*, No. 07-cr-647 ("*Ahmed* Proceedings") (N.D. Ohio Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) (defendants arrested before they could travel overseas to kill U.S. soldiers as described in U.S. Dep't of Justice, Press Release, *Chicago Cousins Plead Guilty to Conspiracy to Provide Material Support to Terrorists* ("Ahmed Press Release"));[4] *United States* v. *Goba*, 220 F. Supp. 2d 182, 218 (W.D.N.Y. 2002) (defendants who trained in al Qaeda camp held on evidence suggesting that, *inter alia*, they were "plan[ning] attack upon Americans"). Section 2339B has also been used to cut off suspected channels of support to terrorist groups. See, *e.g.*, *United States* v. *Paracha*, No. 03-cr-1197, 2006 WL 12768, at *1-2 (S.D.N.Y. Jan. 3, 2006) (describing charges against defendant for laundering money and for obtaining immigration documents for known al Qaeda member); *Holy Land* Jury Verdict (convicting defendants under § 2332B for providing financial support to Hamas, a designated foreign terrorist organization).

Other federal criminal statutes designed to thwart terrorism are found in Chapter 113B of the Criminal Code, entitled "Terrorism." For example,

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[4] http://www.usdoj.gov/opa/pr/2009/January/09-nsd-041.html

prosecutors used 18 U.S.C. § 2332, which prohibits serious attacks on U.S. nationals abroad, to convict Richard Reid, a/k/a the "Shoe Bomber." See Judgment, *United States* v. *Reid*, No. 02-cr-10013 (D. Mass. Jan. 31, 2003) (Dkt. No. 188). Another statute relied upon by the government is 18 U.S.C. § 2332b, which prohibits serious attacks "transcending national boundaries" and was invoked against Zacarias Moussaoui. See Judgment, *United States* v. *Moussaoui*, No. 01-cr-455 (E.D. Va. May 4, 2006) (Dkt. No. 1854). Finally, in a case arising from a plot to bomb the subway station at 34th Street in Manhattan, the government won a conviction under 18 U.S.C. § 2332f, which prohibits the delivery, placement, discharge or detonation of an explosive or other lethal device on public property with the intent to cause death, serious injury or major economic loss. See *United States* v. *Siraj*, 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007).

Prosecutors have also charged alternative, readily provable crimes that do not require any proof that the defendant is linked to terrorism or violent crime.[5]

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[5] In addition, prosecutors frequently charge terrorists with violating generally-applicable statutes that criminalize violent conduct such as racketeering, aircraft piracy, arms dealing, and murder. See, *e.g.*, Judgment, *United States* v. *Abu Ali*, No. 05-cr-53 (E.D. Va. Apr. 17, 2006) (Dkt. No. 397) (30-year prison sentence for, inter alia, conspiracy to commit aircraft piracy and conspiracy to destroy an aircraft); Judgment, *United States* v. *Arnaout*, No. 02-cr-892 (N.D. Ill. Aug. 18, 2003) (Dkt. No. 213) (136-month prison sentence for racketeering). Many terrorism prosecutions have also included conspiracy charges. See *In Pursuit of Justice* at 54-56 (discussing application of conspiracy statutes in terrorism cases).

The DOJ has publicly embraced this strategy and has touted the use against terrorism defendants of statutes criminalizing immigration violations (18 U.S.C. § 1425), false statements (18 U.S.C. § 1001), and fraudulently obtaining travel documents (18 U.S.C. § 1546). U.S. Dep't of Justice, *2006 Counterterrorism White Paper* 29 (2006) ("DOJ Counterterrorism White Paper"). Charging such "alternative statutes" can offer numerous advantages in a particular case. For example, it may permit the government to arrest and detain individuals at an early stage, thus helping to prevent violent acts, and it can avoid the necessity of offering sensitive evidence or publicly revealing that an individual has been linked to terrorism, permitting investigations and intelligence-gathering to continue without risk of exposure. See *ibid.*; see also *In Pursuit of Justice*, at 51-54 (citing various authorities).

Petitioner's aborted criminal case provides an object lesson in the utility of charging "alternative statutes" against suspected terrorists. The government initially charged petitioner with a single count of access device fraud under 18 U.S.C. § 1029(a)(3). See Indictment at 1, *United States* v. *al-Marri*, No. 02-cr-147 ("*al-Marri I* Proceedings") (S.D.N.Y. Feb. 6, 2002) (Dkt. No. 4). This charge allowed prosecutors to successfully seek petitioner's pre-trial detention while affording time to develop the case further. The government subsequently obtained a second indictment that charged six counts: two counts of making false statements to the FBI under 18 U.S.C. § 1001(a)(1) and (2); three counts of making false statements to FDIC-insured banks under 18 U.S.C. § 1014; and one count of identity theft under 18 U.S.C. § 1028(a)(7). See Indictment, *United States* v. *al-Marri*, No. 03-cr-

94 ("*al-Marri II* Proceedings") (S.D.N.Y. Jan. 22, 2003) (Dkt. No. 5). These charges, all of which remained pending at the time petitioner was transferred into military custody, resulted in petitioner's continued pre-trial detention in New York and then Illinois. From the public record, there is little reason to doubt the strength of the evidence against petitioner or the viability of the charges against him. Indeed, his trial was only one month away when petitioner was whisked into military detention. See Scheduling Order, *United States* v. *al-Marri*, No. 03-cr-10044 ("*al-Marri III* Proceedings") (C.D. Ill. May 29, 2003) (Dkt. No. 7) (setting trial for July 21, 2003).

2. The criminal justice system has the capability to detain and incapacitate suspected terrorists

One of the proffered weaknesses of the justice system, and the justifications for military detention of alleged al Qaeda adherents like petitioner, is that the justice system does not have the tools to sufficiently incapacitate terrorists. Indeed, Judge Wilkinson's opinion all but assumed that the justice system has no viable means of detaining al-Marri and other suspects. See Pet. App. 210a-11a (criticizing reliance on justice system because "a *failure* to incapacitate individuals such as al-Marri may have dramatic consequences") (emphasis added). But Judge Wilkinson's assumption does not take account of the significant tools available to prosecutors, under settled law,

to arrest and detain dangerous individuals suspected of complicity in terrorism.[6]

First and foremost, when a defendant is charged with a federal crime, the government can seek to detain him on grounds that he presents a risk of flight or a danger to the community, and if the defendant is charged with a terrorism offense, the Bail Reform Act contains a legislatively mandated presumption that the defendant should be detained pending trial. See 18 U.S.C. § 3142(a), (e)(3)(B)-(C). Many terrorism defendants have been detained (see *In Pursuit of Justice*, at 24 (presenting data on bail decisions in terrorism cases)), and case law permits prolonged pre-trial detention if necessary (see *United States* v. *el-Hage*, 213 F.3d 74, 77-81 (CA2 2000) (approving pretrial detention anticipated to last between 30 and 33 months in Embassy Bombing case)). Indeed, petitioner himself was held without bail for approximately 18 months despite being charged with crimes such as identity theft and false statements to banks. See Ord. of Detention Pending Trial, *al-Marri I* Proceedings (Mar. 22, 2002) (Dkt. No. 6); Ord. of Detention Pending Trial, *al-Marri III* Proceedings (May. 29, 2002) (Dkt. No. 8).

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[6] In addition, under certain circumstances the law of war permits the government to capture and detain enemy combatants "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004) (opinion of O'Connor, J.); see also *ibid.* ("detention of individuals" who fought against the United States in Afghanistan as part of the Taliban is a "fundamental and accepted . . . incident to war" and may extend "for the duration of the particular conflict in which they were captured").

Upon conviction, defendants convicted of terrorism offenses are often subject to lengthy periods of incarceration. Terrorism statutes carry heavy maximum penalties, and the Sentencing Guidelines recommend significant penalties for terrorism-related crimes. See, *e.g.*, 18 U.S.C. § 2332b(c) (capital punishment available where death results, otherwise life or 25-, 30- or 35-year sentences available for various acts of terrorism transcending national boundaries); 18 U.S.C. §§ 2339A(a) & 2339B(a)(1) (life sentence available where death results, otherwise 15-year sentence available for material support); see U.S.S.G. § 3A1.4 (minimum offense level of 32 and criminal history category of VI for terrorism-related crimes, resulting a minimum recommendation of 210-262 months under U.S.S.G. Ch. 5, Pt. A). In practice, these provisions often translate into lengthy sentences for defendants who are convicted in terrorism cases. See *In Pursuit of Justice*, at 26 (presenting sentencing data).

Petitioner's own case illustrates the availability of substantial sentences in terrorism cases. Had the government successfully prosecuted petitioner on the Illinois charges, he would have been exposed to a maximum penalty of 146 years in prison: 10 years for access device fraud (see 18 U.S.C. § 1029(a)(3) & (c)(1)(A)(i)); 8 years for each of two counts of making false statements to the FBI (see 18 U.S.C. § 1001(a)); 30 years for each of three counts of making false statements to FDIC-insured banks (see 18 U.S.C. § 1014); and 30 years for one count of identity theft (see 18 U.S.C. § 1028(a)(7) & (b)(4)). The Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism ("Rapp Declaration") asserts that petitioner's criminal conduct was "in

preparation for acts of international terrorism" (Resp. App. 19a), indicating that petitioner would have faced a recommended sentence of at least 210-262 months under the Sentencing Guidelines. See also Pet. for Cert. 3 n.1 (noting that § 3A1.4 would apply at sentencing). Of course, the sentencing court could lawfully have imposed a more severe (or more lenient) sentence than the one recommended by the Guidelines.

Aliens suspected of terrorist activity are subject to a second means of incapacitation—arrest and detention by the Attorney General pending removal proceedings. See 8 U.S.C. § 1226(a). Immigration detentions are either mandatory or subject to the unreviewable discretion of the Attorney General, depending on the immigration charges. See generally 8 U.S.C. § 1226. In cases of suspected terrorism, the government has often used immigration detention to complement its authority to detain under the criminal law. Zacarias Moussaoui, for example, was initially detained before 9/11 for overstaying his visa (see Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report* at 273 (2004)), and the government can use immigration detention as a "backstop" when the bail statute would otherwise require a defendant's release. Compare Minute Entry, *United States* v. *al-Shannaq*, No. 02-cr-319 (D. Md. July 11, 2002) (releasing defendant Rasmi Subhi Salah al-Shannaq before trial) with Warren P. Strobel & Cassio Furtado, *3 in Visa Plot Have Hijack*

Links, Miami Herald, July 11, 2002, at 3A (al-Shannaq detained on immigration charges).[7]

Finally, in situations where the government cannot file criminal or immigration charges, it can invoke the material witness statute, 18 U.S.C. § 3144, to detain a potential witness for a limited time pending his testimony. Although the material witness statute may be used for only a limited period of time and imposes numerous procedural safeguards—including prompt and continuing judicial review and the appointment of counsel—it is an effective tool for the government in appropriate situations. See Serrin Turner & Stephen J. Schulhofer, Brennan Ctr. for Justice at N.Y.U. Sch. of L., *The Secrecy Problem in Terrorism Trials* 38 (2005); *United States* v. *Awadallah*, 349 F.3d 42, 45-48 (CA2 2003) (upholding perjury indictment of man detained as material witness after his phone number was found in a 9/11 hijacker's vehicle). Indeed, petitioner himself was originally arrested on a material witness warrant and was detained on that basis for approximately two months. See Pet. App. 12a-13a.

3. The criminal justice system adequately protects the secrecy of classified information

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[7] In addition, under Sections 411 and 412 of the USA Patriot Act, Congress authorized the arrest and detention of aliens believed to be connected to terrorism where no charges have been filed, but the statute requires the government to commence removal proceedings or to file criminal charges within seven days after arrest. See 8 U.S.C. §§ 1226a(a).

In his opinion below, Judge Wilkinson also expressed another, commonly leveled criticism of the justice system—that it is not "responsive to the executive's legitimate need to protect sensitive information." Pet. App. 215a. But as Judge Gregory explained in his concurrence, Judge Wilkinson and his fellow critics have given short shrift to "the statutory framework Congress created for handling classified material in a judicial setting, the Classified Information Procedures Act ('CIPA')." *Id.*, at 144a; see also *id.*, at 153a-55a (explaining how CIPA principles could be applied to govern al-Marri's proceedings).

CIPA establishes procedures that allow judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. See 18 U.S.C. app. 3; see also *In Pursuit of Justice*, at 82-84 (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. See *In Pursuit of Justice*, at 8-9 (summarizing findings); *id.*, at 84-86 (collecting cases).

Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified testimony. Indeed, Congress's express intent in enacting CIPA was that district judges "'must be relied on to fashion creative and fair solutions to these problems,' *i.e.*, the problems raised by the use of classified information in trials." *United States* v. *Rosen*, 520 F. Supp. 2d 786, 788 (E.D. Va. 2007) (quoting S. Rep. 96-283, reprinted in 1980 U.S.C.C.A.N. 4294). In Moussaoui's

case, for example, the court faced the novel question of how to apply CIPA to a *pro se* defendant, and concluded that where CIPA would direct information to be disclosed to defense counsel but not the defendant, a *pro se* defendant would receive standby counsel to review the classified materials. See *United States* v. *Moussaoui*, No. 01-cr-455-A, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002). Similarly, courts have permitted witnesses whose identity is secret to be referred to by a pseudonym, or to testify using a mask or some other method to shield the witness's identity. See, *e.g.*, *United States* v. *Moussaoui*, 382 F.3d 453, 480 n.37 (CA2 2004) (in order to protect national security, district court could allow the use of "alternate names for people or places" in creating substitutions for certain witnesses' proposed testimony).

In his opinion below, Judge Wilkinson deemed CIPA insufficient to protect classified information because judges "will fail to appreciate the broader dangers associated with a potentially sensitive piece of information." Pet. App. 218a. However, Judge Wilkinson's hypothesis is unsupported by evidence and ignores the government's role, under CIPA, in apprising the court of the risks posed by disclosure of classified evidence. In fact, under CIPA, the government can prevent the disclosure of classified information, though it runs the risk of sanctions if an acceptable substitute cannot be found. See 18 U.S.C. app. 3 § 6(e).

Judge Wilkinson's opinion also raised fears about the possibility of leaks, focusing in particular on two alleged examples of security breaches in terrorism cases. As set forth below, however, we believe the first such incident simply did not happen, and the

second does not illustrate flaws in CIPA, since CIPA's procedures were not even invoked.

The first incident cited by Judge Wilkinson supposedly occurred "during the criminal trial of Ramzi Yousef, [when] 'an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communications links had been compromised.'" Pet. App. 218a-19a (quoting Mukasey, *supra*); see also *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J., dissenting) (referring to same anecdote). However, public-record information does not support the claim that this incident occurred, and based on our review of the record, we believe that it did not. Instead, it seems likely that the report of the incident has become garbled and that the "innocuous bit of testimony" actually occurred in the Embassy Bombings trial in March 2001 rather than in either of the Ramzi Yousef trials in 1996 and 1997. See Trial Tr. at 5292-94, *United States* v. *el-Hage*, No. 98-cr-1023 ("*el-Hage* Proceedings") (S.D.N.Y. May 1, 2001) (Dkt. No. 600) (government's closing argument discussing delivery of satellite phone battery pack to Bin Laden in May 1998). However, the evidence in the Embassy Bombings trial about the delivery of a satellite phone battery to Bin Laden could not have tipped off anyone that the phone was being monitored because the phone had already been inactive for almost two and a

half years when the government offered evidence about it at trial.[8]

The other example of a security breach cited by Judge Wilkinson is that "'in the course of prosecuting Omar Abdel Rahman . . . the government was compelled . . . to turn over a list of unindicted co-conspirators [including Osama bin Laden] to the defendants,'" and that within ten days, that list "was in bin Laden's hands, 'letting him know that his connection to that case had been discovered.'" Pet. App. 214a (quoting Mukasey, *supra*) (second ellipsis in opinion); see also *Boumediene*, 128 S. Ct., at 2295 (Scalia, J., dissenting) (recounting same report). Although the dissemination of the co-conspirators list did occur, it cannot fairly be used to criticize the effectiveness of CIPA because there is no indication that the government sought to invoke CIPA, or even a protective order, to restrict disclosure of the list. See *In Pursuit of Justice*, at 88. Had the government sought a court order sealing the list or prohibiting review by the defendants or anyone not working on the defense team, perhaps the list would not have reached Bin Laden.

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[8] Phone records received in evidence show that the phone's use dropped off in late August and September 1998, after the embassy bombings in East Africa and the U.S. cruise missile attack on Bin Laden, and that the phone went dead entirely on October 9, 1998. See Trial Tr. at 3035 & Gov't Ex. 594, *el-Hage* Proceedings (Mar. 20, 2001) (Dkt. No. 605) (testimony of witness from phone company; phone records). Yet the phone records were not offered in evidence until March 20, 2001. See *ibid.*; see also *In Pursuit of Justice* at 88-89.

In fact, in later terrorism cases, protective orders and other measures have been employed to restrict the dissemination of sensitive materials. For example, during petitioner's pre-trial detention, the government obtained a protective order limiting the release of sensitive information while charges were pending against him in the Southern District of New York. See Protective Order, *al-Marri II* Proceedings (Mar. 24, 2003) (Dkt. No. 9). Petitioner was also placed in a Special Housing Unit that limited his ability to communicate with the outside world for the duration of the New York proceedings. Once petitioner was moved to Illinois, the government imposed Special Administrative Measures, or "SAMs," that severely restricted his contact with the outside world.

In sum, there is "no indication that [CIPA], reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial." Ass'n of the Bar of the City of N.Y., *Indefinite Detention*, at 143. That is not to say, of course, that CIPA or judges are foolproof, but the risk of error does not support an argument that courts are inherently susceptible to security breaches.

4. The criminal justice system has displayed a practical and common-sense approach to evidentiary rules in terrorism cases

In his opinion below, Judge Wilkinson also criticized the justice system for imposing evidentiary strictures that are too rigid to allow for the kind of evidence that is available to prosecute terrorists. See, *e.g.*, Pet. App. 211a-12a ("The 'fog of war' creates confusion, and . . . it is often difficult to respect the evidentiary standards . . . that are the hallmarks of

criminal trials"). Judge Wilkinson identified two evidentiary problems as being particularly problematic in terrorism trials: the chain-of-custody requirement and securing witnesses for in-court testimony. *Ibid.* However, Judge Wilkinson cited no actual examples where evidentiary problems have proved insurmountable in terrorism cases.

In fact, many terrorism prosecutions present no unusual evidentiary problems. In petitioner's case, for example, a review of the Rapp Declaration and the criminal docket suggests that the principal evidence against petitioner was composed of emails and other data found in petitioner's computer; papers and other personal effects seized after a search of petitioner's home; phone records, financial and other banking records; records of business transactions; federal immigration records; and the defendant's statements to the FBI. See Resp. App. 9a-15a; Compl., *al-Marri III* Proceedings (May 1, 2003) (Dkt. No. 1) ("Ill. Compl."). These are bread-and-butter pieces of evidence whose admission would not seem to present any special difficulty.[9]

Further, experience shows that both of the specific evidentiary issues cited by Judge Wilkinson have

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[9] While his case was pending in the Southern District of New York, petitioner moved to suppress the physical evidence recovered by the government in searches of his home and automobile. See Suppression Motion, *al-Marri I* Proceedings (June 25, 2002) (Dkt. No. 16). After holding an evidentiary hearing, however, the district court denied petitioner's motion to suppress on grounds that he had consented to the searches. See Decision and Order, *al-Marri I* Proceedings (Nov. 12, 2002) (Dkt. No. 30).

proved to be surmountable. For example, in *United States* v. *al-Moayad*, a terrorist-financing case in the Eastern District of New York, the prosecution rebutted the defendant's entrapment defense by submitting into evidence what "appeared to be an application form for a mujahidin training camp" that listed the defendant as a reference. 545 F.3d 139, 156 (CA2 2008). The government "authenticated the form through the testimony of FBI Special Agent Jennifer Hale Keenan," who testified that it was among a number of items she received, while she was stationed in Pakistan, from American officials in Afghanistan who had in turn seized those items from an al Qaeda training facility. *Ibid.* Although the Second Circuit reversed al-Moayad's conviction based on other trial errors, it found that Hale Keenan's testimony sufficiently authenticated the mujahidin form, even though she simply described "the process of receiving, inventorying, and shipping the documents to Washington D.C." *Id.*, at 156, 172-73 (noting that the "bar for authentication of evidence is not particularly high"); see also Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A06 (describing trial court's acceptance of alleged al Qaeda training camp application into evidence).

The Fourth Circuit's recent *Abu Ali* opinion offers a good example of the manner in which courts can overcome problems with witness availability. See *Abu Ali*, 528 F.3d, at 238-42. Two of the witnesses against Abu Ali were Saudi government agents who had interrogated Abu Ali and obtained confessions, but who were not authorized to travel to the United States. *Id.*, at 238-40. The trial court allowed Abu Ali's attorneys to depose the Saudi agents via a two-

way video link subject to procedural protections, including: (1) the presence of attorneys for both parties in Saudi Arabia, along with a translator; (2) real-time transcription of the depositions; and (3) frequent breaks during which Abu Ali was able to communicate with his counsel in Saudi Arabia via cell phone. *Id.*, at 239-40. The Fourth Circuit found that the trial court's protections satisfied Abu Ali's Sixth Amendment Confrontation Clause rights. *Id.*, at 240-42.

Courts and prosecutors have also been able to obtain the presence of active-duty U.S. military personnel when necessary. In *al-Moayad*, the FBI agent who conducted much of the investigation was recalled to testify at trial in Brooklyn, even though at the time of trial he was on active duty in Iraq as a Marine captain where he was stationed in the so-called "Triangle of Death." *In Pursuit of Justice*, at 109; John H. Richardson, *Brian Murphy v. The Bad Guys*, Esquire, Feb. 26, 2007. Similarly, in the case of John Walker Lindh, active-duty military personnel, including Special Forces officers, were ready, willing, and able to testify at John Walker Lindh's suppression hearing; their testimony was not necessary in light of Lindh's guilty plea shortly before the hearing was to commence. See *In Pursuit of Justice*, at 109.

5. The criminal justice system adequately protects the safety and security of both its participants and the public at large

Judge Wilkinson also expressed doubts about the justice system's ability to provide safety and security for trial participants and for the public at large (see Pet. App. 214a-15a), but he cited no specific examples of security breakdowns. Although safety in the

courtroom can indeed be a serious concern, experience suggests little reason to conclude that terrorism cases present courtroom security risks that are not manageable. Indeed, many of the most serious security breakdowns have occurred following non-terrorism-related civil or criminal litigation. See *In Pursuit of Justice*, at 121-22 (citing examples).

In appropriate cases, judges and security officials can invoke a series of extra precautions to maintain safety, including extra metal detectors and court security officers, physical restraints on defendants, and anonymous juries. See *Holbrook* v. *Flynn*, 475 U.S. 560, 570-72 (1986) (additional, uniformed officers did not prevent fair trial); *Illinois* v. *Allen*, 397 U.S. 337, 343-44 (1970) (authorizing physical restraints in extreme cases); *United States* v. *Wong*, 40 F.3d 1347, 1376 (CA2 1994) (approving use of anonymous juries in appropriate cases and subject to reasonable precautions to minimize prejudice to the defendant). Witnesses, in turn, can be protected through a variety of measures including the U.S. Marshals Service's Witness Security Program, which since 1971 has successfully protected, relocated, and given new identities to over 8,000 at-risk witnesses (and their families); indeed, no participant following the program's security guidelines has ever been harmed, and an 89% conviction rate has been achieved in cases where protected witnesses testified. See U.S. Marshals Service, *Witness Security Program Fact Sheet* (Dec. 3,

2007);[10] U.S. Marshals Service, Website, *Witness Security*.[11]

Judge Wilkinson's opinion also raised a separate kind of security concern—that "[t]error suspects may use the bully pulpit of a criminal trial in an attempt to recruit others to their cause." Pet. App. 214a. However, we are not aware of any factual basis for this concern or any discernible propaganda benefit conferred upon terrorists or their causes by court trials. To the contrary, the Executive's refusal to use the justice system in some terrorism cases—along with the use of extrajudicial mechanisms such as detention at Guantanamo and military tribunals—has apparently been the real propaganda bonanza for al Qaeda and other terrorist groups.

Finally, the government can impose SAMs, which aim to prevent inmates from sending communications to persons outside the prison system that may create a risk of violence or terrorism. See 28 C.F.R. § 501.3(a). SAMs may include housing a prisoner in administrative segregation, as well as denying privileges such as "correspondence, visiting, interviews with representatives of the news media, and use of the telephone." *Ibid.* SAMs have been imposed during pre-trial detention in a number of terrorism cases. See, *e.g.*, *United States* v. *el-Hage*, 213 F.3d 74, 78, 81-82 (CA2 2000). Petitioner, too, was subject to SAMs after his transfer to federal custody in Illinois. Indeed, his counsel was preparing to litigate the SAMs when petitioner was transferred into mili-

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[10] http://www.usmarshals.gov/duties/factsheets/witsec.pdf

[11] http://www.usmarshals.gov/duties/witsec.htm

tary custody. See Letter from Pet'r's Counsel to Gov't (June 4, 2003) (attached as Ex. 5 to Pet. for *Habeas Corpus*, *al-Marri* v. *Bush*, No. 03-cv-1220 (C.D. Ill. July 8, 2003) ("July 8 *Habeas* Pet.")); see also July 8 *Habeas* Pet., at 8-10.

6. Prosecutors can develop reliable intelligence information by debriefing cooperating defendants

As a final matter, Judge Wilkinson opined that defendants' rights to speedy trial and immediate assistance of counsel could "hinder the government's need to gather information" because "effective . . . interrogation[] typically takes time" during which the suspect must be held incommunicado. Pet. App. 213a. However, this argument ignores the reliable intelligence that has been derived from cooperating defendants in terrorism cases. In a webpage devoted to "Waging the War on Terror," the Department of Justice touts its ability to gather information "by leveraging criminal charges and long prison sentences." U.S. Dep't of Justice, Website, *Waging the War on Terror*.[12] According to the site, cooperating defendants "have provided critical intelligence about al-Qaida and other terrorist groups, safehouses, training camps, recruitment, and tactics in the United States, and the operations of those terrorists who mean to do Americans harm." *Ibid.* Furthermore, as those familiar with the criminal justice system are well aware, prosecutors must corroborate the infor-

[12] http://www.lifeandliberty.gov/subs/a_terr.htm

mation gained from cooperating defendants so that they can withstand cross-examination.

One example of a successful cooperator is Yahya Goba, one of six defendants indicted in the Lackawanna Six case. Goba agreed to cooperate with the government and pled guilty in March 2003 to providing material support to al Qaeda in connection with his attendance at an al Qaeda training camp in Afghanistan. See Plea Agreement, *United States v. Goba*, No. 02-cr-214 ("*Goba* Proceedings") (W.D.N.Y. Mar. 25, 2003) (Dkt. No. 113); Change of Plea, *Goba* Proceedings (Mar. 25, 2003) (Dkt. No. 116). He later testified as a government witness at the trials of Mohammed al-Moayad and Jose Padilla, and in other cases as well. See *al-Moayad*, 545 F.3d, at 156-57; Decision and Order as to Yahya Goba, *Goba* Proceedings (Dec. 14, 2007) (Dkt. No. 288); see also Plea Agreement, *United States* v. *Qureshi*, No. 04-cr-60057 (W.D. La. Feb. 11, 2005) (Dkt. No. 31) & DOJ Counterterrorism White Paper, at 30 (discussing Mohammad Salman Farooq Qureshi's proffer about al Qaeda member Wadih el-Hage and an organization that may have assisted in financing the embassy bombings in Kenya and Tanzania).

C. The Government Will Very Likely Be Able to Prosecute Petitioner After Releasing Him From Military Custody

The original criminal charges against petitioner were dismissed with prejudice at the government's request. See Order of Dismissal & Tr. of Proceedings at 10-16, *al-Marri III* Proceedings (June 23, 2003) (Dkt. Nos. 16, 17). Nevertheless, a review of the allegations against petitioner suggests that the govern-

ment could probably bring new charges against him under several different statutes.

First, the allegations, if backed by evidence, appear to support a charge of providing material support to a terrorist organization in violation of 18 U.S.C. §§ 2339A and/or 2339B. Between 1996 and 1998, petitioner is alleged to have trained at al Qaeda camps in Afghanistan where, among other things, he allegedly received training in the use of poisons. Resp. App. 6a. In the summer of 2001, petitioner allegedly volunteered to carry out a terrorist attack on behalf of al Qaeda. *Id.*, at 7a. According to the Rapp Declaration, al-Qaeda "instructed al-Marri to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." *Id.*, at 8a. Petitioner then allegedly moved to the United States. *Id.*, at 5a. When his laptop computer was later seized, it was, according to the government's allegations, found to contain "numerous computer programs typically used by computer hackers," suggesting that petitioner had undertaken to do as al Qaeda instructed. *Id.*, at 13a. Furthermore, petitioner's alleged computer contents indicated that he had researched the use of chemical weapons in contemplation of a terrorist attack, research that was "consistent with the documented interests of al Qaeda" and thus may have been carried out on al Qaeda's behalf. *Id.*, at 9a-10a.

Evidence of petitioner's contacts with other al Qaeda figures, and his surreptitious conduct, could further bolster a material support prosecution. For example, after he entered the United States, petitioner allegedly called a telephone number in the

United Arab Emirates (UAE) that was used by Mustafa Ahmed al-Hawsawi, an alleged al Qaeda financier and co-conspirator of Zacarias Moussaoui's. *Id.*, at 4a-5a, 8a. The UAE number was also used on a Federal Express package sent by 9/11 hijacker Mohammed Atta and in connection with other alleged al Qaeda figures. See Ill. Compl., at 8. Further, petitioner allegedly met with al-Hawsawi in Dubai in August 2001 and received funds from him, including the funds used to purchase the seized laptop. Resp. App. 8a.

A material support prosecution could further rely on the allegations of petitioner's surreptitious behavior. For example, petitioner allegedly used an alias, "Abdullakareem A. Almuslam," to stay at a hotel which was used in turn as the home address for this alias in connection with the opening of fraudulent bank accounts for a company, "AAA Carpet." *Id.*, at 17a.[13] Further, petitioner allegedly admitted to creating three email accounts under false names. Each of these accounts contained a draft message with a coded version of petitioner's telephone number and addressed to an email account associated with Khalid Shaykh Muhammed. *Id.*, at 11a-12a. There is also evidence which, if proven, would show that petitioner surreptitiously entered the United States in 2000 and then lied about it. See Ill. Compl., at 16-17.

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[13] Two witnesses who were shown photographic arrays have allegedly identified petitioner as the individual known as Abdullakareem Almuslam. Resp. App 17a (first witness); Ill. Compl. at 14 (second witness).

If proven, petitioner's travel on behalf of al Qaeda, his research into available methods for carrying out a terrorist attack, and his volunteering to work on al Qaeda's behalf in the first place would likely constitute material support. See, *e.g.*, Judgment, *United States* v. *Faris*, No. 03-cr-189 (E.D. Va. Apr. 30, 2003) (Dkt. No. 34) (judgment entered where defendant charged with material support and plea agreement entered after defendant scouted Brooklyn Bridge for possible terrorist attack). Furthermore, petitioner's alleged agreement with members of al Qaeda that he would assist them and the al Qaeda organization in carrying out a terrorist attack would likely support a charge of conspiracy to provide material support under the same statutes. See, *e.g.*, Superseding Information & Plea Agreements, *Ahmed* Proceedings (Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) & Ahmed Press Release (defendants agreed to travel overseas to kill U.S. soldiers).[14] Because the material support statutes have an eight-year limitations period (see 18 U.S.C. § 3286(a)), the government need

[14] Conspiracy to provide material support to a designated terrorist organization was prohibited by § 2339B at the time of the alleged agreement. Conspiracy to provide material support to terrorists was prohibited by 18 U.S.C. § 371 at the time of the alleged agreement; the conspiracy was evidently still ongoing after October 26, 2001, when Congress extended the maximum sentence and statute of limitations applicable to such conspiracies by adding a specific conspiracy provision to § 2339A. *See* USA Patriot Act, Pub. L. No. 107-56, § 811(f), 115 Stat. 272, 381 (2001).

only charge petitioner before the summer of 2009 to avoid a limitations problem.[15]

Second, the allegations suggest that the government could charge petitioner with mail fraud or attempted mail fraud under 18 U.S.C. §§ 1341 and 1349. Petitioner's alleged wrongdoing will likely have caused credit card issuers to seek payment from account holders by sending statements containing the wrongful charges through the mails. Furthermore, a grand jury found that petitioner applied for several bank accounts using a false name and a false mailing address at which he would "receive documents related to the bank accounts he intended to open." Indictment at 1, *al-Marri III* Proceedings (May 22, 2003). Petitioner's alleged use of the mail was seemingly intended to further his fraudulent scheme to make charges against credit card numbers, and so would support a charge of mail fraud. See Ill. Compl., at 14-15. Mail fraud has a 10-year limitations period where the fraud affects a financial institution. See 18 U.S.C. § 3293(2). In this case, then, the statute of limitations would extend at a minimum into 2011.

Finally, the allegations would likely sustain a charge of wire fraud under 18 U.S.C. § 1343, which similarly has a 10-year limitations period where the fraud affects a financial institution. Petitioner allegedly opened an account with a credit card processor,

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[15] In addition, the government may toll the statute for an additional three years if it seeks evidence from abroad (see 18 U.S.C. § 3292(a)(1)), as it could presumably do in petitioner's case. See Resp. App. 7a (petitioner allegedly volunteered for terrorist mission while in UAE).

through which he attempted to make charges against several of the stolen credit card numbers the government found when it seized his computer. See Ill. Compl., at 14-15. Transmitting the fraudulent charges to the credit card processor via wire could likely support a charge of wire fraud.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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