



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

Trying Terrorism Suspects in Article III Courts: The Lessons of *United States v. Abu Ali*

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August 2010

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Trying Terrorism Suspects in Article III Courts: The Lessons of *United States v. Abu Ali*

Stephen I. Vladeck *

I. Introduction

To say that it is difficult to divorce from the politics of the moment the ongoing debate over the suitability of trying terrorism suspects in the Article III courts¹ would be an epic understatement. 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; provide the defendants with a platform from which to spew anti-American propaganda; risk publicly revealing information about counterterrorism sources and methods; prove to be costly both with regard to the security measures they require and the judicial resources they consume; and 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 the potential “distortion effects.”²

A number of different institutions and organizations have issued reports providing various quantitative and qualitative assessments of the work of the Article III courts in post-September 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 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.”³

In this Issue Brief, I aim to test that thesis against one of the more significant of the post-September 11 criminal prosecutions to date—the trial of Ahmed Omar Abu Ali.⁴ Abu Ali’s case is thought-provoking on any number of levels, including:

- the strange (and potentially troubling) circumstances in which it began—with Abu Ali filing a habeas petition while he was in Saudi custody, claiming that he was being tortured at the behest of the U.S. government;

* Professor of Law, American University Washington College of Law. This Issue Brief is derived from a longer article forthcoming in the *Texas Law Review*. See Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 *Tex. L. Rev.* (forthcoming 2010).

¹I use the term “Article III courts” to refer to the federal court system created by Congress pursuant to Article III of the U.S. Constitution, which established the Supreme Court and “such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

²Although these critiques have appeared in any number of places, one of the most concise discussions can be found in Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, *WALL ST. J.*, Aug. 22, 2007, at A15. On the idea of “distortion effects,” see Stephen I. Vladeck, *Foreword: National Security’s Distortion Effects*, 32 *W. NEW ENG. L. REV.* 285 (2010).

³CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, *TERRORIST TRIAL REPORT CARD 5* (2010), available at <http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf>.

⁴See generally *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

- the uniqueness of the charges against him—which included conspiracy to assassinate the President in addition to a host of more conventional post-September 11 terrorism counts;
- the procedural innovations adopted by the district court to allow Saudi intelligence officials to provide remote deposition testimony outside the presence of the defendant;
- the thorny question of whether *Miranda* 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; and
- the clear violation of the Sixth Amendment’s Confrontation Clause at trial that both the district court and Fourth Circuit held to constitute harmless error.

As I demonstrate, *Abu Ali* is a microcosm both of 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.

II. The *Abu Ali* Litigation

A. Background and District Court Decision

Ahmed Omar Abu Ali is a U.S. citizen born in Texas and raised in the Virginia suburbs of Washington, D.C.⁵ In September 2002, at the age of 21, he left home to study at the Islamic University in Medina, Saudi Arabia. Nine months later, he was arrested by officers of the Mabahith—the counterterrorism security forces of the Saudi Ministry of the Interior. The Mabahith came 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 34 people, including nine Americans, and that he was involved in planning for future al-Faq’asi and al Qaeda attacks on U.S. soil.

Abu Ali was initially detained in Medina. 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.” Abu Ali, on the other hand, alleged that he was not fed on his first day in custody, and that Saudi officials hit him, slapped him, punched him in the stomach, and pulled his beard, ears, and hair on the night of his arrest. Abu Ali would further testify that the beatings continued on his second day in custody, but ceased after he agreed to cooperate with the

⁵The facts are variously taken from three sources: for the district court’s decision denying Abu Ali’s motion to suppress and motion to dismiss the criminal indictment, see *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343–46 (E.D. Va. 2005); for the Fourth Circuit’s decision affirming Abu Ali’s conviction, see *Abu Ali*, 528 F.3d at 221–26; and for the D.C. district court’s decision denying the government’s motion to dismiss Abu Ali’s habeas petition, see *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. *See id.* at 31 n.1.

investigation. 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 days there.

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. 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 Abu Ali or engaging in any such behavior. Both officials 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 not an attempt to deprive Abu Ali of sleep. These officials also testified that Abu Ali was granted breaks, access to food, water, a bathroom, and refreshments during breaks in questioning. 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.

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

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. 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 un-credible by the trial judge in his criminal case.

Nevertheless, in July 2004, Abu Ali’s parents filed a habeas petition on his behalf in the D.C. district court. 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 power of the U.S. courts. The government, rather than responding to Abu Ali’s claims on the merits, moved to dismiss, arguing that Supreme Court precedent barred the district court from exercising jurisdiction.

In a thorough opinion handed down in December 2004, the district court denied the government’s motion to dismiss, holding that Abu Ali’s allegations, if true, were sufficient to establish jurisdiction. Judge Bates proceeded to “authorize expeditious jurisdictional discovery . . . to further explore [Abu Ali’s] contentions.” 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. 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. Eventually, he was charged with nine distinct offenses, including several material support charges, and charges relating to conspiracies to (1) assassinate President Bush; (2) commit aircraft piracy; and (3) destroy aircraft.

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. Over Abu Ali’s objection, such depositions were taken in July 2005, using procedures that, whatever their merits, were certainly novel. 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.

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.⁶

In light of the practical obstacles, the district court sought to create deposition procedures that would allow the examination of the witnesses but still 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.” 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.”

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,

⁶ *Abu Ali*, 528 F.3d at 239 (4th Cir. 2008) (citation omitted).

so that the jury could see their reactions. Judge Lee presided from his courtroom in Alexandria, ruling on objections as they arose. 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.

Abu Ali next moved to suppress the admission of the Mabahith officers' deposition testimony, along with various inculpatory statements he made while in Saudi custody, and for dismissal of the indictment. Among other claims, Abu Ali:

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. . . . Mr. Abu Ali [also] contends that the United States and the Saudi Government acted as partners or "joint venturers" in his arrest and lengthy detention in Saudi Arabia.⁷

After taking nearly two weeks of testimony in connection with Abu Ali's motions, the district court issued a painstaking 113-page opinion concluding 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."

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, and not the result of "gross abuse" or "inherently coercive conditions." Despite recognizing that the voluntariness of the statements must be determined by the "totality of the circumstances," the court's discussion focused specifically on whether or not Abu Ali had been tortured.

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 in Medina, and his testimony was held to be more credible than Abu Ali's allegations 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."

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," and expressed apprehension over its inability to discern "whether Mr. Abu Ali is sincere or just cunning." A particular point of

⁷*Abu Ali*, 395 F. Supp. 2d at 341.

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." 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."

Next, the district court turned to the *Miranda* 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. 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.

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. 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.

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." 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. 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.

At roughly the same time, the district court was also considering the government's request pursuant to the Classified Information Procedures Act (CIPA) to introduce classified evidence at trial memorializing the communications between Sultan Jubran and Abu Ali. 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. The government first produced copies of the unredacted documents at issue to Abu Ali's CIPA-cleared counsel on October 14, 2005. Three days later, the government provided Abu Ali's uncleared defense counsel with slightly redacted copies of the documents, 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." As the Fourth Circuit would later explain, "the declassified versions provided the dates, the opening salutations, the entire substance of the communications, and the closings, and had only been lightly redacted to omit certain identifying and forensic information."

On October 19, 2005, the government filed an *in camera, ex parte* motion pursuant to section 4 of CIPA, 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. 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, even though Abu Ali himself would only be able to see the redacted version of the documents. 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. 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. The district court, after an *in camera* CIPA hearing, concluded that the communications were discovered independently from the Saudi government’s investigation (and were therefore not the product of a joint 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.”

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

B. Appellate History

On appeal, Abu Ali reiterated many of the claims he had advanced at trial. As relevant here, 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*. Second, he argued that the government failed adequately to corroborate his confessions. Third, Abu Ali claimed that the introduction of the Mabath officials’ deposition testimony violated his rights under the Sixth Amendment’s Confrontation Clause. Fourth, Abu Ali challenged the government’s introduction of classified evidence at trial (to which he was not privy) as a further violation of the Confrontation Clause. In an 80-page, jointly-authored opinion,⁸ Judges Wilkinson, Motz, and Traxler rejected nearly all of Abu Ali’s arguments.⁹

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.” 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

⁸The only exceptions are footnotes 5 and 6, 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.

⁹Judge Motz filed a separate dissent with regard to the majority’s decision to vacate and remand Abu Ali’s sentence. *See id.* at 269–82 (Motz, J., dissenting).

venture, and that the introduction of his statements at trial was therefore not a violation of *Miranda*. 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 Mabathith 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.¹⁰

Judge Motz dissented on this point—the only trial-related issue that divided the otherwise unified panel. 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.¹¹

However, because Judge Motz agreed with Judges Wilkinson and Traxler that any error was harmless beyond a reasonable doubt, 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. As such, the district court correctly denied his motion to suppress.

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. Nonetheless, the court explained that corroborating proof was sufficient so long as it “‘tend[ed] to establish’—not establish—‘the trustworthiness’ of the confession.” The government, according to the Fourth Circuit, “offered significant independent circumstantial evidence tending to establish the trustworthiness of Abu Ali’s confessions.” In support, the court noted that the record included evidence that an al-Qaeda cell member identified Abu Ali as a member of the cell, as well as

¹⁰*Id.* at 230 n.5 (majority opinion).

¹¹*Id.* at 231 n.6.

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). 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. 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."

Third, as to whether the ad hoc procedures devised for taking the deposition testimony of the Mabath officials violated Abu Ali's Confrontation Clause rights, the Fourth Circuit concluded that the district court's creative approach adequately protected Abu Ali. Relying on the Supreme Court's decision in *Maryland v. Craig*,¹² 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.

With respect to *Craig*'s 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." 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." Thus, because "requiring face-to-face confrontation here would have precluded the government from relying on the Saudi officers' important testimony," the court held that the admission of the Mabath officials' deposition testimony satisfied the first prong of *Craig*.

Applying 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 Mabath 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 Mabath 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

¹²See *Maryland v. Craig*, 497 U.S. 836 (1990).

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.¹³

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), while Abu Ali had received only the redacted, unclassified version of the documents. As the court explained:

[F]or reasons that remain somewhat unclear to us, the district court 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.¹⁴

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 [extremely redacted] substitutions are provided to the defendant.” Moreover, there was no room to “balance a criminal defendant's right to see the evidence that will be used to convict him against the government's interest in protecting that evidence from public disclosure.” Instead, “If 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.”

Nevertheless, the panel concluded that the government's error (and the concomitant violation of the Confrontation Clause) were harmless. 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. 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.”

Notwithstanding the numerous significant legal issues implicated by the district court's and 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.” Without comment or dissent, the Supreme Court denied certiorari on February 23, 2009. On remand to the district court for resentencing, Judge Lee resentenced Abu Ali to life in prison, which Abu Ali has again appealed to the Fourth Circuit. Short of a surprising change of direction from the Court of Appeals on the sentencing issue, however, it is there that his legal proceedings are likely to come to a close.

¹³*Id.* at 241–42.

¹⁴*Id.* at 254.

III. 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 Mabath 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. 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. Hybrid Deposition Procedures

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 pre-trial 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." 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. Thus, courts have increasingly recognized circumstances—such as those in *Abu Ali*—where depositions taken outside the defendant's presence do not violate the Confrontation Clause.

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

- (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.¹⁵

The proposed revision, though, raises both practical and constitutional concerns, as a trio of Latham & Watkins lawyers have demonstrated in an insightful recent article.¹⁶ 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." Although one may well be convinced by the Fourth Circuit's analysis in *Abu Ali* that the ability effectively

¹⁵CONF. COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 20–21 (2009).

¹⁶See Barry M. Sabin et al., PROPOSED CHANGES TO FEDERAL RULE OF CRIMINAL PROCEDURE 15: LIMITATIONS, TECHNOLOGICAL ADVANCES, AND NATIONAL SECURITY CASES *in* CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD, *supra* note 3, at 35

to prosecute crimes related to transnational terrorism *is* an important public policy that would justify the accommodation, it is not at all clear that the same argument would hold for lesser crimes—even if they are felonies, all the new rule would require. Indeed, that concern was at the heart of the en banc Eleventh Circuit’s decision in the *Yates* case,¹⁷ cited and distinguished in *Abu Ali*. 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.” 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. 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 innovative protections for the defendant and his counsel.

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 issues that such remote depositions might raise could largely subside. Thus, as they note with regard to just one example:

telepresence 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.¹⁸

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 decisions made by the trial court.

B. Joint Venture and Governmental Custody Issues

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

¹⁷See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc).

¹⁸See Sabin et al., *supra* note 16, at 38.

of the Mabahith such that *Miranda* should have applied. Moreover, and unlike the unique deposition and CIPA issues that had arisen, the question of when *Miranda* kicks in with regard to 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 split on the substance of this issue, although they agreed that any *Miranda* error was harmless. 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.” Thus, “we are convinced, as was the district court, that American law enforcement officials were not trying to “evade the strictures of *Miranda*.” Judge Motz, in contrast, believed that the critical fact was that questions presented by U.S. officials were answered by the defendant. 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.”

It bears emphasizing that the judges were fighting over inches of jurisprudential real estate. But the inches are significant. The question presented in *Abu Ali* was unprecedented; no prior case involved U.S. officials submitting questions specifically to be asked of U.S. citizens by foreign interrogators on foreign soil. And so the answer 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*] 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.¹⁹

Not to be outdone, Judge Motz emphasized how the majority’s view “permits United States law

¹⁹United States v. Abu Ali, 528 F.3d 210, 230 n.5 (4th Cir. 2008).

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.”

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.

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. Put another way, the rhetoric of Judges Wilkinson and Traxler notwithstanding, foreign interrogations of U.S. citizens raise complicated *Miranda* questions 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.

C. The Silent Witness Procedure

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. 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 Abu Ali’s claim that the government had learned of their existence prior to his arrest, which would bolster his “joint venture” argument. 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.

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 mistakes will be made, but the Supreme Court’s increasing embrace of harmless error principles heavily mitigates the consequences of 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. In that regard, it may well be 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.

A number of scholars have wondered whether the Supreme Court in recent years has taken harmless error doctrine too far. 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 Confrontation Clause error was *not* harmless, but in a way, this observation proves the point. After all, the flaw in *Abu Ali*'s case 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.

IV. Conclusion

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 challenges. The thoughtful procedure devised by Judge Lee to allow the Mabath officials to testify while protecting the defendant's Confrontation Clause rights are a model that courts should follow (and *have* followed). More generally, this innovative procedure demonstrates how technology and national security can actually help *cabin* proposed changes to the Federal Rules of Criminal Procedure. After all, if such innovation can exist within the present framework, what need is there for hasty changes to rules that have long served the interests of justice? The principled disagreement over whether *Abu Ali*'s interrogation constituted a "joint venture" raises a fascinating question of constitutional criminal procedure that turns in no meaningful substantive way on the fact that his was a terrorism trial. 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 the flaws sometimes derive not from the laws, but from the judges who apply them.

None of these points, on their own, does anything to conclusively establish the feasibility of civilian criminal trials for *all* terrorism suspects, including the 9/11 defendants. If *Abu Ali* proves anything, it is that every case raises a 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."²⁰ *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, even if reasonable minds could argue (in this area of the law, as in any other) that judges sometimes get it wrong.

Indeed, what *Abu Ali* might drive home 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:

Persons of good will may disagree over the precise extent to which the formal criminal justice process must be utilized when those

²⁰United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

suspected of 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. . . . [T]he 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.²¹

²¹*Abu Ali*, 528 F.3d at 221.