



SECRETS AND LIES: THE PERSECUTION OF MUHAMMAD SALAH (PART II)

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Among the handful of high-profile terrorism cases in which the U.S. government has failed to win convictions in jury trials, that of Muhammad Salah stands out. Like the cases against Sami Al-Arian, Abdelhaleem Ashqar, and the Holy Land Foundation, the case against Salah was built on the criminalization of political support for the Palestinian resistance. But while the Palestinian-Israeli conflict is at the core of all four cases, Salah's, unlike the others, was primarily about Israel: the case was manufactured in Israel, the evidence on which it was based was generated in Israel, and its prosecution depended on close U.S.-Israeli cooperation at every turn.

Salah, a Palestinian-American Chicago resident and former grocer, was arrested in Israel in January 1993 while on a mission to distribute money to poverty-stricken Palestinians in the occupied territories. Accused of being a U.S.-based Hamas terrorist commander, he was interrogated by Shin Bet, tried before a military tribunal, and spent almost five years in prison in Israel. While the U.S. initially supported Salah and rejected Israel's accusations against him, in January 1995 he became (while still in prison) the first and (to date) only U.S. citizen to be branded a "specially designated terrorist" by his government. Upon his return home in November 1997, he was one of the main targets of an intensive terrorism funding investigation, dropped in 2000 for lack of evidence but reactivated in 2002 in the wake of 9/11.

In this two-part exclusive report, Salah's lawyers recount for the first time the details of their client's labyrinthine case. Part I focused on the Israeli phase of the story, including the political context of Salah's arrest, and the investigations and legal proceedings launched against him in the United States when he returned. In essence, part I laid the foundation for the trial to come, emphasizing in particular its complex legal underpinnings and implications as well as its importance as a "test case." Part II focuses on the post-9/11 period that unfolded under the George W. Bush Justice Department, starting with Salah's

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indictment in November 2004, continuing with the two years of contentious pretrial preparations and hearings, and ending with the trial itself. As in part I, the legal dimensions of the case are emphasized, as are the government's maneuvers to advance new standards governing the admissibility of coerced confessions and secret evidence at trial and to manipulate other established principles of the U.S. criminal justice system.

This article deals solely with Mubammad Salah, but Abdelhaleem Ashqar, a former professor of business administration in Virginia, was his codefendant at trial. Both were indicted, along with twenty other coconspirators, for participation in a fifteen-year "racketeering conspiracy" to "illegally finance terrorist activities" in Israel and the occupied territories, as well as for several lesser charges. The two men had never met before the trial opened in October 2006. Despite the common charge, their cases were very different and went forward in parallel fashion, with different lawyers, witnesses, arguments, and entirely separate pretrial proceedings. When the jury trial ended in February 2007, both men were acquitted of all terrorism-related charges.

The U.S. war on terror launched in the wake of the 11 September 2001 attacks cleared the way for the George W. Bush administration's pursuit of neo-conservative foreign and domestic policy objectives already on the drawing board. The tragedy also served to extend and deepen the U.S.-Israeli partnership in the U.S. war on terror, both at home and abroad. Within this context, the government's prosecution of Muhammad Salah—a test case meant to demonstrate how bedrock constitutional principles governing the admissibility of coerced confessions and secret evidence at trial, closed courtrooms, and cross-examination rights could be stretched in the post-9/11 era to make U.S. trials resemble Israeli military tribunals in the occupied territories—is an outstanding example of a U.S.-Israeli joint venture in the legal realm.

SALAH AND THE "FINANCIAL WAR ON TERROR"

Within weeks of 9/11, the 500-page Patriot Act, which greatly expanded domestic surveillance and prosecutorial powers while strengthening financial controls on funds that could be construed as supporting "terrorism," was ready for presentation to Congress, and was signed into law on 26 October 2001. But already on 24 September 2001, the less visible "financial war on terror" had been declared by President Bush, who vowed to launch "a strike on the financial foundation of the global terror network."¹ The main targets were the Muslim charities claimed to constitute a "significant source of terrorist financing." Almost immediately, the Treasury Department began naming the charities as "Specially Designated Global Terrorists" and closing them down. Most prominently, the Holy Land Foundation (HLF), the largest Muslim charity in the United States, was closed and its assets were frozen in December 2001.²

U.S. government interest in “terrorist financing” was not new. Israel had been complaining since the early 1990s that substantial terrorist funds were flowing from U.S. Muslim charities into the occupied territories to support Hamas. Israel’s determination to stop the flow had been a major factor in Muhammad Salah’s arrest at the Erez crossing into Gaza in January 1993. To emphasize the importance of Hamas’s supposed U.S. presence, Israel claimed that Salah was a U.S.-based senior Hamas military commander. With Salah’s alleged statements conveyed to Washington, branches of U.S. intelligence began to heed Israel’s warnings. By the mid-1990s, FBI counterterrorism units launched an investigation into terrorism funding targeting Salah (following his release from Israeli prison) and others.

The Clinton administration closed down the investigation in late 2000 for lack of evidence, but other parties were not so fastidious. In *Boim v. Quranic Literary Institute, et al.*, a group of pro-Israel lawyers launched a civil damages suit in May 2000 against seven U.S. Muslim NGOs, including the HLF, and a handful of individuals, including Muhammad Salah, for the 1996 drive-by shooting death of an Israeli American student named David Boim, allegedly by Hamas. The suit claimed that the defendants were responsible for the killing because their financial support of charities allegedly linked to Hamas could be used to fund Hamas terrorism.

But while the *Boim* lawyers could file a civil damages suit against Salah and the Muslim charities in 2000 and have some chance of prevailing, a criminal case in federal district courts would have made little headway before 9/11 led to looser interpretations of the law.³ Salah’s alleged crimes had been committed in 1993, almost a decade earlier, on foreign soil. More important, the acts for which he spent almost five years in Israeli prison had not been illegal in the United States at the time, and despite having been under constant surveillance between his return home in November 1997 and the closing of the investigation against him three years later, no credible evidence linking him to Hamas (designated as a terrorist organization since 1995) had been found. Most crucially, Salah’s conviction by an Israeli military tribunal had been based on statements he had made during almost two months of “intensive interrogation” by Israel’s General Security Service (GSS, commonly known as Shin Bet), whose record of torture had been strongly condemned by human rights organizations and the U.S. State Department, and whose standard interrogation practices had been outlawed by the Israeli High Court of Justice itself.⁴ In 2002, however, in search of publicity victories in the war on terror, and emboldened by the newly minted Bush definition of torture,⁵ the Justice Department reopened the case against Salah.

The U.S. government spent two years crafting the charges. By August 2004, all the pieces had been assembled, and Attorney General John Ashcroft himself dramatically announced the indictment against Salah, Musa Muhammad Abu Marzuq, and Abdelhaleem Ashqar in a nationally televised press conference.⁶ The forty-three-page indictment contained three counts against Salah. Count I, for racketeering conspiracy, took Salah’s 1993 confessions to Shin Bet and tailored them to fit the Racketeer Influenced and Corrupt Organizations

Act (RICO), a law designed for drug traffickers and mobsters. Racketeering conspiracy was simply a clever way to circumvent the problem that Salah's financial distributions in the occupied territories in 1993 had been legal in the United States at the time, as Hamas did not receive the U.S. terrorist designation for another two years.

Count II, material support for terrorism, was based exclusively on claims by a single FBI informant (long known as unreliable) concerning an otherwise uncorroborated 1999 incident linking Salah to Hamas. This count aimed to mask the blatantly political nature of a case built around a decade-old charge and to create the impression that Salah was involved in more recent activities threatening U.S. soil. Associating Salah with Hamas *after* its official designation as a terrorist organization in 1995 was moreover the only way the government could indict him for "material support for terrorism," a charge that had far more resonance with the American public than the RICO charge.

Finally, count III, the relatively minor obstruction of justice charge, was based on the claim that in April 2001, Salah had given false or incomplete answers to written questions posed to him in the above-mentioned *Boim* civil damages suit.⁷

THE LAUNDERING OF MUHAMMAD SALAH'S CONFESSION

The most important count for the government—indeed, the only reason it was interested in prosecuting the case in the first place—was the RICO charge involving money laundering and conspiring with a "racketeering enterprise" (Hamas) to finance terrorist activities in Israel and the occupied territories. Complicating the government's case, even after 9/11, was the fact that count I rested almost entirely on Salah's statements to Shin Bet. For a confession to be used as evidence at trial, U.S. law requires that it be voluntary—that is, that "the totality of the circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will."⁸ According to a 1944 U.S. Supreme Court ruling,

It is inconceivable that any court of justice in the land, conducted as courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistent with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.⁹

From his first meetings with U.S. consular officials following his arrest, Salah consistently maintained that his statements to his interrogators had been

extracted under torture. U.S. law provides for such situations by allowing the defendant in a criminal case to file a motion to suppress all statements alleged to have been the product of coercion. If the motion is deemed worthy of pursuit, a pretrial hearing is held at which the judge must decide on the basis of the evidence presented whether the statement was coerced; if so, it cannot be used at trial. In October 2005, Salah's defense formally filed a suppression motion,¹⁰ with a sworn affidavit by Salah describing his interrogation attached as supporting documentation.¹¹

In the period following the indictment, Salah had petitioned the U.S. government to provide numerous classified documents needed for his defense. Not surprisingly, given the nature of the case, the overwhelming majority of these were Israeli classified documents, many of which the Government of Israel (GOI) had already made available to the prosecution. After asking Israel's permission, the United States provided certain of these documents to the defense on the basis of a limited waiver. These included Salah's own written and tape-recorded "confessions" and the transcripts of the military proceedings in Israel. Meanwhile, the U.S. government declassified and turned over to the defense some of its own documents, including the consular files pertaining to Salah's arrest, interrogation, and imprisonment in Israel, and records of his financial transactions.

Most of the materials essential to the defense, however, were not provided, either because Israel declined to make them available or because the U.S. government itself refused to ask for them. With the approach of the suppression hearing at which Salah would have to show that his statements had been coerced, such documents became even more crucial, and Salah's constitutional right to see the evidence was beyond dispute. Facing yet more stonewalling from the U.S. government, in December 2005 the defense sought a court order directing it to produce the requested documents and to obtain those it did not possess from Israel.¹² Among these were the written guidelines governing Shin Bet interrogations at the time of Salah's arrest, which would show the degree of coercion routinely permitted in security cases. That such rules existed was clear from the court transcript of Salah's military trial in Israel, where one of his main interrogators, while refusing to specify the methods used, stated "There is a framework and it is binding. . . . The interrogation was performed according to GSS interrogation procedures [that] are known and I work according to them."¹³ Salah also asked for the secret Annex II of the GOI's 1987 Landau Commission Report authorizing the use of "moderate physical and psychological force" in interrogations¹⁴; Annex II spelled out precisely what the authorized "moderate physical and psychological force" entailed. Also demanded was evidence regarding Israel's surveillance of Salah starting from his arrival in Israel in mid-January 1993 and the circumstances leading to his arrest on 25 January. (Israel had steadfastly refused to provide such information on the grounds that it was "classified.") Finally, Salah requested the names of the IDF soldiers who had arrested him and driven him around for five hours before delivering him to Shin Bet "in need of medical attention,"¹⁵ as well as the identities of other

persons who had been interrogated by Shin Bet, so that they could be called as witnesses.

Of particular interest to the defense was any information concerning the “bird exercise,”¹⁶ which Salah’s chief interrogator had called the “linchpin of the investigation” for having elicited “the most significant information.”¹⁷ Specifically, the defense sought to know the rewards the birds had been promised in exchange for participating, the identity of their Shin Bet contact person, their authorized methods, and the records charting the exercise. Again, that such evidence existed was shown in the transcript of the military trial, where Shin Bet interrogators, although refusing to provide details, testified that the “speech elicitors’ gambit” took place in stages and that “at each stage we would receive progress reports from different interrogators. . . . The manuscripts from the speech elicitors [birds] . . . [and] the names of the interrogators who did [the bird debriefing] are in our possession.”¹⁸

The prosecution responded by disputing both the relevance of the requested materials and its own obligation to seek them from Israel.¹⁹ Although the government lawyers had obtained what they needed to prosecute Salah from the GOI, they emphasized that the materials being sought by the defense, which were classified, were under the control of a “separate sovereign”—Israel—which was under no obligation to provide them. Indeed, the government claimed that the GOI had not disclosed all the documents even to its own lawyers.

The defense argued that consistent with the U.S. Constitution, the U.S. government could not be allowed to secure documents, witnesses, and other materials from the GOI that were needed to convict Salah and then claim to have no control over material evidence known

to exist that could exonerate him. To allow this tactical maneuvering would open the door to abuse by positioning the government to launder the misdeeds of foreign agents in an American courtroom.

Judge Amy St. Eve, however, refusing to recognize U.S.-Israeli collusion in denying Salah access to critical materials, did not order that *any* of the documents be produced. Instead, she directed the defense to issue formal letters to the GOI requesting the evidence. The defense objected to this cumbersome and futile procedure, but nonetheless complied. No response of any kind was ever received from the GOI.

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SHROUDING EVIDENCE: THE CLASSIFIED INFORMATION PROCEDURES ACT

Meanwhile, the suppression hearing was set for March 2006. The government had already made clear its intention to call as witnesses several of Salah’s Shin Bet interrogators to “testify to Salah’s role in Hamas and activities in moving

money for terrorist activities as obtained specifically through statements he made to them.”²⁰ This move had been welcomed by the defense, which, having failed to obtain the needed documentation, looked forward to the opportunity to expose Shin Bet interrogation methods during cross-examination. However, just two months before the hearing, the government suddenly filed a motion invoking the Classified Information Procedures Act (CIPA) in order to exclude the public and press from the courtroom during the Shin Bet testimony and to severely limit cross-examination. The justification for recourse to CIPA was that “the information to be provided through the testimony of the ISA [Israeli Security Agency] agents is classified under Israeli law.” Since according to the government’s motion the classification extended to Shin Bet’s “work, activities, information and procedures” and included “the information it gathers [and] *the means by which the information is gathered*,”²¹ closing the court to the public was necessary to “protect against unauthorized disclosure of classified information” as well as to assure the witnesses’ safety.

The government asserted that the United States must treat as classified whatever information Israel deems as classified “unless and only to the extent that Israel is willing to waive the classification.”²² The motion further advised that the GOI had “indicated willingness” to waive the classification for Salah and his lawyers on condition that that the public be barred from the courtroom during the testimony. The waiver was not a “blanket” one, however, and the government motion reserved the right to exclude the defense from meetings with the judge to be held *ex parte*, *in camera*, for those parts of the Shin Bet testimony that Israel was unwilling to disclose (the “birds” exercise was specifically cited as an example). The motion also made clear that Israel, which had taken the “unprecedented step” of agreeing to send “operational agents of a sensitive intelligence agency to the U.S. to testify”²³ was bending over backward to produce the witnesses, hinting that the defense’s resistance to the measures could result in the decision’s being reversed.

Remarkably, the government made no attempt to conceal the intent of the motion. “When ISA agents testify in their own country,” the motion read, “the Israeli courts apply secrecy protocols for the purpose of safeguarding secret information. . . . These protocols are similar to what the Government seeks in this motion.”²⁴ In other words, what the U.S. government had in mind was an Israeli-style military tribunal in the heart of Chicago in which the prosecution could use the Shin Bet evidence selectively, without scrutiny by the public or even the defense.

The fact that the record of Shin Bet torture was already widely known and documented—indeed was regularly criticized in the U.S. State Department’s own annual human rights reports²⁵—was of no consequence given the government’s obligation to treat as classified information that had been classified by Israel.²⁶ The defense therefore raised the issue only cursorily. On the other hand, it strongly objected to the government’s invocation of two presidential executive orders—one passed by the Clinton administration in 1995 and another by the Bush administration in 2003²⁷—as the basis for the classification.

In this regard, the defense noted that the executive orders contained provisions that “in no case shall information be classified in order to conceal violations of law or to prevent embarrassment to a person, organization or agency.” In this instance, it was obvious that the violations of law the CIPA classification sought to conceal were Shin Bet’s illegal interrogation methods, and that the entity it sought to protect from embarrassment was the Government of Israel.

The defense also challenged the applicability of CIPA to the Salah case. Passed in 1980 as part of the Carter administration’s effort to facilitate the prosecution of cold war spies, CIPA was intended to reconcile the government’s need for secrecy with a criminal defendant’s constitutional right to a fair trial. CIPA was designed to prevent the form of blackmail known as “graymail,” whereby a criminal defendant threatens to reveal classified information as part of his defense as a means of forcing the government to dismiss an indictment to avoid the information’s disclosure. CIPA sought to sidestep the “disclose or dismiss” dilemma by setting forth procedures for the judge to review classified information before the trial or hearing. By this means, the judge would determine in advance whether or not a defendant was entitled to the information for his defense. If the judge ruled in the affirmative, the government could either declassify the information and give it to the defense or tender unclassified “substitutions” containing the essential information. Only if the government declined these options could the judge dismiss the indictment.

The Salah prosecution, of course, differed in at least one fundamental respect from the typical “disclose or dismiss” situation. It was not the defendant who possessed classified evidence with which to “graymail” the government, but the government that had chosen to indict a case steeped in classified evidence it did not wish to disclose; indeed, the government’s case was *based* on Salah’s “classified” confessions that had been conveniently “declassified” by the GOI for the trial, whereas the information concerning Shin Bet’s interrogation procedures and other documents needed for Salah’s defense remained conveniently classified. Moreover, the CIPA nowhere countenances closed proceedings. A provision authorizing closed trial proceedings was included in an alternative bill proposed at the same time as CIPA, but that bill had been rejected by Congress. The closed courtroom provision survived, however, to be incorporated into the *military rules* governing the use of classified information at court-martial proceedings.

The U.S. Supreme Court has long held dear the importance of “public access to criminal trials [which] permits the public to participate in and serve as a check upon the judicial process—an essential component of self-government.”²⁸ It further holds that the presumption of open court proceedings may be overcome “only by an overriding interest based on findings that closure is essential to preserve higher values.” In Salah’s case, the “higher values” to be preserved, again, were Shin Bet’s systematic interrogation practices. Indeed, the government’s motion invoking CIPA stated openly that the “extraordinary government interest” at stake was Israel’s national security. Specifically, it asserted that disclosure of the evidence would harm “the national security

of not only Israel but also the United States,” because it would “jeopardize the sharing of critical national security information between the two countries.”²⁹

In late January 2006, just over a month before the suppression hearing, a group of twenty-two Chicago community organizations along with the *Chicago Tribune* challenged the government’s motion to close the courtroom during key testimony. In an editorial dated 2 February, the *Tribune*’s public editor, Don Wycliff, explained that his paper’s intervention was not aimed at aiding either Salah or the government, “but [at] ensuring public access to a government proceeding of surpassing importance.”³⁰ Not surprisingly, the petition for an open courtroom was rejected.

SALAH’S SUPPRESSION HEARING

Going into the hearing on 6 March 2006, the government had exactly what it wanted: a courtroom closed to the public and press, witnesses testifying under code names, and curtailed cross-examinations to protect “classified information.” The proceedings involving the Shin Bet interrogators were Kafkaesque. The government refused to call any of the “birds” or their Shin Bet handlers and called only two of Salah’s twelve interrogators. Code-named “Nadav” and “Chaim” and referred to as “Captain” and “Major” throughout the hearing, they were accompanied by GOI and Shin Bet lawyers as well as unidentified security personnel. During the Shin Bet testimony, the courtroom was cleared and the doors and windows were covered with black felt. Nadav and Chaim, seasoned operatives with long experience testifying at military court proceedings in Israel, declared under oath that Salah had not been threatened or coerced but had cooperated freely and voluntarily supplied all his statements. During cross-examination, whenever the witnesses were questioned about their training, authorized methods, other Palestinians they had interrogated, or anything relating to the “birds,” U.S. prosecutors, prompted by the Israeli legal contingent, asserted confidentiality and directed the witnesses not to answer. This happened more than one hundred fifty times in the two-week hearing. With the repeated objections and claims of classification, the defendant’s constitutional right to confront his accusers through cross-examination—which the Supreme Court has called “of critical importance in the truth-seeking process”³¹—was deeply prejudiced.

Nonetheless, bits of valuable information did get through. During the discovery process, the U.S. government, backed by Israel, had maintained that documents pertaining to Shin Bet’s operating procedures were unnecessary because Salah, as a U.S. citizen, would not have been tortured. When faced with a barrage of State Department records and independent determinations by human rights organizations to the contrary, the government fell back on another categorical exception: Salah could not have been tortured because he was “too old.” He was thirty-eight at the time. Once again, the government backed off when confronted with a wealth of evidence documenting Shin Bet abuse of the elderly and infirm. Ultimately, faced with the reality that no

category of Palestinian was exempt from Shin Bet abuse, all these arguments were abandoned. At the suppression hearing, however, the prosecution asserted that Salah had been *specifically* exempted from standard interrogation procedures pursuant to a “special order.” Chaim, who was in charge of the interrogation, testified that he had “received a direct order from the head of the ISA, Yaakov Perry, saying that I should treat Muhammad Salah differently than other detainees, and that in his interrogation we shouldn’t use tools. . . .” When pressed on cross-examination, Chaim acknowledged that he had neglected to communicate the order to others on his interrogation team, and that if the order had not been received the interrogation would have been standard. When Nadav was questioned, he testified that he never saw any special instructions.

Throughout the hearing, the Shin Bet witnesses and prosecution team held lengthy *ex parte* meetings with the judge. During these sessions, the judge presumably heard answers to some of the questions that the witness had refused to answer in the courtroom, but on a number of issues (as the judge later told the defense), the Israelis refused to disclose information even to her. After some nine hours of secret meetings, the judge informed the defense that the answers to the questions posed on cross-examination were classified and would not be disclosed. Instead, the defense was given four nearly meaningless CIPA “substitutions” for inclusion in the final brief on which the judge would make her determination.³² The following is illustrative:

The United States of America, for purposes of the suppression motion regarding statements of Muhammad Salah, does not contest that some, but not all, of the measures defendant Muhammad Salah alleges, were, in certain circumstances, legally available to interrogators of the Israel Security Agency during the period of Muhammad Salah’s interrogation.³³

Denied access to key documentation and full cross-examination rights, the defense was left to prove Shin Bet’s systematic use of torture and coercion through expert testimony. Yuval Ginbar, chief researcher for B’Tselem, the leading Israeli human rights organization in the occupied territories, and Jonathan Kuttab, an attorney and founder of the Palestinian human rights group Al-Haq, both testified that the treatment described by Salah in his affidavit was consistent with the routinized methods used against Palestinian security detainees as documented by their own³⁴ and every other human rights organization having studied the subject, not to mention by the United Nations and the United States. Incredibly, the prosecution challenged the testimony of Ginbar and Kuttab on the grounds that neither was privy to the secret interrogations or the classified military directives to interrogators. In other words, barred from obtaining the best evidence (the Shin Bet’s own guidelines), the defense was faulted for not having seen it.

Psychiatric testimony by Dr. Eyad El-Sarraj, director of the Gaza Community Mental Health Program, who has treated thousands of torture victims,

established that most detainees are “broken” in the first forty-eight hours if they can be kept away from outside influence and deprived of the hope that someone will come to their rescue. El-Sarraj told the court about his own experience being held in solitary confinement by the Palestinian Authority (PA), and how within a matter of hours he believed his “life was over” and “would have signed anything” just to get out of isolation. In the Salah case, it was clear that six days of “intensive” Shin Bet interrogation, threats of administrative detention, and the repeated assurance that “the U.S. has no power to stop us—we control the FBI” was more than enough to extinguish Salah’s hope of rescue by his government.

In addition to expert witnesses, the Salah defense called two Palestinians who had also been interrogated by Chaim. Ahmad al-Batsh, a former Palestinian legislator, and Ribhi Qatamesh, a well-known West Bank attorney, testified via live video from Ramallah about what “Chaim” had done to them during their interrogations. Both men described almost exactly the same techniques that had been applied to Salah.

In its summation, the defense argued that Salah’s 1993 statements to Shin Bet should be suppressed because testimony at the hearing conclusively established that the organization had used coercive methods in Salah’s interrogation, including isolation and refrigeration cells, hoods and stress positions, week-long incommunicado status, sleep deprivation, threats to family, and relay interrogation that continued for almost two months. Moreover, since Shin Bet did not specifically deny using any of these methods, the defense argued that the statements should be suppressed on the basis of the uncontested record.

Turning a blind eye to the well-documented torture record, however, including corroboration of Salah’s treatment in U.S. consular reports, the judge held that Salah’s statements were admissible at trial, marking the first time evidence obtained by Shin Bet methods would be heard in a U.S. court. Judge St. Eve essentially credited the interrogators’ testimony and found that Salah’s five-hour recorded statement on the fifty-fourth day of his interrogation had “ratified” the “bird manuscript,” despite the absence of any witnesses or documentation concerning the bird gambit. The ruling gave American judicial imprimatur to statements obtained under torture as admissible evidence.

ISRAEL AND THE UNITED STATES: THE JOINT VENTURE

The defense had claimed from the beginning of the pretrial process that the case against Muhammad Salah was essentially a “joint venture” between the U.S. and Israeli governments, as evidenced by these governments’ continuing cooperation in denying Salah access to evidence critical to proving his innocence. On 29 August 2006, with scarcely a month left before the opening of the jury trial and no additional documentation forthcoming, the defense filed a motion for a hearing to establish the existence of a U.S.-Israeli “prosecutorial joint venture.”³⁵ Were such a motion to succeed, the court would have to compel the U.S. government to secure the requested materials.

The government had denied accusations of being in a “joint venture” all along, but its actions throughout the process belied its denial. Indeed, “joint venture” was a precondition from the outset: Without Israeli-generated documents and testimony, there would have been no case, and the prosecution could not possibly have gone forward without active U.S.-Israeli cooperation at every step of the way both in terms of securing witnesses and material evidence for the government and depriving the defense of the same. Throughout the pretrial period and almost up to the jury trial, government prosecutors (sometimes accompanied by FBI agents) made at least ten trips to Israel to meet with Israeli intelligence and government officials.³⁶ Already provided with hundreds of classified Israeli documents, government lawyers were given access to witnesses for repeated interviews that would support the government’s case. By contrast, the investigator for the defense team in the West Bank was not permitted by the Israeli authorities to interview witnesses in Gaza or even in a neighboring West Bank town.

In preparation for the suppression hearing, Israeli authorities had threatened to arrest and refused to provide a travel visa to a defense witness (Ribhi Qatamesh) and warned another (Ahmad al-Batsh) that if he left his home in East Jerusalem to testify, he would likely not be allowed to return. Salah’s original lawyer at the Israeli military trial elected not to come to testify in person because she feared the authorities would interfere with her law practice. As noted above, lawyers from the Israeli Justice Ministry were active participants in the open court proceedings, repeatedly directing the U.S. prosecutors when to pose objections and signaling witnesses when to refuse to answer questions during cross-examination, and even in *ex parte* hearings in the back room without the defense.

The U.S.-Israeli “joint venture” long predates Salah’s U.S. trial. Collaboration between U.S. and Israeli security forces began during Salah’s interrogation in Israel. Faced with Salah’s refusal to plead guilty before the military tribunal, Shin Bet interrogators threatened to use their “close connections with the FBI” to have his family arrested in the United States.³⁷ In spring 1995, even after his sentencing, a Shin Bet interrogator known as “Abu Ghazal” repeatedly visited Salah, asking him to answer questions prepared by the FBI, again threatening to have his wife arrested if he refused. When Salah demanded to see the U.S. consul, Abu Ghazal said the consulate had “no clue what is going on” and threatened to have his consular visits stopped altogether. Consul General Edward Abington, apprised of the threat, asked Washington to check with the FBI to see if any of its agents had been in touch with Israeli intelligence regarding Salah. In late May, consular official Kathy Riley reported Washington’s confirmation “that *indeed* the FBI had been up to no good with Salah *again*. (They didn’t have the guts to put it in a front channel?)” Several days later she wrote a follow-up memorandum stating “The FBI admitted they were involved. . . . Their comment: ‘Sorry, we should have talked to the Embassy rather than the Shin Bet.’”³⁸

There is evidence to suggest that close Shin Bet-FBI cooperation on terrorism, and specifically on Hamas, actually *originated in* the Salah

interrogation. As detailed in part I, the U.S. government, including U.S. intelligence, had been extremely skeptical when Israel first publicized Salah's alleged statements that Hamas's terrorism activities were being directed from cells in the United States, dismissing Israel's claims; the FBI assistant director of counterterrorism himself stated that the allegations were intended to divert attention from America's strong stand against Israel's deportation of the 415 Islamists a month before Salah's arrest.³⁹ An important factor in overcoming U.S. skepticism was Judith Miller's 17 February 1993 front page story in the *New York Times*, which basically confirmed Israel's claims asserting that Salah had been cooperating with the investigation in providing information about Hamas's military leadership cadres in the United States and about money flowing from U.S. Muslim charities to the occupied territories to support Hamas terrorism there. It later transpired that Prime Minister Yitzhak Rabin himself had invited Miller to Israel and arranged for her to meet Salah's Shin Bet interrogators and to secretly observe a 30-minute segment of his interrogation on the basis of which she could write a credible story warning of the Hamas presence in the United States.⁴⁰ As a government witness at Salah's jury trial in Chicago, Miller was forthright about the purpose of that visit (and the resulting article): "No one in the U.S. government was believing that . . . the U.S. was an important base for Hamas. . . . American officials assumed that Israel was exaggerating the external terrorist threat coming from the U.S. to justify the mass deportations and to deflect their condemnation." Also at Salah's jury trial, Shin Bet interrogator Nadav mentioned in passing that Shin Bet had "used Judith Miller to influence the FBI." The gambit apparently succeeded, because shortly after Miller's article appeared, the formerly skeptical FBI suddenly took Israel's claims seriously enough to submit 125 written questions to Shin Bet to be propounded to Salah during his ongoing interrogation.⁴¹

The "joint venture" went beyond official government channels to include nongovernmental bodies. The Anti-Defamation League (ADL) often served as a conduit of information between the United States and GOI, while providing the U.S. government with "plausible deniability." The lawyers in the *Boim* civil suit, whose ties to Israel were very close, played a key role in advising Salah's prosecution, particularly with regard to the obstruction of justice charge.

There is also evidence of direct links between the ADL and Shin Bet. For example, whereas the U.S. government repeatedly denied having intelligence concerning Salah's 1993 arrest in Israel, the information turned up in an amicus curiae brief filed by the ADL in 1998 which asserted, citing Shin Bet interrogation reports, that he had been arrested on information obtained from a Palestinian doctor arrested by Israel in December 1992.⁴²

The ADL's possession of highly classified Israeli information purported not to have been shared with the United States raises interesting questions about the circular flow of information involved in the Salah case in particular and

There is evidence to suggest that close Shin Bet-FBI cooperation on terrorism, and specifically on Hamas, actually originated in the Salah interrogation.

“terrorism” cases in general. Lines are murky, but the fact that Israel had been complaining to the United States for some time before Salah’s arrest that U.S.-based Muslim charities were “terrorism funders” and that the U.S. government (and the FBI) dismissed these accusations until they conveniently appeared in the alleged statements of a Palestinian American security detainee, suggest that Israel’s source for U.S. domestic “intelligence”—and more specifically about which U.S.-based organizations to “go after”—may have been U.S. groups associated with the pro-Israel lobby. Salah’s taped “confession,” much of which had been dictated by the “birds” under the direction of Shin Bet,⁴³ contained specific names of charities (such as the HLF) and of individuals (such as Musa Abu Marzuq) that had previously not been identified as requiring scrutiny. Replete with names and alleged acts, the transcript of the five-hour tape was handed over to the U.S. government after Salah’s trial in Israel and became the blueprint for multiple prosecutions and arrests in the United States throughout the 1990s and beyond.

DISINFORMANT MUSTAFA AND THE “MATERIAL SUPPORT” CHARGE

The purpose of count II, besides situating Salah’s “crimes” on U.S. soil and making the case seem more current, was to link Salah to Hamas after its 1995 designation as a terrorist organization. The charge was based entirely on the allegations of a single person, a longtime FBI informant who went by the alias “Jack Mustafa,” whose veracity the FBI itself had questioned.⁴⁴ Assigned to “be-friend” Salah upon his return to the United States in 1997, Mustafa was soon producing extravagant reports of Salah’s involvement with terrorist training camps in the American heartland, meetings with the Hamas military high command, and advice and assistance in terrorist plots in Israel. In 2000, however, Mustafa was removed from the case when the Clinton administration decided to close the investigation for lack of credible evidence.

When the government reopened the Salah case in 2002, Mustafa was put back on the job. With the government clearly intending to rely on him as a witness, some FBI supervisors expressed grave concerns about the integrity of his information in a series of internal memos in 2003. Seeking to corroborate information supplied by Mustafa about another of Arab American target, FBI agents had caught him in a blatant lie; further investigation revealed that his story had been invented from scratch. The final FBI memo in the exchange, pointedly noting that Mustafa’s fabricated intelligence about the other individual was “eerily repetitive” of his claims concerning Salah, ended with the recommendation that “the asset’s reporting not be used in further FBI investigation unless independently corroborated. Corroboration by technical means is highly recommended.”⁴⁵

The FBI put a wiretap on Salah’s home and work telephone lines. It also put a wire on Mustafa and had him meet with Salah on numerous occasions. In none of the recorded conversations, however, either on the telephone or with Mustafa, was there any evidence of illegality or anything that corroborated

Mustafa's claims. The Bush Justice Department nonetheless pressed full steam ahead. In 2004, it selected one of Mustafa's less preposterous claims for presentation to a grand jury, which returned an indictment charging Salah with "material support for terrorism." The specific charge was that Salah had recruited Mustafa in October 1999 to "scout specific locations in and around Jerusalem for suitability as targets for Hamas terrorist attacks." Significantly, there were no references to this trip in the FBI's voluminous Mustafa debriefing reports turned over to the defense in the discovery process. Indeed, there was a complete absence of FBI reports on interviews with Mustafa during and in the immediate aftermath of the alleged 1999 trip, and the details of the "scouting" expedition appeared for the first time after the Justice Department returned Mustafa to the case in 2002. The claim that Salah, who had lived his entire adult life in the Chicago area, would send someone who himself had lived in the United States for the past twenty years on a scouting expedition to identify potential bomb locations in Jerusalem was patently absurd.

In the three-count indictment against Salah announced in August 2004, Mustafa was not identified by name but as "Individual A." Members of the local Muslim community were able to surmise, however, that "Individual A" was Mustafa, and anonymous communications began to circulate warning persons whom he had "befriended" about his activities on behalf of the FBI. In early 2006, as preparations for trial were well underway, the prosecution reacted vigorously to complaints (apparently from Mustafa) about the communications by moving to revoke Salah's bond and convening another grand jury. Salah and his seventy-five-year-old brother were subpoenaed and accused of witness intimidation. When the government failed to produce any evidence linking Salah to the anonymous letters, or any evidence that Mustafa was directly threatened (or even that such warnings were illegal), the judge denied the motion to revoke Salah's bail, and no indictments were returned by the grand jury.

As the case progressed to trial, and the court refused to dismiss the indictment's count II based on the unreliability of the Mustafa evidence, the defense demanded a record of all the rewards and incentives the government had offered Mustafa for his informing activity, the briefing documents, and the FBI files of the 1997–2000 investigation of Salah and of any other investigation that had employed Mustafa.⁴⁶ It also asked for Israeli intelligence files on Mustafa. Then, on the very eve of trial, faced with motions for disclosure of information known to exist and with the judge poised to grant them, the government suddenly dismissed the material support for terrorism charge. Though refusing to disclose its motivations, the government declared that it would not be calling Mustafa as a witness.⁴⁷

With count II gone, two counts of the original indictment remained: the RICO charge, and the obstruction of justice charge.

THE TRIAL BEGINS

Jury selection began on 6 October 2006. The defense went into the trial with a number of disadvantages. Besides having failed to obtain official

documentation spelling out Shin Bet's authorized interrogation methods, its ability to call witnesses was limited. Virtually all the witnesses relevant to Salah's statements to Shin Bet were in Israel, and it was the U.S. government (in collaboration with Israel) that decided who would be allowed to appear. Once again, only two of Salah's interrogators were called. The suppression hearing had functioned as a kind of "dry run" or "dress rehearsal" for the trial. Nadav, personable and soft-spoken, was apparently seen as having performed well and was retained for the trial, but chief interrogator Chaim may have been judged unlikely to have jury appeal and was replaced by the more affable Benny, whose role in the interrogation had been relatively limited. The defense had wanted to call all the interrogators, at the very least those closely involved in the "bird exercise," as well as some of the birds themselves, but this was denied.

Judges always have the power to veto witnesses whose potential testimony is deemed "not relevant," but Judge St. Eve exercised this prerogative rather liberally with regard to the defense's requests in the Salah case. Thus was the testimony of the two Palestinians who had undergone Shin Bet security interrogations by the same team that handled Salah deemed irrelevant. Similarly El-Sarraj, who had given riveting testimony at the suppression hearing on the impact of prolonged isolation on a detainee, was not authorized to reappear, and it was only after strenuous written protest that world-renowned torture expert Metin Basoğlu was permitted to testify on the psychological effects of interrogation on breaking a defendant's will. The government could also refuse to disclose the identity of potentially important witnesses for the defense. For example, responding to the prosecution's efforts to link Salah to "terrorist training camps" in the United States, the defense fought hard, without success, to discover the identity of an operative whose name had been redacted from a key FBI memo. The operative in question had infiltrated a so-called "terrorist training camp" in Milwaukee and reported afterward that it was like a family picnic with no discussion of violence at all.⁴⁸

The government again invoked CIPA for the trial, obliging Israel to extend its "classification waiver" to the jury. As at the suppression hearing, the courtroom was closed to the press and public during the testimony of Shin Bet agents. Although this time there was no visible Israeli presence in the courtroom in the form of Israeli lawyers signaling U.S. prosecutors whether or not a witness should answer this or that question, the defense's right to cross-examination remained tightly controlled.

On the other hand, prior to trial the defense had succeeded in persuading the judge to revisit the CIPA stipulations granted during the suppression hearing, which had been very far from meeting the CIPA requirement of "provid[ing] the defendant with substantially the same ability to make his defense as the disclosure of the specific classified information." The revised stipulations, while hardly a substitute for full cross-examination, represented an improvement over the earlier ones. Thus, instead of the meaningless admission that "some, but not all" of the torture measures Salah had claimed "were, in certain circumstances, legally available to [Shin Bet] interrogators," the government was forced to

specify that Shin Bet was authorized to use hoods, threats of violence, sleep deprivation, shackling to small chairs, and slapping, and that these methods could be used regardless of the detainee's age or citizenship. Another stipulation acknowledged that Salah was placed in an unmonitored cell with ten to twenty prisoners who received reduced sentences, better prison conditions, and/or money for their participation in the "bird exercise." The government also conceded that Israeli interrogators are "trained in methods to maneuver a person into providing information." There were five stipulations in all.

CONFLICTING NARRATIVES

The thrust of the government's main case, the RICO charge, was to depict the " Hamas enterprise " as a racketeering outfit engaged in murder, kidnapping and hostage taking, maiming or injuring, money laundering, passport fraud, and obstruction of justice, and then to link Salah to this "enterprise" and its violent acts by proving that he was a member of Hamas and part of a decade-old conspiracy to support the organization. From the prosecution's standpoint, the great merit of conspiracy law is that a person's membership in the organization in question is sufficient to show guilt of conspiracy. Moreover, since Salah was charged with RICO *conspiracy* and not *substantive* RICO, the government was not required to prove that he had in fact committed any of the offenses—or even that the offenses had actually been committed—but merely that he agreed that such offense could be committed to further the goals of the "enterprise."

Despite the indictment's unprecedented political language and allegations, the prosecution initially took the position that all evidence about the Israeli-Palestinian conflict was irrelevant and should be barred from the trial. There was no dispute that funds from bank accounts associated with Musa Abu Marzuq had been transferred to Salah's bank account, or that Salah had travelled (on his own passport) to the West Bank and Gaza to deliver funds to individuals there. But the defense argued that the jury needed to understand the humanitarian situation in the occupied territories in order to determine Salah's intent and motivation. In this instance, the court ruled in favor of the defense: the jury's need to determine Salah's intent compelled the government to allow the jury to hear evidence about the history and conditions of the Palestinian people.

The government claimed not to take sides in the Palestinian-Israeli struggle, but the narratives of the conflict and the role of Hamas presented by the prosecution and the defense could not have been more different. For the prosecution, Hamas was a ruthless Islamic fundamentalist terrorist operation driven by hatred of the Jewish people and committed to the destruction of Israel and the derailment of the peace process, with its network of charities being no more than a way to funnel money to its terrorist activities. For the defense, Hamas was a legitimate part of the Palestinian national movement for self-determination while its network of *zakats* provided desperately needed social services to Palestinians living under a harsh illegal military occupation whose conditions had dramatically worsened during the 1987–93 intifada.

Dr. Matthew Levitt, a senior counterterrorism analyst for the Treasury Department's Office of Foreign Asset Control (OFAC)⁴⁹ and author of a book on Hamas, presented the government view of Hamas. Though Levitt knows no Arabic, has spent very little time in the occupied territories, and did not interview Hamas leaders or rank and file members,⁵⁰ he is a frequent expert witness on Hamas on the U.S. terrorism prosecution circuit.⁵¹ Levitt's account focused almost entirely on the impact of terrorism on Israelis. He showed a color chart of Hamas suicide bombings with the dates (all after Salah's arrest) and the number of victims; he never mentioned the far more numerous Palestinian deaths by Israeli military raids, or any Israeli act that might have precipitated the Hamas attacks (though he did acknowledge under cross-examination that the first such attack had been a response to the massacre by an Israeli settler/army reservist of over two dozen Muslims praying at a Hebron mosque). Levitt's discussion of Hamas's goals relied entirely on its 1988 "charter," ignoring the numerous subsequent policy statements issued by the movement's leadership that directly contradict it. Israel's illegal occupation of the territories was also absent from Levitt's account, though in cross-examination he conceded that the living conditions of Palestinians under occupation were deplorable and that they were in real need of humanitarian assistance. He further conceded (again under cross-examination) that the first intifada was a nonviolent grassroots uprising against the occupation.

The witness for the defense, Dr. Khaled Hroub, an independent Palestinian researcher associated with the Middle East and Islamic Studies center at Cambridge University and the author of two acclaimed books on Hamas, presented a very different picture. Though not an apologist for Hamas, he has extensively interviewed many of its leaders and is intimately familiar with its workings. He emphasized the Hamas movement in its totality, the vast network of essential social services and charities and their separation from military and political arms, and provided a broad context for its rise. Hroub also emphasized the evolution of Hamas's views, sharing with the jury official statements and communiqués issued after 1988, including one as early as 1994 that expressed Hamas's willingness to agree to a joint cessation of violence with Israel.

The government, playing on common American stereotypes, suggested that Hamas's opposition to Oslo was in itself indicative of extremism, if not terrorism. (Hroub devoted part of his testimony to showing that opposition to Oslo went far beyond Hamas, and that it drew much of its strength from unbridled Israeli settlement expansion, land confiscations, and the widespread Palestinian conviction that the peace process was part of an Israeli plan to consolidate and institutionalize the occupation.) The government spent days presenting evidence secretly recorded by the FBI in 1993 at a three-day conference of Palestinian (mainly Hamas) activists in Philadelphia to discuss ways of conveying to the American public the dangers of the Oslo process. The government's attempt to equate terrorism and opposition to Oslo was seriously undermined by its own witness. During cross-examination, FBI special agent Robert Miranda (the case agent in charge of the Dallas-based HLF prosecution) admitted that

not once in three days of continuous surveillance had any conference participant mentioned violence or any illegal activity whatsoever. Indeed, what the jury heard made clear that the conference participants' main concern was that the American people, convinced that "peace had been achieved," would turn their attention away from the daily suffering of the Palestinian people.

The prosecution's attempt to depict Hamas as a gangland-style organization also suffered setbacks at trial. The government highlighted a 1996 official communication from Hamas asking the U.S. government not to comply with Israel's request to extradite Abu Marzuq, who had been arrested in the United States, to Israel.⁵² The prosecution's witness in this matter was Paul Matulic, foreign policy adviser to Senate Judiciary Committee Chairman Orrin Hatch, who had been the one to receive the official communication from Hamas. Matulic did not testify as the government expected, however. He stated that he did not consider the letter to be a terrorist threat. In his experience, terrorists did not provide their names, addresses, and phone numbers, nor would they ask the United States "to kindly consider" their proposals. Moreover, Matulic testified that the letter was "professional in tone" and made clear that Hamas was not opposed to the United States, but that its "struggle has always been confined to resisting the Zionist occupation of Palestine."

SALAH AS "HAMAS MILITARY COMMANDER"

In addition to demonstrating the terrorist (or racketeering) nature of Hamas, the government had to link Salah to Hamas's alleged terrorist acts. Specifically, the prosecution sought to present Salah as a "high-level military commander" who delivered money to Hamas for the purpose of buying arms and rebuilding military cells. The primary source of these allegations was Salah's coerced statements to Shin Bet, but evidence was also provided by Shin Bet witnesses at trial.

To demonstrate Salah's high status within the Hamas military hierarchy, the prosecution leaned heavily on Shin Bet's claim that a week into interrogation Salah had revealed where the body of a missing IDF soldier, kidnapped and presumed killed by Hamas in 1989, had been buried. Both Nadav and Judith Miller testified about this at trial—Miller in fact had reported in her February 1993 article in the *New York Times*, written just weeks after Salah's arrest, that the head of Shin Bet had told her that Salah must be a Hamas military leader because he had identified a place near Hebron as the soldier's burial site. In her testimony at trial, Miller also mentioned that Shin Bet had shown her a map drawn by Salah of the location. Nadav likewise mentioned the map, but he testified that Salah had said the body was buried by a well in Yavne, south of Tel Aviv, hours away from Hebron. The government made much of Salah's supposedly inside information (How, it was argued, could anyone but a high-level military

When the prosecution produced the map, which consisted of three circles and a dot labeled "well," allegedly drawn by "military commander" Salah, the jury laughed out loud.

commander have access to it?) even though efforts to locate the body with it predictably led nowhere. In fact, the body was finally recovered three years later near a garbage dump outside Tel Aviv on the basis of a detailed map supplied to Israel by the PA. When the prosecution produced the map allegedly drawn by “military commander” Salah, which consisted of three circles and a dot labeled “well,” the jury laughed out loud.

THE “CONFESSION”: VOLUNTARY OR COERCED?

In the absence of corroborating testimony or credible witnesses, the charges against Salah, once again, depended on the credibility of his confession and whether or not it had been coerced. Shin Bet interrogators Benny and Nadav assured that it had not been, and Judith Miller testified that during the half hour she secretly observed Salah being interrogated in Arabic by good cop Nadav, the interaction between them had been cordial and Salah had seemed “jaunty and combative.” Nadav, totally contradicting his own testimony at the suppression hearing,⁵³ said there had been a “special order” that Salah (despite his supposed status as a military commander) was to be treated differently, but no supporting documentation or corroborating witness were produced. Nadav also asserted that Salah had been allowed to go “at his own pace” (though Benny spoke of waking him repeatedly in the night for interrogation). Some of the statements of both Shin Bet witnesses strained belief, for example Benny’s claims that the “good cop/bad cop” routine existed only on television and that there was no such thing as the “shabeh” position,⁵⁴ and Nadav’s insistence that a defendant’s “waiting” in the context of interrogation meant sitting in a private room in a regular chair without being handcuffed and being able to get up and open the window. Neither Benny nor Nadav professed to know anything about the bird exercise.

Because of CIPA constraints, the defense was unable to hammer away at the Shin Bet witnesses’ credibility during cross-examination, but testimony by B’Tselem’s Yuval Ginbar, drawing on ten years’ experience documenting Shin Bet tactics—not only through interviews with Palestinians but also from Shin Bet testimony at Israeli military tribunals and admissions by the Israeli government before the High Court—was overwhelming. Ginbar testified extensively about the “bird” exercise—a common Shin Bet technique—and explained how interrogations, which had been completely systemized and where the practices described by Salah were absolutely routine, had been carefully designed to break resistance. Ginbar also testified that from his own experience “lying was the norm” in Shin Bet, and that the Landau Commission’s 1987 finding that Shin Bet routinely committed perjury with the sanction of its supervisors had been corroborated by subsequent GOI reports.⁵⁵ For its part, the defense was able to present highly redacted versions of State Department telegrams and correspondence that showed that Salah had consistently complained of torture from the start, and that consular officials themselves believed he had been tortured.⁵⁶

In arguing that Salah's statement had been voluntary, the government made much of the transcript of the five-hour tape-recorded session in which Salah, with prodding and encouragement from good cop Nadav, had essentially read the "bird document" aloud.⁵⁷ In the taped transcript, Salah had said to Nadav, "You are my friend," and had even joked with him. For the prosecution, the "friendly" relations of "trust" between Nadav and Salah evidenced in the tape, supplemented by Miller's testimony, constituted proof that the statements could not have been coerced and that torture had not been used on Salah.

This is where the testimony of Dr. Metin Basoğlu, chief of Trauma Studies at University of London's Institute of Psychiatry, came in. Widely considered to be the world's foremost researcher on the subject of torture and psychology, Basoğlu explained that Salah's bravado and joking stance while making his statement was the common reaction of a broken man desperately trying to assert some control. He also explained at some length the devastating effectiveness of the "good cop/bad cop" routine in psychiatric terms, clarifying the confused and complex feelings of dependency and gratitude the "good cop" elicits in the detainee.⁵⁸ Basoğlu shared the findings of his study based on interviews with hundreds of torture survivors around the world who had been asked to rate the mental distress caused by various forms of torture. The results established that psychological manipulation, sleep deprivation, nudity, forced stress positions, blindfolding and hooding, threats of violence to self and others, and mockery and verbal abuse—all standard Shin Bet practices at the time of Salah's interrogation—*caused at least as much if not more* distress than physical torture. When published to acclaim just two months after his testimony,⁵⁹ Basoğlu's study severely undermined U.S. Defense Department and U.S. Justice Department position statements, issued in the aftermath of human rights abuses by the U.S. military at Guantanamo Bay, that argued for a definition of torture that would stop just short of acts causing severe *physical* pain. Significantly, the prosecution declined to cross-examine Basoğlu.

MATERIAL EVIDENCE?

One of the most striking features of the prosecution's case was the virtual absence of material evidence. Reference was made to surveillance photos of Salah prior to his arrest; none was shown. Reference was made to timing devices found in Salah's home; none was produced. What the government did have was reams of Salah's bank records detailing hundreds of transactions between 1989 and 1993. These documents, however, far from proving Salah's guilt, gave the defense the opportunity to emphasize yet again that the activities for which he was being tried had been completely legal and above-board at the time. The utter transparency of the records proved beyond doubt that this was no money laundering operation—there were no aliases, no hidden accounts under other names or "front organizations," no circuitous routings, but straightforward transfers, many from accounts of Abu Marzuq (under his

own name) to Salah's account. The government tried to suggest that the fact that Abu Marzuq, who received much of the money from foreign donations, was the main source of the funds going into Salah's account in itself proved that the funds were destined for military/terrorist uses. The defense argued that Abu Marzuq, a legal U.S. resident at the time, was living openly as the political head of Hamas and as such was responsible for a movement most of whose budget went to cover its vast social services and *zakat* networks. The prosecution was unable to produce any credible evidence that any funds given to the charities were ever used for any but charitable purposes.

The prosecution also inferred undercover dealings and illegality from Salah's resort to money changers rather than banks in the occupied territories. To make the point, it called as witness a Chicago resident who had a money-changing business in Gaza with his brother and who had been there at the time of Salah's 1993 trip. Though a government witness, the man explained that it was impossible to wire money to the territories because all banks were under Israel control and the money would be confiscated. For the same reasons, he said, it was too risky to physically transport it across borders, leaving anyone wanting to help alleviate the terrible poverty in the occupied territories no choice but to go through money changers.

If the government's evidence linking Salah to Hamas military activities was unpersuasive, to say the least, there was not a shred of evidence of any contact between Salah and any branch of Hamas after his return to the United States in 1997. The government had dropped the Mustafa charge, so the defense was unable to introduce the fact that Salah had been the subject of a far-reaching investigation and thus under constant surveillance from the time of his return. In its closing arguments, however, the defense was allowed to allude to the surveillance and wiretapping to emphasize that despite this the government had found no evidence of any involvement with Hamas since it had been declared a terrorist organization.

OBSTRUCTION OF JUSTICE: THE *BOIM* INTERROGATORIES

Indeed, the only link between Salah and Hamas since 1993 was in the above-mentioned *Boim* civil suit filed in May 2000, where Salah was named a defendant. In that case, Salah⁶⁰ and seven U.S. Muslim organizations were sued for \$600 million in damages for the 1996 killing attributed to Hamas of David Boim on the grounds that their support for the *zakats* funded Hamas terrorism. Salah should not have been part of this case at all, since he could not possibly have engaged in any funding activities for more than three years before the shooting, having been in Israeli prison since January 1993. In fact, the real agenda driving the case was to bankrupt the U.S. Muslim charities, to deter financial contributions to these charities, and to lay the ground for future criminal prosecutions.⁶¹

Salah, like the other defendants in the *Boim* suit, did not have to appear in court but was required to answer in writing the questions—called

“interrogatories”—posed by the lawyers. The twenty-one interrogatories had no relation to the Boim murder and virtually nothing to do with material support. Salah was asked, for example, to list every meeting he had ever attended that addressed the issue of Palestine, “specifying in each case the subject involved and the names of all others in attendance at the occasion or event.” Although the Boim lawyers had unrestrained use of subpoena power to obtain all of Salah’s bank records, they demanded that he list all of his “annual receipts and expenditures from 1 January 1989 to the present giving a detailed description of each item.” He was also asked to list every organization to which he had ever belonged and all documents he had “authored,” an apparent attempt to trick him into characterizing his statements to Shin Bet as having been voluntary.⁶²

Salah’s civil lawyers mounted strenuous objections to the interrogatories on the grounds that they constituted a “witch hunt” and a “fishing expedition” calculated to intimidate their client. Nonetheless, Salah, in keeping with his lawyers’ advice, provided limited answers, each of which was prefaced by the statement “over objection, I’ll give some answers,” which automatically invalidated the answers for use in the suit. Had the Boim’s lawyers really needed Salah’s answers to the interrogatories for the purposes of their suit, they would have filed a motion to compel more complete answers. But they did not. Instead, they took the incomplete answers to the Justice Department and showed Bush administration prosecutors how they could be used in a criminal case against Muhammad Salah.⁶³

For the jury to be able to properly evaluate the obstruction of justice charge, it needed to know the forces at work behind the *Boim* suit and the illegitimate nature of the interrogatories. The defense had hoped that the architect of the case, Nathan Lewin, would be the government’s chief witness, since given his openly held views it was safe to assume that the jury would understand from the cross-examination the precise nature of his agenda. For example, in 2002 Lewin recommended before the Senate Judiciary Committee that any funds seized by the U.S. government from Muslim charities should go to pay private lawyers (like himself) who sue the charities (irrespective of the outcome) and that the government be required by law to cooperate with the lawyers bringing lawsuits against alleged terrorism funders.⁶⁴ Lewin had also called for the execution of the family members of suicide bombers,⁶⁵ and accused the Clinton Justice department of “selective prosecution and fomenting terrorism” when it refused to extradite, try, and seek the death penalty for David Boim’s killer (convicted by the PA) on the grounds that the evidence against him had been obtained by torture.⁶⁶ The government apparently realized the dangers of allowing Lewin to testify, however, and did not call him. Deprived of the opportunity to cross-examine Lewin, the defense tried to call professor Norman Finkelstein, a well-known academic and author of numerous books on the Israel-Palestine conflict and the Israeli lobby, to tell the jury about the power and political motivations behind the *Boim* lawsuit. But the prosecution challenged Finkelstein’s expertise and the relevance of his potential testimony, and

the judge agreed, so the jury was given no evidence that could have clarified where the *Boim* case fit into the rest of the case.

THE VERDICT

Throughout the three-month jury trial, the Chicago Arab-American and progressive communities turned out in unprecedented numbers to show support for Salah and his codefendant Ashqar. Salah being a longtime Chicago area resident, his case especially galvanized the local community. Initially, however, many Arab Americans were reluctant to attend hearings, deterred by the two separate security checks (at the courthouse and the courtroom entrances) and especially by the mandatory scan of driver's licenses of everyone seeking to observe proceedings in high-security cases. Once the jury trial began and it became clear that the defense was managing to present a piece of the Palestinian narrative and that issues were being debated that rarely got a hearing, the situation changed. People began forming long lines early in the morning to get seats, and additional overflow courtrooms were opened where the proceedings were shown on closed circuit television. Some community members approached defense lawyers with tears in their eyes, expressing thanks for "speaking for us," for "telling our story."

Closing arguments were presented in mid-January 2006. The jury deliberated for two weeks. When the verdict acquitting both Salah and Ashqar of all terrorism-related charges was read on 1 February 2007, the explosion of joy in the courtroom was such that the guilty verdict for obstruction of justice seemed to go unnoticed. With regard to Salah, the defense never knew which interrogatory answers the jury found obstructive,⁶⁷ and in any event the split verdict was very probably the result of a compromise among jurors to avoid a hung jury. Indeed, several jurors who attended the Salah's later sentencing "unofficially" informed the defense that this was the case.

The day after the verdict, banner headlines in both major Chicago dailies trumpeted the victory. "Two Found Not Guilty of Supporting Hamas: Split Verdict Seen as Setback for the Bush Administration," announced the *Chicago Tribune*. Quoting Salah's first words after the verdict, a front page *Chicago Sun Times* banner headline proclaimed, "We Are Not Terrorists" and showed members of the Muslim community kneeling in prayer in front of the federal courthouse. Statements of support and solidarity flooded in from around the world.

The month after the verdict, however, the government, ignoring the acquittal on terrorism charges, demanded that Salah be given a ten-year sentence for his *Boim* interrogatory responses, arguing that they had been "calculated to protect Hamas." (The jury had never made such a finding.) Manipulating the U.S. sentencing guidelines, which judges are required to consider among many other sentencing factors, the government insisted that "terrorism enhancement" be applied and that the judge must not be bound by the acquittal since judges are entitled to apply in sentencing a less onerous standard of guilt than the "proof beyond a reasonable doubt" required of a jury. In other words, the

government was urging the judge to sentence Salah as if he had been convicted of the terrorism charge.

The community rallied in support of Salah, submitting more than 600 letters to the court setting forth the exemplary life and extraordinary record of service to the community of this man who had grown up in the Qalandia refugee camp in the West Bank and come to the United States when he was seventeen. Many letters described him as the “conscience of the community,” a role model and inspiration who gave hope and guidance to young people, encouraging their education. The letters detailed his kind and gentle nature and his role as a mentor and friend to several generations of young Arabs, teaching them English, Arabic, math, and Islam. Other letters described how as a small grocer he gave credit and free food to the needy and refused to sell alcohol, pork, or pornography in his store. Letters also told of his volunteer work at his mosque, where he acted as janitor and caretaker and ran programs for youth. Several people described how he prepared the deceased for Muslim burial. Many praised the jury and thanked them for restoring their belief in justice. All the letters urged the judge not to send Salah to prison but instead to return him to the community so that he could continue to serve.

The defense maintained that Salah should not be sentenced to prison because of his record of service, lack of criminal history, the needs of his five children, the minor nature of the conviction, the punishment he had already endured (and would continue to endure) by virtue of his OFAC “terrorist designation,” and his previous five-year prison term in Israel. Nonetheless, on 11 July 2007, the judge sentenced Muhammad Salah to twenty-one months in prison, a \$25,000 fine, and one hundred hours of community service.⁶⁸ Although far lighter than what the government asked for, the sentence was unwarranted. Indeed, Salah’s sentence, when juxtaposed with the contemporaneous presidential pardon of Scooter Libby, convicted of lying to a federal grand jury and three other counts of obstruction, exposes the politically motivated nature of the entire prosecution. Still, what has been shown in the cases of Muhammad Salah and Abdelhaleem Ashqar, of Sami Al-Arian in Tampa, and the hung jury in the HLF case in Dallas, is that American juries are not willing automatically to convict Palestinians for supporting resistance to occupation because they realize that these defendants do not pose a threat to American soil. These cases also show that when the nature of the conflict is exposed, juries appear to question America’s unwavering support for Israel.

At the end of trial, the lead prosecutor—before he fought tooth and nail to obtain a maximum sentence for Salah—called Salah’s lawyers to congratulate them on a verdict he acknowledged to be a victory for the defense. Without doubt, the acquittal on terrorism charges had been a stunning blow for the government, a clear defeat for the Bush Justice Department’s plan to join with Israel in targeting those in the United States who give aid and support to people living under occupation.

Yet at the same time, the government also made important gains in terms of breaking ground for future prosecutions. The Salah prosecution was the first

where a coerced confession—certain to be an important element in a post-9/11 world—was admitted in a U.S. court; furthermore, the fact that the coerced confession was made on foreign soil laid the ground for extraordinary renditions. The case pioneered the use of CIPA for allowing secret evidence and can serve as a model for establishing prosecutorial joint venture that previously—coupled with the government’s failure to produce evidence to which Salah was entitled—could have been grounds for dropping the indictment based on Israeli-generated documentation and testimony.⁶⁹ The government also used the case to manipulate the civil discovery rules so as to create the basis of an obstruction of justice criminal indictment, the likes of which had never before been seen in federal court, and marked the first time that anyone had ever been charged criminally for providing incomplete or false answers to interrogatories in a civil case.

In short, the Salah case established precedents which, unless challenged or invalidated by the Supreme Court, will be available for prosecuting terrorism cases in the future if and when—under whatever administration—the government chooses to use them. And that was mainly, or largely, what this case was about in the first place. It is doubtful that it was ever really about a soft-spoken, big hearted former grocer from Chicago by the name of Muhammad Salah.

NOTES

1. Remarks by the President, Secretary of the Treasury O’Neill, and Secretary of State Powell on Executive Order, the White House, Office of the Press Secretary, 24 September 2001, quoted in “Collateral Damage, How the War on Terror Hurts Charities, Foundations, and the People They Serve,” Washington, DC: OMB Watch (July 2008), p. 9.

2. “Collateral Damage,” p. 19 n. 54.

3. Indeed, even the *Boim* civil suit had been languishing before 9/11. The defendant organizations’ lawyers appealed the case on constitutional grounds in the hopes of having it thrown out of court, but 9/11 occurred two weeks before the scheduled hearing. The Justice Department immediately filed an amicus brief supporting the *Boim* lawyers’ theory that these organizations should be considered “aiders and abettors” of terrorism, and on 5 June 2002 the Seventh Circuit Court of Appeals agreed, allowing the lawyers to proceed full force in their attempt to crush the defendant organizations. See Michael E. Deutsch and Erica Thompson, “Secrets and Lies: The Persecution of Muhammad Salah (Part I)” [henceforth referred to as “part I”], *JPS* 37, no. 4 (Sum. 2008), p. 53.

4. In May of 1999, the High Court ruled that most of Shin Bet interrogation methods, including sleep deprivation, hooding, and the use of small, uneven chairs during “waiting” (all practices used in Salah’s interrogation) exceeded their lawful authority. The Court concluded that a “reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading treatment whatsoever . . . these prohibitions are absolute.” *In re: Public Committee Against Torture, H.C. 5100/94 et al.*, Israel High Court, September 1999.

5. On 1 August 2002, responding to a request from White House Counsel (then-Judge) Alberto R. Gonzales for guidance on the legality of interrogation methods that do not violate U.S. prohibitions on torture, Deputy Assistant Attorney General John Yoo wrote what came to be known as the “torture memo.” Yoo’s 5-page memo emphasized that to constitute torture, acts must be “*specifically intended* to inflict severe physical or mental pain or suffering” (emphasis in original) and that the infliction of such pain must be the “precise objective” of the exercise, thereby giving

interpretive leeway to all but “rogue prosecutors” of torture defendants.

6. The government was unable to bring Abu Marzuq, who was living in Damascus, to trial, but Ashqar, as noted in the introduction, was Salah’s codefendant at trial. Despite Abu Marzuq’s absence, all the court documents are headed “*United States of America, Plaintiff, v. Mousa Mohammed Marzook, et al., Defendants.*” The case number is 1:03-cr-00978, U.S. District Court for Northern District of Illinois (7th District), where transcripts of active hearings and jury trials are filed.

7. See part I, p. 41.

8. *United States v. Sablotny*, 21 F3d 747, 750 (7th Cir. 1994).

9. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

10. Pre-Hearing Memorandum in Support of Muhammad Salah’s Motion to Suppress, 17 October 2005.

11. Affidavit of Muhammad Salah filed in support of Muhammad Salah’s Motion to Suppress, 17 October 2005.

12. Defendant Muhammad Salah’s Motion for Material Discovery Necessary for Evidentiary Hearing on Motion to Suppress, 12 December 2005.

13. Transcript of 1993 military tribunal in Israel, turned over during the discovery process and in the possession of defense counsel.

14. The Landau commission, an official Israeli government body convened to look into systematic lying by Shin Bet agents before military tribunals, authorized moderate coercion in interrogations. The theory was that since the perjury had been committed in order to cover up the widespread use of torture, allowing some coercion would enable interrogators to testify truthfully in the secret military proceedings.

15. See part I, p. 44.

16. The “bird exercise” refers to Salah’s ten-day incarceration incommunicado in an unmonitored cell with more than a dozen hardened Palestinian prisoner-collaborators (known as “birds”) who had been coached by Shin Bet to extract a made-to-order confession in writing. See part I, pp. 46–49.

17. See Defendant Muhammad Salah’s Post-Hearing Brief in Support of His Motion to Suppress Statements, March 2006 [no specific date given].

18. Transcript of the 1993 military tribunal, in the possession of defense counsel.

19. Gov’t Response to Salah’s Motion for Material Discovery Necessary for Evidentiary Hearing on Motion to Suppress, 5 January 2006.

20. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA) and for Application of Other Measures to Ensure Witness Safety, 5 January 2006, p. 2.

21. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), p. 3 (emphasis added).

22. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), pp. 5–6.

23. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), p. 24.

24. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), p. 5.

25. The section on Israel in the State Department’s 1993 Country Report on Human Rights notes that “As in 1992, international, Israeli, and Palestinian human rights groups and diplomats continued to provide detailed and credible accounts of widespread abuse . . . of Palestinian and Palestinian-American detainees, both immediately after arrest and during interrogation. According to credible reports, hooding, forced standing or tying up in contorted positions, prolonged exposure to extreme temperatures, blows and beatings, confinement in small space, sleep and food deprivation, threats against the detainee’s family, and threats of death were common practice in interrogation facilities. The apparent intent of these practices was to disorient and intimidate prisoners, often with the goal of obtaining confessions or information about third parties.” The 1994 report repeated some of the same

allegations, noting “credible reports indicating that Israeli security forces are responsible for widespread abuse, and in some cases torture, of Palestinian detainees, including those who possess U.S. citizenship.”

26. The open-ended use of classification laws to keep secret government documents is a mainstay of the Bush administration. According to civil liberties group OpenTheGovernment.org’s 2003 *Secrecy Report Card*, in 2003 alone 14 million new documents were classified “secret,” 60 percent more than in 2001, the biggest jump in a decade. A stunning example of the classification policy was the May 2004 Defense Department memorandum barring Pentagon staff from reading the “Taguba Report” about the “systematic and illegal abuse of detainees” by U.S. forces at Abu Ghraib which had already been posted on major media Web sites around the country.

27. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), p. 3.

28. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982).

29. Gov’t Motion to Conduct Certain Portions of the Evidentiary Hearing on Defendant Salah’s Motion to Suppress Pursuant to Classified Information Procedures Act (CIPA), pp. 3–4.

30. Don Wycliff, “Secrecy’s Corrosive Effect in Terrorism Case,” *Chicago Tribune*, 2 February 2006. The Tribune’s brief stated that “Secrecy can destroy the legitimacy of government institutions, including our criminal courts in particular . . . Secrecy can cripple . . . public trust in the judicial process. Secrecy can hide abuses of fundamental rights of citizens.”

31. *United States v. Inadi*, 475 U.S. 387, 406 (1986).

32. Defendant Muhammad Salah’s Post-Hearing Brief in Support of His Motion to Suppress Statements, March 2006. [n.d.]

33. See Stipulation 1 under CIPA for suppression hearing.

34. B’Tselem issued two reports, in 1991 and 1992, which documented practices used at the Ramallah and Hebron interrogation centers and specific abuses committed on detainees by interrogator “Haim.” Both reports outlined the same interrogation practices Salah was subject

to, including the “bird” exercise, and found them to be “routine techniques of interrogation” and “commonplace.” Al-Haq likewise conducted an exhaustive study and found that the interrogation methods used on Salah were “systematic” and “standardized . . . in the interrogation of Palestinians.”

35. Defendant Salah’s Motion for Evidentiary Hearing to Establish the Joint Venture, Cooperation, and Partnership between the United States and Israel in the Prosecution of Muhammad Salah, 29 August 2006.

36. The estimated number of trips is based on the defense’s analysis of FBI reports turned over to the defense in the discovery process.

37. Shin Bet interrogation logs turned over during the discovery process, in the possession of defense counsel.

38. State Department Documents, 23 March 1995, Gov’t Bates Stamp No. 09697-09699; 3 May 1995, Gov’t Bates Stamp No. 09700-09702; 26 May 1995, Gov’t Bates Stamp No. 09419 (emphasis in original); 29 May 1995, Gov’t Bates Stamp No. 09420.

39. See part I, p. 40.

40. See part I, p. 47.

41. These questions were unexpectedly declassified and turned over to the defense by the government in the midst of the suppression hearing, apparently in response to earlier requests from the defense for information about FBI-Shin Bet cooperation.

42. See amicus curiae brief of the Anti-Defamation League filed in *Humanitarian Law Project v. Janet Reno*, Nos. 98-56062, 98-56280. Subsequent investigations revealed that the doctor, who was named in the brief, had been tortured by Shin Bet and sent to the “birds” to produce a manuscript the month before Salah’s arrest.

43. See part I, p. 48.

44. When Robert Wright, the driving force behind the terrorism funding probe of Salah and others in the 1990s, was removed from the investigation in 1999, one of the reasons for his dismissal was apparently his over-reliance on informants such as Jack Mustafa. See part I, p. 57, n. 56.

45. FBI memo, September 2003, Gov’t Bates Stamp No. 13439-13443.

46. See part I, pp 52–53.

47. In April 2007, two months after Salah was acquitted on terrorism-related charges, Mustafa was arrested by FBI agents for impersonating an FBI agent while in possession of a handgun, in a months-long scheme to extort \$500,000. With Salah's sentencing on the obstruction conviction still pending, however, the case against Mustafa was abruptly dismissed by the U.S. attorney's office.

48. Redacted FBI report on "confidential informant" made available to the defense.

49. Levitt had earlier been with the FBI and with the Washington Institute for Near East Policy (WINEP), an organization which defines its "central policy objective" as "keep[ing] the strategic relationship of Israel at the center of U.S. Middle East policy."

50. In cross-examination, Levitt revealed that much of his knowledge derives from intelligence reports provided to him from Israeli and U.S. security agencies and from the internet.

51. He also testified at the *Boim v. Quranic Literacy Institute, et al.*, civil case.

52. See part I, pp. 50-51.

53. See under "Salah's Suppression Hearing," above.

54. The "shabeh" position involves the bending or contortion of a prisoner (over a chair or pipe, e.g.) for an extended period of time. See B'Tselem, "Routine Torture: Interrogation Methods of the General Security Service," February 1998, available at http://www.btselem.org/English/Publications/Summaries/199802_Routine_Torture.asp.

55. A State of Israel Comptroller report in 1992 found that despite the authorizations in the secret Landau protocol, Shin Bet was still systematically lying about their use of force and coercion.

56. See part I, pp. 49-50.

57. See part I, p. 48.

58. See part I, pp. 46-47.

59. Metin Basoglu et al., "Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?" *Archives of General Psychiatry* 64, no. 3 (March 2007), pp. 277-85.

60. Salah was the only individual actually served in the case, but three other individuals were named: Abu Marzuq and the two men who allegedly carried out the killing.

61. See part I, pp. 53-54.

62. The interrogatories and responses were turned over to the defense during the discovery process.

63. Given that interrogatory answers in civil cases are not publically filed, Salah's prosecution almost certainly would have obtained them from the *Boim* lawyers.

64. Testimony of Nathan Lewin, U.S. Senate Judiciary Committee, on the subject of the tools needed to fight terrorism financing, 20 November 2002, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=519&wit_id=1421.

65. Nathan Lewin, "Deterring Suicide Killers," May 2002, available at www.shma.com/may02/nathan.htm.

66. See Nathan Lewin, "A Promise the U.S. Makes, but Does Not Keep," *Jewish World Review*, 27 August 2002.

67. The prosecution had specifically argued that Salah's negative answer to the question of whether Salah had ever met any of the other defendants was a lie because he had surely, according to the government, "met" Abu Marzuq. Salah never denied that he had deposited checks from him in his bank account, so it is unlikely that he would have lied about meeting him in person.

68. Ashqar was also convicted of criminal contempt for his refusal to collaborate with U.S. grand juries convened in New York and Chicago to investigate the Palestinian resistance movement. He received a draconian, unprecedented sentence of eleven years and is currently in federal prison. His case is presently on appeal.

69. In its August 2006 motion for an evidentiary hearing to establish joint venture in Salah's prosecution, the defense, pursuant to the principles of due process, fair trial, *Brady v. Maryland* 373 U.S. 83 (1963), and the CIPA, argued for dismissal of count I on grounds of double jeopardy.