# PAINTBALL JIHAD

*The Overzealous Prosecution of the Virginia 11*

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# FOREWARD

In the summer of 2003, I was working in a pro-bono legal research position at Busch & Nubani, P.C., a small law firm in Annendale Virginia. Ashraf Nubani was the only full time attorney at the office and the staff consisted of me, a paralegal, and Ismail Royer, who ran the Public Relations department. Despite the office's size and newness, we were swamped on a daily basis with Muslims calling with a multitude of legal problems they were facing. Many of these cases involved immigration matters, due to the tightening of immigration enforcement after 9-11, while others sought advice on how to respond to FBI inquiries that many were facing on a regular and repeated basis.

In the middle of the summer, much to my surprise, Royer was arrested along with several others in a high-profile prosecution claiming that the defendants had played paintball in a conspiracy to partake in jihad in several corners of the world. I had the opportunity of working with Royer's attorneys during the bond hearings and witnessing firsthand the ferocious manner in which the prosecution, led by Assistant US Attorney Gordon Kromberg, sought from day one to brand the defendants as a dangerous network of terrorists that must be kept behind bars for the safety and security of America. At the time, I remember thinking that the defendants would surely get off with nothing more than a slap on the wrist. Of course, I was awfully mistaken. I went back to school in September and didn't follow the case much until I heard the shocking conclusion in mid-2004.

I have attempted in this account to be as honest and true to the facts and circumstances of this case as possible. As with all endeavors of this type, perfect information is impossible to uncover. While I have spent countless hours pouring over the briefs, transcripts and case materials, I have undoubtedly made mistakes and omissions that would lend support to one side

or the other. I have also focused more on those parts of the case that I found more interesting and critical, as well as those parts that I had more access to information about. Despite these shortcomings, I believe this account gives a fairly accurate impression of what happened. I have done my best to check the facts with the case materials as well as with Royer himself, who provided me with an incredible amount of detail concerning the events. Where the facts were in dispute, I try to offer both sides. Fortunately, as Judge Brinkema stated in her opinion, "The majority of the facts in this case are not in dispute. Rather, the parties differ dramatically as to the interpretation to be placed on the facts." Although I do take a position at the end, I intend to leave the ultimate decision up to the reader.

I would like to thank Professor Phillip Heymann of Harvard Law School for supervising this project. I also want to offer my sincere appreciation to Ismail Royer for helping me wade through the complex set of facts. Finally, I thank my lovely wife, Fatimeh, for her unwavering support during my research and writing process.

# INTRODUCTION

*"For more than two hundred years, Attorneys General have called on the men and women of justice to be faithful stewards of the law. Rarely in history has an Attorney General asked America's prosecutors and law enforcement officers to do what they are asked to do today: to be both defenders of justice and defenders of the people; to devote their talents and energies to the urgent task of saving lives ahead of losing cases..*

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*Let the terrorists be warned. If you overstay your visa -- even by one day -- we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America… [t]aking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders."*

– US Attorney General John Ashcroft,
in a speech to the U.S. Conference of Mayors in Washington DC, October 25, 2001.

We should give serious consideration to Ashcroft's words. What did he mean by devoting energies to saving lives *ahead* of losing cases? And who are these "terrorists" he refers to; whom we need to arrest for overstaying visas or breaking local laws, rather than charging with terrorism? What does it mean to be a "suspected terrorist" under these circumstances? Did 9-11 cause a fundamental change in our notion of justice? Are terrorists so dangerous that we should put aside our longstanding notions of equal protection, justice, and prosecutorial discretion to cast a wide net over anyone we think may be prone to "terrorist" activity?

In this paper, we look at one case from among the hundreds of cases were brought as a direct result of this new policy.

# PART I: THE DEFENDANTS

**Mohammed Aatique** is a Pakistani national working in the United States on an H-1 visa. He lived in Royersford, Philadelphia before moving to an apartment in Norristown where he was arrested at the age of 30.

**Hammad Abdur-Raheem,** an African American was born on June 10, 1968 in Washington DC and was raised in an orphanage until he was adopted at age 7. His adoptive parents raised him in Hyattsville, Maryland where Abdur-Raheem attended University Park Elementary school, Nicholas Orm Middle School, and Northwestern High School. After graduating from high school, he attended Prince George's Community College and then transferred to Northern Virginia Community College. Hammad served in the Persian Gulf war and it was during this time that he became interested in Islam as a religion. After seeing the Spike Lee film on Malcolm X, he began studying Islam in more depth and converted on November 14, 1994. Abdur-Raheem has been described as kind and gentle, reclusive, and exceptionally intelligent. He was working at Verizon and had two children with his Moroccan wife when he was arrested in June of 2003 at the age of 29.

**Ibrahim Ahmed Al-Hamdi** is named after his uncle, Colonel Ibrahim al-Hamdi, the late President of Yemen who was assassinated in 1977. His father was the Yemeni vice ambassador to the United States. Al-Hamdi had just gotten married in Saudi Arabia and was on the way to his wedding reception when he was arrested at the age of 25.

**Sabri BenKhala** is of Tunisian origin. He was arrested in Saudi Arabia while studying in Medina for being part of the alleged conspiracy by playing one or two paintball games. Other than Caliph Basha, Benkhala was the only other defendant to be acquitted.

**Caliph Basha Ibn Abdur-Raheem ("Caliph Basha"),** an African American was not well known to the other defendants and was only involved in the "conspiracy" for playing one or two paintball games. He was living in northern Virginia when he was arrested at the age of 29. A narcoleptic, Caliph Basha literally slept through much of what happened, including portions of his own trial. He was the first to be acquitted of all charges.

**Seifullah Chapman** was born in Cresent City California in 1972 to a Canadian/American mother and American father. He fell in love with the Marine Corps in second grade and grew up enjoying anything involving physical activity and the outdoors. Two hours after graduating from high school he was at a MEPS center doing a medical evaluation and was at boot camp within 24 hours. He attended several schools while serving in the Marine Corps and after leaving the military, double majored in Sociology and Criminal Justice at Marymount University in Arlington, Virginia with the hopes of joining the FBI.

Chapman's high school years were spent in an African American foster home. It was there that he grew interested in Black History and was first exposed to Islam after reading Malcolm X's autobiography. But beyond not eating pork, Chapman didn't take on Islam until years later. In 1993, Chapman was in a near-death car accident and decided his life needed a change. Soon afterwards, he received orders to Okinawa, Japan and decided it was time to give up his life as a wild Marine, smoking, drinking and chasing women. Chapman began interacting with Muslims in Okinawa and formally converted to Islam there in 1994. Chapman was honorably discharged from the Marines as a disabled veteran when his pancreas was crushed in a Humvee accident. Chapman is currently married with four children, Dominique, Elijah, Yasmeen, and Ameerah. He was arrested in Jeddah, Saudi Arabia where he was teaching English at the age of 31.

**Masoud Ahmad Khan** is a US citizen, born to an American mother and Afghan father. His mother was doing Christian missionary work in Afghanistan where she met his father, originally of Pakistani origin. She converted to Islam and the two married. Khan was an ardent study of Islam and had the entire Qur'an committed to memory. He was working as a kitchen designer at Home Depot when he was arrested.

**Khwaja Mahmoud Hasan** is half Iranian and half Pakistani. He was twice married and twice divorced, and worked at a computer engineer. Hasan was described as a "hanger-on" and was considered out of shape and no good at paintball. He was teaching Biology in Saudi Arabia when he was arrested. Hasan was the first to plead guilty and became a critical witness for the government.

**Yong Ki Kwon** is a naturalized U.S. citizen and comes from a very wealthy family in South Korea. He has been described as affable but goofy. His brother attended the same Catholic school as Royer in St. Louis and Kwon came to Islam through Khan's brother. He was arrested at the age of 27.

**Donald Thomas Surratt,** an African American was a gang member in his younger days before converting to Islam after joining the US military and participating in the Mogadishu "Black Hawk Down" incident. He had recently returned from studying in Egypt when he was arrested in Baltimore at the age of 30.

# ISMAIL ROYER

Randall Todd Royer was born in St. Louis, Missouri. His father, Ramon, a humanist and avid student of Western philosophy worked as a studio photographer. His mother Nancy, a religious Catholic, had become a nun at age 16. After leaving the convent in her early 20's, she obtained a bachelor's degree in education from Herris-Stowe Teacher's College in St. Louis, a historically black institution, and taught at public schools in the inner city. To make ends meet, she began doing some modeling and this is how she came to meet Ramone.

Royer was born in March of 1973. In 1975, Royer's parents adopted his sister Anne from Vietnam, after watching a documentary about children who had been orphaned in the war. The Royers would continue to take in numerous foster children as the years passed. This left an early impression on Royer whose parents continued to raise him with a heightened awareness of injustice in the world. As a teenager, Royer attended top notch private schools in Missouri but performed poorly during his early high school years and was involved in some indiscretions. Finally, in his junior and senior years, Royer began to take a serious interest in Western phiolosophy and civil and human rights, which seems to have been a turning point in his life. His grades improved dramatically and he became more active after school, cofounding an extracurricular civil rights club. He was also inspired through music, and his mother, a former symphony cellist, helped him learn the piano, on which he composed a number of pieces.

During the early 90's, events like the Persian Gulf War, the Los Angeles riots, racial tensions in St. Louis, and the heated debates that ensued on his high school and college campuses again set Royer searching for answers. This search would lead him to Islam, which he had learned about by reading the Autobiography of Malcolm X years before, while in high school. Royer was particularly moved by the transformative role of Islam in the life and character of

Malcolm, and in 1992, formally converted to Islam, taking the name Ismail. Royer's parents would find it difficult to understand his conversion but were supportive of his decision.

After converting, Royer immediately became active in the St. Louis Muslim community, which at the time, was inundated by a flood of Bosnian refugees. Royer began volunteering at the mosque to help these refugees resettle. As he began to work more closely with the refugees, he witnessed firsthand the trauma that they carried with them, and began following the increasing news coverage of the "ethnic cleansing". Like most Americans, Royer was horrified at the images of emaciated Bosnians in Serbian concentration camps. Unlike most Americans, however, Royer would decide to act.

In 1995, despite a complete lack of military training, Royer took leave from his studies in political science at the American University in Washington DC and flew to Bosnia, hoping for a chance to fight on behalf of the Bosnians. He traveled to the heart of conflict where among other things he witnessed the massacre of sixty Bosnian civilians in an open-air market by Serb gunners firing from the surrounding hills. Although he initially had some trouble getting involved in a military unit, Royer entered a training program which included physical training as well as weapons training. He learned how to clean and fire an AK-47, how to use an RPG, and defuse landmines. After completing his training, Royer was assigned to a unit of foreign volunteers called the Abu Zubair group[1]. The unit worked closely with a larger brigade in the Bosnian army named *Kateebatul Majahideen*, founded by a man by the name of Abu Abdulaziz. *Kateebatul Mujahideen* was composed of Muslims from many countries who had been animated by a religious mandate to defend the Bosnian Muslims. Royer was impressed by the

[1] The government on several occasions stated that Royer fought under an "al-Qaeda military commander" in Bosnia. (Ex: see *Government's Motion to Reconsider Release* in US v. Sabri Benkhala). In a debrief after Royer's plea bargain, the government showed a video lionizing a man by the name of "Abu Zubair" who was killed years before Royer was in Bosnia. The government admitted in open court at this point that this must have been a different Abu Zubair and as Royer had contended from the beginning, the group had no affiliation with al-Qaeda.

*Mujahideen*[2] who, unlike the Serbs they were engaging, appeared to take their ethics seriously. For example, the brigade issued a field manual laying down the rules of Islamic conduct in warfare such as no harming civilians or clergymen, no targeting of houses of worship, no harming animals, no cutting down trees, etc. For several weeks, Royer accompanied the Abu Zubair group on operations and engaged in firefights against Serbian forces, repelling them from Bosnian villages. Royer's activities in Bosnia however, were not limited to military action. Before leaving the region, Royer also spent a month teaching English to elementary students in Sarajevo.

Upon his return to the States, Royer redoubled his efforts to aid Bosnian refugees in St. Louis and then returned to American University in Washington DC where he became involved in the American Muslim Council, a Muslim political action committee in 1996. Additionally, he was the president of the Muslim Students' Association (MSA) at American University and a regular spokesman for MSA National. That summer, Royer returned to Sarajevo to work for a relief and development agency where he served as the liaison to NATO and the United Nations. He then traveled to Zenica where he helped found the American-Bosnian Business College. It was in Zenica, where Royer met and married his wife Mirsada.

After returning to the States with his wife in 1997, Royer joined the Council on American-Islamic Relations (CAIR), America's foremost Islamic advocacy and civil rights organization, where he conducted research to support civil rights cases and campaigns and intervened in numerous discrimination cases. CAIR offered Royer the opportunity to attend Congressional hearings, meet members of Congress, and even to be photographed with then

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[2] Lit. "*those who partake in Jihad*"

President Clinton. During this time, Royer also became well known in the DC metropolitan Muslim community as a staunch supporter of Muslim rights[3].

In spite of his political activism, Royer didn't abandon attempts at physical involvement. In February of 1999, after learning of the situation in Kosovo, Royer traveled to Macedonia to join a *Mujahideen* unit but returned in April after learning from authorities that practicing Muslims were not being allowed into Kosovo.

The next turning point in Royer's life would be the Russian invasion of Chechnya. A human rights disaster[4], Russia's campaign included indiscriminate carpet bombings of villages and the rounding up of men, women and children into concentration camps. Once again, Royer sought the opportunity to join the *Mujahideen* in their resistance movement. The political climate at this time had changed, however. Several high profile terrorist acts and the emergence of al-Qaeda had changed the American impression of *Mujahideen* from one of support and favor, as during the Afghan jihad against Russia, towards a growing wariness of Muslim paramilitary groups involved in armed conflict. On January 5, 2000, as a reporter for the internet magazine iviews.com, Royer attended a symposium on terrorism sponsored by the Potomac Institute for Policy Studies in Washington DC, aired live on C-SPAN. Sitting on the panel was Ambassador Wilcox, former State Department Coordinator for Counterterrorism. Beside him stood the Indian Ambassador to the United States. During the question and answer session, Royer asked Wilcox whether fighting in Bosnia, Chechnya, or other causes not connected to the United States would be considered terrorism. Wilcox responded that involvement in insurgencies or paramilitary

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[3] Joshua Salaam, who worked closely with Royer at CAIR would later write on his behalf calling describing Royer as a "natural activist" who he considered his "mentor in social and political activism".

[4] Human rights abuses in Chechnya have been documented by all the leading international human rights organizations. For more information on human rights abuses in Chechnya, see Amnesty International or the Human Rights Watch website at: http://www.hrw.org/campaigns/russia/chechnya/

activities against other combatants is not terrorism as defined by the U.S. government.[5] Based on this information,[6] and considering his positive experience in Bosnia, Royer determined to go to Chechnya with the intent to join a Chechen resistance group. It was around this time that Royer encountered Ibrahim al-Hamdi, at a local mosque. He had known al-Hamdi from the past but the two had been out of touch for some time. During their conversation, Royer and al-Hamdi expressed their mutual outrage of the Chechen plight and discussed the possibility of traveling together to join in the resistance. From his previous experiences in Bosnia and Kosovo, Royer understood that they would likely need a contact in Chechnya to join a unit there. Al-Hamdi knew someone involved in Chechnya, but his contact didn't prove useful. The two then began considering what other options would allow them in to make it into Chechnya. After making sure that they were not on the US designated foreign terrorists list, Royer began considering *Lashkar-e-Taiba* (LeT, pronounced, "L, E, T")[7], the military wing of a Pakistani religious learning and social welfare organization named *Markaz Da'wa wa'l Irshad* (MDI)[8]. LeT was connected to *Kateebatul Mujahideen*, the parent group of Royer's unit in Bosnia and Royer could use his contacts there to gain entry for himself and al-Hamdi to a LeT camp. Although LeT focused mainly on the Kashmir conflict, Royer was hopeful that once there, the two would be able to gather enough training and contacts to make it to Chechnya. Before we continue the story however, it is worth discussing the connection between LeT, MDI, *Kateebatul Mujahideen*,

[5] Royer did not ask whether fighting in Chechnya was "illegal", but rather whether or not it was "terrorism". In his response, Wilcox did not mention that such activity would still violate the Neutrality Act, either because he did not think of it at the time, or, because he was unaware of it altogether.

[6] Royer interpreted Wilcox's response to mean that taking part in the Chechen resistance, and others in a similar vein, would be legal. This is evidenced by a later email he wrote in 2002 from Bosnia where he stated "I have had conversations on a couple of occasions with this Wilcox on this topic and he repeated the same thing to me, that there is nothing illegal under US law about being involved in combat against other combatants, regardless of whether it's a US ally." This incorrect understanding of the law would later cause problems not just for Royer, but for the other codefendants as well.

[7] Lit. "Army of the pure"

[8] Lit. "Center for Invitation [to Islam] and Instructions

and other *Jihadi* groups around the world.   To do so would be impossible without going back to the 80’s, in Afghanistan.

# PART II: WHAT HAPPENED

# AFGHANISTAN

National Security Advisor Zbigniew Brzezinski under the Carter administration is considered to have been the chief architect of fostering an international Islamist movement to quench the tide of communist expansion. The Soviet invasion of Afghanistan was considered not only a major threat, but a major opportunity as well. Between 1978 and 1992, the United States poured some several billion dollars into a CIA program to recruit, train, equip, and send into battle tens of thousands of foreign *mujahideen*. The logistics of this plan were provided by Pakistan's Directorate for Inter-Services Intelligence (ISI). The program was also sponsored by Arab financiers, especially Saudis, who poured additional billions into the program. As the war took its course, the mujahideen "freedom fighters" were cheered on equally by West and the Muslim world. After almost 15 years and over a million lost lives, the Soviets withdrew from Afghanistan.

The end of the war in Afghanistan left thousands of foreign *mujahideen* wondering what to do next. While some of the foreign fighters returned to their lives, others believed that the jihad should continue to other areas where Muslims were facing occupation and violence. We offer some examples here:

*Kateebatul Mujahideen,* the group Royer fought with in Bosnia was founded by an "Afghan" veteran by the name of Abu AbdulAziz and focused on the Bosnian conflict. Samir Saleh Abdullah Al-Suwailem (more famously known as "Khattab" [9]) traveled to Chechnya and led an insurgency movement against the Russian occupation there. Ja'far Omer Taleb returned to Indonesia and co-founded *Lashkar Jihad*, an organization aimed at defending Muslims in the Moluka Islands.

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[9] Khattab was considered a hero by many Chechens, similar to Ahmad Shah Masoud, the leader of the Northern Alliance was in Afghanistan. Khattab was assassinated by the Russian government in March of 2002.

*Markaz Dawa Wa'al Irshad*, roughly translated as "Center for Invitation [to Islam] and Instructions," was founded around 1986 to help organize organize Pakistani *mujahideen* participating in the *jihad* in Afghanistan. As it expanded, the educational aspect was separated from the military aspect. Consequently, a military wing of the *Markaz Dawa Wa'al Irshad* was established by Hafiz Mohammed Saeed in the name of *Lashkar-e-Taiba (LeT)("Army of the Pure")*. After the Russian withdrawal, LeT changed its focus to Kashmir.

These various groups thus sprung from the same root and shared many characteristics. Although they were led by undeniably staunch religious figures, the groups had a quite pragmatic approach that distinguished them from extremist groups such as al-Qaeda[10]. First, unlike al-Qaeda, the groups were defensive in nature, seeking primarily to preserve majority-Muslim lands from expressions of foreign military power. Second, they were careful to only engage what they viewed as legitimate military targets, keeping in line with Islam's general proscription against harming civilians in warfare[11]. In keeping with their goal of retaining public legitimacy, the groups attached themselves to the governing body of the people they were fighting on behalf of, offering to aid them in their struggle until their presence was no longer needed or welcome. Hence, *Kateebatul Mujahideen* was an official unit of the third corps of the Bosnian army. *Lashkar-e-Taiba* was closely aligned with the Pakistani government and military. And *Lashkar Jihad* was openly supported and even trained by the Indonesian government until the Bali bombing when the organization dissolved[12].

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[10] In fact, all of these groups have come out at one time or another denouncing Osama bin Laden and al-Qaeda's methodology.

[11] Much has been said on this topic. Suffice it to say, at the very least, the primary Islamic sources unambiguously prohibit the harming of women, children, the elderly, and clergymen.

[12] *Lashkar Jihad* strongly condemned the act and even posted a fatwa by renowned Sheikh Bin Baz urging Osama bin Laden to repent. As the atmosphere in Indonesia likely combined with pressure from the government convinced them that it would be best to dismantle the organization.

Groups such as the ones we mentioned, which sprouted from pro-jihad US policy, were for the most part tolerated by the United States until after September 11 when US policy determined that these groups posed too great a threat to national security and global stability. Under pressure to remain on the side of the US in the ongoing "war on terror" the foreign governments that once supported and supported these groups, have recently distanced themselves if not altogether dismantled many of them.

# VISITING LASHKAR-E-TAIBA

Considering his positive experiences with *Kateebatul Mujahideen* in Bosnia, its close affiliation with LeT, and the lack of other options, Royer convinced al-Hamdi to travel to Pakistan and use LeT as a conduit to Chechnya, despite the distance between the two countries. Royer decided on LeT for several reasons. First, he learned that it wasn't on the designated terrorist list. Second, he found that it was a balanced organization with many non-military features. At the time, he came across Pamela Constable's article in the Washington Post describing the organization in the following manner:

> "Except for the black saber painted on the entrance sign, this sprawling rural complex could be the campus of a thriving agricultural college. New brick buildings are rising among healthy wheat fields and shallow fish-breeding ponds. Students lounge on the grass, and workers toss grain into tractor carts.
> But the compound, 30 miles from Lahore, is the intellectual and economic nerve center of a fast-growing Islamic movement called Markaz Al-Dawa and its armed wing, Lashkar-e-Taiba, which means "Army of the Prophet." Its centerpiece is an Islamic university with 1,000 students, whose subjects include science, English, Arabic, Koranic studies and jihad, or holy war. [13]"

Royer and al-Hamdi originally planned to leave together, but al-Hamdi, had problems getting a visa due to his Yemeni citizenship. Royer's wife was well into her second pregnancy at this time and since he wanted to return in time for her delivery, Royer left without al-Hamdi. En route to Pakistan, Royer dropped off his family with his wife's parents in Bosnia. Upon his arrival in Pakistan in late February of 2000, Royer sought admission into the LeT community, which he accomplished by asking an LeT official to call some of his contacts in Bosnia who verified who he was, and his good character. But soon after entering the camp, Royer fell ill. His sickness was so serious that he was bedridden for an entire month, shattered any chances of

[13] Constable, Pamela. *Islamic Militants Undaunted by Clinton Rebuff.* The Washington Post, April 2, 2000.

going to Chechnya and making it back in time for his wife's delivery. Upon realizing this, Royer abandoned his aspirations for Chechnya and began focusing on what was happening in Kashmir.

While ill, Royer stayed in an LeT office in Lahore and was requested by LeT's chief of foreign relations, Abu Omar, to setup a news bulletin for LeT on the internet. Before agreeing to do so, Royer first sought to confirm their views on combat, terrorism, and Osama bin Laden[14]. Abu Umar offered him assurances that LeT categorically opposed attacks on civilians as anti-Islamic and viewed Osama bin Laden as an extremist with "deviant" views. Royer then began publishing press releases and articles on behalf of LeT through a Yahoo! listserve he named the "Taiba Bulletin", which he populated with email addresses of various media outlets, government officials, and university professors. The initial bulletins consisted of rewritten battle reports from the front lines in Kashmir. However, Royer began using the opportunity to communicate the non-terrorist nature of the organization. Therefore, on behalf of LeT and under the supervision of Abu Omar, Royer repeatedly wrote condemnations of terrorist attacks on civilians by other groups.

Like many militant Muslim groups, LeT had its fair share of troubling aspects as well. For example, the prosecution later made reference to a 1999 LeT conference in which a large banner was displayed with a dagger through the flags of Russia, India, Israel, and the US. While in Pakistan, Royer himself noticed that some of LeT's materials included images of burning American and Israeli flags. Furthermore, he discovered that the human rights organizations had repeatedly condemned several attacks on civilians perpetrated by other Muslim militant groups in Kashmir. Royer openly questioned LeT officials on both of these issues. As for the imagery,

[14] While it may sound strange that bin Laden would be on Royer's mind before September 11, Royer was for years actively engaged in online debates of current Muslim issues. He had even published an article a few weeks before arriving in Pakistan stating that "the U.S. obviously has a legitimate interest in seeing Bin Laden brought to trial" for the 1997 bombings of the American embassies in East Africa, adding that bin Laden was "isolated from the larger Muslim community". Iviews.com, Feb. 7, 2000.

he was told that they were representative of LeT's dissatisfaction with US policy and a means of rallying support, and was assured that fighting America was nowhere on LeT's agenda. Royer responded by recommending that they remove the imagery as it would be construed improperly[15]. As for the human rights reports, Royer recommended that LeT's military leaders meet with the international human rights groups to discuss their concerns and clarify LeT's position vis-à-vis conventions of warfare and human rights, to which LeT enthusiastically agreed[16].

Towards the end of his time in Pakistan, Royer was growing increasingly aware of the suffering of the Kashmiri people[17] and what LeT was really fighting for. After recovering from his sickness, he was taken on a tour of LeT training camps in Muzafarabad. There, he was able to enjoy the scenic mountainside and visit several different sites. But nothing affected him more than visiting a hospital in Kashmir where saw firsthand the victims of Indian shelling, including a small child who was badly maimed from a shell that landed in his front yard. That evening, Royer accompanied several LeT representatives, Pakistani soldiers, and a Pakistani army officer to the front line, known as the Line of Control. Interestingly enough, Royer spoke Bosnian to the Pakistani officer who had served in the Pakistani U.N. battalion in the Bosnian war. The group entered a small bunker and the army officer asked Royer if he would like to fire some rounds over the line. Taking hold of the belt-fed machine gun, Royer fired the gun into the dark night. Little did he know that these rounds would cost him years of his life[18].

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[15] Royer mentioned that they had begun doing so before he left, however, al-Hamdi who visited LeT later that year, and several of the other defendants who went there in late 2001 testified that they saw similar imagery.
[16] Unfortunately, Royer left before such a meeting could come to fruition.
[17] In fact, Royer found reports by Human Rights Watch and Amnesty International in the LeT offices citing Indian forces for human rights atrocities in Kashmir.
[18] In Judge Brinkema's opinion, the act constituted a violation of the Neutrality Act, to which Royer later pled guilty.

Before leaving Pakistan, Royer told LeT he would continue helping them convey their political views, and they told him that any Muslim who wanted to live on their campus and help with their publications, teach in their university, or obtain military training was welcome. They also extended a personal invitation to Royer, offering him housing and a job with their communications department should if he returned. Shortly thereafter, Royer returned to Bosnia, picked up his wife, and the couple arrived back in the States on May 3, 2000 and a few weeks later, Mirsada gave birth his son Hamza. Royer rejoined CAIR and continued his career in political activism.

# PAINTBALL

Nabil Gharbieh[19] asserted that in early January, he and Kwon came up with the idea of using paintball for jihad training after a dinner with Sheikh Ali Timimi[20] and that he thereafter began recruiting other Muslims from the Dar al-Arqam Center to join them[21]. Although in Brinkema's opinion, this fact went uncontested, Royer casts doubt on this story, claiming that the paintball games actually began with a youth group at the local mosque, Dar al-Hijra, in which Gharbieh was a member. On the first outing, Royer, together with Gharbieh, al-Hamdi, and members of the youth group borrowed the paintball equipment, went to a public park and began shooting around at each other. The next time they went to Manassas battlefield but their fun was cut short when they were discovered by park rangers. This occurred before Royer went to Pakistan and from his perspective, was clearly for pure recreation. The fact that the youth were part of the games, and the group was using the low-end pump paintball guns support this contention.

These two stories can be reconciled, however, in the following manner. Shortly after the first paintball outings, Royer left to Pakistan for two months. During that time, Kwon purchased high end paintball equipment and the group began having more serious outings without the kids. Gharbieh and Kwon invited other brothers who they met at Dar al-Arqam including Hammad, Surratt, Chapman, Aatique, Caliph Basha, and al-Hamdi. When Royer returned, al-Hamdi told him that they were still playing paintball and invited him to join the group. This would explain

[19] Gharbieh was an early informant for the government and was never indicted for his involvement.
[20] Known in the indictment as unindicted co-conspirator #1. Timimi is presently on trial for his involvement in the "conspiracy".
[21] See US v. Khan. 309 F.Supp. 2d 803. As a witness for the prosecution, Gharbieh's story appears at least a little suspect because it conveniently links Timimi, a major target for the prosecution, with the beginning of the paintball games. Royer claims he never heard Timimi's name in connection with paintball.

why Gharbieh claims that he and Kwon came up with the idea, and how their primary intention behind it could have been jihad training without Royer or others being aware.

Chapman was an intense individual who took whatever he did seriously. As Royer described him, "if we had been stamp collecting, he would have been the most serious about it." When Chapman joined the paintball crew in the summer of 2000, the outings became more organized[22]. The paintball outings became a regular biweekly occurrence, and moved from public paintball courses to private farmland in Spotsylvania County. Although the group also participated in rowing, hiking, camping, basketball, horseback riding, and target practice, the most frequent activity was paintball which at this point more closely resembled combat training[23]. For example, Abdur-Raheem, Chapman, and Surratt, were asked to lead drills, due to their previous experience in the US military. And as leader, Chapman would impose penalties, such as pushing a car, for people who showed up late[24]. There were also regular discussions of what was happening in Chechnya and other hotspots and Royer often took the opportunity to share his experiences as a *mujahid* in Bosnia and speak highly of LeT. Furthermore, the group created a paintball website that was password protected, where they posted among other things links to news about *jihadi* activities in the world. Finally, several members of the group also purchased AK-47 style rifles, the "weapon of choice", as the government put it, for *mujahideen* in Bosnia, Kashmir, and Chechnya, and participated in occasional hunting and target practice at firing ranges.

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[22] Id. The opinion says that Chapman became the "emir" of this group which is incorrect. Kwon was always the emir. Brinkema took note of Chapman taking responsibility for imposing sanctions if people showed up late, such as doing manual exercises. But these were not unlike similar sanctions that one would receive for showing up late to football practice.

[23] In fact, Chapman was quoted as telling the group, "We're going to learn to fight." Still, paintball is inherently a martial sport and Royer claims he detected little if any increase in the military character of the other men.

[24] Royer later recounted that he thought Chapman was taking things a little too seriously, and that it detracted from the fun. Royer recounts occasions where someone would get worked up and others would respond, "Its just a game, man."

Considering these ancillary activities, it is likely that at least some of the men did consider the paintball games and other activities as more than recreation. For them, it probably was intended as an avenue for general military preparation. At the same time, there was no single, agreed upon, concrete goal or mission. Although Kashmir, Chechnya, and other causes were discussed, there was never a discussion about preparing to join a particular cause. The group members were also at different levels in terms of their abilities. Some were clearly novices, while others, who had previous military training, were much more adept. Royer, knowing first hand what was required to be a *mujahid* was quite unimpressed by the ineptitude and lack of athleticism of several of the men. The experience level of the men may offer some insight into their intentions behind the paintball games. For those with previous military training or experience, the games would not have done much to improve their skills (although they may have had the intention of helping the others prepare themselves). Whereas, for those without previous experience, paintball games under the instruction of those better versed in combat would more likely to have been for the purpose of improving combat skills. While paintball by itself could not possibly prepare someone for actual field combat, it could allow a novice to acquire enough basic skills to be accepted into a training camp overseas. Royer states that whether they played paintball or not, he still would have encouraged the men to get involved with LeT. In fact, Royer at one point considered starting an LeT-America group to raise the level of seriousness but decided not to because he thought it might violate laws against foreign agency and he also thought most of the men lacked potential and commitment.

Even if some of the group members did consider their training as preparation for jihad - which is more likely for those without previous experience - it is extremely unlikely that anyone in the group was contemplating military action against America or US interests during this timen

and the government failed to allege a single act that would support such a contention. To the contrary, Royer, who was really the only instigator behind fighting abroad, was publishing numerous writings during this time from himself, and on behalf of LeT denouncing terrorism[25] and attacks on America[26]. Included in these communications was a public letter to ABC president David Westin citing LeT's disinterest in fighting America and lack of affiliation with bin Laden[27]. In addition, his writings evidence a repudiation of the oft-mentioned "clash of civilizations" and support for reconciliation of Muslim and American interests[28].

The paintball games fluctuated from between 5 and 30 players and didn't have an overarching goal. The most plausible explanation of their activities, at least at this earlier juncture, appears to be that the outings were an enjoyable bonding experience for some, while at the same time, a means for combat preparation for others. These latter aspirations are in line with the activities several of the defendants undertook during this time, and would have been

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[25] After a wave of Church bombings in Indonesia on Christmas Eve in 2000 Royer wrote in a news release distributed to media outlets and Muslim listserves: "These bombings are a horrific and inhuman assault on innocent civilians who gathered solely for the sake of worship… 'Anyone who would murder families and their babies for some cheap political goal is worse than an animal.'" *Kashmir Mujahideen Condemn "Horrific, Inhuman" Attacks on Indonesian Churches, quoting a statement released by the Indonesian group Lashkar Jihad.*

[26] Ex: "The real Lashkar-e-Taiba… are not involved in attacks on innocent civilians, nor are we part of the all-encompassing, omnipotent Osama Bin Laden conspiracy that the West is currently hallucinating about. We have no interest in targeting anything other than the Indian military's brutal occupation of Kashmir." *Letter on behalf of Abu Umar to the Los Angeles Times*, December 2000.

[27] "Laskhar-e-Taeba has no interest in fighting America, since America is not fighting us, and this is the ruling of the Qur'an… Our organization is not involved, nor has it ever been involved, in any activities in America or East Africa. We condemn all acts of violence against civilians and those who commit such acts, whether Muslim or non-Muslim…."

[28] A few of his numerous writings, issued in the name of LeT and supporting this contention are referenced below:

> "[T]he interest of the US and the world's Muslims overlap to such an extent that having peaceful relations between them is mutually beneficial. This is why Islamic organizations, including Lashkar-e-Taiba have called for a dialogue to facilitate understanding." *Dangerous Elements Agitating for Clash of Civilizations*.

"A policy based upon the notion that the Islamic revival is inherently anti-American and thus must be suppressed is a self-fulfilling prophecy. A non-hostile relationship with the grassroots of the Islamic world is vastly more beneficial to America's national security interests than friendly relationships with regimes that are… doomed by their autocratic domestic behavior." *U.S. foreign policy towards Muslims must change*, Institute for Islamic Information and Education. http://www.iiie.net/Opinions/USForeignPolicy.html

motivated by their adherence to Islamic tradition which extends a general duty to able males to be prepared for military jihad[29].

In August, al-Hamdi was finally issued a Pakistani visa. Royer then called the LeT offices on his behalf to vouch for his character. He also provided al-Hamdi with a LeT phone number to call upon his arrival. On August 20, al-Hamdi went to Pakistan and after a few days in Lahore traveled to Muzafarabad in early September. For three weeks, al-Hamdi trained at a LeT camp using mostly small arms, although he also received limited training on machine guns and a rocket propelled grenade launcher. Towards the end of his trip, al-Hamdi accompanied LeT on a mission where his unit fired weapons towards Indian troops in Kashmir.

After retuning to the states on September 25, al-Hamdi attended a meeting outside at the Dar Al-Arqam Center in Virginia. Outside the Center, al-Hamdi spoke to Chapman, Caliph Basha, Royer, and Abdur-Raheem and described his experiences at LeT, encouraging them to visit LeT. Al-Hamdi's talk struck a chord, especially with Chapman, a serious personality, who later expressed his desire to train with LeT. Also in September of 2000, the FBI visited Chapman at his job at NOVA and Chapman answered several questions pertaining to the paintball activity. After this event, there was a split on whether the paintball should remain public. Royer and Abdur-Raheem argued that they should be very open with their activities and even found a group called the "Muslim Paintball League" to clarify their goals. They even proposed the idea of creating a group for Muslim sisters as well. Gharbieh and Kwon disagreed, insisting that the games remain secretive[30]. In the end the group decided it was wise to be more secretive about their activities, and made the paintball games by invitation only.

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[29] Jihad has many ways and meanings only one of which involves physical combat. Sensitive to this fact, the prosecution qualified their use of the word by referring to "violent jihad". I prefer the more neutral term "military jihad". We discuss the religious obligation of jihad in a little more depth in our final analysis.

[30] Gharbieh even tried to "discipline" Royer for not being secretive enough.

Besides purchasing and trading a few rifles and ammo among themselves and from gun shows in Virginia, nothing notable occurred that winter since the group thought it would be dangerous to wear camouflage in the forest during hunting season. In the spring, the group resumed its activities and it is from this time period that we have perhaps the most reliable account of the paintball activities. On April 1, 2001, Yusuf Wells, an employee of an Islamic charity named the Benevolence International Fund was invited by Gharbieh to a paintball outing while on a fundraising trip to the DC-metropolitan area. In his report about the trip he wrote:

> *I was taken on a trip to the woods where a group of twenty brothers get together to play Paintball. It is a very secret and elite group and as I understand it, it is an honor to be invited to come. The brothers are fully geared up in camouflage fatigues, facemasks, and state of the art paintball weaponry. They call it "training" and are very serious about it. I knew at least 4 or 5 of them were ex US military, the rest varied.*
>
> *Most all of them young men between the ages of 17--35. I was asked by the amir of the group to give a talk after Thuhr prayer. I spoke about seeing the conditions of Muslims overseas while with BIF, and how the fire of Islam is still very much alive in the hearts of the people even in the midst of extreme oppression. I also stressed the idea of being balanced. That we should not just be jihadis and perfect our fighting skills, but we should also work to perfect our character and strengthen our knowledge of Islam. I also said that Muslims are not just book reading cowards either, and that they should be commended for forming such a group.*
>
> *Many were confused as to why I had been "trusted" to join the group so quickly, but were comforted after my brief talk. Some offered to help me get presentations on their respective localities.*[31]*"*

Also in April, the group once met to watch videos of insurgent operations in Bosnia and Chechnya that Royer had purchased in Saudi Arabia after his pilgrimage to Mecca. Royer again took the opportunity to convince his friends to visit LeT but received no immediate interest. Then, about a month later, Chapman called Royer on the phone, requesting him to come to his home. There, Chapman expressed his interest in training with LeT, and discussed the possibility of moving to Pakistan, in one of the homes on the LeT compound that Royer had described.

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[31] US v. Khan. 301 F. Supp. 2d 789, 804. (D. Va., 2004). Royer, who was there for the talk disputes the part where Wells discussed jihad and the need for balance and said Wells merely spoke about Islam around the world. Several of the defendants said that Wells exaggerated or added this part in order to please the superiors he was submitting his report to.

Chapman specifically stated that he did not want to fight since he was married with 3 children at the time[32]. Royer replied that LeT offered several other opportunities and proceeded to call the LeT office, giving Chapman's *kunya* as "Abu Ilias"[33] and telling them that Chapman wanted to visit the camps and train, but not fight[34].

In July, Aatique approached Royer, telling him that he was going to Pakistan in September to visit his family and that while there, he wanted to visit the LeT office and perhaps the camp as well. Royer called LeT on Aatique's behalf and wrote him a letter of recommendation as well.

Chapman traveled to Pakistan in early August where he spent about 30 days at the LeT camp consisting of 3 days of training on AK-47 style guns and the rest of the time hiking in the mountains and performing various military drills. On September 11, 2001, Chapman learned about the attacks on America while listening to BBC radio and, - worried about the fate of his family in the aftermath - headed back to the States.

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[32] This was recorded in an FBI 802, during an early FBI interview with Royer. At the sentencing hearing, Chapman's lawyer motioned for a mistrial because the government had concealed this statement but the motion was denied.

[33] The government emphasized the use of "Abu names" by the defendants, arguing that they were used as codenames to conceal their identities. "Abu" means father in Arabic and Arab/Islamic tradition has for centuries followed the custom of calling one by their *kunya* "Father of so and so". This naming convention appears to have been adopted by groups like LeT. The fact that the defendants used their actual children's names rebuts the government's theory that they were trying to conceal themselves. For example, Chapman's son's name was Elijah, Ilias in Arabic, so he was called Abu Ilias.

[34] At Chapman's sentencing hearing, his lawyer argued for appropriate relief after learning that the government had withheld a statement by Royer to the FBI corroborating this story and contradicting a government witness. The statement was provided to the defense but it was among thousands of pages in a small room which was only accessible by appointment. Brinkema denied the motion on the grounds that it was a "minor issue".

## AFTER 9-11

September 11 had seriously effected Muslims in America as they scrambled to make sense out of what happened and as they faced a pervading fear of what was to become of them and their communities. Many Muslim women feared going outside, or removed their headscarves for fear of being targeted and hate crimes against Muslims rose dramatically. Notably, Royer was working at CAIR at the time and was actively involved in their efforts to foster understanding and express solidarity with the rest of the country. Among their activities, CAIR organized a blood for the 9-11 victims and Royer personally shuttled Muslims to Red Cross stations to donate blood.

The September 11 speaking event at the Dar-al-Arqam Center had been planned as a regular meeting before the attacks took place. Naturally, the evening turned into a discussion of what had happened that day. A Dar-al-Arqam officer by the name of Haytham Abu Hantash condemned the attacks outright as completely unacceptable and unislamic. Timimi agreed that the attacks were unislamic, but added that America was partially responsible because of its foreign policy, and that the event was therefore, not a total tragedy. Hantash responded angrily that the attacks could not be justified and the two began engaging in a "scholarly quibble" wherein Timimi offered arguments that would justify the attacks Islamically[35]. Hantash stated that it was insensitive and out of place to engage in a technical debate about the legality of the attacks, insisting on an unconditional condemnation which Timimi neglected to offer. This was the last time Timimi spoke at the Center and some suggested that his comments caused a split between him and the Center. Officials from the Center denied a split, explaining that Timimi

[35] For example, he argued that innocents can be killed if they are used as human shields.

chose not to speak publicly after 9-11[36]. Still, the Center removed his writings and tapes from their bookstore.

Five days later, Kwon organized a private meeting at his house on Timimi's request to discuss what the brothers should do. This meeting is one of the most critical aspects of the case. Since both the prosecution and defense had a strong interest in framing the discussion to fit their narrative, the precise facts of the meeting are a little murky and the meeting is one of the few topics that remain in dispute. Indeed, the details of the discussion was not only crucial to the intent of the defendants' future actions, but were particularly important to the government's future case against Timimi. The court opinion reports the discussion only in parts and in a piecemeal fashion. The exposition I include here takes that and other evidence into consideration, as well as a full and detailed description of what happened by Royer himself.

It is uncontested that the meeting was meant to be kept secret and an *amana* or trust between the brothers. The shades were drawn and the phones were unplugged to avoid possible surveillance[37]. Only members of the paintball group were invited (with the exception of Khan who was close to Kwon and regularly attended the Center), and when Gharbieh brought a friend, the discussion stopped until the two left.

Timimi began by reading the famous fatwa by Sheikh Hamood ibn Uqla al-Shu'aybi[38]. The fatwa imputed guilt on all Americans for the military actions of the US government based on their ability to vote for their leaders:

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[36] *See* The Muslim Link, Vol. 4, No.4, July 30-Aug 27, page 8.

[37] Royer says that they were secretive because it was the only way to create an environment where people felt they could speak freely and uninhibited in the aftermath of 911. Indeed, paranoia in the Muslim community was well-founded. At the time, the FBI had ramped up information gathering with respect to mosques and Muslim leaders. Many Muslims even abandoned their obligation to attend Friday prayer because the FBI was taking down the plates of vehicles in the parking lots at various mosques.

[38] Because of the attention it received after 9-11, most thought that Shaikh al-Shu'aibi had written the fatwa in response to the 9-11 attacks. In reality, the fatwa was issued before the attacks but were widely circulated after them, because of how directly they spoke to the event.

> *"[W]e should know that whatever decision the non-Muslim state, America, takes -- especially critical decisions which involve war -- it is taken based on opinion polls and/or voting within the House of Representatives and Senate, which represent directly, the exact opinion of the people they represent -- the people of America -- through their representatives in the Parliament [Congress]. Based on this, any American who voted for war is like a fighter, or at least a supporter…"*

Timimi then offered the argument against this position, and explained that al-Shu'aybi's premise could be flawed because it assumed America was a true democracy, whereas in reality, America's two-party system didn't offer the people control over the foreign policy their government employed.

Timimi didn't assume either of these positions, but continued that the question was no longer whether September 11 was right or wrong, but rather what Muslims should do. He went on to explain that whether or not the Taliban gave up bin Laden, America would likely launch an offensive against Afghanistan. Timimi continued that the US offensive would not be limited to any region and that in his estimation, the response would escalate into an all out war against Muslims. Timimi described how the recent events were indicative of the end of times wherein an apocalyptic war between Muslims and non-Muslims would ensue in Arabia, Palestine, and India[39]. Timimi recited *hadith* from the Prophet Muhammad stating that people will be raised for judgment with those they die among, that the best of people are *mujahideen,* and encouraged the men to be with *mujahideen.* He continued that if they were unable to follow this path, then they should make *Hijra* (lit. emigrate), to the Muslim world to practice their faith free from persecution. Finally, he recommended that whoever had a gun should sell it because it looked bad for Muslims in America to have guns after 9-11.

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[39] Kwon and others stated that Timimi mentioned Afghanistan among the places where such battles would take place. This is highly unlikely considering that not a single hadith exists mentioning Afghanistan as such, and Timimi, as a scholar would been well aware of this fact, and fearful of misrepresenting any statement of the Prophet.

After his talk, which lasted about 15 minutes, Timimi opened the floor for questions and discussion. Khan asked if *Hijra* was Islamically obligatory, or whether it was merely recommended. Timimi offered two pre-9-11 opinions, one saying that it was mandatory, and one saying it was recommended and continued that if one believed *Hijra* was obligatory before 9-11, then it was even more obligatory after; and if one believed it was recommended before 9-11, then it became obligatory after 9-11. At some point, Royer told the group that in his opinion, it was a bad idea to go to Afghanistan because as Americans, if they were caught, they would be considered traitors or spies and likely shot on the spot. Timimi did not respond one way or another to Royer's comment.

Sometime after the formal discussion, Royer renewed his invitation to help the men visit and train with LeT. Aatique reminded the others of his plan to go to Pakistan, train with LeT, and possibility fight, and invited them to join him.

After hearing of Aatique's plans, Khan, who had been planning a trip to Pakistan since July to take care of an urgent family matter[40], purchased tickets to travel with him. A few days after the meeting, Hasan and Kwon called Royer asking to meet with him. The three met at Kwon's house and Kwon told Royer that they wanted to go to Kashmir, and that Aatique and Khan had already left. In order to avoid surveillance, the three went to a payphone and Royer called LeT to vouch for Hasan and Kwon, and mentioned Aatique and Khan as well. Royer discussed with Hasan and Kwon his plans to meet them all in Pakistan and his hopes to secure one of the homes in the LeT compound as was offered to him previously. Hasan and Kwon left for Pakistan on September 22.

Aatique and Khan split up after arriving in Karachi on September 20. Aatique visited his family for a week. Khan stayed with his family in Karachi and testified in court in the pending

[40] Khan's father had recently passed and it was rumored that he had been poisoned.

proceeding concerning his father. Aatique traveled to the LeT office in Lahore alone, and from there, he was taken to the LeT camp where he was given weapons manuals to study and began training. Khan arrived at the camp three days later accompanied by Hasan and Kwon. A day later, Aatique left the camp, headed back to Karachi, and returned to the States on the October 7 return flight he had originally purchased.

At the camp, the other three men participated in training including commando tactics and firing machine guns. Each of them was also given one rocket-propelled grenade and anti-aircraft missile which they fired toward a tree and a mountain respectively. The LeT camps were graded so that the higher on the mountain you went, the more intense the training became. Unlike al-Hamdi, none of the men reached the top level where fighters made final preparations and enter combat in Kashmir. Khan and Hasan left the camp and Pakistan in early December 2001. Kwon, however, remained in Pakistan in order to start a mango export business. A few months later, he traveled to South Korea to work with his father on his business.

Back in the States, Royer heeded Timimi's advice to get rid of his rifle, and on September 22, 2001, packed his trunk with his rifle, all his ammunition, and a folding stock[41] and headed to a gun store named Potomac Arms. Royer didn't sell the rifle after being offered an extremely low price by the dealer, who told him that there was little demand for his rifle because after 9-11, people were buying AR-15's, the civilian version of an M-16 to protect themselves. On his way back from the dealership, Royer was pulled over by Alexandria Police officer Sietta for driving without valid license plate stickers. Royer did not have his license on him but told Sietta that he had his passport in the trunk. When he opened the trunk, Sietta found the gun, and the ammunition. Sietta questioned Royer who explained that he was trying to sell the gun, and

[41] The folding stock was illegal if put on a firearm but is legal now that the ban on assault weapons has expired. Royer didn't know it was illegal when he purchased it and it was never found to be attached to the rifle. He claims he had it with him that day to sell with the rest of his equipment.

then arrested Royer for driving without a license and valid tags. At the station, Royer spoke to a detective and again explained why he had the gun and ammunition. The next day, the detective called Potomac Arms and confirmed Royer's story[42]. Royer received a trial date for the driving violation and was released on bond.

Rather than delay his trip for his court date, Royer left 3 days later with one of his children to Bosnia and was joined a week later by his wife and other 2 children. From Bosnia, he attempted to get to Pakistan, but was unable to acquire a visa to do so. Royer states that his intention was to take LeT on their offer of providing a job for Royer and housing and his family and claims that at this point, he had no intention of fighting in Kashmir or elsewhere because of he was now married with three children and thought it would be more effective to support Muslim causes by writing, ideally in a communications job with LeT. Royer anticipated that it may have been difficult to enter Pakistan and was simultaneously considering several other options including going to Malaysia, Saudi Arabia, and staying in Bosnia to start a honey export business. None of these options panned out. So Royer stayed in Bosnia and began working on a research paper entitled "*US Public Opinion Toward Islam and Muslims After the Sept. 11 Attacks*" on behalf of Islamtoday.net, a Saudi-based think tank. Royer had hopes that this paper

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[42] During the bond hearings, the government offered the theory that Royer went to the gun store in order to purchase additional weaponry. Brinkema was ready to let Royer out on bail contingent upon his ability to prove that he really was trying to sell his gun that day. The press and FBI were all over the staff at Potomac Arms that day, who said they remembered Royer coming but nothing else. Then, in a 3-way phone conversation between Royer's attorney, the prosecution, and the officer who found Royer with the gun, the officer stated that he had contacted the dealer the day after the incident and was told that while Royer did come to the store at the time he claimed, the dealer had no recollection of him trying to sell a gun and stated that Royer did not bring his gun into the shop. Upon hearing this evidence Brinkema denied Royer's bond.
Royer claims that Sietta had told him at a chance meeting in 2002 that his story had checked out, as did a St. Louis FBI agent by the name of Frank Brostrom. The FBI even offered Royer his gun and ammunition back but Royer declined to claim it. Royer's lawyer tracked down the Alexandria detective who verified Royer's story. Although the government admitted to making a mistake, Royer's renewed request for bail was denied mainly based on a new claim that the Abu Zubair group Royer had been involved in Bosnia was connected to al-Qaeda. The government later admitted that this too was incorrect, see note 1 supra.

would land him a job in Saudi Arabia. Although his paper was accepted and published[43], Royer's contacts in Saudi stopped answering his emails. Short on funds, lacking other options, and perceiving the atmosphere in America to have cooled off, Royer returned to the States in April 2002.

Finally, the government alleged that on October 15, 2001, another meeting was held at al-Hamdi's home with Timimi, Abdur-Raheem and Caliph Basha. There, al-Hamdi and Timimi encouraged Abdur-Raheem and Caliph Basha to train with LeT, and Timimi allegedly spoke in favor of the Taliban's resistance to the US invasion, and added that they were engaging in a legitimate jihad. Whether or not this meeting occurred, no one else went to LeT or took any action as a result of it.

[43] Royer's 35-page report was published on Islamtoday.net in April and is available on the website at: http://www.islamtoday.net/english/showme2.cfm?cat_id=23&sub_cat_id=481. The article was also reprinted in the Middle East Affairs Journal, Summer/Fall 2003 (Vol.9, Nos.3-4).

# AFTER PAKISTAN

By mid-December, the defendants had left the LeT camp and only Kwon remained in Pakistan. Soon afterwards, the United States designated *Lashkar-e-Taiba* a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act. In an apparent to maintain legitimacy, *Markaz Dawa wal Irshad* changed its name to *Jamaat-ud Dawa*, or "Society of the Call [to Islam]" and LeT broke off from them, at least officially[44].

The paintball games never resumed. When Royer returned to the States in April, he turned himself in to authorities in Virginia and faced trial for the driving citations he received before leaving. After reviewing his evidence, the judge dismissed all charges against him. Royer got a job working for Americans for Tax Reform in DC that summer. It was around this time that the FBI began showing an interest in him and Royer voluntarily met with them without a lawyer to answer their questions.

The defendants would have been completely disassociated with LeT after it was put on the terrorist list if it wasn't for a man named Abu Khalid, also known as Pal Singh. He appears to be one of the few LeT members who regularly traveled to the United States and the United Kingdom. It was perhaps for this reason that Kwon sought his help after overstaying his Pakistani visa in the summer of 2002[45]. On March 27, 2002, Singh tried to purchase a wireless video module for a model aircraft from England but ran into trouble when the US-based vendor was unable to confirm the shipping address on his British credit card. Singh then emailed Chapman and requested him to purchase the equipment and forward it to him, which Chapman proceeded to do on April 8. A month or two later, Singh told Chapman he would be visiting the

[44] LeT has always been reliant on support from the Pakistani government. It appears that at the present, likely due to Pakistan's recent agreements with India concerning Kashmir, LeT is no longer conducting operations.

[45] In order to get in touch with Singh, Kwon emailed Chapman and asked for his email address. Chapman didn't have it and referred Kwon to al-Hamdi, but al-Hamdi did not know his contact info either.

States, and asked Chapman if he could stay at his home. Chapman replied that he was busy with his children but would help him find a place. When Singh arrived, Chapman housed him for 2 days and then arranged for him to stay with Khan for another few days. After this visit, Singh discovered that the camera Chapman had purchased for him had a faulty battery. He shipped the camera back to the vendor, who replaced the battery and shipped it back to Chapman on July 10. Since Chapman was leaving the States for a teaching job in Saudi Arabia, he gave the camera to Khan to give to Singh.

In December, Khan ordered a GPS-based model airplane control system. The device was compatible with the video camera, and could be programmed to fly an airplane to particular GPS coordinates and to turn on and off the video camera. It seems quite likely that this purchase was on behalf of Singh who had emailed Khan the following just days earlier:

"THANKS BRO DO THIS ASAP AGAIN ASAP
ILL TRY NOT TO BOTHER U AGAIN
THE MONEY SHOULD BE IN UR ACC CONTACT ME IF NOT"

The details of these transactions were only uncovered during an evidentiary hearing. Chapman sought to suppress the statements he made on the plane from Riyadh, claiming that he had already retained a lawyer and therefore should not have been questioned. In order to have his lawyer testify on his behalf, Chapman had to waive his attorney-client privilege. The legal question became whether or not Chapman had retained this attorney for the present matter or for some other matter. On the stand, and free from his duty to confidentiality, Chapman's lawyer was asked why he had been retained. Rather than simply respond that it was related to the current indictment, Chapman's lawyer explained that Chapman retained him after worrying that the FBI was pursuing him for buying model airplane equipment.

The government then researched Chapman's financial records and learned of Khan's involvement by cross-referencing email addresses. But neither Chapman nor Khan was charged

with providing material support to LeT after the US had placed it on the designated foreign terrorist list - perhaps because of the manner in which the government came about the information, or because they already had such an abundance of evidence against the defendants. Still, the information cut against the defendants' claims at trial that they had abandoned involvement in LeT after it was placed on the terrorism list.

# PART III: PROSECUTION

# THE ARRESTS

The first search warrant sought evidence of material support for terrorism or foreign terrorist groups and were issued in February of 2002 against Timimi, Gharbieh, al-Hamdi and Kwon. The FBI searched their homes and when they found a rifle at al-Hamdi's house, the FBI arrested him and charged him with illegal possession by an alien[46]. Gharbieh fully cooperated from the beginning, offering the FBI whatever information they asked for, to such an extent that he was never indicted. The FBI requested al-Hamdi to answer questions about the paintball and Kashmir. Before agreeing, al-Hamdi sought the advice of his lawyer who answered ignorantly that since he had done nothing illegal, he should answer all of FBI's questions rather than exercise his 5th amendment rights. Al-Hamdi pled guilty to the firearm offense and in pursuant to a cooperation clause, testified before the grand jury on June 19 and 24 regarding Khan, Royer, and others.

In South Korea, Kwon began receiving visits from US federal agents. On one occasion, the FBI came with the U.S. legal attaché and the South Korean police. The Korean police told him "cooperate if you know what's good for your family.[47]" The FBI proposed that they go to Hawaii which would be "neutral" territory where they could conduct further questioning. Kwon, worried about his father, naively agreed, but on the condition that he could bring his father with him. Kwon then flew with his father to Hawaii. At the airport, Kwon was immediately detained and his father was promptly returned to South Korea. Kwon was taken to a room where a large FBI agent sat in front of a lie detector test. Kwon failed the test after stating that he went to Pakistan for a wedding, and the agent began yelling at Kwon and telling him to cooperate. He

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[46] Al-Hamdi pleaded guilty to this charge on June 5th.
[47] *U.S. Inquiry Puts Spotlight on Muslim War Gamers*, Karen Branch-Brioso. St. Louis Post-Dispatch (Missouri) June 13, 2003 Friday Five Star Late Lift Edition.

was then arrested on passport fraud charges[48] and flown to Virginia where he was moved daily between hotels and FBI safehouses. Kwon told Royer that he was not permitted to call his attornet. The FBI convinced Kwon to phone other defendants and get them to offer incriminating evidence that would be recorded and used later against them. None of the defendants knew Kwon had been brought to the states so the FBI masked the caller-ID to appear as though the call was coming from South Korea. Kwon called multiple defendants including Royer in this manner. Although Royer had already been contacted by the FBI, he was still under the impression that no one had violated US laws, and during the conversation told Kwon "nothing we did was illegal." After these conversations, Kwon called Royer again, this time, telling him that he just arrived in Virginia to answer the government's February subpoena and requested Royer to come to his hotel room in Fairfax, Virginia where he asked Royer questions while the FBI secretly videotaped the discussion (with Kwon's consent). Kwon also succeeded in convincing Khan to come to his hotel but Khan became suspicious and agreed only to meet him in the lobby.

Royer's home was searched in March. In May, search warrants were issued and executed against Khan, Aatique, Surratt, Caliph Basha, Abdur-Raheem. Among them, Aatique agreed to cooperate fully with the FBI. Perceiving the mounting investigation, Abdur-Raheem and Royer decided to be proactive about the situation and go to the press to offer their perspective. Feeling they would be more sympathetic to their side, they went to the St. Louis press who published an article on the 17$^{th}$ of June[49]. The same day, Aatique emailed Royer saying that he had "unfriendly visitors" and asking for advice. Royer was suspicious and told him that he should talk to a lawyer. Aatique then requested Royer to meet him at the mosque. Royer agreed, and

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[48] On his 2001 visa application for Pakistan, Kwon falsely wrote that he was going to attend a wedding. Since he had a US passport this constituted fraud under

[49] St. Louis Post-Dispatch (Missouri), June 13, 2003, Friday Five Star Late Lift Edition.

Aatique then asked Royer if he could bring some of the other brothers. When Royer agreed Aatique then asked Royer to tell him who he would bring. Royer went to the mosque alone and found Aatique, as he later described, nervous and dripping with sweat. Aatique was carrying some papers, and told Royer, that the FBI had sent him. He then showed Royer a Taiba bulletin newsletter that Royer had wrote and stated that the FBI knew about it. Royer responded that he had already admitted his involvement with the newsletter to the press. Aatique then showed him an article written by a Hindu nationalist who wrote that LET was connected to Al-Qaida. Royer responded that for every article the FBI brought in that vein, he would bring 2 Western experts who would testify that LET was not affiliated with al-Qaeda. The two then departed ways.

Royer was working as public relations officer for his lawyer Ashraf Nubani that summer. On Thursday June 26th, Mr. Nubani received a call from Newsweek magazine and was told they had information that his client was going to be arrested. The government also made an announcement that there would be a major arrest on Monday. Royer set up a news conference at the National Press Club in Washington DC for Friday morning, with the hopes of getting on record that the men never supported terrorism, had no animus towards the US, and were being persecuted because they were Muslim. But early Friday morning, Royer, Aatique, Khan, Surratt, Abdur-Raheem, and Hasan were all arrested and joined al-Hamdi and Kwon in jail. An account of the arrest is given by Abdur-Raheem as follows:

> *"The FBI arrived at my home at around 5:30am. They pounded on the door and demanded that I open it. When I opened the door, about 15 agents stormed into my house with guns drawn. One agent put a gun to my head and told me to get down. Once I was down, he handcuffed me. I remember one of the agents saying, 'You knew were we were coming'."*

Despite the arrests, Royer's father Ramon, and Abdur-Raheem's father King Lyon attended the scheduled press conference and defended their sons. "My son is a veteran of the

U.S. Army. He took an oath to uphold the laws of the United States of America…he is a loyal citizen, the same as I am," said Lyon at the conference. Later that day, U.S. attorney for the Easter District of Virginia Paul McNulty announced that a federal grand jury had indicted 8 individuals on charges of conspiracy, firearms violations, and other charges for their conspiracy to train and participate in jihad in Kashmir, Chechnya, the Philippines, and other areas around the world. Naturally, the case immediately caught the attention of the national media and press who began covering it extensively.

Chapman, Hasan, and Benkhala were all in Saudi Arabia at the time. Benkhala had been studying Islamic Law at the University of Medina since 1998. Hasan was teaching biology. Chapman was in Jeddah teaching English. After the arrests in Virginia, the FBI contacted the Saudis to round up the three[50]. In late July, the three were individually arrested by Saudi authorities in Medina. Chapman spent 5 days handcuffed, shackled, and blindfolded in a Jeddah jail before being flown in that condition to the Mubahith Prison in Riyadh. In Riyadh, the defendants were held for about three weeks in solitary confinement under 24-hour running bright lights. They were interrogated in the late hours of night by Saudi officials on behalf of the FBI until they were finally turned over to American authorities on July 17th. After being turned over, the three defendants were stripped naked in front of about 20 FBI agents who proceeded to photograph their bodies and genitalia[51]. They were then dressed in prisoner jumpsuits and readied for the flight home. The flight was handled by the FBI's Hostage Rescue Team, which implemented what the government described as "standard precautions and procedures". The

[50] They also may or may not have requested the arrest of Ahmad Abu Ali who was an unindicted co-conspirator in the indictment. The government claimed and made several references to Abu Ali being arrested in connection with the 2003 Riyadh bombings. Abu Ali was held by the Saudi's without charge for over 20 months until his family won a lawsuit against the United States government on his behalf. The government then requested that the Saudis charge Abu Ali or release him to the US. Abu Ali was then extradited to the US and now faces charges of conspiring to support al-Qaeda. He was never charged for involvement in the Riyadh bombings.

[51] The government explained that this was to document their condition and bar any claims that they were tortured by the Saudis.

defendants were handcuffed and shackled, and forced to wear goggles with black tape over the lenses. They were individually interrogated on the flight and were unaware of who else was on the 737 with them. Chapman was interviewed by S/A Mamula and S/A Thrascel. He was told that if he did not tell them what they wanted to know, he would never see a judge, jury, or lawyer. Rather, he would be taken directly to prison for life. Benkhala was told that he had been indicted by a grand jury in Virginia and that if he did not cooperate, the plane would land in Guantanamo Bay. Benkhala asked about how he could get a lawyer and the FBI told him that one would be appointed to him but proceeded to question him. Hasan was subjected to similar interrogation. Brinkema later ruled that Benkhala's Miranda rights were violated and suppressed the entire conversation as inadmissible against him in court. However, she did not suppress the statements of Chapman and Hasan because of the slightly different details regarding their request for a lawyer. The flight landed at Washington Dulles International Airport. They were then loaded into a van and escorted with a motorcade consisting of 4 police cars and 2 FBI suburbans to Alexandria jail where a daunting 42-count indictment awaited them.

# THE INDICTMENT

The original indictment consisted of numerous charges distributed between and among the 11 defendants. Although we discuss the charges briefly below, we will not focus too much on this indictment because after the first round of plea bargaining, the government issued a superseding indictment applying to the remaining defendants.

## The Indictment Counts:

**Count 1: 18 USC § 371: Conspiracy to commit offense or to defraud United States**

This felony makes it illegal to conspire and take overt acts in furtherance of a crime against the United States and carries a penalty of up to 10 years in prison. The predicate offense used by the government was a violation of the United States Neutrality Act.

**Counts 2-5: 18 USC § 960 Commencing an Expedition Against a Friendly Nation (Also known as the Neutrality Act)**

This rarely invoked felony makes it illegal to begin, set on foot, provide, prepare means, or take part in any military or naval expedition to be carried out from the United States against any territory, dominion, foreign state, colony, district, or people with whom the United States is at peace. This offense served as the predicate offense for all of the firearm charges listed below and carries a maximum penalty of 3 years in prison.

**Counts 6-10: 18 USC 924(b) Receipt of Firearm or Ammunition with Cause to Believe a Felony will be Committed Therewith**

This felony makes it illegal to transport or receive a firearm or ammunition in interstate or foreign commerce with knowledge or reasonable cause to believe that a felony will be committed with it. It carries a sentence of up to 10 years in prison.

**Counts 11-12: 18 USC 924(g) Acquisition of Firearm after Arrival from Foreign Country with Intent to Engage in Crime of Violence**

This felony makes it illegal to acquire firearms after arriving from any State or foreign country with the intent to engage in a crime of violence and carries a penalty of up to 10 years in prison.

**Counts 13-15: 18 USC 924(h) Transfer of a Firearm for Use in a Crime of Violence**

This felony makes it illegal to transfer a firearm, knowing that it will be used to commit a crime of violence and carries a penalty of up to 10 years in prison.

**Count 16: 18 USC § 924(o) Conspiracy to Possess and Use a Firearm in Connection with a Crime of Violence**

This section states that whoever commits a §924(c) violation (detailed below) shall be imprisoned for up to 20 years, and if the firearm is machinegun or destructive device, can be imprisoned for life.

**Count 17: 18 USC § 1001(a) False Official Statement**

This felony makes it illegal to use false information on an official document or statement, for example a passport or visa application as was the case with Hasan. It carries with it a penalty of up to 5 years in prison.

**Counts 18-41: 18 USC § 924(c) Using A Firearm in Connection with a Crime of Violence**

This felony adds mandatory minimum sentences onto crimes of violence when a firearm is used or possessed in furtherance thereof. The penalty depends on the type of firearm used. For a regular gun, the penalty is a mandatory minimum of 5 years. If the firearm is a short-barreled rifle or a semi-automatic gun, a minimum of 10 years is added to the sentence. For a machine-gun or destructive device, a minimum of 30 years is added. If there is a second conviction under this subsection, a minimum of 25 years is added to the sentence, and if the second conviction is a machine gun or destructive device, the defendant is sentenced to life in prison.

Noticeably absent from the indictment were any charges relating to terrorism or offering services or material support to the Taliban, al-Qaeda, although the indictment did make references to these types of activities in the statement of facts. With the exception of a single count against Hasan for giving a False Official Statement, the charges at this point relied entirely on the Neutrality Act. Although Benkhala, Caliph Basha, Abdur-Raheem, and Surratt didn't violate the Neutrality Act directly, the government charged them with conspiracy to violate the

Act for their involvement in the paintball games and target practice. The weapons violations charged the defendants with using firearms in connection with the conspiracy to violate the Neutrality Act. For example, the government alleged that the use and transfer of firearms in the United States was illegal since it was for the purpose of combat training in furtherance of a conspiracy to violate the Neutrality Act. Similarly, the firearms training that several of the defendants received in Kashmir was alleged to be in furtherance of the conspiracy to violate the Neutrality Act and therefore illegal. This was a serious charge for the defendants who shot machine guns, RPG's and anti-aircraft guns because of the extremely high sentences associated with those types of weapons. The only exception was that Royer and al-Hamdi were charged with at least one weapons violation in relation to their actual act of firing on Indian positions in Kashmir rather than in furtherance of the conspiracy. As if this wasn't enough, the government also charged several of the defendants with aiding and abetting the others in their crimes.

By adding the weapons charges, the prosecution transformed what would have amounted to a maximum 3 year sentence into potential life sentences for almost all of the defendants. This tactic was essential for the government to coerce several defendants into plea bargaining at the early stages and then cooperating in order to lay the foundation for the superseding indictment and was a radical departure from the very limited Neutrality Act prosecutions in the past.

# THE NEUTRALITY ACT

When Great Britain and Holland took up arms against France in 1793, George Washington issued a proclamation urging United States citizens to avoid all acts that could contravene a neutral stance towards the war[52]. In 1974, when a French diplomat attempted to recruit and arm Americans to go abroad in aid of France, Congress passed the Neutrality Act to protect "the constitutional power of Congress to declare war or authorize private reprisal against foreign states.[53]" Since then, the statute has been amended, briefly repealed and reenacted but has remained relatively unchanged in its language which reads in its current form:

> *"Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both[54]"*

Except where the territories involved were within the ambit of "manifest destiny", the statute was vigorously enforced until World War I[55]. Since that time, there have been less than ten Neutrality Act prosecutions in the entire country. The drop in enforcement is attributed to increased United States military power and a changing national sentiment from a weak isolationist nation to a strong global power involving itself more intimately in foreign affairs and

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[52] Washington and his cabinet were in favor of strict impartiality. For a more detailed description of the history and origins of the Neutrality Act, see The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in the United States Foreign Policy. Harvard International Law Journal. Volume 24, Summer 1983. Jules Lobel.

[53] Dellums v. Smith, 577 F. Supp. 1449, 1453 (N.D. Cal. 1984). See also United States v. O'Sullivan, 27 F. Cas. 367, 377 (S.D.M.Y. 1851).

[54] 18 U.S.C. §960 (2005).

[55] See Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution. Harvard Law Review. (1982) Page 1967.

conflicts[56]. In a 1961 speech seemingly condoning the Bay of Pigs invasion, Attorney General Robert Kennedy called the Neutrality Act obsolete and ill-suited for modern foreign policy.[57]

Although the Act remained in existence, its violation was never considered a serious crime. Aside from its general nonenforcement, The Neutrality Act is also quite limited in scope. The Act only makes it illegal to combine or organize a military expedition in the United States. Apparently, it remains legal for an individual to leave the country with the intent to enlist in foreign military service so long as one does not *plan* and *organize* with others while in the United States[58]. Furthermore, the Act only applies in cases or conflicts where the United States is neutral[59]. In fact, FBI Agent Frank Brostrom told Royer that he was not being prosecuted for his activities on behalf of Bosnia and Kosovo because the United States was not neutral in those conflicts. Finally, as the examples below detail, even when activity is deemed to meet the Act's stringent criteria, the Act and related prosecutions have generally limited themselves to a lenient maximum penalty of 3 years in prison.

For example, in 1984, several men received sentences of 3 years and less when caught in an FBI sting operation that involved a plan to overthrow the Haitian government. On July 28, 1986, conspirators involved in a plot to overthrow the government of the Republic of Suriname were indicted for conspiracy and violations of the Neutrality Act and sentenced to one year in

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[56] In the mid-1800's opponents of the Act argued that "we have heretofore pursued a different course from a sense of our weakness but… now our conscious strength dictates a change in policy…" Lobel at 45.

[57] Robert Kennedy argued in favor of Cuban refugees who returned to Cuba "to engage in a fight for freedom." Harvard Law Review at 1968.

[58] It is not a crime or offence against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offence against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.' Wiborg v. United States, 163 U.S. 632 (U.S., 1896). "It is lawful for men, many or few, to leave this country with the intention to volunteer in the Cuban army, provided that they have not combined and organized in this country..." United States v. Murphy. 84 F. 609, 613 (D. Del. 1898). Judge Brinkema later disagreed with this interpretation and became the first judge to rule that an individual could constitute a "military expedition".

[59] In *United States v. Terrell*, 731 F. Supp. 473 the court assumed the that "at peace" was synonymous with "neutral" and found that the United States was not "at peace" with Nicaragua in 1982 due to its support of the Contra cause before and after Boland II.

prison[60]. The three year sentence has applied even when the most serious of weapons were involved. In a 1981 plot to invade and take over Dominica, Former Ku Klux Klan Grand Wizard Don Black along with a number of KKK mercenaries were caught boarding a chartered boat loaded with automatic weapons, shotguns, rifles, handguns, dynamite, and over 5000 rounds of ammunition. Despite the extensive planning, funding, and weaponry that were involved, Black and the others received sentences of 3 years and less[61].

Today, there remain numerous ongoing violations of the Neutrality Act which are allowed to operate unfettered. Chhun Yasith, a 44-year old American citizen founded and currently leads the Cambodian Freedom Fighters (CFF), a California-based organization with a stated mission of overthrowing the government of Cambodia. The CFF claims to have 500 members in the United States and up to 20,000 supporters in the Kingdom of Cambodia. On November 7, 2000, 70 CFF insurgents armed with assault rifles and rocket propelled grenade launchers killed 4 in an attempted coup d'etat before they were put down by authorities. Yasith openly admits his activities and vows to continue future operations[62]. Despite years of activity and ongoing complaints from the Cambodian government that the United States is harboring terrorists, Chhun is yet to be prosecuted.

The CFF's Vietnamese counterpart, named The Government of Free Vietnam, seeks to overthrow the Vietnamese government through peaceful or military means and claims to have 75 chapters worldwide, with 6,000 members and 100,000 supporters secretly trained along the

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[60] See Johnson v. Offshore Express, Inc., 845 F.2d 1347, 1352 (5th Cir., 1988).

[61] The plan was named "Operation Red Dog" and aimed at restoring former Dominica Prime Minister Patrick John and then setting up lucrative cocaine and gambling industry on the island.

[62] "*By Night, a Fierce Rebel: The man leading the violent movement to topple Cambodia's government is a California accountant.*" Time Asia, January 8, 2001 Vol. 157 No.1. Kay Johnson. Interestingly enough, Chhun sees himself as the legitimate heir of the US-backed armies that fought the communist government during the 80's; reminiscent of America's support of Afghan *Mujahideen* against the Russians.

Vietnam-Cambodia border[63]. Although GFVN members have been arrested worldwide in connection with embassy bombings and bombing attempts, GFVN and its members continue to operate without prosecution. Hmong exiles in the United States are also reported to be supporting armed insurgencies in Laos[64] and prosecutors have similarly turned a blind eye.

Finally, although the United States is "at peace" with the Palestinian people, numerous American citizens serve with the Israeli Defense Forces (IDF), which conduct regular operations in the occupied territories in the West Bank and Gaza. Many Americans have also taken part in the IDF's civilian anti-terrorism course called "Operation Shiloh" that includes weapons and combat training.

The defendants raised many of the issues above and motioned to dismiss the neutrality violations and related counts on the grounds that they were being selectively prosecuted for their religious beliefs. But Brinkema agreed with the government that they were not being singled out because of their religion but rather because LeT and other groups were anti-American and posed a potential threat to the United States.

Still, in choosing the maximum sentence, Congress would have been well aware that the behavior they were prescribing in the Neutrality Act included the use of firearms. In fact, it is difficult to imagine a circumstance where an act constituting a "military expedition" would not also involve the use of weapons and firearms. Neutrality prosecutions in the past have been consistent with this interpretation. Nevertheless, after failing to prosecute a single Neutrality Act case in the 4th Circuit for over a century, the government proceeded to slam the defendants in addition to the neutrality violation, with charges of conspiracy and firearms violations for each

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[63] Id.
[64] Id.

and every instance during the three year period in which the defendants possessed, transferred, or discharged a firearm.

## THE SUPERSEDING INDICTMENT

Facing mandatory minimums of decades to life in prison for the weapons charges, Surratt, Kwon, Aatique, and Hasan all pled guilty before the trial began in exchange for lighter sentences. Surratt was only peripherally involved to begin with and received the smallest sentence of 46 months for his involvement in the paintball games and for firing rifles at rifle ranges 3 years earlier. In his statement of facts, Surratt mentioned nothing about Afghanistan or fighting America, but stated that the training was for general combat preparation to fight abroad on behalf of Muslims should the opportunity present itself. For this reason, Surratt's plea didn't do much harm to the rest of the defendants.

The most important and damaging plea without a doubt was Hasan's. It appears the content of his statement originated very early on. Hasan was the first to say that the trip to Pakistan was for the purpose of fighting against the United States in Afghanistan and appears to be the source for this theory as included in the facts of the original indictment and charges in the superseding indictment. Royer and several of the other defendants claim that Hasan completely fabricated these details under interrogation and pressure from the government. In a later meeting, Royer confronted Hasan on this issue, asking him why he said what he did. Hasan responded defensively that he would not have done so had it not been for the pressure he received from the government.

Not surprisingly, several facts cast doubt on Hasan's final statement of facts. First, it is important to remember that some of Hasan's earliest statements came under interrogation by Saudi's while in solitary, and during FBI interrogation on the flight home after having been stripped nude, photographed, and bound and blindfolded on the flight home. It is unclear at what point Hasan decided to cooperate, but it may have been on this return flight under the threat of

being taken to Guantanamo Bay[65]. Second, in his statement, Hasan admits to training with LeT with the intent to serve in armed hostility against India *and* the United States (in Afghanistan), although Hasan took to Pakistan before the United States invaded Afghanistan and never accomplished either of these alleged goals. The peculiar statement also claims that Hasan and the others *decided* to leave the camp after they learned from BBC reports that the US was winning decisively against Afghanistan in December 2001[66], but fails to explain why they abandoned their stated plans to fight in Kashmir or other parts of the world, and makes no mention of LeT removing foreigners from the camps in December 2001. Finally, Hasan admits to an overarching conspiracy beginning in January 2000 of training with the intent to fight not only against countries at peace with the United States, but against the United States itself, despite the fact that the United States was not involved in any conflicts against Muslim countries until the invasion of Afghanistan in October 2001.

After Hasan's plea agreement, Kwon agreed to plea 4 days later. He later told Royer that the government put a statement of facts before him that was cut and pasted from Hasan's to the extent that the government neglected to change Hasan's name to Kwon in some places. In the final version, Kwon admitted word for word to the overarching conspiracy described in Hasan's statement. Kwon's statement adds more details and color to the plan, explaining that the defendants left LeT after 1) deciding that fighting in Afghanistan would have been futile given America's success, 2) that going to Chechnya was logistically infeasible, and 3) that LeT would not send him to fight in Kashmir.

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[65] Hasan himself admitted to Royer in later that he decided to cooperate while on the plane.

[66] As a government witness in the later trial of Sami Omar Al-Hussayen, Hasan also added that Taliban leader Mullah Omar's call for all Muslims to fight in Afghanistan had been altered to a call for food donations. Al-Hussayen was found not guilty of all counts after being arrested and charged with material support for terrorists for his involvement in several Islamic websites. Hasan testified for the government that by watching some of the videos on the websites Al-Hussayen ran, he was encouraged to participate in jihad.

Although Aatique held out for an entire month before pleading guilty, he had been cooperating with the government from much earlier on and his final statement is similarly suspect. Aatique stated that in the September 16 meeting with Timimi, he told the others of his previous plans to go to Pakistan and train with LeT, inviting others to join him. He also stated that his actions and words encouraged Kwon, Hasan, and Khan to attend LeT to fight against American forces in Afghanistan and other "enemies of Islam". Aatique admitted to discharging firearms at an LeT camp in furtherance of a conspiracy to serve in armed hostility against the United States (in Afghanistan), as well as against India. These statements are altogether incredible considering that Aatique spent only 4 days at the LeT camp, and left Pakistan *before* the United States even bombed Afghanistan. As a witness during the trial, Aatique seems to have contradicted his own statement. When asked on direct examination why he left LeT, Aatique answered "because it was never my intention, it was never my intention to go and fight anywhere." Aatique explained that he went to LeT to train "similar to paintball but with real weapons" and that if while at LeT something happened (such as the "end-of-times" battle that Timimi had described), he might have participated.

Hasan, Kwon, and Aatique received sentences of 10-12 years for conspiracy to violate the neutrality act and weapons charges and were never charged with any conspiracy or attempts to attack the United States. By obtaining their statements, the government was able to convince a federal grand jury in September 2003 to charge the remaining 7 defendants with a 32-count superseding indictment. The new indictment included the original charges and added several new and much more serious crimes including conspiracy to levy war against the United States and conspiracy to provide material support to al-Qaeda. We detail the new crimes below:

## The Superseding Indictment Counts

**Count 2: 18 USC § 2384 Seditious Conspiracy**

Passed in 1851, this statute criminalizes conspiring within the jurisdiction of the United States to forcibly put down, overthrow, levy war, or oppose the authority of the United States, or prevent, hinder, or delay the execution of any US law, or to seize or hold property of the United States contrary to its authority. The carries a penalty of up to 20 years in prison.

**Count 2: 18 USC §2390 Conspiracy to Levy War Against the United States**

This felony makes it illegal to enlist or engage within the United States or any place subject to its jurisdiction with intent to serve in armed hostility against the United States and carries a maximum penalty of 3 years in prison.

**Count 3: 18 USC § 2339B Conspiracy to Provide Material Support to a Terrorist Organization (Al-Qaeda)**

This felony makes it illegal to provide material support or resources to a designated terrorist organization and carries a sentence of up to 15 years in prison unless death results in which case the defendant can receive up to life in prison.

**Count 4, 6: 50 USC § 1705 Conspiracy to Contribute Services to the Taliban**

This penalty statute establishes a sentence of up to 10 years for violating an order made under the International Emergency Economic Powers. In this case, the defendants were charged with providing services to the Taliban in violation of President Clinton's Executive Order (Exec Order No. 13,129, 64 Fed. Reg. 36,759 July 7, 1999), and specifically, OFAC's corresponding regulation 31 C.F.R. §545.

**Count 5: 18 USC § 2339A Providing Material Support to Terrorists (LeT before December 2001)**

This statute was passed in 1996 after the bombing of the Oklahoma City government building. It defines a violation as giving material support to anyone while intending or knowing that the support will be used in connection with any one of a list of violent crimes. In this case, the government alleged that LeT was involved in a violation of 18 USC §956 (conspiracy to murder, maim, kidnap, etc. in a foreign country) and therefore "terrorists" for purposes of §2339A. The crime carries a maximum sentence of 15 years in prison unless death results in which case a defendant can receive up to life in prison

**Count 1, Object 2: 18 U.S.C. §2390 Enlistment to Serve Against the United States**

This felony carries a maximum penalty of 3 years in prison for enlisting or engaging within the jurisdiction of the United States with the intent to serve in armed hostility against the US.

# PRE-TRIAL MOTIONS

The most compelling and persuasive legal arguments came from Royer's pre-trial motions which were extensively adopted and referenced by the remaining defendants. Indeed, Royer's standout court-appointed lawyer, John Nassikas of the law firm Arent Fox, PLLC deserves should be commended for his vigorous advocacy on behalf of his indigent client. We detail the most critical legal arguments here.

First, the defense argued that 18 U.S.C. §2384 (seditious conspiracy) could not apply since the alleged conspiracy was to fight in Afghanistan wherein the United States did not have jurisdiction. Supporting its claim, the defense claimed that the plain meaning and intent of the statute - consistent with its title "Seditious Conspiracy" and its original purpose which was to criminalize crimes against the United States not captured by treason statutes[67] - required the conspiracy *and* conduct to be committed within the jurisdiction of the United States. Therefore, the defense argued that the clause "levy war against them, or oppose by force the authority thereof," must be read only to prohibit conduct within the jurisdiction of the United States and pointed out that not a single court had upheld a §2384 case where the alleged conduct was to occur outside the jurisdiction of the United States. In fact, except where the United States had special jurisdiction, such as in Puerto Rico[68], or at the U.S. embassy in Tehran[69], §2384 had never been used to reach conduct outside of the territory of the United States. Finally, the

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[67] The statute was passed in 1851, in the midst of the Civil War where a Confederacy Army had been raised to "Levy war" against the authority of the U.S. Government. Congress was worried that §2384 was akin to treason without that statute's constitutional safeguards and Senator Trumbull thus contrasted treason and seditious conspiracy, stating, "I do not suppose it would constitute treason if half a dozen persons conspired together to seize an article of property belonging to the United States… That consists in levying war against the United States, or aiding and abetting its enemies in time of war." The Congressional Globe 1861, 276, 77.

[68] See United States v. Gonzales Castro, 228 F. 2d 807 (2d Cir. 1956) (Conspiracy to overthrow the U.S. Government in Puerto Rico by force).

[69] See Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980) (noting that the U.S. Embassy in Tehran is subject to "special territorial jurisdiction" of the United States), *rev'd on other grounds*, 453 U.S. 280 (1981).

defense cited two cases, *United States v. Rodriguez*[70] and *United States v. Rahman*[71], which determined that the statute was limited to conduct occurring within the jurisdiction of the US, and was for the purpose of safeguarding domestic public security. The government's response, citing not a single case in support of its construction of the statute, claimed that 1) the plain meaning of the "levy war" clause meant that the statute could reach conduct in places where the United States did not have authority, and 2) even if the statute mandated US jurisdiction, the United States had jurisdiction in Afghanistan due to the September 11 attacks. Brinkema agreed with the government and declined to read §2384 as including the jurisdictional limitation, calling the construction in *Rodriguez* dicta, and arguing that "courts are not to add elements to the plain language" of the statute.

The defense's next argument was that the International Economic Emergency Powers Act and the Executive Orders and Regulations (IEEPA) restricting trade with the Taliban in Count 4 were limited to property transactions and commercial services and could not apply to the voluntary, non-commercial conduct the defendants were allegedly conspiring. They argued that the IEEPA only authorized the President to regulate transactions related to property interests[72] and that the particular executive order[73] and corresponding OFAC regulation under which the defendants were charged regulated only certain financial transactions related to property. While "services" is included in the order, the defense argued that this was merely to clarify the types of transactions and could not expand the reach of the order and powers under IEEPA. In addition,

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[70] 803 F.2d 318, 320 (7th Cir. 1986) distinguishing seditious conspiracy from treason as defined by Article III, Section 3 of the U.S. Constitution the Court held: "Unlike treason, seditious conspiracy does not extend beyond the United States jurisdictional boundaries. It does not contemplate the presence of an enemy foreign state or an actual war."
[71] 854 F. Supp. 254, 259 (S.D.N.Y. 1994), aff'd, 189 F.3d 88 (2d. Cir. 1999).
[72] 50 U.S.C. §1702(a)(1)(B) (2000).
[73] The order prohibited "any transaction or dealing by United States persons… in property or interests in property blocked pursuant to this order… including the making or receiving of any contribution of funds, goods, or services to or for the benefit of the Taliban." Exec. Order No. 13,129 64 Fed. Reg 36,759 (July 4, 1999).

OFAC's (the Office of Foreign Assets Control) mission, as its name suggests, is to "impose controls on transactions and freeze foreign assets under US jurisdiction". Finally, the defense argued that with the exception of one case[74], IEEPA and its corollary Trading with the Enemy Act (TWEA) have never in their history reached purely non-commercial conduct. The government, citing *US v. Lindh* in its favor, argued that the term "contribution" implied that voluntary transactions were covered by the statute and that "services" do not necessarily connote commercial activity. In addition, the government pointed out that certain transactions were specifically excluded from the regulations (for example, personal communications, journalistic activity, and humanitarian donations) as opposed to the exclusion of all non-commercial activity. Brinkema again agreed with the government, citing *Lingh*, and finding no evidence that "services" were limited to commercial conduct.

One of the most perplexing legal issues surrounded the government's use of §2339A which sought to define the defendants' conspiracy to visit and train with LeT before it was added to the US terrorism list as material support to terrorists. §2339A defines material support for terrorists as material support for an organization involved in one a number of US crimes. The government claimed that LeT was involved in a violation of §956 (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country) against India, and because they knew this, the defendants' conspiracy to train with LeT constituted material support for terrorists under §2339A. The defense made numerous arguments against this construction of §2339A. First, they argued that LeT couldn't possibly have been involved in a §956 conspiracy because §956 requires the conspiracy and acts to be within the jurisdiction of the United States whereas

[74] *United States v. Lindh*, 212 F. Supp. 2d 541, 558-63. This case was against the "America Taliban" John Walker Lindh. The defense distinguished the case by arguing that the Court in *Lindh* only analyzed whether the President had authority to regulate "services" and barely touched on the types of services that could by governed.

LeT operated in Kashmir and Pakistan[75]. The defense continued that the defendants themselves could not provide the jurisdictional hook for the §956 conspiracy because there was never an agreement between them and LeT to violate the Act. Indeed, as the defense stated, it would be absurd if the individuals charged as §2339A conspirators could simultaneously constitute the conspirators for the purposes of the underlying §956 violation. Spelled out, the charge would then mean that the defendants conspired to provide material support or resources (their own selves), knowing and intending that the material support or resources (their own selves) would be used in preparation for or in carrying out a conspiracy among themselves to commit certain acts overseas. That is, they would be charged with a conspiracy to provide material support to their own conspiracy.

The defense furthermore argued that the defendants lacked the knowledge and intent requirements under §2339A. Unlike §2339B which categorically prohibits material support to designated terrorist groups, §2339A only prohibits material support to a group in furtherance of that group's illegal conduct. The government argued that the defendants were aware of LeT's conspiracy to violate §956 and that by making arrangements for others to travel to LeT, Royer and the others were conspiring to further this activity. Once again, Brinkema agreed with the government, finding that LeT was involved in a conspiracy to violate §956 and that Royer and al-Hamdi's involvement in that group sufficed for jurisdictional purposes. She found that although §2339A was passed in October 2001, well after Royer and al-Hamdi's visited LeT, the conspiracy continued after October and thus did not pose an Ex Post Facto problem.

[75] §956 states: "Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming… shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided…"

We should mention here a peculiarity that later arose. In her decision, Brinkema found Khan not guilty of a conspiracy to violate the Neutrality Act (finding that he only intended to fight in Afghanistan, not India), yet somehow still found him guilty of providing material support to LeT in furtherance of their §956 conspiracy. That is, somehow, by merely training with LeT, Khan was found to have materially supported and furthered their efforts against India. In addition, Brinkema found Abdur-Raheem, who never even saw an LeT camp, guilty of a §2339A conspiracy to provide material support to LeT, because he played paintball (before 9-11) with Chapman, Khan and others involved with LeT and apparently at one point mentioned his desire a help militants fighting in India[76].

Brinkema's judgment on this issue has serious implications. It suggests that any militant or insurgency group that is involved in violent or destructive activities directed at people or property anywhere outside the United States, are considered "terrorists" for purposes of §2339A[77], irrespective of whether or not they target civilians. Furthermore, simply training among such a group's members, or even supporting others who train with such a group, in Brinkema's opinion, can constitute material support.

As for the Neutrality Act violations, the defense argued that Royer, al-Hamdi, and Chapman could not be charged with violating the Neutrality Act because whether or not an individual could be charged under the Act, an individual could not constitute the "military expedition" that must exist for a violation of the Act to occur. In support of their position, they pointed to the Supreme Court decision in *Wiborg v. United States* which held that "a military expedition is a journey or voyage by a company or body of persons.[78]" The defense buttressed

[76] *See United States v. Khan.* 309 F. Supp. 2d 789 at 822.
[77] Perhaps with the exception of groups fighting in regions with which the United States is not at peace.
[78] *Wiborg v. United States*, 163 U.S. 632 (U.S., 1896).

this interpretation with several lower court decisions and other sources in their favor[79]. The government argued that the statute's use of the singular "whoever" suggests that a single individual could violate the Neutrality Act and offered several lower court decisions taking this approach, although not offering any cases where a military expedition involved one person. Not surprisingly, Brinkema found the government's argument persuasive holding that a single person can alone constitute a military expedition or enterprise.

The defendants further argued that a Neutrality Act violation could not constitute the necessary "crime of violence" upon which the weapons charges were predicated. They argued that since the Neutrality Act prohibits the preparation or setting afoot of a military expedition within the United States as opposed to the actual violent act that may occur in the foreign territory, violation of the Act is not a "crime of violence". But Brinkema agreed with the government that the language in the Act includes the word "military" which presupposes violence.

The defendants also motioned to dismiss Count 4 (material support to Al-Qaeda) because the indictment contained no specific facts relating to Al-Qaeda. The government argued that the defendants conspired to provide material support to Al-Qaeda by facilitating travel to Pakistan to obtain training to be used in Afghanistan, thereby benefiting the Taliban by fighting for them, thereby materially supporting Al-Qaeda by interfering with the capture of Usama bin Laden. Brinkema found these allegations sufficient to support the charge.

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[79] Among these sources, the defense cited Lobel's article in Harvard International Law Journal (supra), quoting in part "Neither the Neutrality Act nor international law prevents individual citizens from leaving the country with the intent to fight against a foreign government, whereas groups of individuals are prohibited even from planning foreign military expeditions… The reason for distinguishing between individual and organized group activity is clear: group activity is unlawful because the group is in effect organizing a separate state entity within the United States. The group acts like a foreign sovereign within the United States borders and thereby threatens the legitimate sovereign…"

The last important argument dealt with the extraterritorial effect of the weapons charges. Specifically, the defense sought to requested the court to dismiss the weapons charges where the act occurred in Pakistan because an ancillary statute, such as §924(c) may only apply extraterritorially if the underlying substantive offense to which the firearm is connected itself applies to extraterritorial conduct. For example, since the Neutrality Act violation occurs wholly within the United States, no extraterritorial reach exists under this statute, and therefore, extraterritoriality cannot reach §924(c) predicated on it. Brinkema deferred her decision on this issue awaiting a Bill of Particulars from the government stating all the underlying offenses for §924(c).

In the end, Brinkema only once agreed with the defendants and dismissed only a single object of the conspiracy count, finding that the defendants' participation in paintball and alleged plans to fight in Afghanistan against the United States could not constitute enlistment or engagement with the Taliban in violation of §2390[80].

It is also useful to mention that before trial, al-Hamdi sought diplomatic immunity due to his Yemeni citizenship but was denied because his immunity expired shortly after he turned 21, in 1998, despite pressure from the Yemeni government[81].

[80] An example of something that would constitute a violation of §2390 is offered by Justice Scalia in *Holloway v. United States*, 526 U.S. 1, 16 (1999) (offering that a Canadian who, within the United States, enlists in the Canadian Army, intending to wage war against the United States would violate §2390).

[81] In a latter from Abdulwahab al-Hajjri, Yemen's ambassador to the US State Department on April 18, a month after al-Hamdi had been arrested on weapons charges, the ambassador wrote "Yemen has taken steps that allowed U.S. officials access to Yemeni suspects on Yemeni soil, an act that has caused the government much consternation with opposition forces inside Yemen… We, therefore, find it somewhat disconcerting to see the case of Mr. al-Hamdi being drawn out in this manner."

# JUDGMENT

After realizing that Brinkema would not dismiss any of the charges against him, and facing the prospect of life in prison, Royer agreed to plead guilty in exchange for a lighter sentence. Unlike the first four who pled, Royer was not willing to sign off on the government's statement of facts and made numerous modifications up to the moment he signed it. For example, Royer removed all mention of paintball as jihad training and all references to fighting in Afghanistan and was careful not to harm any of the other defendants. In the end, he pled guilty only to conspiracy to violate the Neutrality Act, and aiding and abetting Aatique, Khan, Hasan, Kwon, and al-Hamdi in the use of firearms in violation of the Neutrality Act[82] by helping them enter LeT. Royer was sentenced to 20 years in prison on April 9, 2004. Al-Hamdi followed suit and pled guilty to two weapons charges in connection with a neutrality violation and conspiracy in exchange for 15 years in prison in April 2004. Al-Hamdi's statement severely damaged Chapman's case because he claimed that the purchase of a rifle from Chapman on December 18, 2000 was for the purpose of enhancing his ability to train for jihad in Chechnya, Kashmir, or other places outside the United States. This statement was completely contradictory to numerous statements al-Hamdi had offered to the FBI, reported in 302's, over the course of several months in which he stated that he purchased that rifle for hunting[83]. Although al-Hamdi tried to correct the mistake at trial and testified that the rifle was for hunting, Brinkema disregarded his testimony as well as the 302's and relied on al-Hamdi's statement of facts and the general existing conspiracy to find Chapman guilty of possessing the rifle in furtherance of the conspiracy to violate the Neutrality Act, adding 25 years to Chapman's sentence.

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[82] Strangely, Khan was found not guilty of violating the Neutrality Act, so, in effect, Royer pled guilty to aiding and abetting something that Khan was not guilty of.
[83] The two had even gone hunting with the rifle just two weeks before the sale.

The defendants that did not plead guilty determined that as Muslim men in a post-911 atmosphere they would not be able to receive a fair and unbiased jury trial, and therefore waived this right. Although all the defendants filed to sever their trials, only Benkhala's motion was granted. Benkhala and Caliph Basha were only marginally involved with the others to the extent they played one or two games of paintball when they visited the States. On February 20, 2004, Caliph Basha, who slept through much of the trial, was found to not be involved in the conspiracy in any meaningful way and Brinkema dismissed all charges against him. On March 9, Brinkema found Benkhala not guilty of all charges and released him as well.

The three remaining defendants were all offered plea bargains. Abdur-Raheem was offered 2 years, Chapman was offered 7 years, and Khan 25 years. However, after seeing the statement of facts that the government wanted them to sign off on, they refused. It was on March 4, 2004 that Khan, Chapman, and Abdur-Raheem each found guilty of the majority of the counts against them after refusing to plea bargain. In a press conference after the verdict, Bernie Grimm, who represented Khan, said the case was the result of "9-11 hysteria." "If I thought Mr. Khan had any role in aligning himself with Islamic extremists, I never would have represented him," Grimm said. "This has to do with John Ashcroft, with George Bush getting re-elected. ... Today I'm embarrassed to be an American." Ashcroft himself called the convictions "a stark reminder that terrorist organizations are active in the United States," adding that "we will not stand by as United States citizens support terrorist causes."

## SENTENCING

On June 15, in front of an overflowing courtroom packed with family, supporters, community members, and press the defendants stood before Judge Brinkema to receive their sentences. Before the sentences were given, the government gave the defendants one last chance to accept a plea agreement in exchange for full cooperation. "We have no interest in incarcerating these people. We want them to cooperate. The door is still open and I hope they take it," said Kromberg. Chapman responded "I cannot do what the cooperators did because I know they are not telling the truth."

Each defendant made a short speech, declaring their innocence, thanking those who supported them, and offering a critique of the judgment and the trend of injustice against Muslims. Chapman and Khan's speeches were the most emotion. Chapman began by describing his commitment to his country, community and the people and property around him; and how he dreamt of being an FBI agent until he saw the way the FBI treated him on his return flight from Riyadh. "Thankfully, Allah saved me from that". He said that he was proud to be a United States Marine, and still loved his country. He continued, "this Court believes this case is not about Islam, not about Muslims. I believe it is. My entire community believes it is. I don't think that September 10, 2001, we would be standing in front of your Honor." Khan invoked Dr. Martin Luther King's letter from Birmingham Jail and writings from St. Thomas Aquinas and offered a brief discussion of true justice. He challenged the government for their selective prosecution of Muslims and offered thanks to his community and family before breaking into tears along with several others in the courtroom. The defense lawyers also made several arguments calling for a mistrial but they were all denied. As to Khan, Kromberg argued full force for harsh penalties. "While the Pentagon was still smoking, Mr. Khan decided now is the

appropriate time to go fight the Americans… For that, he deserves every day for which this court is about to sentence him to."

As Brinkema read out the sentences, the courtroom broke almost into hysteria. Abdur-Raheem received 97 months while Chapman was given 85 years. Khan received life in prison. Brinkema herself said the sentences were "appalling" but that she they were mandatory and not within her discretion[84]. Specifically, she said the 85-year sentence that Chapman received was "sticking in my craw". "What Mr. Chapman has been found guilty of is a serious crime, but there are murderers who have served far less time," she said. "I have sentenced al-Qaeda members who were planning attacks on these shores to far less time."

The defendants' lawyers also expressed their frustration and disbelief. Chapman's attorney, John K. Zwerling, called the case "the greatest miscarriage of justice" he had been involved in during the 34 years of his legal career, noting "I cannot reconcile in my mind how this is a blow to terrorism, how this makes us any safer than we were a week ago." And Khan's attorney, Jonathan Shapiro, blasted the government for imposing the firearms charges, which he said "drove these incredible sentences." U.S. Attorney Paul J. McNulty, in a brief statement, said the sentences were "appropriate and reflect the seriousness of the offenses."

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[84] Two of the defendants had their sentences enhanced because they involved terrorism counts. They are now back in Virginia awaiting resentencing in light of the recent Supreme Court decisions in Fan Fan and Booker which found such mandatory enhancements unconstitutional.

# PART IV: ANALYSIS

Unlike most prosecutions, the guilty verdicts and plea agreements in this case did not result in the type of finality that our criminal law system is designed to promote. At the end of the day, two opposite perspectives remain. One sees a victory by the government in the ongoing war on terror. The other sees a tragic story of several Muslim men, a few of whom made some poor decisions, pursued, prosecuted, and punished for no reason other than that they were Muslim. My analysis begins with a short discussion about what I have come to believe was in the minds of the defendants during their activities. I then describe what would have been a fair and honest prosecution. Finally, I argue that the prosecution's underhanded tactics undermine were not only unfair to the defendants but undermine the future ability of law enforcement to gather useful intelligence in the ongoing war on terror.

It seems pretty clear that the defendants had different motivations and intentions by playing paintball but at least some did see paintball as a means to fulfill their religious obligation of preparing for jihad[85]. What I find extremely unlikely, is that there was any overarching plan or conspiracy to fight in a particular cause or area. Even the government did not claim such a plan existed. The allegations that the defendants played paintball to prepare for jihad in areas including Kashmir, Chechnya - regions is involving conflicts where Muslims are seeking to repel an occupation wherein human rights abuses are being perpetrated upon them. If a new Muslim region came under attack, it would be quite likely that the defendants would have discussed the events in that region as well. To this extent, the case has a lot more to do with Islam than either the government or Brinkema were willing to admit because the "meeting of the minds" necessary to constitute a conspiracy was never more specific than an agreement to become prepared to

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[85] Aatique said that combat training was "a purpose" of the paintball games and that some specifically stated that this was their purpose.

fight on behalf of Muslims in Muslim regions, something that every religious Muslim in the world presumably agrees upon.

Contrary to the prosecution's position that the defendants "subscribed to a radical form of Islam"[86] the defendants' beliefs and actions were closely in line with classical Islamic texts that clearly establish war as a necessary evil that is noble when done in furtherance of what is good. In a widely accepted *hadith*, the Prophet Muhammad said, "A single endeavor (of fighting) in God's Cause in the forenoon or in the afternoon is better than the world and whatever is in it.[87]" Becoming a *shaheed*, or martyr, is considered the epitome of success[88] and is considered a gift from God. A Muslim (male) versed in their religion understands this well, and whether they have any particular plans to engage in combat, at least has a wish to be blessed with this fate. Indeed, failing to have any such wish could take a Muslim into the condemned realm of hypocrisy[89]. Furthermore, a mere wish may not suffice. If a Muslim truly aspires to one day fight on behalf of God, they must exhibit some sort of preparation. "And if they had really intended to march forth, certainly they would have made some preparation for it…[90]" Therefore, we should not be surprised to learn of Muslims whether in America or elsewhere, seeking to be generally prepared for combat.

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[86] Their ignorance on the matter exemplifies why the government has no business trying to define the Islamic tradition in a criminal proceeding.
[87] Narrated Anas bin Malik, Sahih Al-Bukhari, Volume 4, Book 52, Number 50
[88] "Think not of those who are slain in Allah's way as dead. Nay, they live, finding their sustenance in the presence of their Lord. They rejoice in the Bounty provided by Allah: And with regard to those left behind, who have not yet joined them (in their bliss), the (Martyrs) glory in the fact that on them is no fear, nor have they (cause to) grieve. They glory in the Grace and Bounty from Allah, and in the fact that Allah suffereth not the reward of the faithful to be lost (in the least). Qur'an 3:169-171.
The Prophet said, "Last night two men came to me (in a dream) and made me ascend a tree and then admitted me into a better and superior house, better of which I have never seen. One of them said, 'This house is the house of martyrs." Narrated Samura, Sahih Al-Bukhari. Volume 4, Book 52, Number 49.
[89] The Prophet said "Whoever dies without having fought in battle, nor having the sincere wish in his heart to fight in battle, dies on a branch of hypocrisy." Sahih al-Bukhari.
[90] Qur'an 9:46.

Before we continue, it should be noted that there are numerous parties and groups in the United States that believe in a right and duty of military preparation. There also exist numerous legal commercial opportunities for pursuing serious training with guns, tanks, and even fighter jets[91]. That notwithstanding, the motivations behind military preparation remain significant, because, at least plausibly, they indicate how ominous the activity really is[92]. Indeed, whether valid or not, several factors seem to suggest that, in today's world, Muslims in America who, motivated by their religion, participate in combat training can pose more of a threat than other groups. For example, those who are dedicated enough in their Islam to get involved in such training are likely to hold views against American foreign policy in the world and specifically the Middle East. These committed Muslims are also less nationalistic in the sense that were the interests of the United States and Muslims to diverge, these committed Muslims would choose God over their government. However, such loyalties are not limited to committed Muslims. We can expect Americans who are committed to any ideology to choose their ideology before their government. The difference with Muslims is that global politics, and the oft-repeated "clash of civilizations" have pitted Islam and the West against one another. Although jihad was tolerated and even supported in the 80's, US policy shifted after jihadis took an anti-American turn. After 9-11, it was determined that supporting or acquiescing jihad was simply too dangerous and the US made the decision to put an end to it no matter where the location and what the cause. Almost overnight, jihad and terrorism became indistinguishable. What was once considered

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[91] Incredible Adventures, a Florida based company that offers the opportunity to train in urban warfare using M-4 assault rifles, drive tanks, and fly real fighter jets on simulated bombing runs and combat missions. See: http://www.incredible-adventures.com/

[92] A caveat here. If we are going to offer that Muslims preparing for combat in the US are considerably more dangerous than militia groups conducting similar training, we should not lose sight of the general threat that can be expected by allowing such activity in the first instance. The case of Timothy McVeigh suffices to prove this point.

legitimate resistance or freedom movements became outright terrorism. The majority of the defendants were caught in the middle of this shift in policy.

For the purposes of this analysis, we now need to separate the defendants into three groups. The first group includes those who trained via paintball and rifle ranges but never went or planned to go abroad to fight, namely, Surratt, Abdur-Raheem, Caliph Basha, and Benkhala. The second group constitutes those who went to LeT with the intent to fight (somewhere) and includes al-Hamdi and Royer. Chapman, who went to LeT but specifically did not want to fight, falls somewhere between the first and second group. Finally, the last group includes those who went to LeT after 9-11 for the purpose of combat training and with the possible intent of fighting against the US in Afghanistan.

As for the first group, an honest prosecution would have never indicted them as part of this case. Benkhala was so uninvolved that his trial was severed and the narcoleptic Caliph Basha had done nothing more than play a few paintball games and legally possess a rifle. Surratt and Abdur-Raheem were more involved in the paintball games but never took any action to fight abroad. Although they did go abroad after 9-11, Surratt went to study in Egypt and Abdur-Raheem went to teach in Saudi Arabia.

As for Royer and al-Hamdi, if the government wanted to prosecute them, they should have done so solely under the auspices of the Neutrality Act, consistent with similar cases in American history. Royer, who says he knew he was walking a fine line, took painstaking efforts to stay on the right side of the law, and never believed what he was doing was illegal. He was convinced of LeT's legitimacy because of its close affiliation with the Pakistani government and was specifically told by Ambassador Wilcox that taking part in foreign insurgencies was not terrorism. His overt act against India amounted to firing a few bullets over the Indian border.

Al-Hamdi was involved in a single operation with LeT. Neither Royer nor al-Hamdi ever posed a threat to the United States and Royer had literally spent years writing against terrorism. The government lacked little justification for piling on the weapons charges which are designed to generate longer sentences because crimes with guns are more dangerous. The use of firearms in this case had no impact on the gravity of the crime. For example, possessing a weapon in Virginia had no impact on Royer's ability to fire a few bullets in Kashmir. And firing weapons in Kashmir was no more dangerous than any other military expedition in violation of the Neutrality Act. The two should not have become the first people in history to be charged with material support for terrorism for actions that constituted a simple violation of the Neutrality Act. If prosecuted and convicted, the two should have been sentences to the maximum of 3 years in prison as was intended by Congress and clearly spelled out in the statute.

The final group is a little more complicated. It is most difficult to discern what intent the four men who went to Pakistan after 9-11 really had. Hasan and Kwon who pled guilty in the earliest stage of the prosecution said they intended to train at LeT to fight in Afghanistan, Chechnya, or Kashmir. As later witnesses called during the trial, their story was more refined, and they testified that they went to LeT *solely* to receive sufficient training to fight on behalf of Mullah Omar and the Taliban against the pending US invasion[93]. The rest of the defendants denied any intentions to fight in Afghanistan or against the United States. Royer believes that while possible, any intent to fight in Afghanistan would not have amounted to more than wishful thinking. To begin with, not a single person told him of their intentions to fight in Afghanistan when they asked him to call LeT on their behalf. Aatique had already planned his trip in July, and told Royer that while there, he wanted to visit LeT and return – a plan he stuck to. Khan told Royer that he had to go to Pakistan to testify in court in regards to a serious family matter, and

[93] Because they focused so strongly on Afghanistan, Brinkema found Khan not guilty on the Neutrality charge.

that after taking care of this, he also wanted to train at LeT. The other two simply told Royer that they wanted to go to Kashmir and train. Second, Royer was well aware of LeT's reliance on their cozy relationship with the Pakistani government, and knew LeT would not have jeopardized this relationship by aiding fighters to enter Afghanistan. Therefore, he claims he would never have sent them to LeT if he knew they wanted to go to Afghanistan. As it turned out, Pakistan did close their border to Afghanistan and Pakistani authorities began removing foreigners from the camps, which is when Khan, Hasan, and Kwon left. Royer also believed several of the men simply weren't *mujahideen* material. This contention was confirmed through instant messenger communications with his contacts at LeT who complained that several of the men would leave the camp for days on end, and that they could not handle the stringent training.

It is also possible that the men did in fact intend to fight in Afghanistan without Royer knowing. Perhaps, they kept it from him in fear that he would not help them visit LeT after hearing him take a position against fighting in Afghanistan at the dinner with Timimi. If that was the case, then at least Kwon and Hasan, who pled to such an intention, did indeed want to fight for the Taliban, and, as they stated, only turned back after learning that the Taliban were losing the war and that LeT would not help them enter Afghanistan or Chechnya. I believe the most accurate description of their intentions comes from Aatique whose testimony Brinkema disregarded because of his inconsistent statements. Aatique claimed that there was no specific intention to fight, but the idea was to receive training and if America did launch an all-out-war against Muslims, they would be prepared to defend their brethren. Perhaps the defendants contemplated the Russian loss in Afghanistan, and thought that if the war in Afghanistan took a similar course, they would join the resistance. This would explain why they would choose to return to the States after learning that the Taliban didn't stand a chance. We should remember

that the US hadn't invaded Afghanistan when the defendants came up with their plan, which explains why they said their intentions were to fight in a number of potential regions. It is of course possible that the plan changed to specifically intending to go to Afghanistan once the US actually invaded, which would explain why Aatique, who left Pakistan before the invasion, would claim there was never an intention to fight. Finally, we should remember that the four went to Pakistan in two different groups. Aatique and Khan, who traveled together and both had other reasons for going to Pakistan could have had one intention (to train), while Hasan and Kwon, who traveled together could have had another (to fight in Afghanistan). This scenario would allow for everyone to have been generally truthful regarding their stated intentions.

Even if we accepted the government's story as fact, the defendants' intentions as of leaving the States would still have to be predicated on several "ifs". They would fight US troops in Afghanistan only if 1) the US actually attacked Afghanistan, 2) the Taliban were able to mount a reasonable defense, 3) they received enough proficiency to participate in combat, and 4) they could get entry into Afghanistan from Pakistan. The only one of these "ifs" that ever came to fruition was the US invasion. The closest the defendants ever got to fulfilling their alleged goal was to train at the LeT camp in Muzafarabad, located at the border of Kashmir and Pakistan. Still, their behavior is extremely troubling and the government was rightly concerned. However, the prosecution should have had nothing to do with terrorism. We have to be clear that being against the war on Afghanistan, or even desiring to defend Afghanistan does not equate to supporting al-Qaeda, bin Laden, or even terrorism although the government charged them with all of these. We have laws prohibiting sedition and foreign enlistment that should be used for such offenses.

As for Chapman, he was already training in Pakistan when 9-11 and actually returned to the States. At LeT, he only trained, and never fired a single shot at Indian targets. One has to question the government's desire to sentence him to life in prison for this activity. As it turned out, Chapman had extremely poor judgment when it came to the later purchase of model airplane equipment for Singh, but these facts didn't change the charges against him or his sentence. The 85 years he received was not for this purchase, but mainly for the weapons charges. For example, Chapman's sale of a rifle al-Hamdi in December of 2000 cost him 25 years.

Even if the prosecutions themselves were justified, (I have argued that only some), it is almost impossible to justify the punishments that were sought and meted out. Of the theories of punishment typically invoked when discussing the topic, prevention, deterrence, retribution, and rehabilitation, deterrence is clearly the underlying principle in this case. That is, the government wanted to communicate to the public that pro-militant activity, particularly amongst Muslims and regardless of the cause, was intolerable. The government really wasn't concerned that US neutrality was violated with respect to Kashmir, nor were they worried that the firing of rifles at ranges posed a risk to Americans; and the defendants never actually complete any act worthy of serious retribution[94]. As for prevention, there was little to prevent considering that the group broke up after 9-11 and never came back together and that the activities ended in late 2001[95], a full year and a half before the prosecution. The FBI investigation itself was sufficient to convince the defendants to stay far away from such activities. Finally, if they were seeking rehabilitation, the government certainly would not have pursued life sentences. That leaves deterrence as the justification for the punishments.

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[94] Although Kromberg certainly believed that Khan deserved life for attempting to go to Afghanistan after 9-11. See page 66 supra. Aatique, Kwon, and Hasan didn't deserve a similar fate in Kromberg's eyes because they partially made up by cooperating with the government.
[95] With the exception of the purchases for Singh but the defendants were quite hesitated to get involved and Singh had wrote in his letter that it would be the "last time".

However, if deterrence was the purpose, then the government should have made an extra effort at retaining their legitimacy so as to effectively communicate their message to the public. Rather than forcing the court perform legal acrobatics to make the charges fit the defendants, the government could have prosecuted the defendants fairly, and then went to Congress to pass and then publicize laws explicitly making what the defendants did illegal.

Another serious problem with the government's use of the weapons charges and terrorism rhetoric was that it was so coercive as to distort the truth about what had occurred. To face multiple weapons charges coupled with terrorism charges and connections to al-Qaeda in the Eastern District of Virginia is enough to make even the most resolute defendant whimper in fear. The government - under political pressure to prosecute "terrorist" cases – seems to have generated a theory for the case, and then selectively listened and molded the facts to support it. By coercing the meeker defendants to plea and then sign off on pre-prepared statements, they closed themselves off to the possibility of looking objectively at the case[96]. As a result, they ended up with a story that was unbelievable; and so alien to the remaining defendants, that they refused to plea (and suffered the severe consequences). Thus, the vast majority of Muslims who followed the case considered it without merit, and a selective, prejudicial, abuse of prosecutorial discretion that was done for purely political purposes[97]. In the eyes of the community, the FBI and the government prosecutors had concocted a fraud.

The government of course has an interest in preventing ominous activity and communicating to others that it will no longer tolerate the types of activities these defendants

[96] Coercive interrogations were recently found to lead a significant number of individuals facing the death penalty into false confessions. It was recently found that a shocking 25% of inmates exonerated by DNA testing had falsely confessed to their crimes.

[97] After the sentences came down, the Council on American Islamic Relations made the following comment, "It is the near universal perception in the Islamic community that these men would never have been charged had they not been Muslims, and that once convicted, prosecutors would never have sought such draconian sentences."

were involved in. But it also has an interest in remaining legitimate in the eyes of the public, and of retaining the cooperation of Muslim communities for gathering accurate and useful intelligence in the ongoing war on terror. By choosing to weigh so heavily on the first interest to the detriment of the second, the government undoubtedly undermined its ability to gather useful intelligence in the future. Indeed, many of the defendants had at one point or another volunteered themselves for questioning to the FBI without lawyers, believing they had done nothing illegal. If the FBI could turn innocent Muslims into terrorists, who in the Muslim community would voluntarily speak to them or offer them information in the future?

Finally, I offer a moral perspective. America's longstanding principle of equal justice under the law has been threatened by overzealous prosecutions in the aftermath of 9-11. As CAIR warned:

> "Under the current administration, we are quickly approaching a state of affairs in which there is a two-tier prosecutorial system in America; one system for Muslims, and one for all other Americans. This disturbing trend should be of concern to everyone who values America's centuries-long tradition of equal justice under the law."

We cannot forget that despite what they did, the majority of the defendants are still Americans, and deserve no less than to be treated as such. We have to deal with the reality that we have not only imprisoned some people, we have taken fathers and husbands from American children and wives. This story is hopefully not over. Chapman, Khan, and Abdur-Raheem still have hopes in the appeal process. In addition, the government has begun filing sentence reductions for some of the other defendants and will hopefully continue to do so for everyone who pled guilty, and perhaps the rest if they cooperate in some way. It is our hope that the sentences will be significantly reduced to more accurately fit what the defendants did, and that the government will conduct future prosecutions with a more just approach.